JUDICIAL REVIEW OF APPOINTMENTS TO THE JUDICIARY: PUTTING THE PRINCIPLES OF ADMINISTRATIVE LAW TO USE

Dr. Jaswinder Kaur, Assistant Professor, Rajiv Gandhi National University of Law Punjab, Patiala

Abhinav Partap Singh Sachdeva, Rajiv Gandhi National University of Law Punjab, Patiala

ABSTRACT

The manner of appointment of judges to the Supreme Court and the High Courts in India has long been the subject matter of a controversy that has, on one hand, casted doubts on the independence of the higher judiciary while, on the other hand, given rise to allegations of judicial overreach in a democracy. Though the executive and judiciary are likely to remain embroiled in the political issued as to 'who' should select the judges, this paper seeks secure fairness in the process by addressing the question of 'how' should the appointments be made. For when the procedure is transparent, rule-based, and non-arbitrary, whoever is responsible for the application of such procedure will be unable to exercise much discretion. After a comparative study of process and review of judicial appointments in other countries, the authors argue that the principles of administrative law, like legality, rationality, and procedural fairness, must be made the grounds of judicial review of the decision-making process behind judicial appointments. These rules, evolved through judicial precedents as the touchstone for ensuring non-arbitrariness in executive actions, must also bind the choices made by the judges when they sit as a Collegium to perform the 'administrative' task of choosing candidates from the bar and the bench.

Keywords: Judicial review, judges, judicial appointment, fairness

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1. Introduction

An independent judiciary is widely recognised as the backbone of any democracy since, in most democracies, the courts are responsible for not only a fair adjudication of disputes regarding the rights of the individual and their infringement by the State but also upholding and enforcing the Rule of Law. Judicial independence, in turn, is determined significantly by, *inter alia,* the manner of selection of judges, which must be free from the ideological influences of social or political philosophy of the ruling dispensation in the executive.[1] In India, the appointment process has seen a unique jurisprudential, case law-based evolution, culminating in the contentious and opaque 'Collegium System' of appointment for judges to higher judiciary, wherein the candidates recommended by the judges of the Supreme Court are to be accepted by the President.[2] Having its own pros and cons, this system is here to stay as the Supreme Court has declared its unwillingness to accept the model of the National Judicial Appointments Commission put forward by the currently ruling dispensation[3], by striking down a constitutional amendment,[4] on grounds of violation of the basic structure doctrine.[5]

A controversy in 2023 regarding the appointment of Justice Victoria Gowri as a judge in the Madras High Court had sparked a debate regarding the amenability of the Collegium's recommendation to judicial review in India. The issue involves various complexities and inter-linked nodes of constitutional and administrative jurisprudence. It had raised questions on the efficacy of the Collegium System and the need for transparency in order to ensure a fair system of selection.[6] Among numerous opinions and editorial, Senior Advocate R Vaigai of the

[1] Arghya Sengupta, 'Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry' (2011-2012) 5 Indian J Const L 99. 116-117
[2] *Id,* p 100-104
[3] Anashri Pillay, 'Protecting judicial independence through appointments processes: a review of the Indian and South African experiences' (2018) 1(3) Indian Law Review 283
[4] The Constitution (Ninety-ninth Amendment) Act 2014
[5] *Supreme Court Advocates-on-record Association & Anr v Union of India* (2016) 5 SCC 1
[6] Sanjay Ghosh, 'How Much Sunlight? Debating Collegium Transparency | Column By Sr Adv Sanjoy Ghose' (*Live Law,* 9 Feb 2023) <https://www-livelaw-in.rgnul.remotexs.in/columns/how-much-sunlight-debating-collegium-transparency-column-by-sr-adv-sanjoy-ghose-221167> Accessed 2 May 2023

Madras High Court commented that the decisions of the Collegium are not beyond judicial review as it performs an administrative function.[7]

This line of thought might be worth exploring. Bringing transparency and putting effective checks on this power which the Supreme Court has, for better or for worse, appropriated to itself, is perhaps the sole mechanism to prevent the judiciary from not acquiring a hegemonic control over judicial appointments in the constitutional courts. Structural changes in the current system of appointment of judges, especially after the NJAC judgement, will need a lot of consensus-building between the two branches of the state. On the other hand, bringing the Collegium System within the purview of administrative law and subjecting such selections to the scrutiny of judicial review might give rise to a fairness in procedure without any big institutional changes, thereby safeguarding the independence of judiciary.

2. A Comparative Study on the Review of Judicial Appointments

The unbiased functioning of the courts depends, to a very large extent, on the manner of appointment of the judges, especially those in Constitutional Courts who are responsible for the judicial review of the actions of the Executive and the Legislature.[8] A merit-based, objective, and unbiased selection of judges is crucial to maintaining the impartiality of the Judiciary, and thereby strengthening democracy. However, irrespective of the power and autonomy given to the Judiciary in various countries, the final say on the appointment of judges mostly remains in the hands of political leadership, which may be the executive, the legislature or a mix of both. This poses the danger of compromising the autonomy of judges who often need to hear and decide cases wherein actions of these other branches of the State, who have bestowed these judges with their esteemed offices, are the subject of review. Judges cannot be allowed to appoint judges and any proposition to the contrary would suffer from the vice of elitist and aristocratic attributes unsuitable for egalitarian societies. The process needs to reflect the choice exercised by representatives of the people in one way or another, meaning thereby that the answer as to 'who' shall appoint judges will essentially remain, more or less, the same. Inevitably, the solution lies in focussing on the 'how' part of the selection procedure. The

[7] Sohini Chowdhury, 'Collegium Is Performing An Administrative Function, So Its Decisions Can't Be Beyond Judicial Review : R Vaigai' (*Live Law,* 19 Feb 2023) < https://www.livelaw.in/top-stories/collegium-is-performing-an-administrative-function-so-its-decisions-cant-be-beyond-judicial-review-r-vaigai-221955> Accessed 2 May 2023

[8] Arghya Sengupta, 'Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry' (2011-2012) 5 Indian J Const L 99

methods of judicial appointments are as varied as the political values of different countries.[9] On a broader basis, the selection processes may be divided into two categories based on the manner: elective and appointive.[10] Here, we shall take the example of the United States of America and the United Kingdom to see the nuances of both models.

2.1 The Models of Judicial Appointments

The elective model was earlier followed extensively in the US, wherein the judges were to be elected by the popular votes of the people. Even now, in the state judiciary, some states provide for elections of judges by a contest at the very initial stage. In contrast, most states have a system of retention elections, where judges appointed by the executive need to secure a majority of votes in their favour after a particular period post appointment.[11] This aims towards a democratization of judicial offices that not only adjudicate matters of private law but also 'make' law by establishing precedents that the common people need to obey.[12] However, the partisan manner of the conduct and funding of the election campaigns poses serious questions on adherence to the principles of natural justice and the rule against bias in some cases.[13] The appointments to the federal courts are made by the President of the United States, and later confirmed by the Senate, and have now become mostly based on political and ideological considerations.[14]

In the United Kingdom, where an appointive system is followed, the power which earlier rested with the Lord Chancellor (part of the executive) to appoint judges has now been transferred to a judicial appointments commission which makes recommendations to the Lord Chancellor who may reject a candidate only if he/she is not suitable.[15] Though the composition of the commission is not restricted to judges, or even to legal members for that matter, it has been

[9] Eleni Skordaki, *Judicial Appointments: An International Review of Existing Models* (The Law Society, London, 1991), p 12.
[10] Sarkar Ali Akkas, 'Appointment of Judges: A Key Issue of Judicial Independence' (2004) 16 Bond L Rev [i], 201
[11] Mark Tushnet, "Judicial Selection, Removal and Discipline in the United States" in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press 2011)
[12] Sarkar Ali Akkas, 'Appointment of Judges: A Key Issue of Judicial Independence' (2004) 16 Bond L Rev 200, 202
[13] *Caperton v. A. T. Massey Coal Co., Inc.* 129 S.Ct. 2252 (2009) (USA)
[14] *Mark Tushnet* (n 12) p 136
[15] Kate Malleson "Appointment, Discipline and Removal of Judges: Fundamental Reforms in the United Kingdom" in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press 2011) 120-121

alleged to not have made sufficient efforts to bring diversity to the bench in the UK, which mostly consists of aged, white males.[16]

In both of the aforementioned systems, there exists no provision for contesting the appointment of judges on merit, as the entity responsible for 'appointing' the judge differs from the one 'selecting' the individual for the appointment. Nonetheless, a review of judicial appointments is not entirely impossible.

A unique system in Japan provides for a 'popular review' of the judicial appointments to the Supreme Court made by the Cabinet, wherein the people, while voting in the general election for the House of Representatives, may also cast a ballot to remove a judge(s) appointed by the government.[17] A voter may put an 'X' sign against the name of the judge whom he wishes to get dismissed and if majority of voters cast a vote to dismiss a judge, he shall be removed from the office.[18] Thereafter, a review of the appointment of the judge is supposed to happen after every ten years wherein people get a chance to vote to dismiss him. Though judges of the Supreme Court do not serve long enough to face a ten-year review, this system gives the power to the people to dismiss a judge for his misconduct, thereby asserting that the sovereignty resides in the people and the will of the people must prevail, even in matters of judicial appointments.[19]

2.2 Judicial Appointments in Germany: A Noteworthy Solution

A better example of a judicial review system for judicial appointments may be seen in Germany. Similar to the appointments in the subordinate judiciary in India, all judicial officers in Germany are selected in a fashion akin to the other civil servants.[20] The candidates who apply for judgeship are evaluated by the presidents (equivalent to chief justice) of the courts who then send their recommendations to the Ministry of Justice. For offices in the higher judiciary, judicial electoral committees, consisting of members of the legislature and executive, vote for recommending a suitable candidate to the Ministry. In either case, a candidate who is

[16] *Id,* 132-33
[17] Hideo Tanaka, 'The Appointment of Supreme Court Justices and the Popular Review of Appointments' (1978) 11 Law Japan 25
[18] *Id,* p 34
[19] *Id,* p 33, 35
[20] Johannes Riedel, 'Judicial Review of Judicial Appointments in Germany' (2020) 2020 Revista Forumul Judecatorilor 37

not selected has the right to approach the administrative court under Art 19 of the German Constitution if he claims that the appointment was not based on merit.[21]

In order for this right to be realised, the government started to declare the names of recommended candidates well in advance of the appointment so that any challenge can be addressed by the courts in time. On filing an application to challenge the appointment of a judge in the administrative court, the unsuccessful candidate has to prove his case on one of three grounds:[22]

1. The successful candidate does not meet the formal requirements for the post which the applicant does;

2. The applicant's evaluation has been incorrect or insufficient; or

3. The evaluation of the successful candidate is wrong and its final result should be lower than applicant's.

The government needs to produce the records of appointment process along with the reasons for selecting the candidate whose appointment is being challenged. The evaluation of the candidates is scrutinised by the court with regard to the aptitude, experience and qualification of the person in addition to the facts relied upon by the recommending authority.[23] If the court finds merit in the applicant's case, it can issue an interlocutory injunction staying the process of appointment and the government is required to reconsider its decision. Judicial review is exercisable even for the recommendation by a parliamentary committee for filling up a vacancy in the federal court of appeal.[24] However, the recommendation given when a single individual (say the chief justice) is responsible for selection is, naturally, higher.[25] This system of strict controls over judicial appointments in Germany has led to greater care and diligence in the evaluation of candidates. However, it has resulted in a complex body of case laws which do not lay down a coherent jurisprudence propounding the valid criteria for selection of judges.

[21] *Id,* p 39-40
[22] *Id,* p 41
[23] *Id,* p 44
[24] *Id,* p 46
[25] *Id,* 54

Nonetheless, this is better than having no judicial review of the appointments which would have allowed arbitrariness in the system.[26]

2.3 The Indian Scenario

Judicial review, in India, is an essential feature of the basic structure of our Constitution and cannot be abrogated even by a constitutional amendment.[27] It includes judicial review of the administrative acts of both, the executive and the judiciary.[28] There are no "no-go" areas in the realm of judicial review and no restriction exists on this power of the Constitutional Courts in India, except those which the courts have imposed on themselves.[29]

The Supreme Court has restricted the scope of Article 32 by stating that decisions of judicial and quasi-judicial bodies are not amenable to judicial review under the writ jurisdiction as they do not violate the fundamental rights of a person even if they are based on a misinterpretation of the law.[30] However, a writ can lie against the 'administrative' or 'executive' order of a judicial authority. Despite that, the appointment of judges to the High Courts and the Supreme Court of India[31] by the President has been largely kept outside the purview of judicial scrutiny.

The initial position of law laid down in *Supreme Court Advocates-on-Record Assn. v. Union of India* was that, as far as the recommendations of the Collegium are concerned, subjecting them to public disclosure would act against "public interest" since the same might affect the "free and frank expression of honest opinion by all constitutional functionaries" involved in the consultative process for appointments and transfers of judges.[32] However, if the appointment was done by the President without the recommendation of the Collegium, it could be reviewed. The Supreme Court justified its decisions on the ground that the primacy given to the opinion of members of the judiciary itself ensured sufficient safeguard to the process against any arbitrariness.[33] This amounted to their Lordships effectively evolving for themselves a replica of the doctrine of 'Sovereign Immunity', by taking the premise that 'the

[26] *Ibid*
[27] *L. Chandra Kumar v UOI,* AIR 1997 SC 1125
[28] *N. Kannadasan v. Ajoy Khose*, (2009) 7 SCC 1, para 105
[29] IP Massey, *Administartive Law* (9th edn, Eastern Book Company 2018) p 280
[30] *MP Jain & SN Jain Principles of Administrative Law* (9th edn, 2022) vol 2, para 33.3.2
[31] Constitution of India 1950, Art 124
[32] *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441, 708-9
[33] *Supreme Court Advocates-on-Record Assn*. para 480

Judges can do no wrong', in contrast with the archaic notion that 'The King can do no wrong', a concept that the Courts have watered down and practically made redundant over the years.[34]

2.3.1 The 'Eligibility' vs 'Suitability' Debate

The Supreme Court, softening its stance and realizing that their Lordships may also sometimes be mistaken, had declared in 2009 that judicial review in cases of appointments to the High Courts is possible only on the grounds of eligibility and not suitability.[35] The Division Bench was hearing a matter involving a challenge to the appointment of an advocate as a Judge in the Allahabad High Court wherein it was alleged that the person concerned, *inter alia*, did not fulfil the criteria of being an advocate for 10 years[36] which is necessary for being elevated to the Bench. The reason given for the argument was that he had not practised before the High Court but was a member of a tribunal for 10 years.

Refusing to grant the petitioner's request to quash his appointment, the Court held that the person fulfilled the 'eligibility' criteria for appointment given under Art 217(2) as he was an advocate for ten years. Whether not practising before the High Court itself made him undeserving for the job was a matter of suitability under Art 217(1). The former was held to be open to judicial review while the latter was not.[37] The Court said that to determine "who should be elevated" falls in the purview of 'consultation' which the President is supposed to hold before appointing the judge. Hence, the contents of such consultation cannot be reviewed by the court but whether "effective consultation" took place or not "could fall within the scope of judicial review".[38] Hence, refusing to treat 'mere consultation' as satiating the requirement under Article 124 of the Constitution, the Court stepped towards accepting the test of 'effective consultation' as the touchstone for judicial review of appointments to the higher judiciary.

This judgement was relied upon by the Court while dismissing the challenge to Justice Gowri's appointment to the Madras High Court, on the ground that the Collegium failed to consider the relevant material while choosing the candidate.[39] However, the Court did not sufficiently elaborate as to what would constitute effective consultation and simply stated that the court

[34] *Massey* (n 5) 487-88
[35] *Mahesh Chandra Gupta v Union of India* (2009) 8 SCC 273, 290-2
[36] Constitution of India 1950, Art 217
[37] *Mahesh Chandra Gupta* para 42, 76
[38] *Mahesh Chandra Gupta* para 44
[39] *Anna Mathews v. Supreme Court of India* 2023 SCC OnLine SC 131

cannot issue the writ of certiorari or mandamus against recommendations of the Collegium.[40] This, the authors argue, is contrary to the 'effective consultation' doctrine which has been hinted at in *Mahesh Chandra.*

2.3.2 Scope of Administrative Law in Reviewing Judicial Appointments in India: The Case of the Subordinate Judiciary

It might be fruitful here to analyse how the extent of judicial review is already much larger when it comes to administrative decisions of the High Courts concerning matters of appointment and dismissals of judges in the subordinate judiciary.

The matter regarding reviewability of appointments and dismissals in the subordinate judiciary has clear jurisprudence, which relies on Art 233, 235 and 311. The control over subordinate courts lies with the High Court[41] with regard to matters of transfers, promotions and punishments for misconduct, other than dismissals. However, for appointments and removal of judges in the subordinate courts, the High Court has to make a recommendation to the Governor[42] which is binding for the Governor to accept.[43] Even an Administrative Committee comprising not all but only some judges of the High Court can make this recommendation. Orders passed by the Governor based on such recommendations made by the High Court on the administrative side have been challenged on numerous instances in the same Court, acting in its judicial capacity, through a writ petition under Art 226, even resulting in quashing of appointment of judges on the ground of illegality in the Governor's order.[44]

It has also been held that the recommendation made by the Chief Justice of a High Court which is final and "would lead to an appointment" of the President of the Consumer Commission, is open to judicial review.[45] This depicts that the decisions of the judges of the constitutional courts made in an administrative capacity for the appointment and dismissal of judges are amenable to judicial review by the very same Court. By extension of this rule, the recommendations made by the Collegium for the appointment of judges are also administrative

[40] *Anna Mathews* para 10
[41] Constitution of India 1950, Art 235
[42] *Id*, Art 233
[43] *Registrar (Admn.), High Court of Orissa v. Sisir Kanta Satapathy*, (1999) 7 SCC 725
[44] *State of U.P. v. Batuk Deo Pati Tripathi*, (1978) 2 SCC 102
[45] N. Kannadasan v. Ajoy Khose, (2009) 7 SCC 1

decisions that can be reviewed by the Supreme Court in a writ petition being filed under Article 32.

3. Evolving the 'Effective Consultation' Test

Having settled that a judicial review of the Collegium's recommendation for appointment of Judges to the Supreme Court and High Courts can be done if 'effective consultation' is absent, it must be seen on what grounds the lack of such consultation can be proven. In the *Second Judges' Case* itself, a nine-judge Bench listed three grounds for review of any administrative action: illegality, irrationality and procedural impropriety. Apart from these three, a mandamus could also be issued against a failure to exercise discretionary power in the instance of non-performance of duty by an administrative body.[46] Though these remarks were made with regard to the executive's duty to appoint judges as per the Collegium's recommendations, same principles can be made applicable while reviewing the exercise of discretion by any administrative body, including the Collegium.

The Supreme Court holds that the extent, scope and intensity of the judicial review depend on the subject matter of review.[47] If the subject matter pertains to an administrative act, mala fides can be a ground for review but the same does not hold true in cases of legislation.[48]

3.1 Contours for Reviewing Decisions of the Collegium

It has been observed, time and again, that judicial review in cases of administrative acts does not lie "against the decision, but the decision-making process"[49], and therefore, even in case of consultation within the Collegium system, the extent and scope of judicial review is limited to the determination of the fact whether the process has been fair and as per the law. Justice Indira Banerjee has succinctly laid down the more evolved grounds of judicial review in administrative law, namely:

i. Perversity,

[46] *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441, 639-40
[47] *R. Daly v Secretary of State for Home Department* (2001) 3 All ER 433 (HL) (UK)
[48] *B.P. Singhal v. Union of India* (2010) 6 SCC 331, para 80
[49] *Sarvepalli Ramaiah v. District Collector, Chittoor*, (2019) 4 SCC 500, para 43

ii. Patent Illegality,

iii. Irrationality,

iv. Want of Power/Lack of Jurisdiction, and

v. Procedural Irregularity.[50]

Therefore, in a case where an Additional Judge of Madras High Court was not made permanent due to allegations questioning his integrity but the Chief Justice of the High Court recommended his name for the President of State Consumer Commission, the Supreme Court quashed the decision. It reasoned that non-consideration of the relevant facts regarding the integrity of the person before recommending his name amounted to an error apparent on the face of record.

It can be observed that the grounds of judicial review are dynamic under administrative law and cannot be fit into water-tight compartments.[51] Discussion can be done in detail with regard to how each of these grounds may be relevant for reviewing decisions of the Collegium, but it will be most fruitful to discuss procedural impropriety, which includes the non-observance of the principles of natural justice.[52]

3.2 Procedural Impropriety and the Principles of Natural Justice

The principles of natural justice are uncodified rules of procedure that are to be followed in judicial as well as administrative proceedings to ensure fairness in all actions of the state.[53] These rules are to be especially adhered to when no procedure has been prescribed by a statute for a proceeding, such as the deliberations by the Collegium. Here, two major principles are to be necessarily followed:

1) Right to a fair hearing (*Audi Alterum Partem*), and

2) The Rule Against Bias *(Nemo Judex in Causa Sua*)

[50] *Sarvepalli Ramaiah*, para 40
[51] *Massey* (n 29) p 388
[52] *M P Jain & S N Jain*(n 6))
[53] *M P Jain & S N Jain* (n 6)

The authors wish to demonstrate how these can be entrenched in the decision-making process of the Collegium.

3.2.1 Hearing the Other Side

When the Collegium discusses names of various judges and its members hold discussions, the factual basis that these members have for deciding the suitability or 'merit' of a person being considered for elevation, is mainly based on specific sources, like the inputs from the Intelligence Bureau, the judgements passed by such persons (in case of High Court Judges) or cases argued by them (in case of advocates), and inputs from other judges of Supreme Court having connection with the relevant High Court.[54]

Despite all the multifarious sources and feedback mechanisms that the Collegium has adopted, there are no procedures to allow a candidate an opportunity to justify himself if adverse input is received against him. This goes against the very concept of fairness as the individual whose merit is being decided is neither aware of the evidence against him[55], nor is she given any opportunity to defend herself.[56]

To counter this, India can learn something from the model of South Africa wherein a Selection Committee interviews prospective candidates for judgeship[57], providing them an opportunity to clarify any inappropriate statements or acts attributed to them.[58] The South African experience shows how transparency can be attained in the judicial appointment process by bringing clarity to the selection criteria along with giving the judicial service commission access to a wide range of information about the prospective appointees due to the public nature of the interviews.[59] One might argue that this will impact the dignity of the sitting judges and the prestige enjoyed by Senior Advocates, comprising the recruitment pool for the higher judiciary, when they are questioned for their acts in public interviews. Such a suggestion may

[54] "Watch: Cji Chandrachud Explains How Collegium Picks Judges" (*India Today,* March 18, 2023) <https://www.indiatoday.in/law/video/watch-cji-chandrachud-explains-how-collegium-picks-judges-2348452-2023-03-18> accessed May 2, 2023
[55] *See, Dhakeshwari Cotton Mills Ltd v CIT* AIR 1955 SC 65
[56] *See*, *Cooper v Wandsworth District Board of Works* 143 ER 414 (1863) (UK)
[57] Anashri Pillay, 'Protecting judicial independence through appointments processes: a review of the Indian and South African experiences' (2018) 1(3) Indian Law Review 283
[58] Rai S and Arora N, "Judicial Appointments in India - a Critical Analysis" (*SCC Blog,* July 20, 2020) <https://www.scconline.com/blog/post/2017/05/23/judicial-appointments-in-india-a-critical-analysis/> accessed May 2, 2023
[59] Anashri Pillay, 'Protecting judicial independence through appointments processes: a review of the Indian and South African experiences' (2018) 1(3) Indian Law Review 283, 311

even lead to the invocation of the *public interest doctrine* to deny any such opportunity of being heard.[60] To overcome this problem, it must be remembered that an oral hearing is not necessary for complying with the principle of *audi alterum partem*.[61] Therefore, even allowing the candidate to submit his response in writing, or even orally, which is to be divulged only to the Collegium, can allow compliance with natural justice without subjecting the candidate to public humiliation.

3.2.2 Nemo Judex in Causa Sua: The Rule Against Bias

Judges are always expected to act free from bias and the same applies to their role as members of the Collegium. However, doubts about nepotism and bias in judicial appointments have surfaced time and again, supported by comments from former judges themselves.[62] Such personal bias must be avoided. If a Collegium member is found to have a possible inclination towards a candidate and has played a role in recommending him despite the same, the appointment must be liable to be quashed for impinging upon natural justice, particularly the rule against bias.

The real danger however stems from the departmental bias[63] combined with judicial obstinacy[64]. It can very well exist within the judiciary, wherein the judges hearing a petition challenging the Collegium's recommendations might refuse to come to any adverse conclusion on the same simply due to their unwillingness to oppose their own colleagues. Nonetheless, the *doctrine of necessity* suggests that a possibly biased hearing is better than no hearing.[65] Since the Apex Court is the only authority under the current constitutional scheme that can be said to have the mandate to review the actions of Collegium, this element of bias needs to be tolerated.

4. Remedies Available

The constitutional courts in India are empowered to employ various constitutional remedies under different articles of the Constitution for the dispensation of justice, all of which are meant

[60] *Union of India v Hindustan Development Corp.* (1993) 3 SCC 499
[61] *Union of India v J.P. Mitter* (1971) 1 SCC 396
[62] Sohini Chowdhury, ''Victoria Gowri Case Prime Example Of What Can Happen When Process Collapses': Justice AP Shah On Need For Transparent & Accountable Collegium' (*Live Law,* 18 Feb 2023) <https://www-livelaw-in.rgnul.remotexs.in/top-stories/victoria-gowri-case-prime-example-of-what-can-happen-when-process-collapses-justice-ap-shah-on-need-for-transparent-accountable-collegium-221928 > Accessed 2 May 2023
[63] *Massey,* pp 205-6
[64] *Jain and Jain,* ch XI
[65] *Ashok Kumar Yadav v State of Haryana* (1985) 4 SCC 417

for different purposes. Remedies in the nature of writs can be issued by the Supreme Court under Article 32 only for the enforcement of Fundamental Rights.[66] Hence, violation of a right under Part III of the Constitution is *sine qua non* for invocation of this jurisdiction. The Special Leave Petition jurisdiction[67] used to hear appeals from any judicial or quasi-judicial body, on the other hand, is restricted to the decisions of courts and tribunals, of which the Collegium is neither.

4.1 Exercising the Writ Jurisdiction

It has been established that a writ of certiorari can be issued if an administrative authority violates the rules of natural justice, that is *Rule Against Bias* and *Audi Alteram partem,* while taking a decision.[68] The principle of non-arbitrariness[69] enshrined in Article 14 of the Constitution forms the jurisprudential basis of such a remedy. The writ can be used to quash the arbitrary order of any constitutional, statutory and non-statutory body, even of a selection board[70] whose task is akin to that of the Collegium. The Supreme Court, while rejecting to consider 'suitability' as a ground to review the appointment of a High Court judge, had pointed out that the writ prayed for was of quo warranto instead of certiorari, and a writ of quo warranto can lie only where the question is raised on the 'eligibility' of the judge so appointed.[71] This indicates that a writ of *certiorari* can be the potential remedy for challenging a Collegium's recommendation based on principles of administrative law. A writ of mandamus can also be issued to ask an administrative body to reconsider its decision, and the same goes for the Collegium.

4.2 Can the High Courts review the decisions of the Collegium?

The High Courts, while having the writ jurisdiction under Article 226, are limited by the principle of territoriality and judicial hierarchy in the exercise of their power over decisions of the Collegium comprising of Supreme Court judges. However, there is uncertainty as to whether a High Court can separately review the recommendations sent by its own Collegium (comprising of the Chief Justice and two other seniormost judges of that high Court) that form

[66] Constitution of India 1950, Art 32
[67] Constitution of India 1950, Art 136
[68] *Massey,* p 400-1
[69] *Maneka Gandhi v Union of India,* AIR 1978 SC 597
[70] *A.K. Kraiptak v Union of India* (1969) 2 SCC 262
[71] N. Kannadasan v. Ajoy Khose, (2009) 7 SCC 1

part of the consultative process. At the moment, it seems implausible as the names suggested by the High Court's Collegium are not published and there is no possible way of knowing its recommendations. However, if in future the Collegium begins to issue the list of names it is sending to the Supreme Court, the same might be open to judicial review by the High Courts on their judicial side since their writ jurisdiction is even larger than that under Article 32, by virtue of the power to issue writs for "any other purpose" apart from enforcement of fundamental rights under Part III of the Constitution.[72]

It is but natural that the judicial review of any decision of the Collegium cannot be done under Article 227 because the revisional jurisdiction of the High Court is exercisable only for actions of those courts and tribunals over "which it exercises jurisdiction."[73] As the High Court does not exercise jurisdiction over the Supreme Court or its administrative agencies, it cannot review the decisions of the Collegium. Again, the exercise of power under Article 227 for reviewing the decision of its own Collegium is not supported by any judicial interpretation at the moment. It may be futile to investigate whether the term 'court' under the said Article would include a High Court's Collegium. This can be nothing more than an academic proposition.

4.3 Moving Beyond the Writs

The writs, however, may not be the best way of controlling administrative actions. Lord Denning had once remarked that the technical nature of the writs has made them unsuitable for ensuring freedom and the rule of law in the modern age.[74] The US Supreme Court has also decided to abandon the use of writs as a mode of controlling administrative actions.[75] In India, the Supreme Court is empowered to issue "directions or orders" in addition to writs to enforce fundamental rights.[76] The intent of the Constituent Assembly, to keep all options open for the Supreme Court to issue any sort of command to protect the fundamental rights, is evident from the original draft of the Constitution which talked of "directions or orders in the nature of the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari".[77] This was later

[72] Constitution of India 1950, Art 226
[73] Constitution of India 1950, Art 227
[74] Denning, *Freedom Under The Law* (Stevens 1949) p 126
[75] *Degge v Hitchcock* 229 US 162 (1913)
[76] Constitution of India, Art 32; *Kochunni v State of Madras* AIR 1959 SC 725, 733
[77] Draft Constitution of India 1948, Art 25

amended to finally clarify 'directions and orders' as being separate from the 'writs' under Article 32.

Even the writs which the court can issue are not limited to the six types specified in the Article since the use of the word 'including' suggests that the list is not an exhaustive but an inclusive one. The Court enjoys a broad discretion while deciding the nature of the writs and their contents which may be tailored as per the peculiar circumstances of each case.[78]

In a recent development, the Supreme Court directed the Acting Chief Justice of the Calcutta High Court to transfer a matter being heard by a single-judge bench of the court, to another bench because the judge hearing the matter had given an interview regarding the *sub judice* case before him to a media outlet.[79] The Division Bench led by CJI Chandrachud, on the plea that the comments in the interview indicated bias on the judge's part, observed that it was not a judge's business to give such interviews.[80] This shows that bias depicted in public is sufficient ground to challenge the fairness of a judge and directing that the case be heard by someone else by giving an order to the Chief Justice on the 'administrative side'. Therefore, it suggests that the Supreme Court, hearing a matter under Article 136, may ask the Chief Justice (of a High Court in the instant case) to perform an act on the administrative side.

In case bias is shown by a member of the Collegium while recommending a person for appointment, this power can be used, upholding the Rule against Bias, to direct the Chief Justice to not consider that member's opinion while deciding the recommendation.

5. Conclusion

From a comparative analysis of the appointment processes of judges in various countries, it can be concluded that the prime hindrance in opening up judicial appointments to judicial review is the intricacies involved in such appointment process itself. The jurisdictions which have been studied in this paper have all tried to strike a balance between keeping judicial appointments away from political influences and ensuring that due regard is given to a

[78] *Chiranjit Lal v Union of India* AIR 1951 SC 41
[79] *Abhishek Banerjee v. Soumen Nandy* Diary No. 15883/2023 (SC)
[80] P Sharma, 'Taking Exception To Calcutta HC Judge's TV Interview, Supreme Court Directs Transfer Of WB Teacher Recruitment Case To Another Judge' <https://www-livelaw-in.rgnul.remotexs.in/top-stories/taking-exception-to-calcutta-hc-judges-tv-interview-supreme-court-directs-transfer-of-wb-teacher-recruitment-case-to-another-judge-227422 > Accessed 2 May 2023

democratic process of appointment where those representing the will of the people have a say. This has made judicial review difficult because in most cases, it is not a single institutional body that is appointing a judge based on a reasoned decision, which can be the subject of review on its merits.

In the US, the election of a judge or his approval by the Senate does not leave any 'ground' on which the suitability of the judge may be challenged. In the UK, the selection process by the judicial appointment commission is so opaque that one does not know why a person was appointed, keeping the public unaware of any ground for review even if it exists. Though in India the idea of a commission having equal representation of executive and judiciary could not fructify, the level of opaqueness in the Collegium's decisions stands at a similar or a higher level as compared to the jurisdictions having a commission like South Africa and the UK. Hence, there is very little scope left for the judicial scrutiny of the selected judges based on suitability of the candidate for the post.

However, lessons may be taken from the German system wherein the executive has adapted the appointment process for judges to meet with the criteria of fairness set by the administrative courts. The German courts have pinned the responsibility on the shoulders of the Ministry of Justice, the final appointing authority, to ensure that the recommendations it receives are founded on merit and undergo comprehensive evaluation based on objective criteria., regardless of the involvement of the political branches of the state.

The Indian courts must take lessons from this stand and be firm in doing a judicial review of the appointments even when they are notified by the President of India on the recommendation of the Collegium. The Supreme Court must keep in mind that when it sits for a review in such cases, it is acting on its judicial side and the judges need not pay any deference to the decisions of the Collegium which are made on the administrative side. The grounds, on which the Court decides a challenge to the appointment of a judge, must be rooted in principles of administrative law (natural justice), and it must be treated as a challenge to the action of the President (who has appointed the judge) rather than that to the recommendation of the Collegium.

Based on the extensive analysis done in this project, it can be concluded that opening the actions of the Collegium to judicial review on the same grounds as that of other administrative bodies will not only repose the trust of citizens in the judiciary but also lead to the evolution of

sound standards to be employed while selecting judges for the higher judiciary. It will enhance transparency and accountability in the process of judicial appointments, reduce arbitrariness by judicial and executive officers, and strengthen the independence of the judiciary in India. These will also get the force of law under Art 141 and must then be compulsorily followed by any commission or body (like NJAC) that is constituted in future, under a statute, for appointing judges to the High Courts and Supreme Court.