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## “AN ANALYSIS INTO THE APPOINTMENT OF JUDGES AND INSTANCES OF OVERRULING THE JUDICIARY BY EXECUTIVE

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### INTRODUCTION

In the 21st century the importance of judiciary as an institution has become important for the citizens as the beacon of upholding their rights. In India the constitution guarantees the independence of the judiciary from the other organs of the government. It is the source of the interpretation of laws and the body responsible for safeguarding the fundamental rights.

The *Inner Conflict of Constitutionalism: Judicial Review and the 'Fundamental Structure' - India's Living Constitution*: Constitution, goes about as its beacon by calling for examination any demonstration of the council or the leader from exceeding limits set for them by the Constitution. It goes about as the protector in safeguarding the major privileges of individuals, as revered in the Constitution, from encroachment by any organ of the state. It likewise balances the clashing activity of force between the middle and a state or among states, as allocated to them by the Constitution.

While articulating choices under its protected command, it is normal to stay unaffected by pulls and tensions applied by different parts of the state, residents or vested parties. Autonomy of the legal executive has been held to be an essential and unavoidable element of the Constitution

## RESEARCH QUESTIONS-

1. Whether the appointment of judges is free from any kind of executive interference (Article 50)?
2. Whether the appointment of judges is open for judicial review?

## CHIEF JUSTICE OF INDIA-

In India, we use to have Federal Court before the establishment of Supreme Court under The Constitution of India, 1950. This paper shows that the practice of appointment of judges were in accordance to seniority rule. In the year of 1950, when a Chief Justice and other 7 judges were to be appointed for the first time in Supreme Court, it was done by elevating or assimilating them from Federal Court to the Supreme Court. **Hon'ble H. J. Kania** was the first Chief Justice of India and was also elevated from federal Court. The constitution of India had no specific provision for the Appointment of the Chief Justice and therefore the system has developed a practice of seniority rule and same has been regarded as convention.

The Law Commission Report of **M.C. Setalvad** who was the First Attorney General of India has submitted a report in the year 1957 which recommended that seniority should not be sole criteria for the selection of the Judges as the Chief Justice of India and has stated that meritoriousness should also be considered for the selection. However, the same recommendations were rejected by the then Government.

Later on, we had an instance that took a major turn into the appointment of judges and showed that judiciary is not free from the executive independence and the appointment of judges can be seen as violation of Article 50 of the Constitution on India. In 1973, when the landmark judgement was decided by the Supreme Court with a majority view of 7:6 in the case of **His Holyhighness Keshavanada Bharti Sripadvalgaru v State of Karnataka**. In the judgement by Supreme Court stated that the Parliament cannot amend the 'Basic Structure of Constitution' and they are not equal to the Constituent Assembly and does not have any kind of unfettered power. This case has showcased the first supersession of the judges and not following of the convention where under Article 124 of the Constitution, the Chief Justice was appointed in accordance to the seniority rule and was a convention or practice followed from 1950.

Here, Hon'ble **Justice Shelat**, Hon'ble **Justice Hegde** and Hon'ble **Justice Grover** were the 3 senior-most judges after the Chief Justice of India and as the Chief Justice of India was retiring, so there was need of appointment of judge as Chief Justice of India by the President. But the main overturn was that none of these three senior most judge was made as Chief Justice of India and the **Justice A. N. Ray** was made as Chief Justice of India and he was in number 5 in seniority. So, it can be seen that for the first time Executive have

appointed the judge not on a seniority basis and has done the appointment with ill-motive and against the said precedent as those judges have given a judgement against the state.

Article 124 empowers the President to appoint the Chief Justice of India and other judges after the consultation of the Chief Justice for the other Judges. Now, the main issue is that Article 74 which says that the President is advised by the Council of Ministers and Prime Minister which in turn shows the interference of the executive and thus violate Article 50 of the Constitution of India showing the independence of judiciary is not followed in the country. It also shows the violation of the Basic Structure Doctrine where in accordance of rule of law, independence of judiciary is an integral part.

The second suppression of the Chief Justice of India and the violation of Convention rule has a history derived from the case **Raj Narain v Indira Nehru Gandhi**, where the Allahabad High Court declared the election of the seat of Prime Minister Gandhi as void. Later on, this went on appeal as the case of **Indira Nehru Gandhi v Raj Narain** and the Supreme Court has partially stayed the order of Allahabad High Court and stated that her election will be held as valid but Mrs. Gandhi was not allowed to vote in the Parliament. Now, after the judgement, an emergency was imposed on the ground of internal disturbances.

There was a question raised that whether the government has unfettered power during the period of emergency and can even suspend Article 21 of the Constitution of India, that is, liberty of the citizens of the India. A case was decided in the name of **ADM Jabalpur v Shiv Kant Shukla** where the court held that in a majority of 4:1 that government has power to suspend Article 21. This was treated as bad in the law and later on, the dissenting opinion of Justice H. R. Khanna became a law. There was a hearsay that when Justice Khanna was writing the decision has mentioned that this might take away his seat of the Chief Justice of India. He was the senior most judge at the time of the elevation of judge as the CJI. But, **Justice M. H. Beg** was appointed as the Chief Justice of India which was junior to Justice Khanna by the Executive.

This was the second supersession of the judges where the executive has interfered into the appointment of CJI and violated the convention rule. The reasoning of the executive was that Justice Khanna has a shorter tenure and they want the CJI to have a longer tenure in order to have the running of the Supreme Court for a longer period.

## OTHER JUDGES

Article 124 speaks about the word ‘**after consultation**’ with the Chief Justice of India and the appointment has to be done by the President. However, Article 50 which is a Directive Principle states that the Executive should be free from the judiciary as in order to uphold the principle of Rule of law, Separation of Powers and Independence Judiciary and thus the appointment cannot be done by the President on his personal opinion. However, as the President is the head of the executive union who is advised by the Prime Minister and the Council of Ministers in accordance to the Article 74 of The Constitution of India. So, there won’t be any kind of independent judiciary and will violate the basic principles of the Constitution. Thereafter, **Three judges case** came up with the guidelines for the appointment of the judges.

In the first judges case, that is, **S.P. Gupta v Union of India**- the word consultation would only mean to consult the judges of the Supreme Court and High Court but the President may not concur with the opinion of the judges. This case gave supremacy to the President’s opinion and stated he has the power to appoint the judges under Article 124 of the Constitution. The case of **Union of India v Sankal Chand Seth** was relied in S. P. Gupta case and stated that the word consultation would mean consultation only and ‘not concurrence’.

An obiter dicta was given in the case of **Subhash Sharma v Union of India** where the Supreme Court had expressed an opinion on the efforts should be made to make a non-political and nonjudicial independent body for the appointment of the judges in order to achieve the mandate of Article 50 of the Constitution where the executive and judiciary should be independent to each other.

In the second judges case, that is, **Advocate-on-Record Supreme Court Association v Union of India** the Supreme Court has overruled the first judges case and came up with the guidelines for the appointment of judges. It stated that word ‘consultation’ would mean concurrence and the opinion of the CJI should be given primacy and therefore, it established a judicial dominance.

In the third judges case, **In Re: Special Reference**, the President Mr. K. R. Narayan sought the opinion of supreme Court under Article 143, which was the 11th Presidential Reference and a 9 judge bench was constituted. It stated about the appointment of judges of the Supreme Court and High Court will be done by the Collegium and the recommendations made by then should be given in the writing.

## CONCLUSION

In the conclusion. we can state the supersession of the judges was not initially open for the judicial review as the aggrieved party never went to the court. Here, it can be said that it was not open for judicial review. There were no cases as such for the appointment of the judges filed in the courts and can be concluded that as the collegium consisting up of the Chief Justice of India and other 4 puisne judges (the next four judges who are seniority-in-line) for the appointment of judges in Supreme Court and Chief Justice of India and 2 other puisne judges for the appointment of judge in the High Court. As the collegium is already a body consisting up of the most knowledgeable judicial minds of the country who are there to interpret the laws and is believed to be work in accordance to the Constitutional principles and cannot extend their power against the Constitution.

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