

# Judicial Appointments in India: From Pillar to Post

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**ABSTRACT:** After more than two decades of relative harmony between the executive and the judiciary, judicial appointments first became an openly contentious issue in India in 1973. In this article, we trace this history, beginning with an examination of the supersession crisis itself and continuing through an analysis of the judicial decisions in the three ‘Judges’ Cases’ of 1982, 1993, and 1998. We then examine in detail the proposed National Judicial Appointments Commission of 2014, and the Supreme Court’s negative response to it. We draw out from this history four broad design principles which ought to be borne in mind when designing a system of judicial appointment under a democratic constitution. We conclude that the level of democratic control of appointments should be proportionate to the extent of judicial power; that no judiciary can be so trusted as to be entirely self-perpetuating; that the political executive must remain an integral part of the appointments process; and that a balance must be struck between the need for transparency and certain advantages that accrue from a degree of confidentiality. These principles are informed not only by the fraught history of judicial appointments in India but also by debates over judicial appointments in other jurisdictions, particularly South Africa, where controversies about judicial appointments have become increasingly frequent.

**KEYWORDS:** Constitution of India, Judges’ cases, judiciary, National Judicial Appointments Commission, NJAC

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## I INTRODUCTION

On 4 February 2020, the Constitution of the Republic of South Africa, 1996, had completed 23 years of functioning as the country's founding charter. Throughout this period, the function of the Judicial Service Commission (JSC) in appointing judges to key courts in the country has been the subject of intense scrutiny. Though no concerted action has been taken to reconsider the existence of a commission-centric appointment process, calls for reform within the broader JSC structure have been widespread.<sup>1</sup> They have focused on the need to depoliticise the JSC; ensure proper criteria for selection and non-selection of candidates; and redress gender inequalities in the composition of the judiciary.

In the first 23 years of the operation of the Constitution of India, however, the appointment of judges to the Supreme Court and High Courts has remained publicly uncontroversial. The provisions relating to the appointment of judges in the Constitution of India are unambiguous — appointment is an executive function, exercised in consultation with the judiciary;<sup>2</sup> the convention of deferring to the view of the Chief Justice of India is widely accepted;<sup>3</sup> and persons who are appointed are considered individuals of integrity, above the hurly-burly of political machinations.<sup>4</sup>

Privately however, murmurs of unprincipled appointments are often heard. In 1955, Jawaharlal Nehru, the first Prime Minister, is said to have recommended either Judge BK Mukherjea or Judge MC Chagla as Chief Justice of India, instead of Judge MP Sastri, who would have been appointed under the seniority convention.<sup>5</sup> Extraneous factors relating to caste were viewed as influential in securing High Court appointments;<sup>6</sup> and a few judges who were appointed were later considered unsuitable, necessitating their transfer from one High Court to another.<sup>7</sup>

The first two decades after independence themselves were characterised by a healthy mutual respect between the three branches of government. The Supreme Court, while vigilant in protecting fundamental rights,<sup>8</sup> was largely deferential to the wisdom of Parliament; constitutional amendments were routinely rendered immune to challenge; and the heady sense of a joint enterprise of responsible nation-building was palpable.<sup>9</sup>

This delicate balance was decidedly upset on 25 April 1973, when three senior judges of the Supreme Court, Justices Shelat, Hegde and Grover, were superseded, and the executive appointed a junior judge, Justice AN Ray, as Chief Justice of India. This breached the

<sup>1</sup> L du Toit 'The Performance of the Judiciary' *Assessing the Performance of South Africa's Constitution* (International Institute for Democracy and Electoral Assistance, 2016); PE Andrews 'The South African Judicial Appointments Process' (2006) 44 *Osgoode Hall Law Journal* 565.

<sup>2</sup> Articles 124 and 217 of the Constitution of India.

<sup>3</sup> BP Sinha, *Reminiscences and Reflections of a Chief Justice* (1985).

<sup>4</sup> SB Narayan 'From Kania to Sarkaria: Judicial Appointments from 1950 to 1973' in A Sengupta & R Sharma (eds) *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (2018).

<sup>5</sup> M Setalvad *My Life: Law and Other Things* (2014); MC Chagla *Roses in December* (2018).

<sup>6</sup> Law Commission of India *Reform of Judicial Administration* (Law Com 14, 1958).

<sup>7</sup> P B Gajendragadkar *To the Best of My Memory* (2014).

<sup>8</sup> The Court was particularly vigilant about the right to free speech, trade and commerce, and the right to property. There were a few arguable exceptions regarding the scope of the right to life and personal liberty where the Court gave Parliament a wide berth; one oft-cited example is the case of *AK Gopalan v State of Madras* 1950 AIR 27. See G Austin *Working a Democratic Constitution: A History of the Indian Experience* (2003) 58–60.

<sup>9</sup> R Rajamani & A Sengupta 'The Supreme Court of India' in NG Jayal & PB Mehta (eds) *Oxford Companion to Politics in India* (2011).

convention of seniority. In terms of the convention, the President of India appointed the most senior puisne judge on the Supreme Court to be the next Chief Justice of India. The appointment was made at the time when the Chief Justice's predecessor left office, and irrespective of the appointee's qualifications, ability or remaining tenure.

The supersession was not a sudden development — an altercation between the judiciary and the government had been brewing since the judgment of the Supreme Court in *Golak Nath*.<sup>10</sup> In *Golak Nath*, the Supreme Court reversed 17 years of precedent and held that fundamental rights in the Constitution were inviolable and could not be altered even by way of amendment to the Constitution by Parliament.<sup>11</sup> This was followed by two judgments reversing populist governmental decisions to nationalise banks and abolish privy purses that had been paid to erstwhile rulers of princely states.<sup>12</sup> Finally, in *Kesavananda Bharati*, when faced with an amendment to the Constitution that circumscribed judicial review, the Court overruled its own judgment in *Golak Nath*, but read in an implied limitation to the amending power — Parliament could amend any part of the Constitution, including fundamental rights, as long as such amendment did not abrogate the basic structure of the Constitution. The contents of the basic structure were left for the Court to determine on a case-by-case basis.

It was on the day that the judgment was delivered, on the eve of the retirement of the outgoing Chief Justice SM Sikri, that the government defied the convention of seniority, according to which Justice Shelat should have taken over as Chief Justice, and appointed Justice AN Ray instead. Though its move was executed stealthily, there was nothing stealthy about its justification. In two days of parliamentary debate, the government articulated a new rationale for appointment of judges and Chief Justices — broadly paraphrased as their 'social philosophy'. These two days of debate presented the first instance of a substantive discussion on criteria and powers regarding the appointment of judges. They also set the future terms of all discussion around judicial appointments in India as the supersession was overwhelmingly viewed as an assault on the independence of the judiciary.

The next two parts of this article take up each of these issues in turn. Part II is a detailed look at the arguments made for and against the supersession in Parliament in 1973. From the debates, the government's partisan intention to appoint favourable judges is discernible. However, the effect of the changed and overtly political nature of appointments to the office of the Chief Justice would have been to create a publicly accountable judiciary. Unfortunately, such a judiciary never took root in India.

Consequently, part III charts how the future course of judicial appointments has played out post-supersession. It focuses on how, as a fallout from this episode, the dominant view of judicial independence as insulation from the government took firm hold. Taken together, the journey of the Constitution of India in its 24th year, a juncture at which South Africa is at present, became epochal in determining the future course of judicial appointments.

Part IV concludes by presenting some thoughts on lessons which might be drawn from India's experience of judicial appointments in designing appointments systems elsewhere.

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<sup>10</sup> *Golak Nath v Union of India* AIR 1967 SC 1.

<sup>11</sup> A Sengupta 'IC Golaknath and Others Case (India)' in *Max Planck Encyclopaedia of Comparative Constitutional Law* (2017).

<sup>12</sup> *RC Cooper v Union of India* AIR 1970 SC 564; *HH Maharajadhiraja Madhavrao Scindia v Union of India* AIR 1971 SC 530.

## II COMMITTED OR OMITTED<sup>13</sup>: THE SUPREME COURT AT 23

The debates in the Lok Sabha (the lower house of Parliament in India) on 3 and 4 May 1973 in the immediate aftermath of the supersession of judges turned on a single question — how political did the Members of Parliament consider the Supreme Court to be? Parliamentarians from the government and other parties supporting the supersession of judges expressed the view that the Supreme Court is always political — such is the nature of law — and thus methods of appointment ought to be geared towards securing substantive political goals. Opponents adhered to the widely held view of constitutional adjudication — judges of the Supreme Court, even in decisions with significant political ramifications, are engaged in interpreting the Constitution. Interpretation is a legal exercise carried out in accordance with established canons and precedents. Thus, while appointing judges, it was both impermissible and undesirable to choose judges on the basis of their political leanings. In essence this was a debate about the nature of judicial decision-making itself and to what extent legal interpretation was influenced by ideology.

Leading the charge for the government, Mohan Kumaramangalam openly declared that seniority was an unsuitable criterion for making an appointment to the office of the Chief Justice of India. It was not the way in which similarly high offices in the Army or the Union Public Service Commission were filled. Further, it reduced the possibility of becoming Chief Justice to a matter of chance that was determined merely by who had been appointed to the Supreme Court first. Instead Kumaramangalam proposed four normative objectives for the appointment of the Chief Justice: first, there must be continuity in leadership in the Court; seniority, which led to very short tenures, would therefore be unsuitable. Second, a judge need not be innocent of political views when appointed; instead, her views on public affairs and philosophy towards the country and to life generally, were critical. Third, certainty and stability in the law were critical for the highest court and any appointment had to reflect this. Finally, it was open to the government to select the person who met the aforementioned criteria; a person, who, in his words, had the most suitable ‘philosophy and outlook’.<sup>14</sup>

Kumaramangalam’s first three points are unobjectionable. The first — the need for continuity in leadership — is a basic principle of managing any public or private institution. For the office of the Chief Justice of India, owing to the seniority criterion, the average tenure of a Chief Justice today is 13 months.<sup>15</sup> At the time Kumaramangalam was speaking, it was approximately two years. In fact, this point was noted by the 14th Law Commission, which commended the stability brought about by Chief Justices enjoying reasonable tenures.<sup>16</sup>

His second and third points — assessing the outlook of a judge towards law and life and the need for certainty and stability in the law when considered outside any specific individuals, also appear innocuous. Appointment of a Chief Justice who can lead the judicial institution ought to be based on certain substantive criteria. Such criteria should ordinarily be declared,

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<sup>13</sup> Lok Sabha Debates *Discussion Re: Urgent Need for Judicial Reforms* col 399 (14 May 1985) speech of Prof. Madhu Dandavate.

<sup>14</sup> Lok Sabha Debates, *Discussion Re: Appointment of Chief Justice of India* col 377 (3 May 1973) speech of Mohan Kumaramangalam.

<sup>15</sup> Vishnu Padmanabhan & Sriharsha Devulapalli ‘How the Supreme Court Has Evolved since 1950’ *LiveMint* (15 August 2018), available at <https://www.livemint.com/Politics/iK7w9InnxqgsELzcf26HRN/How-the-Supreme-Court-has-evolved-since-1950.html>.

<sup>16</sup> Law Commission of India Law Com 14 *Reform of Judicial Administration* (1958).

and a transparent process followed. By declaring such criteria, Kumaramangalam appears to have complied with the demand for transparency.

His final point — that it is open to government to select persons who meet the aforementioned criteria — is arguably correct, as a matter of law. The Indian Constitution is silent on any distinct criteria or processes to be followed in the appointment of the Chief Justice of India, as opposed to other judges of the Supreme Court. In fact, the only distinction is that in the appointment of the Chief Justice, the President is not mandated to consult the outgoing Chief Justice of India, which he must do for appointment of other judges. It is thus open to the President, who must act on the aid and advice of the government to set out criteria for the appointment and then the President must follow a fair process in appointing someone on the basis of such criteria.

However, the appropriateness of the criteria set out for appointment was belied by Kumaramangalam's belligerence regarding Justice KS Hegde, one of the superseded judges (who he referred as 'Mr. Hegde', thus defying accepted tradition). His speech was primarily a diatribe against Justice Hegde's unsuitability to be Chief Justice, particularly joining issue at his press conference where he alleged that Justice Hedge had been superseded because of orders that he (Hedge) had passed in a matter involving the election of the Prime Minister. Though Kumaramangalam strongly denied the relevance of any such judgment to the supersession, through the course of his speech, the substantive views of judges in particular cases did appear to forcefully influence him. Tellingly, in explicating his criteria of 'suitable philosophy' and 'outlook' he mentioned:

But we do want judges who are able to understand what is happening in our country; the wind of change that is going across our country; who is able to recognise that Parliament is sovereign, that Parliament's powers in relation to the future are sovereign powers. ... Those who are able to see that, those who are able to give that importance to those areas of the Constitution which according to us are decisive for taking our country forward, such are the judges, we believe, who can effectively work and help us in the Supreme Court. This is how we look at it.<sup>17</sup>

The candour with which Kumaramangalam expressed the government's desire to appoint judges who could 'effectively work and help' them meant that commentators universally saw through his stated criteria. The supersession was understood primarily as an assault on the independence of judges whose views in substantive cases did not comport with the those of government's. It was the first step to the creation of what jurist Nani Palkhivala described as a judiciary 'made to measure' where judgments would be assessed on the touchstone of substantive help to the government.<sup>18</sup> Justice Ray, according to this account, was not appointed Chief Justice on the fair application of transparent criteria; on the contrary, his judgments in favour of the government in the Bank Nationalisation, Privy Purses and Kesavananda Bharati cases had tilted the balance in his favour. As the former Attorney-General Daphtary said, 'the boy who wrote the best essay won the prize.'<sup>19</sup> It is worth noting that both Kumaramangalam and his critics immediately understood that what was at stake was not merely the seniority convention in the appointment of the Chief Justice of India. It was rather the much broader

<sup>17</sup> Lok Sabha Debates *Discussion Re: Appointment of Chief Justice of India* col. 377 (2 May 1973) speech of Mohan Kumaramangalam.

<sup>18</sup> N A Palkhivala 'A Judiciary Made to Measure' in K Nayar (ed) *Supersession of Judges* (1973) 120.

<sup>19</sup> T Mahmood 'The ADM Jabalpur case revisited' *The Statesman* (23 April 2015), available at <https://www.thestatesman.com/supplements/the-adm-jabalpur-case-revisited-59029.html>.

question of the proper place and role of the judiciary in a democratic society. The supersession debate was essentially a stalking horse for the schism on that more fundamental issue.

Atal Bihari Vajpayee of the opposition (a future Prime Minister) framed the debate in terms of judicial independence and continuance of democracy itself. In his view, it is not as if the Constitution did not have a philosophy until Kumaramangalam delivered his speech. What was at issue was the particular philosophy that Kumaramangalam wanted judges to espouse which was less a philosophy and more a preference towards privileging directive principles of state policy (a byword for socialism) over fundamental rights (equated with individual rights over group interests). Only those with similar preferences would be considered for Chief Justiceship since this would align with the government's own reading of the Constitution. This, in Vajpayee's view, seriously undermined judicial independence.

Secondly, by removing seniority, no matter how flawed as a basis, and replacing it with untrammelled governmental discretion would only politicise the judiciary and appear as if political alignment alone would determine appointment. The lack of alternate criteria meant that the government was less interested in an upright, honest judiciary and more in a pliant one.<sup>20</sup>

The conflation of Kumaramangalam's stated objectives with his personal preferences regarding judicial appointments was considered unsurprising by commentators. Given the judiciary's expansive arrogation of powers, first by limiting any amendment of fundamental rights and then by expounding the basic structure doctrine which it would develop on a case-by-case basis, scrutiny of appointment criteria as well as governmental efforts to control the judiciary were both natural. Unfortunately, Kumaramangalam's speech belied any attempt to distinguish the two. The supersession of judges and the dispensing of the norm of seniority were not independently done to chart out a new basis for appointment; they were done, as was declared in Parliament, in order to appoint judges suitable to the government and thereby send out a clear message to future judges. As a result, the seniority norm became intertwined with fairness and judicial independence, and any form of subjective selection particularly by the government became a byword for its antithesis. It is this binary that has shaped the future contours of the debate around judicial appointments in India.

### III THE FALL AND RISE OF 'INDEPENDENCE AS INSULATION'

#### A Independence in an age of deference

The supersession had two significant effects on the trajectory of judicial functioning. First, it underlined the government's understanding that the Supreme Court was a political institution. This understanding was accentuated during the Emergency between 1975 and 1977 when fundamental rights had been suspended and political dissidence curbed. Faced with an erosion of fundamental rights, several detainees approached various High Courts for relief claiming that the right to *habeas corpus* could not be suspended legally during an Emergency. Though High Courts granted relief, on appeal to the Supreme Court, the judgments were reversed. In *ADM Jabalpur v Shivkant Shukla*,<sup>21</sup> the Supreme Court, in a 4-1 verdict upheld the suspension of the right to move court for violations of fundamental rights and authorised detention by the

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<sup>20</sup> Lok Sabha Debates *Discussion Re: Appointment of Chief Justice of India* col. 175 (3 May 1973) speech of Atal Bihari Vajpayee.

<sup>21</sup> *ADM Jabalpur v Shivkant Shukla* (1976) 2 SCC 521.

executive without trial. While a detailed analysis of the judgment cannot be gone into here, it would suffice to say that the reasoning employed by the majority judges was highly suspect.<sup>22</sup>

The vicious cycle of politicisation was reinforced when the sole dissenting judge, Justice Khanna, was superseded and not appointed Chief Justice of India on Chief Justice Ray's retirement. The fact that Justice Beg, who was appointed, had decided in favour of the government in the same case provided further grist to the mill that government appointments would hereinafter be partisan, determined by their assessment of how sympathetic the judge would be in bellwether cases. Not only were such sympathetic judges rewarded, but inconvenient judges were adversely impacted. Justice Khanna was passed over for Chief Justice, but equally worryingly 16 judges in various High Courts who had decided cases against the government were transferred in a mass order to other High Courts.<sup>23</sup> Though the order was later reversed, individual judges were firmly caught in the vortex of politicisation.

Secondly, the resistance to politicisation of the judicial appointments process arose through an effort led by the Bar to insulate the judiciary legally from excessive governmental interference. Two cases exemplified this effort. In *Union of India v Sankalchand Sheth*,<sup>24</sup> Sheth — a judge who had been transferred as part of the mass transfer order — challenged his transfer for being violative of judicial independence. Though the transfer order had been reversed and no *lis* remained, the Supreme Court nonetheless answered the question given the level of public interest involved. In this case, the majority judges held that for any transfer of judges to be valid it would have to be pursuant to full and effective consultation with the Chief Justice of India. This involved placing identical facts before the Chief Justice as was before the government and a deliberative exercise. This was the first instance where the Supreme Court emphasised the role of the judiciary in protecting its own independence.

The dissenting judges however said that consent of the judge being transferred was a precondition for a valid transfer.<sup>25</sup> This view was based on a fallacious conflation of non-consensual transfers with punitive ones. Although it was right to identify the 16 transfers made during the Emergency as punitive, the lack of consent was not what made them so. The minority's view meant that any transfer made without the consent of the judge was, by definition, punitive. This was an over-correction that rendered the power to transfer itself nugatory.

Irrespective of the merits of the decision, the judgment reflected a renewed attempt by the judiciary to insulate itself from executive excess. It was felt that only through such insulation, fortified by constitutional interpretation, could judicial independence be protected.

The second attempt by the Bar to close ranks and protect judicial independence by insulating appointments from governmental interference was the public interest litigation, *SP Gupta v Union of India*,<sup>26</sup> popularly known as *The First Judges' Case*.

SP Gupta, an advocate of the Allahabad High Court, filed a writ petition challenging the appointment of three Additional Judges of that High Court as permanent judges, as well as challenging a circular letter sent to Chief Justices and Chief Ministers in the States. The

<sup>22</sup> For detailed analyses from figures involved in the case on both sides, see SJ Sorabjee & AP Datar *Nani Palkhivala: The Courtroom Genius* (2012); TR Andhyarujina *The Kesavananda Bharati Case: The Untold Story of Struggle for Supremacy by Supreme Court and Parliament* (5th Ed, 2019).

<sup>23</sup> A Sengupta *Independence and Accountability of the Indian Higher Judiciary* (2019) 65.  
<sup>24</sup> (1977) 4 SCC 193.

<sup>25</sup> *Ibid* at paras 60 and 144, per Justice Bhagwati and Justice Untwalia respectively.

<sup>26</sup> AIR 1982 SC 149.

letter asked the recipients to obtain the consent of Additional Judges in their respective High Courts to be permanent judges in other high courts, consonant with the Government's policy of creating a nationally integrated judiciary by increasing out-of-state representation on High Court benches. The Court dismissed the petition and ruled in favour of the Government.

During the hearings, important questions regarding the process of initial appointments to High Courts were also raised. As a preliminary matter, the relevant sections of the Constitution of India as they stood at the time the *First Judges' Case* was decided are set out below:

Art. 124(2)

Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after *consultation with* such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary...

In the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be *consulted*.

Art. 217(1)

Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after *consultation with* the Chief Justice of India, the Governor of the State and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court...

(Emphasis supplied)

The petitioners argued that in any dispute between the executive and the Chief Justice of India which arose during the consultative process envisaged by art 217, the opinion of the Chief Justice would have 'primacy' over that of the executive. The majority unequivocally rejected this view.<sup>27</sup> According to Justice Bhagwati, the constitutional scheme did not envisage any hierarchy in the consultative process, and therefore the question of 'primacy' did not arise. He went on to say that art 217 clearly posited all three constitutional functionaries involved — the Chief Justice of the State High Court, the Chief Justice of India, and the State Government — as equals in the consultative process. In a rare case of conflict, the Central Government, which, in conformity with practice and convention throughout the Commonwealth was the appointing authority, was entitled to settle the dispute. Arguing that the Governor (that is, the State Government) would be in the best position to assess the 'antecedents' of a judicial candidate and the Chief Justice of the State High Court to assess her legal qualities, Justice Bhagwati wrote that there was a 'valid and intelligible purpose' for the inclusion of each of the functionaries mentioned in art 217.

Justice Desai, in his separate and concurring opinion, pointed out that to place the Chief Justice of India in this position of primacy would be to grant the Supreme Court not just judicial but administrative autonomy over the High Courts, something repugnant to the intention of the Constitution.<sup>28</sup> The Chief Justice of India could not therefore be considered to have 'primacy' over either of these other functionaries.

The majority similarly rejected the view that in appointments to the Supreme Court of India, the Government was bound to follow the advice tendered to it by the Chief Justice. Justice Bhagwati noted the wide array of qualities other than legal expertise and professional competence which were relevant to the appointment of a Supreme Court Judge, including honesty, integrity, commitment to democracy, social acceptability, and sympathy with

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<sup>27</sup> Ibid at para 29, per Justice Bhagwati.

<sup>28</sup> Ibid at para 717, per Justice Desai.

constitutional goals. These are qualities which the democratically accountable executive was considered best able to judge.

Justice Tulzapurkar in his dissenting opinion asserted that the purpose of consultation was ‘limiting the authority or discretion of the President.’<sup>29</sup> For him (joined by Justice Gupta), it followed from this that the Constitution must have intended the judicial rather than the executive functionaries to have primacy in the consultative process.

This approach is erroneous — what the framers wished to avoid was appointments being made *solely* on the advice of the executive of the day. For this reason, the requirement of consultation with the Chief Justice of India, and such other judges as the President may deem necessary, was introduced, so that judicial views must be factored into the decision-making process. It is likely that the framers did not introduce a hierarchy into this process because they foresaw, rightly, that the executive would by and large respect the stature and knowledge of the Chief Justice of India and proceed by consensus. No language of primacy was imported because no hierarchy was envisaged.

The contrary interpretation, which found itself in the minority in *SP Gupta*, but dominated on subsequent benches, was an effort to protect judicial independence by arrogating to the judiciary greater powers of appointment. Though without basis in the constitutional text, it was a likely consequence of the unprecedented supersession in 1973 brought about by governmental overreach. Further, the seemingly partisan choices made by the executive pursuant to supersession also foreclosed any real discussion on transparency and accountability measures to compel the executive to make better choices. Instead, appointment reform in India became an authority-centric exercise, focused solely on limiting the executive and bolstering the judiciary. This was the way to judicial independence, which, it was implicitly assumed would be best protected by the judiciary itself.

## B The assertion of judicial power in the *Second* and the *Third Judges’ Case*

In the *Second Judges’ Case*,<sup>30</sup> the Supreme Court reversed its ruling in the *First Judges’ Case*. It read into the Constitution the primacy of the opinion of the Chief Justice of India formed collectively through a judicial collegium<sup>31</sup> in appointments to the Supreme Court and High Courts. This ‘primacy’ was to have two aspects: first, the Chief Justice of India, in case of Supreme Court appointments and, in the case of appointment to High Courts, the Chief Justice of that High Court, had the right to initiate the appointments process;<sup>32</sup> and second, that in case of any disagreement with the executive, the judiciary would prevail.<sup>33</sup> The *Third Judges’ Case*<sup>34</sup> reaffirmed this doctrine and detailed the process of appointment, casting in stone the unique process of judicial appointment that India follows today.

The law as it stands requires that a collegium of Judges of the Supreme Court comprising the Chief Justice of India and the four most-senior puisne Judges recommend all judicial appointments to the Supreme Court, while the collegium for appointment of High Court Judges comprises the Chief Justice of India and two next most-senior puisne judges of the

<sup>29</sup> Ibid at para 626, per Justice Tulzapurkar.

<sup>30</sup> *Supreme Court Advocates-on-Record Association v Union of India* 1993 4 SCC 441 (*Second Judges’ Case*).

<sup>31</sup> Ibid at para 474.

<sup>32</sup> Ibid at para 509, sub-para 11.

<sup>33</sup> Ibid at para 509, sub-para 1.

<sup>34</sup> *Presidential Reference 1 of 1998* AIR 1999 SC 1 (*Third Judges’ Case*).

Supreme Court.<sup>35</sup> A similar collegium exists in the High Court comprising the High Court Chief Justice and her two most-senior puisne judges for all appointments to that High Court. No appointment can be made without the concurrence of the Chief Justice of India, and she in turn cannot recommend an appointment if two or more members of the collegium disapprove.<sup>36</sup> If a candidate comes from a particular High Court, the views of the most senior Supreme Court judge who has served on that High Court are to be ascertained in writing, though she does not become a member of the collegium itself.<sup>37</sup> Merit is to be the ‘predominant’ consideration, and if a senior High Court judge is passed over in favour of a more junior colleague, no special reasons for *not* appointing the senior judge need to be recorded.<sup>38</sup> In fact, not only are reasons for appointing (or not appointing) a person, not provided, the entire process of the recommendation of a candidate by the judicial collegium operates seemingly informally, without criteria or publicly available records.<sup>39</sup>

We will now examine the constitutional soundness and internal coherence of this machinery in order to shed light on the Indian judiciary’s approach to judicial independence. We will then critically analyse the *Fourth Judges’ Case*,<sup>40</sup> which struck down the Constitution (99th Amendment) Act 2015 creating the National Judicial Appointments Commission thereby restoring the collegium system.

In the *Second Judges’ Case*, Justice Verma writing for the majority asserted that arts 124 and 217 had to be interpreted in a manner which gave effect to the ‘constitutional purpose’ of ‘[ensuring] the independence of the judiciary.’<sup>41</sup> According to the majority, the primacy of the judiciary in judicial appointments was the only way of ensuring that this constitutional purpose was met. This was justified by a historical reading of the provision, the legislative intent of curbing executive excess, and an intrinsic faith that the judicial fraternity would be best placed to maintain its own independence. We take up in turn the two legs on which the majority’s arguments rest — the historical-purposive argument and the functional-institutional argument.

### 1 *The historical-purposive argument*

The Court related the constitutional history of India, pointing out that under the Government of India Acts of 1919<sup>42</sup> and 1935,<sup>43</sup> Judges of the High Courts in the Provinces and (after 1935) of the Federal Court were appointed by His Majesty (in practice, acting through the colonial executive) without any limitation. According to the *Second Judges’ Case*, the overriding concern of the Constituent Assembly after independence was to do away with this unfettered executive power to appoint judges.<sup>44</sup>

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<sup>35</sup> Ibid at para 41, sub-para 2.

<sup>36</sup> Ibid at para 19.

<sup>37</sup> Ibid at para 13, 16.

<sup>38</sup> Ibid at para 22, 23, 24 (This is to the contrary of what was implied in the *Second Judges’ Case*, per Justice Verma: ‘Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between them [High Court Judges] while making their appointment to the Supreme Court.’ [emphasis added]).

<sup>39</sup> *Supreme Court Advocates-on-Record Association v Union of India* 2016 5 SCC 1 46 (*‘Fourth Judges’ Case*) 106 per Chelameswar J.

<sup>40</sup> Ibid.

<sup>41</sup> *Second Judges’ Case* (note 30 above) at para 19.

<sup>42</sup> Sections 101–102.

<sup>43</sup> Sections 200, 220.

<sup>44</sup> *Second Judges’ Case* (note 30 above) at para 523.

Concerns were indeed voiced during the Constituent Assembly's deliberations about an overweening executive impinging on judicial independence. In fact, Dr BR Ambedkar, Chairman of the Drafting Committee of the Constitution, said in the course of debate that 'it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day.'<sup>45</sup> This was a view which found wide support in the assembly.

While this demonstrates that the framers were indeed concerned about the possibility of unfettered executive power in relation to judicial appointments, there is no indication that they ever seriously contemplated a proposal to materially exclude the executive from the process altogether. In fact, one of the few concrete proposals against which Dr Ambedkar warned during the debates was '[allowing] the Chief Justice practically a veto upon the appointment of judges.'<sup>46</sup> An amendment to specifically require the concurrence of the Chief Justice of India in judicial appointments was rejected.<sup>47</sup> It is clear from the debates that the framers were arguing against any organ being vested the unfettered power to appoint; instead they recommended a system of checks and balances carefully avoiding the language of primacy. To suggest that they would have countenanced a complete reversal in the hierarchy, with the judiciary providing the initiative and the final say in appointments, is a plainly incorrect reading of the Constituent Assembly debates.

The Court in the *Second Judges' Case* evidently did not take due cognisance of this aspect of drafting history while purposively interpreting arts 124 and 217. Further, it is a well-established principle of common law that the first port of call for the judiciary in interpreting a provision of law must be the ordinary meaning of the words used by the draftsman.<sup>48</sup> Purposive interpretation, even if employed, is an exceptional approach, to be used only when: 'application of literal construction of the words in the Statute leads to absurdity, inconsistency or when it is shown that the legal context in which the words are used or by reading the Statute as a whole, it requires a different meaning.'<sup>49</sup>

The Court in the *Second Judges' Case* failed to prove that it would lead to any kind of 'absurdity' to adopt the plain meaning — or at least a plain meaning — of 'consultation'. After all, 'consultation' even within its ordinary meaning can take on a wide range of meanings. A 'thick' substantive view of the word 'consultation' had already been articulated by the Court in *Sankalchand Sheth*: consultation had to be 'full and effective'<sup>50</sup> which implies that it must be based on full and identical facts which must constitute the basis of the decision; and in Justice Subba Rao's dictum, that the word 'consult' implied a 'conference of two or more persons ... to enable them to evolve a correct, or at least a satisfactory solution.'<sup>51</sup>

The Court chose not to revive and enrich this line of jurisprudence. Taking a rather blunter approach, it simply read the word 'consultation' to effectively imply 'concurrence', so that no appointment decision could be taken without the judicial collegium having the last word. This was neither an appropriate use of purposive interpretation nor true to the legislative intent behind the use of the term in the first place.

<sup>45</sup> Constituent Assembly of India Debates (24 May 1949) Vol VIII, Book 3.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> *Molar Mal v Kay Iron Works (P) Ltd.* (2000) 4 SCC 285.

<sup>49</sup> Ibid.

<sup>50</sup> *Sankalchand Sheth* (note 24 above) at para 39, per Justice Chandrachud.

<sup>51</sup> *Pushpam v State of Tamil Nadu* AIR 1953 Mad 392.

## 2 *The functional-institutional argument*

In a related contention, the majority in the *Second Judges Case* advanced a justification from institutional competence to support its interpretation of the Constitution. Justice Verma argued: 'It is *obvious* that the provision for consultation ... was introduced because the Chief Justice is *best equipped* to know and assess the *worth of the candidate*'.<sup>52</sup> According to the Court, the 'worth of the candidate' is to be assessed based on '[l]egal expertise, ability to handle cases, proper personal conduct and ethical behaviour, firmness and fearlessness'.<sup>53</sup>

In the *Third Judges Case*, the Supreme Court clarified that 'proper personal conduct', was a quality which the executive might be well-placed to assess, but that 'legal expertise', the primary quality, was the exclusive preserve of the Supreme Court. The Supreme Court made this statement almost axiomatically and does not advance much evidence for it.

There is no obvious reason why the executive would not also be qualified to assess a potential Judge's worth on these grounds. The Union Law Ministry is, by convention, usually headed by someone with some legal experience or training and staffed by a permanent secretariat of civil servants. It also has the counsel of the Attorney General, Solicitor General, and Additional Solicitors General — an advantage not available to the collegium. There is no reason to believe that all these officers together would not be competent to reach at least tentative conclusions on the legal expertise of a candidate for an office in the higher judiciary. Indeed, it has been pointed out<sup>54</sup> that many of independent India's greatest and most fiercely independent jurists were selected before the collegium system was ordained by the Supreme Court in 1993.

Further, even if the executive is best placed to provide its views on 'personal conduct' of judges presumably using its vast law enforcement machinery to perform relevant background checks, there is no argument as to why such determination would be secondary to a determination of legal ability of judges. A judge must possess a range of virtues including knowledge of law, analytical ability, and personal integrity. To suggest that the judiciary, which is purportedly best placed to assess legal ability, should enjoy primacy, even if correct, assumes a hierarchical superiority of the need for legal ability over other factors. This is, without further argument, unjustified.

The Court repeatedly stressed that what it was aiming to achieve was in fact a 'participatory constitutional function',<sup>55</sup> saying that the selection of judges must be a 'joint venture'<sup>56</sup> wherein a role is provided to both the judiciary and the executive in an 'integrated process of appointment'.<sup>57</sup> This repetition was, however, a rather half-hearted attempt to stitch a fig-leaf to protect judicial primacy. This is because the Court also said that it aimed to reduce the role of the executive to the 'minimum extent possible'.<sup>58</sup> It is a rather strange participatory exercise which begins by telling the other participant that she is to have the minimum possible role in it.

Furthermore, if the judicial collegium initiates new appointments, has the right to issue binding recommendations and is the only forum where recommendations are debated, it

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<sup>52</sup> *Second Judges' Case* (note 30 above) at para 40.

<sup>53</sup> *Ibid* at para 52.

<sup>54</sup> TR Andhyarujina 'Appointment of Judges by Collegium of Judges' in S Paul *Choosing Hammurabi: Debates on Judicial Appointments* (1st Ed, 2013).

<sup>55</sup> *Second Judges' Case* (note 30 above) at para 16.

<sup>56</sup> *Ibid* at para 28.

<sup>57</sup> *Ibid* at paras 51, 293.

<sup>58</sup> *Ibid* at para 14.

is unclear exactly where the executive substantively ‘participates’ in a ‘joint venture’. The recognised form of executive inputs in this process is the furnishing of Intelligence Bureau (IB) reports on the background of potential candidates by the Ministry of Law and Justice to the collegium.<sup>59</sup> This part of the process is, unsurprisingly, shrouded in secrecy. It would not be unfair to say that the executive has often used this as a lever to exert influence over certain appointments. Alleged ‘red flags’ in IB reports<sup>60</sup> and long delays in conveying its views to the collegium<sup>61</sup> have become ways for the executive to indicate its displeasure at a particular candidate.

Few would suggest that the present form of executive intervention in the appointments process is conducive to an optimal appointments process. It is worth noting, however, that it is the unique collegium system which has given rise to this form of intervention. Since the executive has been shut out of the ‘formal’ appointments process, it finds more oblique routes to convey its views which are likely more corrosive to accountability than transparent involvement would be. Despite this recognised role for the executive, it remains entirely up to the collegium to decide what action, if any, to take on any report furnished by the Law Ministry. There is no formal, recorded discussion or consultation between the two organs of state; the executive’s role appears to be a subordinate rather than a participatory function.

The Court’s approach is rather reminiscent of Henry Ford’s famous *bon mot*, ‘You can have any colour you like, as long as it’s black’. One would hardly consider this an expression of genuine participation and choice.

Ultimately, both strands of reasoning of the majority judges in the *Second Judges’ case* were based on the implicit belief that judges themselves would be best placed to appoint their future colleagues in a manner that preserved judicial independence. Though this cannot be validated in this article, there is enough evidence elsewhere to suggest from three decades of experience that Justice Verma’s future colleagues belied his fond hope in this regard.<sup>62</sup> Equally, another consequence of judicial appointments being led by the judicial collegium has been a characterisation of the process as a turf war between government and the judiciary. This was demonstrated most overtly in the hearings and judgment in the *Fourth Judges’ Case* and the constant friction between the government and the judiciary thereafter.

### C The stillborn National Judicial Appointments Commission

After two decades of relatively quiet submission to the collegium system, Parliament and Government decided to act. In 2014 they enacted legislation to create a National Judicial Appointments Commission (NJAC). This was not a partisan issue, and both Houses of Parliament as well as the requisite half of all State legislatures<sup>63</sup> approved the proposed amendment, which became the 99th Amendment to the Constitution together with the

<sup>59</sup> Memorandum of the Ministry of Law, Justice and Company Affairs (30 June 1999).

<sup>60</sup> Former Supreme Court Judge, Justice Lokur of the Supreme Court highlighted concerns about the use of the Intelligence Bureau as a conduit of government influence in the judicial appointments process; see Madan B Lokur ‘Govt Calling the SC Shots?’ *Indian Express* (16 September 2019), available at <https://indianexpress.com/article/opinion/columns/govt-calling-the-supreme-court-shots-narendra-modi-6070659/>

<sup>61</sup> K Rajagopal & S Phulkan ‘Law Ministry Clears Indu Malhotra’s Name for Supreme Court Judge Post’ *The Hindu* (25 April 2018), available at <https://www.thehindu.com/news/national/indu-malhotra-set-to-be-sc-judge/article23674730.ece>

<sup>62</sup> Sengupta (note 23 above) 13.

<sup>63</sup> As required by art 368(2) of the Constitution of India.

National Judicial Appointments Commission Act. This Amendment altered the foundation of arts 124 and 217 which had been interpreted by the Supreme Court to create a judicial collegium. It proposed that all appointments to the higher judiciary were to be made by the President on the recommendation of a National Judicial Appointments Commission (NJAC), comprising six members:

1. The Chief Justice of India (as Chairman)
2. The two most senior puisne Judges of the Supreme Court
3. The Minister for Law and Justice
4. Two eminent persons nominated by a committee comprising the Chief Justice of India, the Prime Minister, and the Leader of the Opposition in the Lower House of Parliament.

Decisions of the NJAC were to be by a special majority: any two negative votes could block a candidate. Parliament in passing this amendment had sought to break free of the strictures of interpretation imposed by the Court by amending the Constitution itself. However, the amendment itself was challenged for violating the basic structure of the Constitution.

The key issue was whether Parliament had the power to amend the Constitution to give effect to such a system of judicial appointments. It is settled law in India that Parliament does not have the power to destroy the basic structure of the Constitution through the amendment process in art 368.<sup>64</sup> Equally, it is the law that the independence of the judiciary is part of this basic structure. What was at issue in this case was whether judicial primacy in appointments as established by the *Second Judges' Case* was necessary to protect this part of the basic structure, and consequently whether the NJAC was destructive of it.

Given this question before the Court, it was surprising that the majority judgment spilt much ink reiterating and defending the interpretation of the Constitution in the *Second Judges' Case*. After all, the Constitution had been amended. The Judges were no longer dealing with the same text, and the question was not of interpretation but of whether the amendment conformed with the basic structure of the Constitution. Despite this seemingly unnecessary digression, the majority, on the merits of the question before them, struck down the constitutional amendment in its entirety. This was the first time<sup>65</sup> that the Supreme Court had ever done so.<sup>65</sup>

According to Justice Khehar, the NJAC was destructive of the basic structure for two main reasons: first, it did not ensure adequate judicial representation in selection, such that even if the Chief Justice and two most senior puisne judges agreed on an appointment, it may not be made;<sup>66</sup> and second, that the presence of the Law Minister created a conflict of interest and violated judicial independence because the Government of India was party to much litigation in the Courts.<sup>67</sup> Additionally, Justice Khehar argued that the 'eminent persons' clause was void for vagueness for not prescribing any minimum qualifications for such persons.<sup>68</sup>

None of these arguments provide a convincing basis on which to have struck down the 99th Amendment. Justice Khehar (joined in part by Justice Goel) appeared to use 'judicial primacy' and 'judicial independence' almost interchangeably. There is no substantive reasoning provided why judicial primacy is a necessary requirement for judicial independence to be preserved. Presumably, in their defence, the digression into defending the interpretive exercise

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<sup>64</sup> *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

<sup>65</sup> The Supreme Court had earlier struck down certain parts of the 25th, 32nd, 39th, 42nd, and 52nd Amendments, all of which were ouster clauses excluding the jurisdiction of the Courts from various executive and legislative actions.

<sup>66</sup> *Fourth Judges' Case* (note 40 above) at para 227.

<sup>67</sup> *Ibid* at para 287.

<sup>68</sup> *Ibid* at para 301.

in the *Second Judges' Case* was meant to serve this purpose. But this makes a category mistake — the *Second Judges' Case* could plausibly (though in our view, wrongly) interpret the word 'consultation' as requiring 'judicial primacy'. This would be a purposive interpretation of the provision, as it then stood. It is an entirely different matter to state that such primacy is necessary in any system of appointment, *irrespective* of what the text says, as the majority judges in the NJAC case did. Unfortunately, the judges appeared to have assumed this rather than explained it.

Consequently, as Justice Chelameswar pointed out in his dissenting opinion, they failed to distinguish<sup>69</sup> between an amendment which merely *affected* one single basic *feature* of the Constitution and one which *destroyed* the basic structure as a whole. Once they concluded that primacy in judicial appointments had been affected, since a unanimous vote of the three judicial members of the NJAC was not sufficient to make an appointment, it was considered *ipso facto* that the appointment had destroyed the basic structure. This was an unfortunate lack of reasoning. While the details of the basic structure doctrine cannot be gone into here, it would suffice to say that the power to strike down a constitutional amendment, the highest expression of parliamentary sovereignty, should ordinarily be exercised more cautiously.<sup>70</sup>

The second point, regarding the Law Minister, was curious. The executive has a role in appointments to the judiciary in many countries: the United Kingdom, the United States, South Africa, Australia, Canada etc. and before 1993, in India. It would be strange to say, surely, that any of these jurisdictions could be described as one where judicial independence had been 'destroyed.' As Sengupta points out, the question of unacceptable executive interference in judicial appointments arises (at best) only when the executive has a *determinative* role in the selection of Judges.<sup>71</sup> The Law Minister, as one of six members and with no power of veto, clearly had no such determinative power.

Finally, to strike down a constitutional provision as void for vagueness was a novel development in this case. The process of selection for eminent persons through a high-powered committee was provided in the amendment. The reason no 'objective' criteria — such as years of legal practice, for instance — were prescribed was to allow these eminent persons to be selected from outside the legal fraternity and to 'prevent the judiciary from being, or becoming, a self-perpetuating old boys' club.'<sup>72</sup> For instance, leading members of civil society might be selected in order to give non-governmental stakeholders a say in the appointment of high constitutional functionaries. This lack of criteria was found by the majority to be vague and therefore unconstitutional. To use a principle of administrative law to test delegated legislation in the context of a constitutional provision that vested powers in the Chief Justice, Prime Minister and the Leader of the Opposition in the Lower House of Parliament is, at the very least, a surprising interpretive move.

In his forceful dissent, Justice Chelameswar made a case for judicial restraint. Confining himself largely to the main issue, that is, the power of Parliament to pass the impugned Amendment, Justice Chelameswar drew a distinction between 'basic features' of the Constitution and the 'basic structure' of the Constitution.<sup>73</sup> In his view, it is entirely possible

<sup>69</sup> Ibid at para 492.

<sup>70</sup> A Sengupta 'Appointment of Judges and the Basic Structure Doctrine in India' (2016) 132 *Law Quarterly Review* 201, 205.

<sup>71</sup> Sengupta (note 23 above) 47.

<sup>72</sup> Ibid 49.

<sup>73</sup> *Fourth Judges' Case* (note 40 above) at para 492.

for a 'basic feature' of the Constitution to be amended without destroying the basic structure of the constitutional scheme as a whole.<sup>74</sup> For illumination, let us take Sengupta's example.<sup>75</sup> The process of impeachment of Judges must currently be initiated by a petition signed by 50 Members of either House of Parliament. If this was to be lowered to, say, 20, the Court may well inquire into whether the independence of the judiciary as a basic feature has been 'affected', but it would be difficult to conclude that this change alone — given the numerous further hurdles to impeachment — would constitute a 'destruction' of the basic structure as a whole.

The *Fourth Judges' Case* is not without defenders. Datar echoed Justice Khehar's critique of the 99th Amendment and pursuant legislation, arguing that they were badly drafted and vague.<sup>76</sup> Others like Gopal Subramaniam laid heavy emphasis on the darkest period of India's independent history beginning with the supersession in the 1970s, when the judiciary was subservient when confronted with a dominant executive.<sup>77</sup> The question before the Judges however, was not one of a return to that era. Rather, it was about whether a democratically elected legislature can prescribe, by a constitutional amendment, a means of choosing judges which, while giving due deference to the judiciary, included stakeholders from outside it. As a question of law, this had a straightforward constitutional answer — yes. However, by digging its heels in, the Court underlined that judicial appointments were less a question of constitutional law, and more a matter of constitutional politics. As a political matter, the Supreme Court's foremost goal was to reassert the equation of judicial independence with judicial primacy, by circumscribing the role of the government and fortifying its own role.

Seen in this way, the reasoning of the majority in the *Fourth Judges' Case* appears to be a clear continuation of a line of thought that emphasised the importance of insulating the judiciary from the government. This ghost of supersession was casting its long shadows four decades hence leading to a constitutional over-correction that, while ostensibly designed to secure judicial independence in appointments, has ended up preserving judicial dominance and preventing a working checks-and-balances scheme. The system of judicial appointments as it operates today is denuded of public confidence, opaque, leads to questionable choices and entirely without criteria.<sup>78</sup> This suggests that there is a need to come out of the shadows of the supersession and distil some lessons on what an appointments mechanism should (and should not) look like today.

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<sup>74</sup> Ibid at para 492–502.

<sup>75</sup> Sengupta (note 23 above).

<sup>76</sup> Arvind Datar 'Eight Fatal Flaws: The Failings of the National Judicial Appointments Commission' in Sengupta & Sharma (note 4 above) 122.

<sup>77</sup> G Subramaniam 'The NJAC Case and Judicial Independence: Conceptual and Contextual Safeguards' in Sengupta & Sharma (note 4 above) 168.

<sup>78</sup> A Sengupta 'The Challenges for Judicial Appointments in India' *Oxford Human Rights Hub* (19 February 2015); A Sengupta 'Rethinking the Seniority Convention' *LiveMint* (27 January 2017), available at <https://www.livemint.com/Opinion/C5oLZEveydudf7P36ykDsmI/Rethinking-the-seniority-convention.html>; R Dhavan 'Judicial appointments: A New Fully Transparent System Needed' *The Economic Times* (13 October, 2017), available at <https://economictimes.indiatimes.com/news/politics-and-nation/judicial-appointments-a-new-fully-transparent-system-needed/articleshow/61058387.cms>; A Sengupta 'Talking over the Law: The Need for Public Conversation on the Judiciary' *The Hindu* (18 January 2018), available at <https://www.thehindu.com/opinion/lead/talking-over-a-law-the-need-for-public-conversation-on-the-judiciary/article22458275.ece>; S Parthasarathy 'Criteria for the Courts: On the Appointment of Judges' *The Hindu* (20 November 2018), available at <https://www.thehindu.com/opinion/lead/criteria-for-the-courts/article25541336.ece>.

### III LESSONS FROM THE INDIAN EXPERIENCE: FOUR DESIGN PRINCIPLES FOR APPOINTING JUDGES TO CONSTITUTIONAL COURTS

The Indian experience of judicial appointments is a cautionary tale. It is a lesson for lawyers, judges and policy-makers in India that designing a system of appointments is a complex exercise involving a range of factors, both legal and political. Equally, it cautions other jurisdictions, which might have their own controversies surrounding judicial appointments, that there is no single ‘right’ way to appoint judges to constitutional courts. Designing a workable appointments mechanism must be cognisant of the country’s constitutional history, its political climate, particularly the powers wielded by the judiciary vis-à-vis other organs of government and the popular sentiment of the citizenry towards those organs.

Unsurprisingly, devising an appointments system that captures these realities is a difficult exercise. In India, several experiments have been implemented and several others mooted with varying degrees of success.<sup>79</sup> The purpose of this part is not to prescribe yet another method. Instead, what would be more useful for constitutional lawyers in India and elsewhere is to distil a few key design principles of an appointments system.

To this end, we identify four key principles which ought to be observed: proportionality between the power wielded by the judiciary and the level of democratic scrutiny of judicial appointments; breaking the closed loop by which judges are primarily accountable to themselves and their colleagues; greater faith in the branches of government directly accountable to the electorate in an appointments mechanism; and an optimal level of transparency in appointments to prevent a mechanism as shrouded in secrecy as the collegium in India from taking root.

While understandably these principles will have to be suitably adapted to apply in different jurisdictions, the Indian experience commends these principles as essential facets of any legitimate and well-functioning appointments mechanism. These principles are not exhaustive, nor are they a guarantee of a functioning appointments system; on the contrary, this discussion is meant to serve as a foundation allowing lawyers in various jurisdictions to introspect on their own mechanisms and the shape possible reforms might take.

#### A Appointment methods must be proportionate to the exercise of judicial power

The Indian experience is testament to the salient fact that methods of appointment of judges must correspond to the extent of substantive powers of judicial review exercised by the judiciary. That is why the same executive-led form of appointment which had carried on without significant demur from any stakeholder in the first two decades of independence became entirely unsuitable in the next five years. A series of decisions beginning with *Golak Nath* made the Supreme Court an active player in the constitutional governance of the country. While it had ruled on significant issues in the first decade and a half, its consistent anti-majoritarian rulings upturning two decades of precedent gave it a public profile it had hitherto not had.

<sup>79</sup> The Constitution (Sixty-seventh Amendment) Bill, 1990; The Constitution (120th Amendment) Bill 2013; A Soni ‘Top SC Judge Demands Transparency in Judicial Appointments’ *India Today* (2 September 2016), available at <https://www.indiatoday.in/india/story/cji-njac-judicial-appointments-justice-chelameswar-collegium-338870-2016-09-02>; P Rao ‘Rethinking Judicial Appointments: *Collegium vs Commission*’ *PRS Legislative Research* (16 October 2015), available at <http://www.prsindia.org/theprsblog/rethinking-judicial-appointments-collegium-vs-commission>.

Combined with political ambitions of some of its judges,<sup>80</sup> the Court took on a larger-than-life image in the minds of the citizenry and the government.

In these circumstances, combined with a powerful majority government with a social reform agenda, having an appointments mechanism that was based on convention and practice was always going to be under challenge. As evident from the speeches in Parliament discussed in part II, the perceived activism of the judiciary was a key factor in the first supersession of three judges in 1973 and subsequent governmental efforts to use the existing powers of appointment to meddle with judicial composition.

In these episodes lies a salient lesson — the nature of the appointments process is intrinsically linked to the extent of judicial review powers and consequent public profile enjoyed by the judiciary. The wider the powers of the appointments process and the more public its role, the greater are going to be the demands by stakeholders to share the powers of appointment. Not only did that manifest in the supersession with the executive attempting to wrangle complete control, but also with the introduction of the NJAC, where the executive was attempting to claw back some of its powers of appointment in the face of an extremely powerful Supreme Court which had expanded its writ jurisdiction tremendously.<sup>81</sup>

The underlying problem here is the loosening of the ‘web of integrated government.’<sup>82</sup> The web of integrated government is woven by the carefully established checks and balances scheme by which various organs of government optimally collaborate and conflict with each other to ensure governance. Collaboration is necessary to further governmental objectives; in the same breath, circumscribed conflict is essential to ensure that each organ stays true to its task and has enough fortification to resist over-reach by others and little incentive to over-reach itself. In Madison’s words ‘ambition [must] counteract ambition.’<sup>83</sup>

In India, this web has loosened with the progressive insulation of the judiciary from its coordinate organs in its composition and the concomitant arrogation of wide powers of judicial review. While the latter is substantially beyond the scope of this article, it is widely acknowledged that the Supreme Court of India is one of the most powerful constitutional courts in the world.<sup>84</sup> It governs forest management,<sup>85</sup> the administration of cricket,<sup>86</sup> the location of liquor vends<sup>87</sup> and a range of governance functions whose links to questions of constitutional law are tenuous at best. The insulation of the judiciary from the influence of the executive, concurrent with the expansion of judicial power into domains traditionally regulated by the executive, causes a constitutional dissonance which undermines the web of integrated government.

If, however, traditionally ‘executive’ domains are to continue to be increasingly judicialised, the maintenance of the web of integrated government requires the approximation and transposition of more robust methods of executive accountability to the judicial branch. In

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<sup>80</sup> Justice K Subba Rao was the candidate of the united Opposition in the elections to the Presidency in 1967; Justice KS Hegde had served as an MP in the Rajya Sabha for ten years, and was known to make provocative statements from the bench.

<sup>81</sup> A Bhuwania *Courting the People: Public Interest Litigation in Post-Emergency India* (2017).

<sup>82</sup> Sengupta (note 23 above) 237.

<sup>83</sup> J Madison ‘Federalist Paper No. 51’ in Lawrence Goldman (ed) *The Federalist Papers* (2009) 341.

<sup>84</sup> S P Sathe ‘Judicial Activism: The Indian Experience’ (2001) 6 *Washington University Journal of Law & Policy* 29.

<sup>85</sup> *TN Godavarma Thirumulpad v Union of India* (1996) 9 SCR 982.

<sup>86</sup> *Board for the Control of Cricket in India v Cricket Association of Bihar* (2015) 3 SCC 251.

<sup>87</sup> *State of Tamil Nadu v K Balu* (2017) 2 SCC 281.

other words, we must take a ‘functional’ rather than a purely ‘institutional’ view: the question is not simply whether a particular method of appointment is appropriate to the judicial branch, but whether it is appropriate given what that branch *does*. It may well be that increased judicial power over macro-political matters is inevitable, but neither mode of appointment with which India has had experience — first executive and then judicial primacy — is appropriate to that end. Public administration necessarily involves weighing competing interests and arriving at equitable solutions. These compromises are considered legitimate due to the democratic nature of the decision-making body. If the judiciary is to continue to engage in such exercises at scale, it must be subject to the concomitant levels and forms of accountability to maintain the web of integrated government.

## B No judiciary, however well-intentioned, can be solely trusted

According to Justice Verma, judicial primacy in appointments was acceptable because the judges would always be accountable to the ‘ever-vigilant Bar.’<sup>88</sup> No other accountability was considered either necessary or desirable. As Lord Cooke has pointed out, however, it is unrealistic to imagine that the Chief Justice and senior Judges of the Supreme Court would be held accountable by junior members of the Bar, who would presumably hope to appear before the same Judges in Court.<sup>89</sup>

Whether the Bar is a representative, diverse, or independent enough institution to hold the judiciary accountable may be queried. But even setting aside these questions, this represents a narrow view of accountability in the context of judicial appointments. It assumes that legal proficiency is the main factor to be considered in appointing a judge. While this is of course a necessary condition, it is not sufficient. A different skill set is required to assess other qualities such as the Judge’s personal integrity, character, and antecedents.<sup>90</sup> As discussed earlier, the executive branch possesses a vast law enforcement machinery to make this determination, and there is no apparent reason that determinations on such matters ought to be secondary in importance to the collegium’s and subject to its approval. It, of course, assumes that such determinations will be made fairly and professionally, which is often not the case.<sup>91</sup>

Indeed, certain trends do not inspire great confidence in the ability of the current mode of selection to weigh these various factors in the balance. The Law Commission of India has highlighted the phenomenon of ‘uncle judges,’<sup>92</sup> whereby advocates practising in a particular high court are related by familial and social ties to high court judges in the same jurisdiction. This undermines the perception of judicial impartiality, as these persons have long-standing relationships with many of those who appear before them.

For instance, in 2010, the Chief Justice of the Punjab and Haryana High Court forwarded to the Union Law Ministry a list of serving ‘uncle-judges’ on that Court’s bench, revealing

<sup>88</sup> *Second Judges’ Case* (note 30 above) at para 44.

<sup>89</sup> Lord Cooke of Thorndon *Collected Papers of Lord Cooke* 6 VUWLRP 27/2017.

<sup>90</sup> *First Judges’ Case* (note 26 above) at para 29 (acknowledged by Justice Bhagwati).

<sup>91</sup> In the course of proceedings in the *Third Judges’ Case* (note 34 above), Justice BN Kirpal recounted how the Intelligence Bureau had labeled a prospective candidate for judgeship an alcoholic because of his nickname, ‘boozier’. It was in fact well-known in the legal fraternity that this sobriquet was sardonic, given to him because he was a teetotaler; see Sumit Mitra ‘Supreme Court Bench Makes CJI One among Other Judges in Appointing Colleagues’ *India Today* (9 April 1998), available at <https://www.indiatoday.in/magazine/nation/story/19981109-supreme-court-bench-makes-cji-one-among-other-judges-in-appointing-colleagues-827734-1998-11-09>

<sup>92</sup> Law Commission of India Report No. 230 ‘Reforms in the Judiciary — Some Suggestions’ (2009) at para 1.3.

that 34 per cent — 16 out of 47 — of the serving Justices were related to advocates practising in the same Court.<sup>93</sup> Earlier, in 2003, the Bar Council of India had reported to the Ministry that just over a quarter of all sitting High Court Judges in India had relations appearing in that same High Court.<sup>94</sup>

Nepotism is not a social ill unique to the judiciary or, for that matter, to India. A wide-ranging survey of varied institutions might reveal that these numbers are in line with broader social trends, but this is not within the scope of this article. Legitimacy, however, is at least as much about perception as about reality. The self-appointing nature of the judiciary, operating in a nearly-closed loop, raises questions about the motives behind such appointments as there are no external checks on them. In this way, judicial self-regulation is a poison-pill, which, though it shields the judiciary from accountability, also undermines its legitimacy in the eyes of those it seeks to serve.

### C No political executive, however vile, must be demonised

The assumption behind judicial self-regulation is, of course, due to mistrust in the political process. This attitude is clear in the *Second Judges' Case*, in which Justice Verma discounts any possibility of political oversight of judicial appointments:

Accountability of the executive to the people in the matter of appointments of superior judges has been assumed, and it does not have any real basis...

There is no occasion to discuss the merits of any individual appointment in the legislature on account of the restriction imposed by [the Constitution]...

Experience has shown that it also does not form part of the manifesto of any political party

While it is true there are restrictions on discussing the behaviour of judges in Parliament, this has not precluded debates on judicial independence and the behaviour of the Government in appointing judges. The most heated of these debates, over the behaviour of the government in superseding judges in 1973, is discussed in the first part of this article and surely counts among the most robust and informed exchanges in the history of India's parliamentary democracy.

Furthermore, Justice Verma was mistaken in saying that judicial appointments have never formed part of party manifestos. As Prof RK Tiwari's systematic analysis of party manifestos in India notes: 'Judicial Reforms have always been an important component in the party manifestos.'<sup>95</sup> Specifically, of the parties represented in Parliament, the Socialist Party in its 1957 manifesto, the Communist Party of India (Marxist) in its 1971 manifesto, and the Bharatiya Janata Party in its 2014 manifesto, all advocated for changes to the process of judicial appointments.

Ultimately, the political executive must be held politically accountable for its actions in every sphere of its activity. This is not just for reasons of political morality, but rather hard practicality: there are simply more avenues to hold it accountable. Every five years at the most, the executive must answer to the people for the sum total of its behaviour. As shown above, it is far from true that the people and opposition parties do not care about judicial politics. It arguably decided the Indian General Election of 1977 when Indira Gandhi was voted out

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<sup>93</sup> S Verma 'Every Third HC Judge Is 'Uncle' *Hindustan Times* (3 May 2014), available at <https://www.hindustantimes.com/punjab/every-third-hc-judge-is-uncle/story-emvLdM8SlnlknycQ4A7uLM.html>.

<sup>94</sup> V Venkatesan "'Uncles" on the Bench' (14 January 2011) 28 *Frontline*, available at <https://frontline.thehindu.com/other/article30174072.ec>

<sup>95</sup> R K Tiwari *Political Parties, Party Manifestos and Elections in India, 1909–2014* (2019) 224.

of power.<sup>96</sup> Demonising the executive, and further, trying to restrict its powers, in judicial appointment (or, for that matter in substantive matters of governance) can scarcely provide a sustainably workable solution.

#### D Optimal transparency is critical

In order not to replicate the flaws of the secretive collegium, some level of transparency must be built into the process. In this aspect, the ideal method of appointment must steer a middle course between the smoke-filled rooms of the collegium, and the overtly political showmanship that sometimes comes with too much publicity.

Transparency has both an instrumental and an inherent value.<sup>97</sup> In instrumental terms, it ensures that there have been no extraneous factors animating the process of appointments and allows the public to be informed about the workings of an institution which has a great impact upon the national life. Institutions of government in a democracy must be maintained on the public trust, and this trust cannot be blind. The people must see that their institutions are functioning in a way which best serves the public weal. The judiciary is no exception to this rule in its administrative function as it is in its judicial avatar. This is the inherent need for transparency.

An overly public-facing process, however, has its own pitfalls. The process of confirming judges to the Supreme Court of the United States has provided numerous instances of this danger. The confirmation hearings of Judges Bork in 1986 and Kavanaugh in 2018, whatever the substantive merits, saw intensely heated partisan exchanges which few would argue behoved the dignity of the high office under consideration. Partisan politics are, of course, unavoidable given the process of judicial appointments chosen by the United States of confirmation by the Senate. The intention is not to criticise this entire process — there may well be merits, given the political fallout of judicial decisions, for the elected legislature to have a say in judicial selection — but to point out that there are certainly pitfalls associated with ‘too much’ transparency.

As the South African experience has also shown, transparency is no guarantee of an edifying process of appointment; in one instance, according to the legal commentator Carmel Rickard, a female candidate normally residing abroad was asked in an open JSC hearing whether, even if she were not appointed, she might consider moving back to South Africa ‘if she got a boyfriend there.’<sup>98</sup> That a difficult balance must be struck was highlighted by the three distinct approaches taken to the transparency of JSC deliberations by Madlanga J (for the majority), Jafta J, and Kollapen AJ in the case of *Helen Suzman Foundation v Judicial Service Commission*.<sup>99</sup>

Given these considerations, the two guiding principles in designing an optimally transparent judicial appointment process ought to be (i) maintaining the dignity of the office to which

<sup>96</sup> A G Noorani ‘The Judiciary and the Bar in India During the Emergency’ (1978) 11 *Law and Politics in Africa, Asia and Latin America* 403. <https://doi.org/10.5771/05006-7286-1978-4-403>

<sup>97</sup> D Heald ‘Transparency as an Instrumental Value’ in C Hood & D Heald (eds) *Transparency: The Key to Better Governance?* (2006) 59.

<sup>98</sup> C Rickard ‘Judging Women Harshly’ *Sunday Times* (23 October 2005)

<sup>99</sup> *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC). The majority concluded that JSC deliberations, save only for confidential information, ought to form a part of the public record, analogising JSC proceedings to fair and open trials. Jafta J, on the other hand, made a compelling case against such an analogy and noted the possible effect of publicity on the candour of JSC deliberations, while Kollapen AJ argued for a test of relevance before including deliberations in the record.

appointment is sought while (ii) ensuring that the process is not so opaque as to call into question the substantive reasons for the outcomes of the process.

The pitfalls of opacity are, of course, clear. A process which is totally shielded from public view is one which is susceptible to sub-optimal practices. Many of the vices of opacity are reflected in the functioning of the collegium system in India. The increasing judicialisation of administration and politics demands, as we have discussed above, some level of democratic legitimacy in judicial appointments. A process which is obscured from the public is unlikely to yield such legitimacy.

Though a more abstract idea, the dignity of the courts must also be borne in mind and balanced against this need for transparency. The law court is an institution elevated above those who come to it seeking justice. It is an institution where ‘not only must justice be done; it must be seen to be done.’<sup>100</sup> Although empirical research to confirm this is difficult to conduct, few would dispute that the ‘majesty of the law’ as manifested through many symbols — including but not limited to the elevated bench, black robes, and judicial honorifics — is a factor in the popular legitimacy of the judiciary. This majesty, which reinforces the notion in the minds of litigants that the judge will be an impartial arbiter of the dispute before her, would be undermined if the judicial selection process involved a forensic public examination of a candidate’s past. For example, a prospective candidate may have been involved in student activism, represented a controversial client, or even held political office. Her role as a judge would, of course, depend on setting aside previous biases, and the public has a right to be aware of the salient facts. An overly transparent process, however, may unduly politicise such an examination and could well be used by vested interests to cast a shadow over the legitimacy of a disfavoured candidate. In this, as in other similar matters, an optimal degree of transparency is desirable ensuring that the public retains confidence in the process.

#### IV CONCLUSION

In this article, we have given an overview of the process of judicial appointments in independent India, and a critique of the law that is responsible for the process as it currently stands. It ought to be noted that this history has proceeded in an almost dialectical manner, with executive overreach begetting judicial dominance. In this movement from pillar to post, a commensurate swing in the other direction, at the present moment, would not bode well for the judicial branch and consequently for the constitutional system as a whole. Rather, keeping the political organs within a circumscribed role in the appointments process may be distinctly preferable to casting them aside thereby allowing them to derail a process where they have little skin in the game. With this in mind, we have provided a few design principles for devising a model appointments method. We hope that these principles provide guideposts to any jurisdiction, particularly in the global South, that is looking at reforming its method of appointment of judges to its constitutional courts.

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<sup>100</sup> *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256.