APPOINTMENT OF JUDGES IN THE HIGHER JUDICIARY IN INDIA: AN ANALYTICAL STUDY

Dissertation submitted to National Law University, Assam
in partial fulfilment for award of the degree of
MASTER OF LAWS

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30th June 2018

SUPERVISOR CERTIFICATE

It is to certify that Ms Deboleena Dutta is pursuing Master of Laws (LL.M.) from National Law University, Assam and has completed her dissertation titled **"APPOINTMENT OF JUDGES IN THE HIGHER JUDICIARY IN INDIA: AN ANALYTICAL STUDY"** under my supervision. The research work is found to be original and suitable for submission.

Date: 30.06.2018

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DECLARATION

I, Deboleena Dutta pursuing Master of Laws (LL.M.) from National Law University, Assam, do hereby declare that the present dissertation titled **"APPOINTMENT OF JUDGES IN THE HIGHER JUDICIARY IN INDIA: AN ANALYTICAL STUDY"** is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

Date: 30.06.2018

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ACKNOWLEDGEMENT

Writing this thesis has been fascinating and extremely rewarding. I would like to thank a number of people who have contributed to the final result in many different ways:

To commence with, I pay my obeisance to God, the almighty to have bestowed upon me good health, courage, inspiration, zeal and the light. After God, I express my sincere and deepest gratitude to Prof (Dr.) J.S. Patil, Vice-Chancellor, National Law University and Judicial Academy, Assam.

I owe my most sincere gratitude to my supervisor, Dr. Ishrat Husain, Associate Professor of Law, National Law University and Judicial Academy, Assam who ploughed through several preliminary versions of my text, making critical suggestions and posing challenging questions. His expertise, valuable guidance, constant encouragement, affectionate attitude, understanding, patience and healthy criticism added considerably to my experience. Without his continual inspiration, it would have not been possible to complete this study.

I am highly thankful to all the teaching faculty of National Law University and Judicial Academy, Assam who are always there catering to our needs and queries.

I gratefully acknowledge the Library Staff of NLUA who has helped in getting access to the research literature.

I owe my special thanks to my friend Mr. Partha Shankar Biswas for his valuable guidance that has been very helpful for this study.

I sincerely express my deep sense of gratitude and respectful regards from the core of my heart to my parents who formed part of my vision and taught me the good things that really matter in life. The happy memory of my parents still provides persistent inspiration for my journey in this life.

Deboleena Dutta (SF0217005)

2nd Semester

One year LLM Degree Programme

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PREFACE

Judiciary, the justice delivery system resorted to by the common man for his legal and moral rights are at its zenith in Indian democracy. It is seen as the epitome of justice delivery system in India. But there has been dissent with respect to appointment of judges to various High Courts and Supreme Court of India. The existing collegium system of judges exercising absolute powers to appoint judges lacks complete transparency in the procedure and process of appointments. Nobody outside the system knew about the appointments of the few while the rejection of other few. The absolute power is vested with the judges. Lord Acton's words, "Power tends to corrupt and absolute power tends to corrupt absolutely" rightly proves this very same fact. Hence a new attempt was made to make the system more transparent and effective. Such an initiative was the adoption of National Judicial Appointments Commission (NJAC) and it later turned out to be bigger controversy. The past few years saw a long standing legal battle between the executive and the judiciary regarding the appointments to various High Courts and Supreme Court of India. In order to deal with the situation, the Court held the NJAC as unconstitutional and void. The work seeks to analyze the juridical history of judicial appointments in India, the proposed new system of National Judicial Appointments Commission (NJAC) and the battle surrounding it. The writer with the help of various secondary sources such as books, published articles, and other works has analyzed the above positions. According to the writer, both the NJAC and the collegium system are far from perfect. But, the stand taken by the writer is that NJAC has the potential to become perfect system after curing its minor defects.

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1.	&	And
2.	ABA	American Bar Association
3.	AG	Attorney General
4.	AIR	All India Reporter
5.	AJS	American Judicature Society
6.	Anr.	Another
7.	Art.	Article
8.	ASG	Additional Solicitor General
9.	CAD	Constituent Assembly Debates
10.	Chap.	Chapter
11.	CJI	Chief Justice of India
12.	Cl.	Clause

13.	Col.	Column
14.	Dn.	Division
15.	E.G.	Example
16.	Ed.	Edition
17.	Et al.	Et alia
18.	Govt.	Government
19.	HC	High Court
20.	Hon'ble	Honourable
21.	Ibid	Ibidem
22.	JAAC	Judicial Appointment Advisory Committees
23.	JAC	Judicial Appointments Commission
24.	JSC	Judicial Services Commission
25.	LJ	Law Journal
26.	MBA	Madras Bar Association
27.	MoP	Memorandum of Procedure
28.	NCRWC	National Commission to Review the Working of the Constitution
29.	NDA	National Democratic Alliance
30.	NJAC	National Judicial Appointments Commission
31.	No.	Number
32.	Op.cit	Opere Citato
33.	Ors.	Others
34.	Para	Paragraph
35.	PIL	Public Interest Litigation
36.	pp.	Page
37.	PTI	Press Trust of India
38.	PUCL	People's Union for Civil Liberties
39.	Reg.	Regulation
40.	SC	Scheduled Caste
41.	SC	Supreme Court
42.	Sc.	Scene

43.	SCBA	Supreme Court Bar Association
44.	SCC	Supreme Court Cases
45.	SCJ	Supreme Court Journal
46.	SCR	Supreme Court Reporter
47.	Sec.	Section
48.	SIC	Thus
49.	SLP	Special Leave Petition
50.	ST	Scheduled Tribe
51.	Supp.	Supplementary
52.	Supra	Above
53.	UN	United Nations
54.	UOI	Union of India
55.	*v.*	Versus
56.	Vid	See
57.	Vol.	Volume
58.	WP	Writ Petition

CHAPTER I

INTRODUCTION

1.1. Introduction

"We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the influence of the executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence"[1].

"There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured"[2].

"We have assumed that it is recognised on all hands that the independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but to the citizens at large who may have to seek redress in the last resort in courts of law against any illegal acts or the high-handed exercise of power by the executive... in making the following proposals and suggestions, the paramount importance of securing the fearless functioning of an independence and efficient judiciary has been steadily kept in view.[3]*"*

B. Shiva Rao

The Indian Constitution is a radiant vibrant organism and under the banner of *Sovereign, Socialist, Secular, Democratic Republic*, steadily grows spreading the fragrance of

[1] Dr. Rajendra Prasad, President of the Constituent Assembly and later President of India, Speech to the Constituent Assembly of India preceding the motion to adopt the Constitution (Nov. 29, 1949), in 11 CONSTITUENT ASSEMBLY DEBATES, p. 498.

[2] Dr. B.R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly and later Law Minister of India Reply to the debate on the draft provisions of the Constitution on the Supreme Court (May 24, 1949), in CONSTITUENT ASSEMBLY DEBATES, Vol. VIII, p. 258.

[3] *S.C. Advocates-on-Record Association v Union of India* AIR 1994 SC 268 at pp. 44.

its glorious objectives of *securing to all citizens: Justice, Social Economic and Political*[4]. For securing the above cherished objectives equally to all citizens irrespective of their religion, race, caste, sex, place of birth and the socio-economic chronic inequalities and disadvantages, the Constitution having very high expectations from the Judiciary, has placed great and tremendous responsibility, assigned a very important role and conferred jurisdiction of the widest amplitude on the Supreme Court and the High Courts, and for ensuring the principle of the 'Rule of Law' which in the words of Justice Bhagwati, *"runs through the entire fabric of the Constitution"* and realization of human rights and also the prosperity and stability of a society. To say, differently, it is the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society like ours and a constitutional democracy. The concept of Independence is the livewire of our judicial system and if that wire is snapped, the "dooms day" of judiciary will not be far off. Justice Bhagwati also supported the idea on independence of judiciary in ***S.P. Gupta* v *Union of India***[5] in his words as follows:-

> "*The concept of independence of judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law and thereby making the rule of law meaningful and effective. But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep, independence from many other pressures and prejudices. Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says, "Be you ever so high, the law is above you". This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution."*

[4] *S.C. Advocates-on-Record Association v Union of India* AIR 1994 SC 268 at pp. 44.
[5] *S.P. Gupta v Union of India* AIR 1982 SC 149 at pp. 25 and 26.

"The principle of complete independence of the judiciary from the executive is the foundation of many things in our island life…The Judge has not only to do justice between man and man. He also – and this is one of the most important functions considered incomprehensible in some large parts of the world – has to do justice between the citizens and the State."

– **Winston Churchill**

Even a despot like Churchill understood the requirement of the complete independence of the judiciary from executive influences[6]. The independence of the judiciary is normally assured through the Constitution but it may also be assured through legislation, conventions and other suitable norms and practices. Following the Constitution of the United States, almost all Constitutions lay down at least the foundations, if not the entire edifices, of an independent judiciary. The Constitutions or the foundational laws on judiciary are, however, only the starting point in the process of securing judicial independence. Ultimately, the independence of the judiciary depends on the totality of a favourable environment created and backed by all state organs, including the judiciary and the public opinion. The independence of the judiciary also needs to be constantly guarded against the unexpected events and changing social, political and economic conditions; it is too fragile to be left unguarded.

India has given to itself a liberal Constitution in the Euro-American traditions which aims at establishing a free and democratic society. It also aims at the prosperity and stability of the society. Its makers believed that such a society could be created through the guarantee of fundamenral rights and an independent judiciary to guard and enforce those rights. Therefore, the framers of India's Constitution dealt with these two aspects with maximum and identical idealism.

The independence of the judiciary is not a new concept but its meaning is till imprecise. The starting and the central point of the concept is apparently the doctrine of the seperation of powers[7]. Therefore, primarily it means the independence of the judiciary from the executive and the legislature. But that amounts to only the independence of the judiciary as an institution from the other two institutions of the state or the collective independence without regard to the independence of judges in the exercise of their functions as judges. In

[6] Amit A. Pai, "Committing to an Independent Judiciary", available at http://www.livelaw.in/committing-independent-judiciary (March 24, 2018) (Time – 11:09 AM).

[7] While the doctrine of separation of powers ensures liberty by preventing concentration of powers in one person or body and thereby puts a restraint on the executive and legislative, it also ensures the exercise of judicial power that is unhindered by the other two branches.

that case it does not achieve much. The independence of the judiciary does not mean just the creation of an autonomous institution free from the control and influence of the executive and the legislature. The underlying purpose of the independence of the judiciary is that judges must be able to decide a dispute before them according to law, uninfluenced by any other factor. For that reason the independence of the judiciary is the independence of each and every judge. Independence of the individual judge consists of the judge's substantive and personal independence. The former means subjection of the judge to no authority other than the law in the making of judicial decisions and exercising other official duties, while the latter means adequate security of the judicial terms of office and tenure. The independence of individual judges also includes independence from their judicial superiors and colleagues. Without the former the latter cannot be secured and without the latter the former does not serve much purpose. Therefore, the two, even if separable, must be pursued together. A system which ignores one or the other cannot make much progress towards, much less achieve, the independence of the judiciary.

The most important aspect in the independence of the judiciary is its constitutional position. Just as the Constitution provides for the composition and powers of the executive and the legislature, it should also provide for the judiciary. The second important aspect of the independence of the judiciary is that judicial tenure and appointment must be beyond the control of the executive. Thirdly, impartiality and freedom from irrelevant pressures must be ensured to the judges in all aspects of adjudication.

The Constitution of India is the fundamental law of the land from which all other laws derive their authority and with which they must conform. All powers of the state and its different organs have their source in it and must be exercised subject to the conditions and limitation laid down in it. The Constitution provides for the parliamentary form of government which lacks strict separation between the executive and the legislature but maintains clear separation between them and the judiciary. The Indian Constituion specifically directs the State "to separate the judiciary from the executive in the public services of the State[8]".

Unlike the American Constitution, the Constitution of India has established an integrated and unified judicial system with the Supreme Court standing at the apex and High Courts below it. Under each High Court there exists a system of subordinate courts i.e.

[8] *Article 50 of the Indian Constitution*

District Courts[9]. In India the single system of courts which was, adopted from the Government of India Act of 1935, enforces both Central law as well as the State laws. In USA, on the other hand, the federal laws are enforced by the federal judiciary and the state laws are enforced by the state judiciary. There is thus a double system of court in USA – one for the Centre and the other for the States. To sum up, India, although a federal country like the USA, has a unified judiciary and one system of fundamental law and justice. The unitary character of the judiciary is not an accident but rather a conscious and deliberate act of the Constitution makers for whom a single integrated judiciary and uniformity of law were essential for the maintenance of the unity of the country and of uniform standards of judicial behavior and independence.

The Supreme Court of India was inaugurated on January 28, 1950. It succeeded the Federal Court of India, established under the Government of India Act of 1935. The fasciculus of Articles 124 to 147 in Chapter IV of Part V of the Constitution under the caption "The Union Judiciary" deals with the establishment and Constitution of Supreme Courts, the appointment of Judges and their powers, rights, jurisdiction and service conditions etc. whilst Articles 214 to 231 in Chapter V of Part VI under the caption "The High Courts in the State" deal with the Constitution of High Courts, the appointment and conditions of the office of a Judge of a High Court, their powers, rights, jurisdiction, service conditions including the transfer from one High Court to another etc.

In India, the Judges of the Supreme Court are appointed by the President "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary"[10]. For the appointment of a Judge other than the Chief Justice, the Chief Justice of India must always be consulted[11]. Similarly, the Judges of the High Court are appointed by the President after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court[12].

The Indian Judiciary has been facing several serious problems which are an indirect threat to the independence of the judiciary; a direct threat to it has been on the issues of appointment of the Supreme Court and High Court Judges. A brief survey of the history of judicial appointment in India from 1950 to 1973 shows that the practice was to appoint the senior-most Judge of Supreme Court as the Chief Justice of India. This established convention was violated in the year 1973 when Justice A N Ray was appointed as the Chief

[9] M.P. Jain, INDIAN CONSTITUTIONAL LAW, Lexis Nexis, New Delhi, 7th edition, 2014 (Reprint), pp. 191.
[10] *Article 124(2) of the Indian Constitution*
[11] *Proviso to Article 124(2) of the Indian Constitution*
[12] *Article 217(1) of the Indian Constitution*

Justice of India by superseding the three senior most Judges (Justice J M Shelat, K S Hegde and A N Grover). Again in 1977, Justice M H Beg was appointed as Chief Justice of India by superseding the senior-most Judge (Justice H R Khanna)[13]. Such deviation from the established constitutional convention was motivated with the idea of 'committed judiciary'. These appointments raised certain constitutional challenges containing dangerous implications. The idea of committed judiciary brought negative consequence challenging the very foundation of the independence of judiciary in India. Nani Palkhivala aptly said that *"the concept of a committed judiciary was an anathema, and that the idea of a committed judiciary was like that of boiling ice cream"*[14]. In order to counter these negative challenges various alternative models were suggested namely appointment of judges by an independent commission and secondly appointment by a collegium consisting of only judges. Under the constitutional scheme, any change in law dealing with appointment of judges needs a constitutional amendment – a power which is conferred only to Parliament of India. Since, successive Governments have not shown, their willingness to amend the Constitution rather Government were more interested to promote ideas of committed judiciary. The Parliament of India also felt to take notice of progressive development of constitutional law dealing with appointment of judges in other progressive constitutional system of many countries. In the light of such failure on the part of legislature and executive, Supreme Court of India, during 1980s, took initiative to change the constitutional law on appointment of judges through Judicial Legislation. The Supreme Court of India, in fact adopted Judicial Activism to change the constitutional provision dealing with appointment of judges, however the sad judicial activism was adopted gradually. This journey of judicial activism can be broadly divided into three stages which in fact relate to three important judgment of the Supreme Court of India. The first stage relates to ***S.P. Gupta* v *Union of India***[15], the second stage relates to ***Supreme Court Advocates on Record Association* v *Union of India***[16] and finally the third stage deal with ***In Re Presidential Reference case***[17]. The Supreme Court has given different interpretation of the word 'consultation' in the above provision and devised the collegium system of appointment of Judges in India.

It is a fact that collegium system over the years has come under severe criticism on account of opaqueness in appointment and transfer of judges of higher judiciary. Besides, the

[13] M.P. Jain, INDIAN CONSTITUTIONAL LAW, Lexis Nexis, New Delhi, 7th edition, 2014 (Reprint), pp. 193.
[14] Amit A. Pai, "Committing to an Independent Judiciary", available at http://www.livelaw.in/committing-independent-judiciary (March 24, 2018) (Time – 11:09 AM).
[15] *S.P. Gupta v Union of India* AIR 1982 SC 149
[16] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268: 1993 (4) SCC 441
[17] *In Re Presidential Reference case* AIR 1999 SC 1

growing corruption and nepotism within the judiciary calls for transparency. The recent revelation by Former Justice Markandey Katju and Justice P.D. Dinakaran case is a pointer towards reforming the judiciary. Besides, it is criticized that the consultation process is secretive and unknown to the judiciary and the public, and meritorious candidates from the bar and High Courts are denied an opportunity to serve on the bench for undisclosed reasons.

The National Commission to Review the Working of the Constitution (NCRWC) popularly known as Justice Manepalli Narayana Rao Venkatachaliah Commission was set up by a resolution of the NDA Government of India led by Atal Bihari Vajpayee on 22 February 2000 for suggesting possible amendments to the Constitution of India. It submitted its report in 2002. The commission had recommended that in the matter of appointment of judges of the Supreme Court, a National Judicial Commission under the Constitution should be established and it shall comprise of:-

- The Chief Justice of India: Chairman
- Two senior most Judges of the Supreme Court: Member
- The Union Minister for Law and Justice: Member
- One eminent person nominated by the President after consulting the Chief Justice of India: Member

The NJAC is the second attempt by an NDA government to change the way judges are appointed. When the NDA came to power with a thumping majority, it had NJAC as one of its priorities, and it was established with constitutional status by amending the Constitution of India swiftly through the Constitution (Ninety-Ninth Amendment) Act 2014 passed by the Lok Sabha on 13th August 2014 and by the Rajya Sabha on 14th August 2014. The 99th Constitutional Amendment seeks to amend Article 124(2)[18] of the Constitution that provides for the appointment of the judges of higher judiciary and inserts Article 124A[19], Article 124B[20] and Article 124C[21] providing for composition and function of the National Judicial Appointments Commission. The NJAC was a proposed body which would have been responsible for recommending to the President for the appointment and transfer of judges to the higher judiciary in India and would have replaced the collegium system for the

[18] *Article 124(2) of the Indian Constitution states as – "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal [on the recommendation of the National Judicial Appointments Commission referred to in Article 124A] and shall hold office until he attains the age of sixty-five years. Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted".*

[19] *Article 124A - National Judicial Appointments Commission*

[20] *Article 124B- Functions of Commission*

[21] *Article 124C - Power of Parliament to make law*

appointment of judges. Along with the Constitution Amendment Act, the National Judicial Appointments Commission Act 2014 was also passed by the Parliament of India to regulate the functions of the National Judicial Appointments Commission and to lay down the procedure to be followed by the proposed six-member body for appointment and transfer of judges of higher judiciary. It also empowers Parliament to enact a law regarding composition, function and procedure of the NJAC (The National Judicial Appointments Commission)[22]. The NJAC Act and the Constitutional Amendment Act came into force from 13th April 2015.

The legal fraternity argues that NJAC is a ploy to bring the judiciary within the ambit of executive in the garb of reforming collegium system. Thus, NJAC will limit the judiciary in scrutinizing the executive's malafide action and overreach. It will compromise with the independence of judiciary which has been cornerstone in ensuring the peoples' faith in democracy. Besides, it is argued that the NJAC has not laid down an objective procedure for appointments. These include norms to ensure transparency in nominations, criterion for assessing the suitability of the candidates and objective guidelines for determining meritorious candidates. Judges must also be ensured security of tenure as well as an adequate tenure period through the new mechanism.

A clutch of petitions were subsequently filed in the SC by several persons and bodies with Supreme Court Advocates on Record Association being the first and lead petitioner arguing that the law undermines the independence of the judiciary, and the basic structure of the Constitution. On October 16, 2015 the Constitution Bench of the SC by 4:1 majority upheld the collegium system and struck down the National Judicial Appointments Commission (NJAC) as unconstitutional.

Therefore the work will shed light on the process of judicial appointments in India and the various momentous changes the appointment procedure has undergone since independence, while discussing the implications of the passage of the 99th Constitutional Amendment Act, 2014 and the National Judicial Appointments Commission Act, 2014 and also an analysis of the National Judicial Appointments Commission verdict. It will also provide a conceptual understanding of the judicial independence and also comparatively analyses the system of judicial appointment in other countries. The work also stresses on the reforms that are needed in the present system of judicial appointments in the higher judiciary in India.

1.2. Need and Justification of the Study

[22] *Article 124C of the Indian Constitution*

Judiciary is considered as the 'watch-dog' of the Constitution of India, it is the final interpreter of the law and protector of the Fundamental Rights. For that, it is necessary that Judiciary must be independent and there should be no interference by executive and legislature in the field of Judiciary. During the era of Indira Gandhi when she was the Prime Minister, Judges of the Supreme Court and the High Court's were appointed by the Executive but in 1973 the Government departed from the seniority rule for appointment of Chief Justice. At that time, judiciary felt that executive was trying to make judiciary subservient of Government.

In this backdrop, Judiciary evolved the collegium system for the appointment of Judges in the Supreme Court and the High Court's and upheld that advice given by the collegium system shall be binding on President. Thereafter, the Government passed the Constitution (Ninety-Ninth Amendment) Act 2014 along with the National Judicial Appointments Commission Act, 2014 by virtue of which the National Judicial Appointments Commission was established by replacing the collegium system. However on October 16, 2015 it was struck down as unconstitutional and replaced by the collegium system. Therefore, the researcher thought of taking this topic and discussing the various implications of the study.

1.3. Definition of the Key Terms

1.3.1. Independence of Judiciary – Judicial Independence is the concept that the judiciary needs to be kept away from the other branches of the government. That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests.

1.3.2. Collegium System – Collegium system is a process through which decisions related to appointments and transfer of judges in Supreme Court and High Court is taken by a collegium which consists of CJI, four senior most judges of Supreme Court and three members of concerned High Court (in the matter related to High Court) including Chief Justice of India, Governor of the State concerned and the Chief Justice of the High Court to which the appointment is to be made.

1.3.3. National Judicial Appointments Commission (NJAC) – It was a proposed body which would have been responsible for the appointment and transfer of judges to the higher judiciary in India.

1.4. Research Problem

The Collegium system has its genesis in a series of judgements called "Judges Cases". The collegium came into being through interpretations of pertinent constitutional provisions by the Supreme Court in the Judges Cases. However, it is found that the system is non-

transparent since it does not involve any official mechanism or secretariat and it is seen as a closed-door affair with no prescribed norms regarding eligibility criteria or even the selection procedure which is the core of the study undertaken by the researcher. Hence the research title is entitled as "Appointment of Judges in the Higher Judiciary in India: An Analytical Study".

1.5. Literature Review

1) **M.P. Jain, *Indian Constitutional Law*, 7th Edition, Lexis Nexis, 2014 (Reprint).**

The book extensively deals with the appointment of Supreme Court Judges before 1993 and after 1993 and it also deals with the procedure to appoint Judges in the UK and USA. It also discusses about the 121st Report of the Law Commission which advocated for setting up of a Judicial Commission. It also elaborately deals with the appointment of Judges of the High Courts in India along with the landmark judicial pronouncements.

2) **V.N. Shukla's, *Constitution of India*, 12th Edition, Eastern Book Company, Lucknow, 2013.**

The book deals with the establishment and constitution of Supreme Court under Article 124 and 217 of the Indian Constitution including the appointment of Judges in Supreme Court and High Courts in India along with the judicial decisions.

3) **Suresh Kumar, "Appointment of Judges in India: An Analysis", *Indian Law Journal on Crime and Criminology*, Vol. 1 Issue 1, pp. 1-8.**

The article deals with the appointment of Judges in the Higher Judiciary in India i.e. the Supreme Court and the High Courts along with the constitutional provisions and the judicial interpretation. It also discusses about the NJAC and its composition, functions along with the Supreme Court Judgement striking down the NJAC as unconstitutional.

4) **Ms. Vidhi Agarwal, "Judicial Independence in Judicial Appointments: A Necessity?", *Law Mantra Journal*, Vol. 2 Issue 6, pp. 1-8.**

The article discusses about the judicial appointments in India in retrospect including the Constitution Assembly Debates, Constitutional provisions and the Executive led judicial appointments from 1950-1993, Collegium led appointments from 1993 onwards and the drawbacks of the collegium system of appointment. It also deals with the Judicial Appointments in Prospect along with the past proposals including the 121st Report of the Law Commission of India, the Constitution 67th Amendment Bill 1990, The National Judicial Appointments Commission, 99th Constitution Amendment Act 2014, The National Judicial Appointments Commission Act 2014 and challenges and the suggestions. It also talks about

the Comparative analysis of the law relating to judicial appointments in other countries vis-a-vis India.

5) **Dr. Dharmendra Kumar Singh and Dr. Amit Singh, "Appointment of Judges and Overview of Collegium System in India: A Need to Reform", *International Journal of Advanced Research*, June 2017, pp. 1-7.**

The article makes an analysis of the appointment of judges and an overview to the collegium system. Furthermore, in relation to the Judges appointment of SC and HC, all significant cases are discussed in the article. In order to make the collegium system more transparent and democratic certain reforms have been suggested in this article.

6) **Arghya Sengupta, "Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry", *The Indian Journal of Constitutional Law*, Volume 5, 2011, pp. 111-138.**

The article talks about the conceptual analysis of the Judicial Appointments in India and the Judicial Independence along with the analysis of the Constituent Assembly Debates with special emphasis on the judicial collegium method of appointments which exists currently and to remedy this flawed conceptual understanding, if appointment reform, is to succeed.

7) **Mohd. Shakeib Naru & Shristi Mathur, "Who Will Choose the Judges? The Debate around NJAC and Collegium System", *Journal of Legal Studies and Research*, Vol. 1 Issue 2, December 2015, pp. 120-133.**

The article deals with the history of appointment of Judges in India which includes the Constituent Assembly Debates and the Recommendations of various committees, Constitutional Provisions, Discrepancies in appointment prior to Collegium, the three Judges case and the formation of the Collegium and the critical analysis of the Collegium system. It also discusses about the concept of National Judicial Appointments Commission, its composition and the critical analysis of the NJAC judgement.

8) **Sameeksha V Salimath, Sanmathi Dayanand & Rajath Francis Vithayathil, "National Judicial Appointments Commission: A Comprehensive Review", *International Journal for Legal Developments and Allied Issues*, Vol. 1 Issue 4, pp. 245-253**.

The article deals with the three Judges cases along with a critique of the National Judicial Appointments Commission. It also discusses the reasons as to why the government saw the need to replace the collegium system and how was the NJAC better than the collegium system. It also criticises the National Judicial Appointments Commission and deals with the Supreme Court decision on the NJAC declaring it unconstitutional.

1.6. Aims and Objectives of the Study

i. To trace the historical background of the appointment of Judges in India.
ii. To study and examine the Constitutional provisions and the judicial approach regarding the appointment of Judges in India.
iii. To study and analyze the National Judicial Appointments Commission (NJAC) in India with regard to the appointment of Judges in the higher Judiciary in India.
iv. To make a comparative analysis of the different judicial system regarding the appointment of Judges.
v. To discuss the recent controversies regarding the Collegium system of appointment of Judges in India.
vi. To offer certain constructive suggestions for having a better system of appointment of Judges in the higher Judiciary in India.

1.7. Scope and Limitation of the Study

The scope of the topic "Appointment of Judges in the Higher Judiciary in India: An Analytical Study" is mainly limited to the concept of historical background of the appointment of Judges in India, Constitutional provisions and the judicial approach regarding the appointment of Judges in India, The National Judicial Appointments Commission (NJAC), Comparative analysis of the law relating to appointment of Judges in other countries and lastly to discuss the recent controversies with regard to the collegium system of appointment of Judges in place in India. Also the investigator is limiting the study only to books, articles, journals and web sources.

1.8. Hypothesis

- The opacity in the current collegium system of appointment of judges is not good sign for democracy.
- The creation of the National Judicial Appointments Commission is a concrete opportunity to create a new participatory and transparent method of appointment to the higher judiciary in India in line with contemporary constitutional design.

1.9. Organization of the Study

The above schematic flow chart represents the organization of the study entitled as ***"Appointment of Judges in the Higher Judiciary in India: An Analytical Study"***.

The first chapter is entitled as the 'INTRODUCTION' and it includes a brief introduction to the broad area of research consideration, and a clear statement of the problem along with its purpose and relevance, the objectives of the present study which is followed by the key terms and the research methodology adopted for the present study. The theoretical framework of the present research work is also highlighted in this chapter.

The second chapter is entitled as the 'HISTORICAL EVOLUTION OF THE METHOD OF APPOINTMENT OF JUDGES OF THE HIGHER JUDICIARY IN INDIA' and it includes the Appointment of Judges under the Government of India Act 1919 and 1935, Constituent Assembly Debates and the Recommendations of various Committees and Law Commissions.

The third chapter is entitled as the 'JUDICIAL APPOINTMENT IN INDIA: CONSTITUTIONAL PROVISIONS AND JUDICIAL APPROACH' and it includes the constitutional provisions and the judicial approach in the Judges Cases.

The fourth chapter is entitled as the 'THE NATIONAL JUDICIAL APPOINTMENT'S COMMISSION' and it includes the background of the study, analysis of the NJAC Act 2014 along with the Constitution 99th Amendment Act 2014 and the merits and demerits of the NJAC.

The fifth chapter is entitled as the 'COMPARATIVE ANALYSIS OF THE LAW RELATING TO JUDICIAL APPOINTMENT IN OTHER COUNTRIES' and it includes the process of appointment of Judges in other countries vis-a-vis India.

The sixth chapter is entitled as the 'RECENT CONTROVERSIES OF THE COLLEGIUM SYSTEM OF THE APPOINTMENT OF JUDGES IN INDIA' and it includes the on-going controversies with regard to the collegium system of appointment of Judges in place in India.

The seventh chapter is entitled as the 'CONCLUSION' and it includes a brief statement about the findings of the investigation and presentation of the recommendations for having a better system of appointment of Judges in Supreme Court and High Courts in India which is crucial to the maintenance of the democracy and rule of law.

1.10. Research Methodology

1.10.1. Research

There are accepted truths and theories in all fields of knowledge. The theories with differing levels of generality and degree of conformation existing at a given point of time are known to all. The intellectuals of the society are always inclined to probe for facts of the empirical world and confirm the proved truth of their investigation by accepting or correcting the existing theories. Such probing is called research. Therefore, research is an enquiry for the verification of a fresh theory or for supplementing a prevailing theory by new knowledge.

Etymologically, the term 'research' means to re-investigate into something. It comes from a French word 'recercher' meaning 'to search' and a Latin word 'circare' meaning 'to go round in a circle'.

According to Encyclopaedia Britannica[23], research means and includes the act of searching into a matter closely and carefully, inquiry directed to the discovery of truth and in particular the trained scientific investigation of the principles and facts of any subject, based on original and first hand study of authorities or experiment. However, at present it also includes second-hand sources. Research is mainly of two types, doctrinal and non-doctrinal.

1.10.2. Research Methodology

Etymologically, method means the 'way of doing something'. Methodology is the science or study of a particular subject. The concept of research methodology is much wider. Generally, the method that a researcher follows in pursuing a research is research methodology. It can also be termed as the art and science of the process of research. It is usually a guideline system for solving a problem, with some specific components such as tools, techniques, phases etc[24].

According to B. A. Wortley, the methodological implications of research are – the discovery of truth, a first-hand study and rules used in training the researchers.

1.10.3. Legal Research Methodology

Legal Research means research in that branch of knowledge which deals with the principles of law, legal institutions and social facts as reflected and substantiated by law and society. It is an important component of the process of law reform.[25] It can also be termed as one of the aspects of study of human behaviour, their interactions and attitudes pertaining to any law under the research studies.

Law is an instrument of social change. It must keep pace with a progressive modern society.[26] The problems of tomorrow cannot be solved by the methods or tools used today. These will have to be altered from time to time to suit the changing social circumstances. Legal research can be a useful tool in this regard. Apart from it, Legal research can also fulfil the following objectives:-

1. To gain familiarity with legal phenomena;
2. To discover new laws;
3. To test and verify old laws;
4. To predict the consequences of new laws;

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[23] *Encyclopedia Britannica*, 1911 Edition, London.

[24] B. A. Wortley, "Some Reflections on Legal Research after Thirty Years", JOURNAL OF THE INDIAN LAW INSTITUTE, Vol. 24, No. 2 & 3 (April-September 1982), p. 4.

[25] P. M. Bakshi, "Legal Research and Law Reform", JOURNAL OF THE INDIAN LAW INSTITUTE, Vol. 24, No. 2 & 3 (April-September 1982), p. 111.

[26] K. D. Gangrade, "Empirical Methods as Tools of Research", JOURNAL OF THE INDIAN LAW INSTITUTE, Vol. 24, No. 2 & 3 (April-September 1982), p. 636.

5. To examine the consequences of new facts or new principles of law;
6. To analyze law and legal institutions from historical perspective;
7. To develop the principles of interpretation for critical examinations of statues etc.

The processes or methodology of legal research vary according to the country and legal system involved. However, in India, we observe the following strategy for doing a legal research:-

1. Selection of sovereign,
2. Finding a problem,
3. Formulation of a hypothesis,
4. Collection of data,
5. Analysis of the data,
6. Preparation of a research report etc.

1.10.4. Research Consideration of the Present Study

The research methodology adopted for the present work, "**APPOINTMENT OF JUDGES IN THE HIGHER JUDICIARY IN INDIA: AN ANALYTICAL STUDY**" is primarily doctrinal and analytical. The present work is also based on both primary and secondary sources of data collection. The research is based on analysis of relevant case laws, statutes, analytical publication etc. The source of materials for this investigation comprises of various books, commentaries, law journals, news papers and periodicals, and the vast materials available in the website of Supreme Court of India and the High Court's concerning the area of investigation. Apart from these, the investigator took recourse to literatures of eminent personalities, governmental and non-governmental organisation's document, relevant case laws, and elaborate internet archives sources which present the latest on-line ideas.

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CHAPTER II

HISTORICAL EVOLUTION OF THE METHOD OF APPOINTMENT OF JUDGES OF THE HIGHER JUDICIARY IN INDIA

There is a long evolution of the method of appointment of Judges of the superior judiciary in India. The process of Indianisation of Judiciary was in the offing and ground norms were laid for the same in the Government of India Act, 1915-1919. Provisions with regard to Indian High Courts were set out in Part IX of the Act. The power to appoint a Judge of the High Court was conferred on His Majesty (Section 101). The power to fix salaries, allowances, furloughs and retiring pensions of a Judges was conferred on the Secretary of State-in-Council. The qualifications for being appointed a Judge of the High Court were set out in sub-section (3) of Section 101 which, *inter alia*, provided that he must be:-

a) A Barrister of England or Ireland or a Member of the Faculty of Advocates in Scotland of not less than five years standing, or
b) A Member of the Indian Civil Service of not less than ten years standing and having for at least three years served as, or exercised the power of, a District Judge, or
c) A persons having held judicial office not inferior to that of a Subordinate Judge, or a Judge of a Small Cause Court, for a period of not less than five years, or
d) A persons having been a pleader of a High Court for a period of not less than ten years.

The last two qualifying clauses opened up a possibility for Indians being appointed as High Court Judges. There was a concept of a quota reserved for each category set out hereinabove. The quota was that not less than one-third of the Judges of a High Court, including the Chief Justice but excluding Additional Judges, must be such Barristers or advocates as aforesaid and not less than one-third must be Members of the Indian Civil Service. Section 102 provided that every Judge of a High Court shall hold his office during His Majesty's pleasure[27]. Two ugly features of the colonial approach to appointment of High Court Judges with a tall claim that British Justice is being transplanted to a colonial country, were that the executive branch had a quota in High Court and that the tenure was at His Majesty's pleasure

[27] Law Commission of India, One Hundred Twenty-First Report on *"A New Forum for Judicial Appointments"* July, 1987, pp. 8.

and the salaries and perks were to be determined by the executive. The votaries of independence of judiciary drawing their sustenance from United Kingdom should have examined the provisions before eulogizing British Justice.

Fasciculus of Articles in Part IX of the Government of India Act, 1935, provided for setting up of Federal Court and the High Courts. Section 200 provided for establishment of a Federal Court and Section 220 for constitution of High Courts. The High Court Judges were to be drawn from four separate and distinct groups, namely

i. Barristers of England and Northern Ireland or advocates in Scotland;
ii. Members of the Indian Civil Service;
iii. Holders of judicial office in British India; and
iv. Pleaders practising in High Courts.

The power to appoint a High Court Judge was vested in His Majesty and he was to hold office till he attained the age of sixty years, as provided in Section 220(2). The notable change was that the tenure was changed from His Majesty's pleasure to attaining a certain age, being sixty years then. The power to determine salaries, allowances and such other perks as well as such other rights in respect of leave and pension was conferred upon His Majesty in Council. Similarly, the power to appoint Judges of the Federal Court was vested in His Majesty and he was to hold office till he attained the age of sixty five years as provided in Section 200(2). The power to determine salaries, allowances, perks, rights in respect of leave and pension was vested in His Majesty-in-Council. These provisions indisputably show that the power to appoint Judges of the superior judiciary was unreservedly vested in the executive. No one else was even to be consulted. These were the provisions in vogue when the Constituent Assembly was convened and proceeded to determine the shape of superior judiciary as well as the procedure for selecting manpower to man the superior judiciary.

Appointment of Judges to the higher judiciary has been the most recurrent theme in the history of the judiciary since independence and in the immediately preceding years. In view of the fact that before independence the British Crown, uninfluenced by the domestic politics, appointed Judges to the higher judiciary, its exclusive discretion in such appointments was not questioned[28]. With independence it was apprehended that the situation would change, requiring remedial measures. Therefore in 1945 the Sapru Committee recommended in its constitutional proposals that the "Justices of the Supreme Court and the High Courts should be appointed by the head of state in consultation with the Chief Justice of the Supreme Court

[28] *Section 200 and 220 of the Government of India Act 1935*

and, in the case of High Court Judges, in consultation additionally with the High Court Chief Justice and the head of the unit concerned". Soon after the Constitutent Assembly started the process of Constitution making at the beginning of 1947, the Ad Hoc Committee of the Union Constitution Committee of the Constituent Assembly, which was assigned the task of formulating the proposals on the Supreme Court, reported that it did not think it "expedient to leave the power of appointing judges to the unfettered discretion of the President" and recommended two alternative methods. One of these methods authorized the President to nominate a person for appointment of a judge of the Supreme Court, other than the Chief Justice, in consultation with the Chief Justice. The nomination was to be confirmed by a panel of seven to eleven members comprising Chief Justices of High Courts, members of Parliament and law officers of the Union. The other method was that the President would appoint in consultation with the Chief Justice one of the three persons recommended by the above panel of eleven. The same procedure was to be followed for the appointment of the Chief Justice except that the Chief Justice was not to be consulted.

In his memorandum on the Union Constitution, submitted a few days later, Sir B.N. Rau, the Constitutional Advisor, agreeing in principle, suggested that the appointment of judges should be made by the President with the approval of at least two-thirds of the Council of State which was proposed to advise the President in the exercise of the President's discretionary powers and of which the Chief Justice of the Supreme Court was an ex-officio member. The Union Constitution Committee also did not agree with the Ad Hoc Committee and recommended that "a Judge of the Supreme Court shall be appointed by the President after consulting the Chief Justice and such other judges of the Supreme Court as also such judges of the High Courts as may be necessary for the purpose". The Provincial Constitution Committee made a similar recommendation for the appointment of judges of the High Courts: Judges should be appointed by the President in consultation with the Chief Justice of the Supreme Court, the Governor of the Province and the Chief Justice of the High Court of the Province (except when the Chief Justice of the High Court himself is to be appointed). These recommendations on the appointment of the Supreme Court and the High Court Judges were incorporated in the Draft Constitution prepared by the Constitutional Advisor. The recommendatioms were adopted as such in the Draft Constitution prepared by the Drafting Committee of the Assembly.

The first reaction to these provisions came from the then Chief Justicce of the Federal Court, Justice H.J. Kania, who confined his comments to the independence of the judiciary from the executive and particularly emphasized that in the appointment of High Court Judges *"the*

Governor and the High Court Chief Justice should be in direct contact so that the provincial Home Ministry would not be an intermediary in the proceedings". Chief Justice Kania thought that exclusion of influence of local politics in the selection of judges was necessary for the independence of the judiciary. Later, in a meeting of the judges of the Federal Court and the Chief Justices of the High Courts, the provisions of the Draft Constitution on the judiciary were thoroughly examined and a memorandum was prepared. Emphasizing the importance of the independence of the judiciary, the memorandum expressed concern over the *"political, communal and party considerations"* in the appointment of High Court judges since independence[29] and therefore suggested an amendment to the relevant provision under which the President shall appoint a High Court judge "on the recommendation of the Chief Justice of the High Court after consultation with the Governor of the State and with the *concurrence* of the Chief Justice of India. Such amendment, it was expected, would exclude provincial executive interference in the appointment of judges. The memorandum stated that it should also apply "mutatis mutandis to the appointment of the judges of the Supreme Court" and recommended dropping the words from the relevant draft article which obliged the President to consult the judges of the Supreme Court and High Courts in addition to the Chief Justice of India in the appointment of judges of the Supreme Court. The memorandum also suggested inclusion of a provision disqualifying a person from becoming a judge of the Supreme Court or of a High Court if such person had held the post of a minister either at the Centre or in any State. Similar suggestions on the Draft Constitution were received from other quarters but none of them was found convincing enough by the Drafting Committee for introducing any change in the Draft Constitution[30]. The changes suggested in the memorandum were not accepted, respectively, for the reasons that they did not provide for the contingency of difference of opinion between the Chief Justice of India and the Chief Justice of the High Court that wider consultation was obligatory to minimize the chances of improper appointments and that merit was the only consideration for the appointment of judges and, therefore, no constitutional ban should stand in the way of merit being recognized.

The Drafting Committee itself had, however, decided to move an amendment replacing the existing procedure for the appointment of the Supreme Court and High Court judges by one

[29] Independence came on August 15, 1947 and the meeting was held on May 26-27, 1948. So, within about six months improper executive conduct, which had been absent until then, could be felt.

[30] Requiring consultation with all judges of the Supreme Court and exclusion of consultation with High Court Judges in the appointment of Supreme Court judges; requiring exclusion of the Governor in the appointment of High Court judges.

provided in the proposed Instrument of Instructions to be issued to the President. The Instrument contemplated appointment of Supreme Court Judges by the President on the advice of an Advisory Board consisting of not less than fifteen members of Parliament. The advice of the Board was to be sought in respect of proposed appointees selected by the President after consultation with all the judges of the Supreme Court and the Chief Justices of the High Courts. In the case of appointment of the Chief Justice of India, the Chief Justice of India was not to be consulted. In the case of appointment of High Court judges, the President had to consult the Chief Justice of India, the Chief Justice of the High Court (except in the case of appointmemt of Chief Justice of High Court), and the Governor of the State. The President was not bound by the advice of the Board but in that case he had to place a memorandum before Parliament with reasons for not accepting the advice. As the proposal for the Instrument of Instructions was later dropped, the Drafting Committee did not move the amendment and proceeded with the existing provisions.

In the Assembly basically two issues were raised and discussed on the appointment of judges. Some members proposed that the judges, other than the Chief Justice of India, must be appointed by the President with the concurrence of the Chief Justice of India, while some others proposed approval of Parliament or of its Upper House, the Council of States. Agreeing that the issues were of "greatest importance" and that the Assembly was unanimous that the judiciary must both be "independent of the executive" and "competent in itself", Dr. Ambedkar referred to the practice of appointment of Judges in England, where they are appointed by the executive alone and in the United States where they are appointed by the executive on the approval of the Senate. Dr. Ambedkar concluded:

> "*It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown in the same extent which we find in the United States, 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. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of Legislature is also not a very suitable provision*[31]*. Apart from its being cumbersome, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme*

[31] *S.C. Advocates-on-Record Association v Union of India* AIR 1994 SC 268 at pp. 36.

and the absolute authority in the matter of making appointments. It dose not also import the influence of the Legislature".

"With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgement. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day[32]*. I therefore, think that is also a dangerous proposition".*

The proposed amendments on the aforesaid two lines were, therefore, rejected by the Assembly.

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CHAPTER III

JUDICIAL APPOINTMENT IN INDIA: CONSTITUTIONAL PROVISIONS AND JUDICIAL APPROACH

3.1. Introduction

[32] Constituent Assembly Debates Vol. VIII (1949) at pp. 258.

Judiciary is one of the three wings of the State. The judiciary in India has performed exceedingly well over the last six decades and has contributed significantly to the advancement of public good and good governance and in the administration of justice. Though under the Constitution the polity is dual, the judiciary is integrated and unified which can interpret and apply the laws and adjudicate upon both the Central and State laws and upon controversies between one citizen and another and between a citizen and the State. It is the function of the courts to maintain rule of law in the country and to assure that the government runs according to law. Courts also have the function of safeguarding the supremacy of the Constitution and the laws without fear or favour, without being biased by political ideology or economic theory[33] by interpreting and applying its provisions and keeping all authorities within the constitutional framework. The Judiciary has another meaningful assignment, namely, to decide controversies between the constituent States *inter se* as well as between the Centre and the States relating to distribution of powers and functions between them.

Justice Untwalia has compared the Judiciary to *"a watching tower above all the big structures of the other limbs of the state" from which it keeps a watch like a sentinel on the functions of the other limbs of the state as to whether they are working in accordance with the law and the Constitution, the Constitution being supreme"*[34].

The structure of the judiciary in the country is pyramidical in nature with the Supreme Court standing at the apex. There are High Courts below the Supreme Court in India's judicial hierarchy; under each High Court there exists a system of subordinate courts. The High Court is at the apex of the State judicial system. At present, each State in India has a High Court[35]. Parliament may, however, establish by law a common High Court for two or more States[36]. The Supreme Court thus enjoys the topmost position in the judicial hierarchy of the country. It is the supreme interpreter of the Constitution and the guardian of the people's Fundamental Rights guaranteed to them by the Constitution. It is the ultimate court of appeal in all civil and criminal matters and the final interpreter of the law of the land and thus helps in maintaining a uniformity of law throughout the country.

3.2. Appointment of Judges of the Supreme Court

Appointment of Judges of the Supreme Court is governed by Article 124(2) of the Indian Constitution. It reads:-

[33] *People's Union for Civil Liberties (PUCL) v Union of India* (2003) 4 SCC 399
[34] *Union of India v Sankalchand Himatlal Sheth* AIR 1977 SC 2328
[35] *Article 214 of the Indian Constitution*
[36] *Article 231(1) of the Indian Constitution*

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 of the High Courts in the States as the President may deem necessary for the purpose.

Provided that in the case of appointment of a Judge other than the Chief justice, the Chief Justice of India shall always be consulted.

According to Article 124(2) of the Indian Constitution, the Judges of the Supreme Court are appointed by the President. While appointing the Chief Justice, the President has to consult with such of the Judges of the Supreme Court and the High Court's as he may deem necessary. In case of appointment of other Judges, the President is required to consult the Chief Justice of India though he may also consult such other Judges of the Supreme Court and the High Court's as he may deem necessary[37].

3.3. Appointment of Judges of the High Court

Appointment of Judges of the High Court is governed by Article 217(1) of the Indian Constitution. It states as follows:-

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.

The High Court judges are appointed by the President after consulting the Chief Justice of India, the Governor of the State concerned[38] and in case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court to which the appointment is to be made[39].

As mentioned above, the constitutional provision [Article 217(1)] says that the President appoints these Judges after consulting the Chief Justice of India, the State Governor and the Chief Justice of the High Court concerned. The Central Executive and the State Executive provide the political input in the process of selection of the Judges.

Since the inauguration of the Constitution, the question has been considered by some authorities: how to ensure that the Judges are selected on non-political considerations? It is thought that it is necessary for securing the independence and objectivity of the Judiciary that Judges be selected on merit and not on political considerations. Such an objective can be

[37] *Proviso to Article 124(2) of the Indian Constitution*

[38] *In case of a common High Court for two or more States, the Governors of all the States concerned are consulted*; *Article 231(2) of the Indian Constitution.*

[39] *Article 217(1) of the Indian Constitution*

achieved only if the role of the political elements is reduced in the process of selection of the Judges of the High Courts.

The matter was considered by the Law Commission headed by M.C. Setalvad as early as 1958. In its XIV Report on "*Reform of Judicial Administration*", the Commission opined that the High Court Judges were not always appointed on merit because of the influence of the State Executive. Accordingly, the Commission suggested that the Chief Justice of the High Court should have a bigger role to play in the matter of appointment of the Judges; that it should be only on his recommendation that a Judge be appointed and also that concurrence and not only consultation of the Chief Justice of India be needed for this purpose[40].

The Government did not accept this recommendation. On the other hand, it stated that, as a matter of course, the High Court Judges had been appointed with the concurrence of the Chief Justice of India[41].

Again, the Study Team of the Administrative Reforms Commission on Centre-State Relationship endorsed the Law Commission's view that influence of the State Executive be reduced in appointing the High Court Judges. The team suggested that the State Executive should have the right only of making comments on the names proposed by the High Court's Chief Justice but not to propose a nominee of its own. The team hoped that this would reduce political influence exerted at the State level in appointing High Court Judges and improve professional competence[42].

However, the Administrative Reforms Commission did not endorse the suggestion made by its Study Team. The Commission took the view that the proposal would drastically reduce the role of the State Governments in the selection of the High Court Judges. In its view, the existing procedure balanced the right of the Centre and of the States. It harmonized "the initiative and autonomy of the State on the one hand and safeguards against the question of undue influence by the State on the other[43].

3.4. Discrepancies in the Appointment of Judges Before 1993

Before the year 1993, the President's power to appoint the Supreme Court Judges was purely of a formal nature, for, he would act in this manner, as in other matters, on the advice of the concerned Minister, viz., the Law Minister. The final power to appoint Supreme Court Judges rested with the Executive and the views expressed by the Chief Justice were not regarded as binding on the Executive.

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[40] *XIV Report of the Law Commission of India at pp. 71-75*
[41] *Rajya Sabha* Nov. 24,1959
[42] *Report* I, at pp. 181-88 (1967)
[43] *Report on Centre-State Relationship* at pp. 40

Since the Indian Constitution is silent regarding the criteria for appointing the CJI, the convention in India had been to appoint the senior-most Judge of the Supreme Court as the Chief Justice whenever a vacancy occurred in that office. In 1958, the Law Commission criticised this practice on the ground that a Chief Justice should not only be an able and experienced Judge but also a competent administrator and therefore succession to the office should not be regulated by mere seniority[44]. The Government did not act upon this recommendation for long. It continued to appoint the senior-most Judge as the Chief Justice as it was afraid that it might be accused of tampering with judicial independence.

This norm of appointing the senior most Judge as the CJI of India remained unspoiled until April 26th 1973 when the then Congress Government led by Indira Gandhi suddenly departed from the seniority rule for the appointment of Chief Justice and appointed as Chief Justice a Judge [Justice A. N. Ray] who was fourth in the order of seniority. Thus, three senior Judges were by-passed who then resigned from the court in protest. The main reason behind this supersession is that the superseded judges (Justices J.M. Shelat, K.S. Hedge and A.N. Grover) had decided that the basic structure of the Constitution is unamendable in ***Kesavananda Bharati v State of Kerala***[45]. It was a dictatorial decision taken by Mrs. Gandhi to ensure that the judiciary favours the actions of the government, which she did when emergency was imposed. This raised a hue and cry in the country and the Government was accused of tampering with the independence of the Judiciary. The government invoked the Law commission's recommendation [14th Law Commission] which criticized the practice of appointing the senior most judges as the Chief Justice of the Supreme Court on a ground that a Chief Justice should not an able and experienced judge but also a competent administrator and, therefore succession of the office should not be regulated by mere seniority. Many termed this supersession as the 'Black Day' of the Indian Judiciary[46].

The second supersession again came in 1976, when the Government appointed Justice Beg as the Chief Justice by-passing Justice Khanna who was senior to him at the time on the ground that Khanna's tenure would have been too short. Consequently, Justice Khanna resigned in protest. This suppression was widely perceived as an outcome of the dissenting judgment of Justice H.R Khanna in the infamous ***ADM, Jabalpur v Shivkant Shukla***[47] case where it was held that a citizen does not have fundamental rights during the proclamation of an

[44] Law Commission XIV Report, I, at pp. 39- 40 (1958)
[45] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461
[46]Swapnil Tripathi, "April 26-Revisiting the Black Day of Indian Judiciary", available at http://www.livelaw.in/april-26-revisiting-black-day-indian-judiciary (April 26, 2018) (Time – 09:00 PM).
[47] *ADM, Jabalpur v Shivkant Shukla* 1976 AIR 1207

emergency. Prof. Baxi recalling the incident writes, *'that after the supersession, there were clear indications that the brother justices did not accept the leadership of CJ Beg. The Court almost ceased to be an institution and became an assembly of individual judges'.*

On both occasions apparently the superseded judges had given judgements inconvenient to the executive while the superseding judges had given judgements palatable to the executive. This established a clear nexus between the independence of the judges and their appointment.

It is believed that the architect behind all these supersessions was not the Law Minister but the Minister of Steel, Kumarmangalam, who was the key advisor to Mrs. Gandhi. Scholars have coined the term 'Kumarmangalam doctrine' to explain this ideology of the government to populate the court with judges who were believed to be supportive of government policies.

However, interestingly as against the popular opinion, the above was not the first attempts of supersession by the Central government. Prof. Godbois, a leading scholar on the legal history of the Indian Supreme Court in his book *'The Judges of the Supreme Court'* discusses that after independence there was a tussle going on between Pt. Nehru and the Apex Court. While Nehru tried to bring in socially welfare legislation, the Court used to strike them down for violation of fundamental rights. It was in this background that Nehru uttered the famous words that *'the judges sitting in the ivory palaces are not aware about the real needs and problems of the country'.*

India would, in fact, have seen its first supersession in the form of Justice Patanjali Shastri, who Nehru wanted to supersede. Prof. Godbois recalls that Nehru preferred M.C. Chagla or Justice BN Mukherjee. However, this attempt failed as all the other six associate judges of the Court threatened to resign, if such a plan was executed. Another attempt came against Justice JC Shah, who was to succeed CJI Hidayatullah. It was believed by many, that Mrs. Gandhi wanted to bring an outsider into the Court to supersede Justice Shah. However, it was a determined Hidayatullah who threatened to resign with all the other judges (except Ray) if this was carried out. Interestingly, Justice Hidayatullah, also threatened Mrs. Gandhi that India was soon hosting an international convention of lawyers and if Justice Shah was superseded the whole world would know what happened[48].

Before the appointment of the next Chief Justice in 1978, in 1977 the Union Government changed. It referred the matter of appointment of the Chief Justice to the Law Commission of India. The Law Commission in its 80th Report recommended that in the matter of appointment of the Chief Justice the convention of appointing the senior most judge should

[48] Swapnil Tripathi, "April 26-Revisiting the Black Day of Indian Judiciary", available at http://www.livelaw.in/april-26-revisiting-black-day-indian-judiciary (April 26, 2018) (Time – 09:00 PM).

be followed. Accordingly, after the retirement of Chief Justice Beg, the senior-most puisne Judge, Justice Chandrachud was appointed as the next Chief Justice. Since then, the practice of seniority is being followed without any exception in the matter of appointment of the Chief Justice of India. The Commission also thoroughly examined the constitutional provisions, procedure and practice for the appointment of Judges in the Supreme Court and the High Courts. While it found the constitutional scheme for the appointment of judges "basically sound", it admitted several flaws in its operation and made several recommendations for ensuring the best and most expeditious appointments with more effective consultative process and elimination of political influence. In other words, the Commission recommended a decisive role to the judiciary in the matter of appointments and transfers of judges through a collegial decision making process.

3.5. Judicial Interpretation

The question of selection and appointment of the Judges is crucial to the maintenance of independence of the judiciary. If the final power in this respect is left with the executive, then it is possible for the executive to subvert the independence of the judiciary by appointing pliable judges.

The Constitution does not lay down a very definitive procedure for the purpose as it merely says that the President is to appoint Supreme Court Judges in consultation with the Chief Justice and "such" other Judges of the Supreme Court and of the High Court's as "the President may deem necessary" [Article 124(2)]. Similarly, Article 217(1) says that the President is to appoint the High Court Judges in consultation with the Chief Justice of India, the Governor of the State, and the Chief Justice of the High Court concerned. It was not clear from this provision as to whose opinion was finally to prevail in case of difference of opinion among the concerned persons. This important question has been considered by the Supreme Court in several cases.

3.5.1. Union of India v Sankal Chand Himatlal Sheth[49]

On May 27, 1976, the President of India issued a notification to the effect "In exercise of the powers conferred by clause (1) of Article 222 of the Constitution of India, the President after consultation with the Chief Justice of India is pleased to transfer Shri Justice Sankalchand Himatlal Sheth, Judge of High Court of Gujarat as judge of High Court of Andhra Pradesh with effect from the date he assumes charge of his office". The

[49] *Union of India v Sankal Chand Himatlal Sheth* AIR 1977 SC 2328

notification was issued by the Government of India in its Ministry of Law, Justice and Company Affairs, Department of Justice. Mr. Justice Sheth complied with the order of transfer and assumed charge of his office as a judge of Andhra Pradesh High Court, but before doing so, he filed a Writ Petition No. 911 of 1977 in the Gujarat High Court challenging the constitutional validity of the notification on the ground that the order was passed without effective consultation with the Chief Justice of India. "Consultation" under Article 222(1) means "effective consultation" and since the precondition of Article 222(1) that no transfer can be made without such consultation, was not fulfilled, the order was bad and of no-effect. The apex court comprising of bench of Justices Chandrachud, Bhagwati, Krishna Iyer, Untwalia, Fazal Ali and Syed Murtaza held that:-

Article 222(1) is in substance worded in similar terms as the first proviso to Article 124(2) and Article 217(1). It casts an absolute obligation on the President to consult the Chief Justice of India before transferring a Judge from one High Court to another. That is in the nature of a condition precedent to the actual transfer of the Judge. In other words the transfer of a High Court Judge to another High Court cannot become effective unless the Chief Justice of India is consulted by the President on behalf of the proposed transfer. Indeed, it is euphemistic to talk in terms of effectiveness, because the transfer of a High Court Judge to another High Court is unconstitutional unless before transferring the Judge, the President consults the Chief Justice of India.

While consulting the Chief Justice the President must make the relevant data available, to him on the basis of which he can offer to the President the benefit of his considered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, he must ask for them because in casting on the President the obligation to consult the Chief Justice the Constitution at the same time must be taken to have imposed a duty on the Chief Justice of India to express his opinion and nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfillment by the President of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of justice. Consultation within the meaning of Article 222(1), therefore, means full and effective, not formal or unproductive, consultation.

Deliberation is the quintessence of consultation. That implies that each individual case must be considered separately on the basis of its own facts. Policy transfers on a wholesome basis

which leave no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our constitution.

After an effective consultation with the Chief Justice of India, it is open to the President to arrive at a proper decision of the question whether a Judge should be transferred to another High Court because, what the Constitution requires is consultation with the Chief Justice, not his concurrence with the proposed transfer. But by and large, the opinion of the Chief Justice of India should be accepted by the Government of India. The Court will be entitled to examine if any other extraneous circumstances have entered into the verdict of the executive if it departs from the counsel given by the Chief Justice of India.

Article 222(1) postulates fair play and contains in-built safeguards in the interests of reasonableness. In the first place, the power to transfer a High Court Judge can be exercised in public interest only. Secondly, the President is under an obligation to consult the Chief Justice of India which means and requires that all the relevant facts must be placed before the Chief Justice. Thirdly, the Chief Justice owes a corresponding duty, both to the President and to the Judge who is proposed to be transferred, that he shall consider every relevant fact before he tenders his opinion to the President. In the discharge of this constitutional obligation the Chief Justice would be within his rights, and indeed it is his duty whenever necessary to elicit and ascertain further facts either directly from the judge concerned or from other reliable sources. The executive cannot and ought not to establish rapport with the judges which is the function and privilege of the Chief Justice. In substance and effect, therefore, the judge concerned cannot have reason to complain of arbitrariness or unfair play, if the due procedure is followed.

3.5.2. S.P. Gupta v Union of India

In 1982, the matter regarding appointment of the High Court Judges as well as of the Supreme Court Judges came before the Supreme Court by way of public interest litigation in the famous case of ***S.P. Gupta v Union of India***[50].

Several writ petitions were filed in the various High Courts under Article 226 by several lawyers practising in the various High Courts. All these petitions were transferred to the Supreme Court for disposal. The main question considered by the Court was: of the several functionaries participating in the process of appointment of a High Court Judge whose opinion amongst the various participants should have primacy in the process of selection?

[50] *S.P. Gupta v Union of India* AIR 1982 SC 149

The majority[51] took the view, in substance, that the opinions of the Chief Justice of India and the Chief Justice of the High Court were merely consultative and that "the power of appointment resides solely and exclusively in the Central Government" and that the Central Government could override the opinions given by the constitutional functionaries (viz., the Chief Justice of India and the Chief Justice of the concerned High Court). This meant that the view of the Chief Justice of India did not have primacy in the matter of appointment of the High Court Judges; that the primacy lay with the Central Government which could decide after consulting the various constitutional functionaries and that the Central Government was not bound to act in accordance with the opinions of all the constitutional functionaries consulted, even if their opinions be identical.

The majority thus gave a literal meaning to the word 'consultation' in Articles 124(2) and 217(1) in relation to all consultees and final decision in the matter was left in the hands of the Central Executive[52]. The majority thus took an extremely literal and positivistic view of Article 217(1). In reality, this view made consultation with the Chief Justices inconsequential in the matter of appointment of High Court Judges.

However, even after *Gupta*, the Central Government always maintained that it had, as a matter of policy, not appointed any Judge without the name being cleared by the Chief Justice of India.

Proposal for Setting up a Judicial Commission

The Law Commission of India in its 121st report on "*A New Forum for Judicial Appointments*" issued in 1987 has advocated the setting up of a Judicial Commission. In 1987, after the case of *S.P. Gupta*, the executive came to wield overriding powers in the matter of selection and appointment of Judges. The commission was unhappy with the situation prevailing at the time. Criticising the system prevailing in 1987, the Law Commission observes:

"The present model...confers overriding powers on the executive in the matter of selection and appointment of Judges and in dealing with the judiciary. The constitutional mandate all

[51] Bhagwati, Fazal Ali, Desai and Venkataramiah, JJ. The Bench consisted of five Judges.

[52] *After referring to Articles 124(2) and 217(1), Bhagwati, J., observed as follows (AIR 1982 SC at 200): "...It is clear on a plain reading of these two Articles that the Chief Justice of India, the Chief Justice of the High Court and such other Judges of the High Courts and of the Supreme Court as the Central Government may deem it necessary to consult are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Central Government...It would therefore be open to the Central Government to override the opinion given by constitutional functionaries required to be consulted and to arrive at its own decision in regard to the appointment of a Judge in the High Court or the Supreme Court....Even if the opinion given by all the Constitutional functionaries consulted by it is identical, the Central Government is not bound to act in accordance with such opinion".*

was to separate executive and judiciary in all its ramifications. The Constitution aims at ensuring independence of Judiciary, when translated in action, independence from executive".

Accordingly, the 121st Report of the Law Commission suggested that a National Judicial Commission be set up. But the Law Commission did not work out its composition and function. In this regard, the Law Commission said: "Composition and functions of such a National Judicial Service Commission will have to be worked out in meticulous detail". Tentatively, however, the Law Commission suggested the following composition: Chief Justice of India (Chairman), three senior most Judges of the Supreme Court; retiring Chief Justice of India; Three Chief Justices of the High Court's according to their seniority; Minister of Law and Justice, Government of India; Attorney-General of India and an outstanding law academic.

The Law Commission issued its report in 1987. It is clear that it was primarily to dilute the executive power and as a hedge against executive interference with the judiciary, that the Law Commission mooted the idea of a Judicial Commission. Since then things have changed drastically as a result of the two Supreme Court cases. In fact, the 121st report of the Law Commission played a significant role in the Supreme Court decision in *Advocates-on-Record* case in 1994.

The rationale underlying the Report has now been overtaken by the two Supreme Court decisions viz., ***Supreme Court Advocates-on-Record Association v Union of India***[53] and ***In Re: Presidential Reference***[54]. As a result of these judicial pronouncements, the effective power to appoint Supreme Court and High Court Judges has come to vest in a collegium of Judges. Theoretically, at least, this "de facto" Judicial Commission ensured a freedom from executive interference and consequently guaranteed judicial independence. But actual freedom from political considerations and other pressures, turning as they do on the personal characteristics of selectors coupled with the absence of public scrutiny, has led to a recent rethinking on the issue.

The Constitution (67th Amendment) Bill, 1990

In 1990, the then Union Minister for Law and Justice introduced the Constitution (Sixty-Seventh Amendment) Bill, 1990 in the Parliament. The Bill provided for the creation of a National Judicial Commission for the appointment of Supreme Court and High Court Judges. The Composition of the Commission was to be different for Supreme Court and High Court

[53] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268
[54] *In Re: Presidential Reference* AIR 1999 SC 1

appointments. For appointments to the Supreme Court it would comprise of the Chief Justice of India and the two Supreme Court Judges next in seniority. For appointments to the High Court it would comprise of the Chief Justice of India, the Supreme Court Judge next in seniority, the Chief Minister of the concerned State, the Chief Justice of the relevant High Court and the High Court Judge next in seniority[55]. However, no action was taken on the bill.

3.5.3. Subhash Sharma v Union of India

The majority ruling in Gupta to the effect that in the consultative process leading to the appointment of a High Court Judge, the view expressed by the Chief Justice of India would have as much significance as the opinion of the State Governor or the Chief Justice of the High Court concerned, came to be criticised in course of time by a Bench of the Supreme Court in ***Subhash Sharma v Union of India[56]***. A three Judge Bench of the Supreme Court Bench expressed the view that consistent with the constitutional purpose and process, as expressed in, the Preamble to the Constitution *"it became imperative that the role of the institution of the Chief Justice of India be recognised as of crucial importance in the matter of appointment to the Supreme Court and the High Courts of the States"[57]*.

As regards, the word "consultation" in Article 124(2), the court said: *"The constitutional phraseology would require to be read and expounded in the context of the constitutional philosophy of separation of powers to the extent recognised and adumbrated and the cherished values of judicial independence"*. The Bench emphasized[58]:

"An independent, non-political judiciary was crucial to the sustenance of our chosen political system. The vitality of the democratic process, the ideals of social and economic egalitarianism, the imperatives of a socio-economic transformation envisioned by the Constitution as well as the Rule of Law and great values of liberty and equality are all dependent on the tone of the judiciary. The quality of the judiciary cannot remain unaffected, in turn, by the process of selection of Judges".

The Bench also criticised the developing practice of a State sending up names for appointment to the High Court direct to the Central Government instead of sending the same to the Chief Justice of the High Court concerned. According to the Bench of the court: *"This is a distortion of the constitutional scheme which is wholly impermissible"[59]*. The Bench opined that primacy be given to the views of the Chief Justice of India in the matter of

[55] Ms. Vidhi Agarwal, "Judicial Independence in Judicial Appointments: A Necessity?" LAW MANTRA JOURNAL, Volume 2 Issue 6, pp. 4-5.
[56] *Subhash Sharma v Union of India* AIR 1991 SC 631
[57] *Ibid* at 641
[58] *Ibid* at 640
[59] *Subhash Sharma v Union of India* AIR 1991 SC 631 at 642

selection of the High Court Judges. This would improve the quality of selection. In India, judicial review is *"a part of the basic constitutional structure"* and *"one of the basic features of the essential Indian Constitutional policy"*. Therefore, *"to contemplate a power for the Executive to appoint a person despite of his being disapproved or not recommended by the Chief Justice of the State and the Chief Justice of India would be wholly inappropriate and would constitute an arbitrary exercise of the power"*. The Bench observed:-

"In India, however, the judicial institutions, by tradition, have an avowed a-political commitment and the assurance of a non-political complexion of the judiciary cannot be divorced from the process of appointments. Constitutional phraseology of "consultation" has to be understood and explained consistent with and to promote this constitutional spirit…. The appointment is rather the result of collective constitutional process. It is a participatory constitutional function. It is, perhaps, inappropriate to refer to any 'power' or 'right' to appoint Judges. It is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories…"[60]

The Bench therefore, suggested reconsideration by a larger Bench of this aspect of the process of appointment of Judges.

3.5.4. Supreme Court Advocates-on-Record Association v Union of India

Subsequent to Subhash Sharma case, the question of the process of appointing the Supreme Court and High Court Judges came to be considered by the Supreme Court in ***Supreme Court Advocates-on-Record Association v Union of India***[61]. A public interest writ petition was filed in the Supreme Court by the Lawyer's Association raising several crucial issues concerning the Judges of the Supreme Court and the High Court's and the court has sought to interpret the constitutional provisions concerning the Supreme Court and the High Court's so as to strengthen the "*foundational features and the basic structure of the Constitution*". The petition was considered by a bench of nine Judges. The majority judgement was delivered by J.S. Verma, J., on behalf of himself and Yogeshwar Dayal, G.N. Ray, A.S. Anand and Bharucha, JJ. The majority now gave up literal interpretation and adopted a wider meaning of the constitutional provisions concerning the judiciary. The word "*consultation*" in Articles 124(2) and 217(1) was given a broad meaning.

The court considered the question of the primacy of the opinion of the Chief Justice of India in regard to the appointment of the Supreme Court and High Court Judges. The court emphasized that the question has to be considered in the context of achieving *"the*

[60] *Ibid* at 645

[61] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268: 1993(4) SCC 441

constitutional purpose of selecting the best" suitable for composition of the Supreme Court and the High Court's "so essential to ensure the independence of the judiciary and thereby to preserve democracy"[62].

Thus, the majority view expressed in S.P. Gupta –

i. That the last word in appointment of Supreme Court and High Court Judges rests with the government; and
ii. That the Chief Justice of India has no place of primacy in selection of Supreme Court and High Court Judges were now overruled.

Referring to the '*consultative*' process envisaged in Articles 124(2) and 217(1) for appointment of the Supreme Court and High Court Judges, the court emphasized that this procedure indicates that the Government does not enjoy 'primacy' or "absolute discretion" in the matter of appointment of the Supreme Court and High Court Judges[63].

The Court has pointed out that the provision for consultation with the Chief Justice of India was introduced because of the realisation that the Chief Justice of India is best equipped to know and assess the worth of the candidate and his suitability for appointment as a Supreme Court and High Courts Judges, and it was also necessary to eliminate political influence.

The court has also emphasized that the phraseology used in Article 124(2) and 217(1) indicates that it was not considered desirable to vest absolute discretion or power of veto in the Chief Justice of India as an individual in the matter of appointments so that there should remain some power with the Executive to be exercised as a check, wherever necessary. Accordingly, the court has observed[64]:

"The indication is that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight, the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word 'consultation' instead of 'concurrence' was used, but that was done merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as an individual".

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[62] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268 at 425
[63] *Ibid* at 429
[64] *Ibid* at 430

Thus, in the matter of appointment of a Supreme Court and High Court Judges, *the primary aim ought to be to reach an agreed decision taking into account the views of all the consultees giving the greatest weight to the opinion of the Chief Justice of India. When decision is reached by consensus, no question of primacy arises. Only when conflicting opinions emerge at the end of the process, the question of giving primacy to the opinion of the Chief Justice arises, "unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable*"[65].

The court has further clarified that *"the primacy of the opinion of the Chief Justice of India" is, in effect, "primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion*"[66]. The Chief Justice of India is expected "to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court". The majority of the Judges has emphasized that this process would achieve the constitutional purpose of selecting the best available for composition of the Supreme Court and the High Court's which is so essential to ensure the independence of the judiciary, and, thereby, to preserve democracy[67].

Emphasizing upon this aspect further, "the court has said that the principle of non-arbitrariness is an essential attribute of the Rule of Law and is all pervasive throughout the Constitution. An adjunct of this principle is "the absence of absolute power in one individual in any sphere of constitutional activity. Therefore, the meaning of the "opinion of the Chief Justice" is "reflective of the opinion of the judiciary" which means that "it must necessarily have the element of plurality in its formation". The final opinion expressed by the Chief Justice is not merely his individual opinion but "the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function"[68]. The court has observed in this connection[69]:

"Entrustment of the task of appointment of superior Judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into

[65] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268 at 430
[66] *Ibid* at 431
[67] *Ibid* at 425
[68] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268 at 434
[69] *Ibid* at 434-435

account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive much less in any individual, be the Chief Justice of India or the Prime Minister".

The court also laid down the following propositions in relation to the appointment of the Supreme Court and High Court Judges:

1. Initiation of the proposal for appointment of a Supreme Court Judge must be by the Chief Justice of India and in case of appointment of a High Court Judge it must be made by the Chief Justice of the concerned High Court.
2. In exceptional cases alone, for stated and cogent reasons, disclosed to the Chief Justice, indicating that the person who was recommended is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice and other Supreme Court Judges who have been consulted in the matter, on reiteration of the recommendation of the Chief Justice of India, the appointment should be made as a healthy convention.
3. No appointment of any Judge to the Supreme Court or any High Court can be made by the President unless it is in conformity with the final opinion of the Chief Justice formed in the manner indicated above.
4. As the President acts on the advice of the Council of Ministers in the matter of appointment of a Supreme Court and High Courts Judge, the advice of the Council of Ministers is to be given in accordance with Article 124(2) and 217(1) as interpreted by the Supreme Court.
5. All consultation with everyone involved, including all the Judges consulted, must be in writing. Expression of opinion in writing is an inbuilt check on exercise of the power and ensures due circumspection.
6. Appointment to the office of Chief Justice of India ought to be of the senior-most Judge of the Supreme Court considered fit to hold the office. "The provision in Article 124(2) enabling consultation with any other Judge is to provide for such consultation, if there be any doubt about the fitness of the senior-most Judge to hold the office, which alone may permit and justify a departure from the long standing convention" i.e., to appoint the senior-most Supreme Court Judge to the office of the Chief Justice of India.

7. *"Inter se* seniority among Judges in their High Court and their combined seniority on all India basis" should be "kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court".

The main purpose underlying the law laid down by the Supreme Court in the matter of appointing Supreme Court and High Court Judges was to minimise political influence in judicial appointments as the Central Government could no longer appoint a Judge bypassing the Chief Justice of India as well as to minimise individual discretion of the constitutional functionaries involved in the process of appointment of the Supreme Court and High Court Judges. The entire process of making appointments to high judicial offices is sought to be made more transparent so as to ensure that neither political bias nor personal favouritism nor animosity play any part in the appointment of Judges.

3.5.5. In Re: Special Reference

The ruling of the Supreme Court in the *Supreme Court Advocates* case regarding appointment of the Supreme Court and High Court Judges has been elaborated and articulated further by another 9 Judge Bench in ***In Re: Special Reference 1 of 1998***[70]comprising of Bench of Justices S Bharucha, M Mukherjee, S Majmudar, S V Manohar, G Nanavati, S S Ahmad, K Venkataswami, B Kirpal and G Pattanaik. The Supreme Court has delivered an advisory opinion on a reference made by the President under Article 143. In exercise of the powers conferred by Clause (1) of Article 143 of the Constitution of India, K.R. Narayanan, President of India, hereby referred the following questions to the Supreme Court of India for consideration and to report its opinion thereon, namely, :-

(1) Whether the expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India or does the sole individual opinion of the Chief Justice of India constitute consultation within the meaning of the said articles;

(2) Whether Article 124(2) as interpreted in the said judgment requires the Chief Justice of India to consult only the two senior-most Judges or whether there should be wider consultation according to past practice;

(3) Whether the Chief Justice of India is entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court in respect of

[70] *In Re: Special Reference* AIR 1999 SC 1: (1998) 7 SCC 739

all materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment;

(4) Whether the requirement of consultation by the Chief Justice of India with his colleagues, who are likely to be conversant with the affairs of the concerned High Court refers to only those Judges who have that High Court as a parent High Court and excludes Judges who had occupied the office of a Judge or Chief Justice of that Court on transfer from their parent or any other Court;

(5) Whether in light of the legitimate expectations of senior Judges of the High Court in regard to their appointment to the Supreme Court referred to in the said judgment, the "strong cogent reason" required to justify the departure from the order of the seniority has to be recorded in respect of each such senior Judge, who is overlooked, while making recommendation of a Judge junior to him or her;

(6) Whether the government is not entitled to require that the opinions of the other consulted Judges be in writing in accordance with the aforesaid Supreme Court judgment and that the same be transmitted to the Government of India by the Chief Justice of India along with his views;

(7) Whether the Chief Justice of India is not obliged to comply with the norms and the requirement of the consultation process in making his recommendation to the Government of India;

(8) Whether any recommendations made by the Chief Justice of India without complying with the norms and consultation process are binding upon the Government of India?

In this opinion, the Court has laid down the following propositions in regard to the appointment of the Supreme Court and High Court Judges:-

1. In making his recommendation for appointment to the Supreme Court, the Chief Justice of India ought to consult four senior-most puisne Judges of the Supreme Court. Thus, the collegium to make recommendation for appointment should consist of the Chief Justice and four senior-most puisne Judges. Before this opinion was delivered, this collegium consisted of the Chief Justice of India and two senior-most Judges of the Supreme Court.
2. Although the opinion of the Chief Justice of India has "primacy" in the matter of appointment of a High Court Judge, it is not solely the opinion of the Chief Justice of India alone but it is "reflective of the opinion of the judiciary which means that it must necessarily have the element of plurality in its formation". The sole, individual

opinion of the Chief Justice of India does not constitute "consultation". Therefore, the Chief Justice of India should form his opinion in regard to a person to be recommended for appointment as a High Court Judge in consultation with his two senior-most puisne Judges. They would in making their decision take into account the opinion of the Chief Justice of the High Court, which "would be entitled to greatest weight", the views of other High Court Judges who may have been consulted and the views of the Supreme Court Judges "who are conversant with the affairs of the concerned High Court".

3. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment.
4. The opinion of all members of the collegium in respect of each recommendation should be in writing and conveyed to the Government of India along with the recommendation.
5. The views of the senior-most Supreme Court Judge who hails from the High Court from where the person recommended comes must be obtained in writing for the consideration of the collegium.
6. If the majority of the collegium is against the appointment of a particular person, that person shall not be appointed. The court has gone on to say that "if even two of the Judges forming the collegium express strong views, for good reasons, that are adverse to the appointment of a particular person, the Chief Justice of India would not press for such appointment".
7. "Strong cogent reasons" do not have to be recorded as justification for a departure from the order of seniority, in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation.
8. The following exception have now been engrafted on the rule of seniority among the High Court Judges for appointment to the Supreme Court:
    a) A High Court Judge of outstanding merit can be appointed as a Supreme Court Judge regardless of his standing in the seniority list. "All that needs to be recorded when recommending him for appointment is that he has outstanding merit".
    b) A High Court Judge may be appointed as a Supreme Court Judge for "good reasons" from amongst several Judges of equal merit, as for example, the

particular region of the country in which his parent High Court is situated is not represented on the Supreme Court Bench.

The Court has further emphasized that the plurality of Judges in the formation of the opinion of the Chief Justice of India is an in-built check against the likelihood of arbitrariness or bias. In view of this safeguard, Judicial review of the appointment of a High Court Judge is available only on the following grounds:-

i. If, in making the decision as regards the appointment of a High Court Judge, the views of the Chief Justice and the senior Judges of the High Court concerned, and of the Supreme Court Judges having knowledge of that High Court, have not been sought or considered by the Chief Justice of India and his two senior-most colleagues;
ii. If the appointee lacks eligibility for appointment as a High Court Judge.

But the opinion of the Chief Justice touching the merit of the decision is not justiciable-only the decision making process is subject to review[71].

Thus, the responsibility to make recommendations for appointment as Supreme Court and High Court Judges has been taken away from the Central Executive and has now been placed on a Collegium. The sphere of consultation has thus been broadened. The court has now specifically stated that the Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforestated, in making his recommendations to the Government of India and the recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Government of India[72]. The process of consultation among the members of the collegium has now been formalized as every member Judge has to give his opinion in writing.

3.6. Reflective Judiciary

The judiciary is one of the three organs of the government. In a democratic government, ideally speaking, the legislative and executive powers are representative of the society. Such representation is necessary to justify the government of the people which rules them by their consent. Perhaps at some point in time long ago it could be have been argued that the judiciary does not rule but simply applies the law in a dispute between two private parties. But it is no more in dispute that the judiciary not only makes laws but also participates in policy making, particularly when handling matters concerning the government and its agencies. For the exercise of such powers in a democracy the judiciary must also have

[71] *N. Kannadasan v Ajoy Khose* (2009) 7 SCC 1, 51: (2009) 8 SCALE 351
[72] *In Re: Special Reference* AIR 1999 SC 1: (1998) 7 SCC 739 at 16

similar, if not the same, justification as the other two organs of the government. Therefore, it must also in some way represent the people. Otherwise the laws and the policies laid down by it will have no democratic basis. For that end it is not necessary or even desirable that the judiciary must be elected in the same way as the other two organs of the government. But it must in some way represemt or reflect the society in which it operates. An important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, ideologically, socially, culturally and the like. This is based on the principle of fair reflection. The judiciary is a branch of the government, not merely a dispute resolution institution. As such it cannot be composed in total disregard of the society. Hence, due regard must be given to the consideration of fair reflection. There are other grounds for ensuring well-balanced composition of the judiciary. Firstly, the need to preserve public confidence in the courts. Secondly, the need to ensure balanced panels in appellate courts, particularly in cases with public or political overtones. Putting the same theme at another place, Judges decide cases upon background understading based on fundamental values of the system. Those understandings are judge made and are based on the interpretation of the judge. If the judiciary is not reflective of society as a whole, the adjudication may be based on background understandings strongly coloured by a narrower set of values.

Studies on judicial behaviour have long established that a judge's background plays an important role in that judge's decision making. For the representation of the background, it is not necessary that there should be a numerical or accurately proportional representation in the judiciary, rather there should only be a fair reflection of the society in it. Such reflection is necessary for the independence of the judiciary[73]. Countries which lead in the independence of the judiciary such as United States, Canada, England, Germany and several other countries have been practising it either as a matter of statutory rule or convention. The Singhvi and the Montreal Declarations on the Independence of Justice states: *"The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects"*.

Such practice is not unknown in India. In pre-independent India the Judicial Committee of the Privy Council included as a matter of law judges from India[74]. Similarly, in pre-independence India representation was provided to certain communities in certain High

[73] John B. Wefing, "The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism", 29 RUTGERS L. J. (1998), p. 701, 710.

[74] The Judicial Committee Act 1833 providing for two Indian judges as assessors; the Appellate Jurisdiction Act 1908 providing for full members of the Judicial Committee upto two judges from India.

Courts in view of the strength of those communities within the territorial limits of those High Courts[75]. To some extent these considerations have been taken into account since independence and care is normally taken to give representation to major communities and regions in the Supreme Court. Although sometimes such practice has been criticized because it may come in the way of the ablest among the prospective candidates for judgeship in reaching the bench, nobody seems to have ever alleged that such practice has in any way affected the independence of the judiciary. On the contrary, time and again the need and fact of representation of different regions and minorities in the appointment of judges, particulary in the Supreme Court, has been emphasized[76].

Even though a reflective judiciary was not an issue either in the ***Second Judges Case***[77] or the ***Third Judges Case***[78], one of the judges in the former case clearly spoke for it while the entire Court acknowledged its relevance in the latter case. Nowhere the Court has spoken against it in either of these two cases, though some of the judges have clearly spoken for it. Thus, in the ***Second Judges Case***[79], Justice Pandian stated:

"It is essential and vital for the establishment of real participatory democracy that all sections and classes of people, be they backward classes or scheduled castes or scheduled tribes or minorities or women, should be afforded equal opportunity so that the judicial administration is also participated in by the outsnading and meritorious candidates belonging to all sections of the society and not by any selective or insular group"[80].

Clarifying that he was not asking for a quota or reservation for anyone, Justice Pandian supported himself with examples of United States and United Kingdom and reiterated: *"Though appointment of Judges to superior judiciary should be made purely on merit, it must be ensured that all sections of the people are duly represented so that there may not be any grievance of neglect from any section or class of society"*[81].

Similarly, in the ***Third Judges Case***[82], after noting that merit is the "predominant" consideration in the appointment to the Supreme Court, the Court promulgated the following:-

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[75] Calcutta and Cochin High Courts providing for representation to Muslims and Christians respectively in HINDUSTAN TIMES, Jan. 24, 1999 at p. 2.
[76] *In Re: Special Reference* AIR 1999 SC 1: (1998) 7 SCC 739
[77] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268
[78] *In Re: Special Reference* AIR 1999 SC 1: (1998) 7 SCC 739
[79] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268
[80] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268 at 348
[81] *Ibid*
[82] *In Re: Special Reference* AIR 1999 SC 1: (1998) 7 SCC 739

"When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required merit in more or less equal degree, there may be reason to recommend one among them because, for example, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court bench"[83].

For the purpose of achieveing, maintaining and improving the quality of justice administered by the courts and for reposing greater faith of the people in them and thereby ensuring the independence of the judiciary, the principle of reflection of the society should be observed. With the law established by the Court on the appointment of judges, greater justification lies for the observance of this principle. Earlier a representative executive was supposed to have a dominant role in the appointment of the judges while that role has now been taken over by the judges in whose appointments people have no direct or indirect role. A heavy responsibility, therefore, lies upon the judges to demonstrate that even though they are self-appointed, they represent their society and that they are not a closed group of people perpetuating their own rule. They must discharge that responsibility with sagacity and foresight and must encourage and invite suggestions for appointment of judges from different sources, including the executive, the bar and the legal luminaries. Now the responsibility primarily lies on the bench to create a judiciary which is not only independent of the executive and the legislature, but which is also competent to perform the unfinished task of social revolution which the Indian Constitution makers had envisaged.

3.7. Merits of the Collegium System

The major benefit given by the collegium system to our country is to protect and safeguard the separation of powers between the three organs of our Government, which is the basic structure of the Constitution. It ensures that the independent nature of the judiciary is not affected by the Legislature or the Executive.

The Collegium comprising of Chief Justice of India Dipak Misra, Justice J. Chelameswar and Justice Ranjan Gogoi was considering candidature of 7 advocates for appointment to Calcutta High Court. As per minutes of meeting dated 26th March 2018, *"For the purpose of assessing merit and suitability of the recommendees for elevation to the High Court, the collegium have carefully scrutinized the material placed in the file which includes the views of the Chief Minister as forwarded by the Governor for the State of West Bengal, reports of the*

[83] *Ibid*

Intelligience Bureau, the age, income, reported/unreported judgements in respect of all the recommendes as well as the observations made by the Department of Justice in the file".

It then recommended five out of the 7 advocates, while noting that it needed more information for considering the suitability of another one.

The collegium adopted a similar procedure while considering candidates for elevation to Madhya Pradesh High Court as well.

Apart from this, the Supreme Court Collegium breaking away from its age old tradition has also "interacted" with candidates before recommending their elevation to two HC's. This is a significant development, considering that the mechanism of appointment of judges has often been marred with allegations of opaqueness. In fact, the decision to make public collegium resolutions was also taken in order to address such concerns[84].

3.8. Demerits of the Collegium System

The judicial innovation of the collegium system of appointments of judges to the higher judiciary which was evolved in the ***Second Judges Case***[85] and later cemented in the ***Third Judges Case***[86] governs judicial appointments today. Article 141 of the Indian Constitution provides that *"the law declared by the Supreme Court shall be binding on all courts within the territory of India"*. Thus, the two Judges Cases amounted to virtual amendment of the Constitution leading India to become the only known governing system of the world where judges appoint judges. The move of the judicial invention has been meeting with the patchy criticisms since its inception, mostly on the grounds of opaqueness, objectivity, lack of transparency of the proceedings, limited accountability for decisions taken, no system of checks and balances, nepotism and favouritism, no constitutional backing, no diversity in composition and this process has created considerable public resentment. Justice Ruma Pal

[84]Apoorva Mandhani, "Towards Greater Transparency? SC Collegium "Interacts" with Candidates before Recommending Appointment to High Courts", available at http://www.livelaw.in/towards-greater-transparency-sc-collegium-interacts-candidates-recommending-appointment-high-courts-read-resolutions (March 29, 2018) (Time – 7:36 PM).

[85] *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441

[86] *In Re: Special Reference* AIR 1999 SC 1: (1998) 7 SCC 739

has described the working of the collegium as *"one of the best kept secrets in the country".* Justice P.N. Bhagwati showed his disappointment from the collegium by stating: *"The (collegium) system does not work satisfactorily. I am not in favour of it. I don't know what the truth is but going by rumours, bargaining goes on between the collegium judges. People are losing confidence in the mode of appointing judges. Therefore, it is necessary to change it".* Senior Advocate Fali S. Nariman who contested the matter for collegium went on to the extent of saying that *"(the) case I won– but which I would prefer to have lost"*[87] on the functioning of the collegium. Justice V. R. Krishna Iyer expressed his concern on the issue of transparency by quoting Judge Jerome Frank as- *"In a democracy, it can never be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions.... unable to accept the inescapable shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts".* Justice J. S. Verma, the author of the majority opinion in the Second Judges Case, also highlighted that the collegium system was not working properly and had suggested the immediate setting up of an independent national commission to appoint judges to the superior judiciary[88].

But, a new chapter was written on the day when for the first time in the history of the judicial appointment in India a member of the collegium i.e. the seniormost judge of the Supreme Court of India, Justice J. Chelameswar alleged that the process of appointment of judges through the collegium lacks transparency and accountability. He revealed that *"the records are absolutely beyond the reach of any person including the judges of this Court (the Supreme Court of India) who are not lucky enough to become the Chief Justice of India. Such a state of affairs does not either enhance the credibility of the institution or does good for the people of this country"*[89]. He professed that *"transparency is a vital factor in constitutional governance...Transparency is an aspect of rationality. The need for transparency is more in*

[87] Fali S. Nariman, A CASE I WON – BUT WHICH I WOULD PREFER TO HAVE LOST, BEFORE MEMORY FADES: AN AUTOBIOGRAPHY, 1st ed. 2012, pp. 387- 406.

[88] Collegium system not working properly: Jurists, The Hindu, December 13, 2009, available at http://www.thehindu.com/news/national/collegium-system-not-working-properly-jurists/article64365.ece (Time - 07:49 PM).

[89] Collegium system not working properly: Jurists, The Hindu, December 13, 2009, available at http://www.thehindu.com/news/national/collegium-system-not-working-properly-jurists/article64365.ece (Time - 07:49 PM).

the case of an appointment process"[90]. And keeping this object in his mind and conveying his dissent for the present state of affairs in the collegium, he sent a communiqué to the Chief Justice of India raising the issue of transparency, refusal to attend the meetings of the collegium and advised the need of maintaining records of the proceedings of the collegium containing the basis of appointment, elevation and transfer and also advocated for bringing objectivity in appointments[91]. Hours after, the Chief Justice of India, through PTI, replied in reference to the revelation that "We will sort it out"[92].

Therefore, for the continued command of the confidence and respect of people in the judiciary as an impartial arbiter of disputes, Independence of Judiciary and Constitutional governance, it is desirable to unveil the process and information involved in the appointment of judges, in the interest of a strong judiciary. Because, secrecy leads to suspicion and in the words of Justice V. R. Krishna Iyer, *"suspicion is the upas tree under whose shade reason fails and justice dies. Judges, great in status and mighty in their majesty, should be, like Caesar's wife, above suspicion".* The Apex Court too, in the matter of ***Naresh Sridhar Mirajkar v State of Maharashtra***[93] has cited the observation of Jeremy Bentham as- *"In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the Judge himself while trying under trial the security of securities is publicity".* Hence, transparency cannot be said to be a threat to the 'Independence of Judiciary' which is a basic feature of the Indian Constitution instead it shall strengthen the judiciary. In this background, the National Judicial Appointments Commission (NJAC) came into existence.

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[90] Justice Chelameswar opts out of collegiums, The Hindu, September 2, 2016, available at http://www.thehindu.com/news/national/justice-chelameswar-opts-out-of-collegium/article9066616.ece (Time - 07:52 PM).

[91] My Fight is for Transparency, The Hindu September 5, 2016, available at http://www.thehindu.com/news/national/my-fight-is-for-transparency-says-justice-chelameswar/article9072721.ece (Time - 08:06 PM).

[92] CJI hopes to sort out issues raised by Justice Chelameshwar, The Hindu September 4, 2016 available at http://www.thehindu.com/news/national/cji-hopes-to-sort-out-issues-raised-by-justice-chelameswar/article9070464.ece (Time - 08:07 PM).

[93] *Naresh Sridhar Mirajkar v State of Maharashtra* 1966 SCR (3) 744

CHAPTER IV

THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION (NJAC)

4.1. Models of Judicial Appointment: An International Move to the JAC Model

Most constitutional democracies of the world adopt one of the following models of judicial appointments:-

1. **Judiciary-Executive model: -** It entails appointment by the executive in consultation/concurrence with the judiciary. India as per its original constitutional scheme adopted this model but has currently moved to a more insulated model of judicial primacy in judicial appointments.
2. **Executive-Legislative model: -** It involves a selection of candidate by the executive and an approval of this candidate by a legislative body. For example, in appointments made to the higher judiciary in the United States, the President nominates a candidate which then requires confirmation by the Congress.

More recently several constitutional democracies have moved to a more innovative inter-institutional model of appointment where a statutorily constituted judicial appointments commission plays a significant role. This commission, consisting of the judicial and the executive branch, is charged with the responsibility of making recommendations or appointments of judges based on a procedure that ensures transparency and judicial independence. England, South Africa and Malaysia are examples of this model. The 99th Constitution Amendment Act 2014 and the National Judicial Appointments Commission Act, 2014 in India also follows a similar model.

This third model of the JAC therefore involves the creation of a new institutional arrangement to facilitate collaboration between the judiciary and executive branch. The UN Basic Principles on the Independence of the Judiciary provide that individuals *"selected for judicial office shall be individuals of integrity and ability with appropriate training or qualification in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social original, property, birth or status..."*[94] Similarly, the Siracusa Draft Principles on the Independence of the Judiciary proclaims that *"applicants for judicial office should be individuals of integrity and ability, well trained in the law and its application and they shold have equality of access to judicial office. Selection for the appointment of judges should be made without distinction of any kind such as race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or status"*[95]. The JAC makes possible the conformity with this principle.

It is increasingly being accepted that judicial independence is compromised by a system that confers undue power of appointment upon a single body, be it the executive, judiciary or the legislature. Separation of powers in this third model is not conceptualized as mutual exclusion of the different wings of the government, but rather a collaborative process of deliberation and multiple points of view. The collaborative process also operates as a check and balance to ensure that no single institution has an overweening influence on judicial composition. Where two independent institutions collaborate to appoint the judiciary, protocols of consultation and concurrence have to be developed to shape this relationship.

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[94] *Article 10 of the Basic Principles on the Independence of the Judiciary* adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26th August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[95] *Articles 3, 4 and 5 of the Siracusa Draft Principles on the Independence of the Judiciary 1981*

Further, judicial independence can be secured by other means that focus on the functioning of the judges rather than just appointments. This is often done by regulating salaries, tenures, retirement and such other administrative mechanisms. Unfortunately the discussion on judicial independence in India has come to be understood largely in terms of non-politicization of the appointment process. To rethink the doctrine of judicial independence or separation of powers in the context of the JAC is to think of these doctrines in terms of collaborative and inter-institutional processes which are transparent and accountable. The Constitution (Ninety-Ninth) Amendment Act 2014 and the National Judicial Appointments Commission Act, 2014 in India is therefore not a move back to the older executive-judiciary model but a step towards a new institutional niche, an institutionalization of the executive-judiciary model through the JAC.

4.2. National Judicial Appointments Commission

In 2014, the Bharatiya Janata Party led NDA Government, with a view to broad base the appointment process of the judges to the higher judiciary and make it more participatory, to ensure greater transparency, accountability and objectivity in the appointments to higher judiciary and to scrap the opaque and unconstitutional collegium system of appointing judges which clearly violated the basic principle of check and balance of power by all the three organs of the state, proposed to set up the National Judicial Appointments Commission (NJAC) with enactment of the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 w.e.f. 13th April, 2015.

The Ninety-Ninth Constitution Amendment Act 2014 seeks to amend Article 124(2) and 217(1) of the Constitution that deals with the appointment of judges in the Supreme Court and the High Courts, respectively[96].

Prior to the Ninety-Ninth Amendment, Article 124(2) provided,

"Every Judge of the Supreme Court shall be appointed by the President after consultation with such of the Judges of the Supreme Court and of the High Court's as the President may deem necessary."[97] It further required that the "Chief Justice of India shall always be consulted." Similarly, Article 217(1) empowered the President to appoint High Court Judges "after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court."[98]

[96] *The Constitution (Ninety-Ninth Amendment) Act, 2014*
[97] *Article 124(2) of the Indian Constitution*
[98] *Article 217(1) of the Indian Constitution*

In both Articles, the Ninety-Ninth Amendment replaced the language pertaining to "consultation" with "on the recommendation of the National Judicial Appointments Commission."[99] Thus, the NJAC's recommendations on appointments to the Supreme Court and High Courts were binding on the President.

It also envisages the setting up of a National Judicial Appointments Commission and established its basic framework by inserting new Articles 124A, 124B and 124C after Article 124 of the Constitution in order to provide the NJAC a constitutional status. Further, the National Judicial Appointments Commission Act 2014 regulates the procedure to be followed by the NJAC for recommending persons to be appointed as judges of the Supreme Court and the High Courts, along with their transfers.

4.2.1. Composition of the National Judicial Appointments Commission

(1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:-

a) The Chief Justice of India, Chairperson, *ex-officio*;
b) Two other senior Judges of the Supreme Court next to the Chief justice of India- Members, *ex officio*;
c) The Union Minister in charge of Law and Justice – Member, *ex-officio*;
d) Two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People - Members:

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for re-nomination.

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission[100].

4.2.2. Functions of Commission

It shall be the duty of the National Judicial Appointments Commission to –

[99] *The Constitution (Ninety-Ninth Amendment) Act, 2014*
[100] *Article 124A of the Indian Constitution*

a) Recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;
b) Recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and
c) Ensure that the person recommended is of ability and integrity[101].

4.2.3. Power of Parliament to make law

Parliament, may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it[102].

The National Judicial Appointments Commission Act 2014, accompanying the Ninety-ninth Amendment, was drafted in lieu of this article to lay down the procedure to be followed by the commission while making the appointments. Moreover, the NJAC Act lays down the procedure to be followed which involves the process of consultation amongst the various governmental bodies involved in the process, along with the veto powers which ensures some amount of transparency and accountability.

4.2.3.1. Procedure for Selection of Judge of Supreme Court (Section 5)

(1) The Commission shall recommend for appointment the senior-most Judge of the Supreme Court as the Chief Justice of India if he is considered fit to hold the office:

> Provided that a member of the Commission whose name is being considered for recommendation shall not participate in the meeting.

(2) The Commission shall, on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, recommend the name for appointment as a Judge of the Supreme Court from amongst persons who are eligible to be appointed as such under clause (3) of Article 124 of the Constitution:

> Provided that while making recommendation for appointment of a High Court Judge, apart from seniority, the ability and merit of such Judge shall be considered:
>
> Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation.

[101] *Article 124B of the Indian Constitution*
[102] *Article 124C of the Indian Constitution*

(3) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Judge of the Supreme Court as it may consider necessary[103].

4.2.3.2. Procedure for Selection of Judge of High Court (Section 6)

(1) The Commission shall recommend for appointment a Judge of a High Court to be the Chief Justice of a High Court on the basis of *inter se* seniority of High Court Judges and ability, merit and any other criteria of suitability as may be specified by regulations.

(2) The Commission shall seek nomination from the Chief Justice of the concerned High Court for the purpose of recommending for appointment a person to be a Judge of that High Court.

(3) The Commission shall also on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, nominate name for appointment as a Judge of a High Court from amongst persons who are eligible to be appointed as such under clause (2) of Article 217 of the Constitution and forward such names to the Chief Justice of the concerned High Court for its views.

(4) Before making any nomination under sub-section (2) or giving its views under sub-section (3), the Chief Justice of the concerned High Court shall consult two senior-most Judges of that High Court and such other Judges and eminent advocates of that High Court as may be specified by regulations.

(5) After receiving views and nomination under sub-sections (2) and (3), the Commission may recommend for appointment the person who is found suitable on the basis of ability, merit and any other criteria of suitability as may be specified by regulations.

(6) The Commission shall not recommend a person for appointment under this section if any two members of the Commission do not agree for such recommendation.

(7) The Commission shall elicit in writing the views of the Governor and the Chief Minister of the State concerned before making such recommendation in such manner as may be specified by regulations.

(8) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Chief Justice of a High Court and a Judge of a High Court as it may consider necessary[104].

4.2.3.3. Power of President to Require Reconsideration (Section 7)

[103] *Section 5 of the National Judicial Appointment Commission Act, 2014*
[104] *Section 6 of the National Judicial Appointment Commission Act, 2014*

The President shall, on the recommendations made by the Commission, appoint the Chief Justice of India or a Judge of the Supreme Court or, as the case may be, the Chief Justice of a High Court or the Judge of a High Court:

Provided that the President may, if considers necessary, require the Commission to reconsider, either generally or otherwise, the recommendation made by it:

Provided further that if the Commission makes a recommendation after reconsideration in accordance with the provisions contained in sections 5 or 6, the President shall make the appointment accordingly[105].

4.3. Judicial Interpretation

4.3.1. Supreme Court Advocates-on-Record-Association and Another v Union of India

In early 2015, the Supreme Court Advocates-on-Record Association and Senior Advocates filed writ petitions before the Supreme Court challenging the constitutionality of the Ninety-Ninth Amendment and the National Judicial Appointments Commission Act 2014 in ***Supreme Court Advocates-on-Record-Association and Another v Union of India*** (NJAC Judgement)***[106]***. The petitions alleged, *inter alia*, that the NJAC violated the basic structure of the Constitution by compromising the judiciary's independence[107]. Given that they raised substantial questions of constitutional interpretation, the Supreme Court referred this case to a five-judge bench[108]. The NJAC Judgment, issued on October 16, 2015, contains five opinions and is over one thousand pages long[109]. The Court split four to one, with four Justices—Khehar, Lokur, Goel, and Joseph—in the majority, and Justice Chelameswar in the dissent. All five Justices authored opinions on the merits in this case.

A few key holdings emerged from the NJAC Judgment:-

- First, the Court held that the Constitution mandates judicial primacy in appointments[110].
- Second, based on the constitutional text and longstanding practice, the Court held that judicial primacy is not only constitutionally required, but is also part of the

[105] *Section 7 of the National Judicial Appointment Commission Act, 2014*
[106] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1
[107] Mohit Singh, "NJAC Act and 99th Constitutional Amendment Faces Challenge at Supreme Court; Petitions by AoR Association and Senior Advocates", ONE LAW STREET (Jan. 10, 2015), available at http://onelawstreet.com/2015/01/njac-act-and-99th-constitutional-amendment-faces-challenge-at-supreme-court-petitions-by-aor-association-and-senior-advocates (April 05, 2018) (Time - 09:00 PM).
[108] Mohit Singh, "Supreme Court Refers NJAC Challenge to Constitution Bench—SCAORA v. UOI", ONE LAW STREET (Apr. 8, 2015), available at http://onelawstreet.com/2015/04/njac-challengereferred- to-constitution-bench-supreme-court-aor-association-v-uoi-judgment-7-april-2015 (April 05, 2018) (Time- 09:30 PM); *Article 145(3) of the Indian Constitution requires that a minimum of five Justices adjudicate constitutional matters.*
[109] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1
[110] *Ibid* at 325

unamendable basic structure because it is integral to the independence of the judiciary.

- Third, and as a consequence of the prior holdings, the NJAC was held unconstitutional for violating the requirements of judicial primacy and judicial independence[111].

Justice Khehar identified two ways in which such a violation could occur. Under the NJAC Act, any two members of the commission could veto a nomination[112]. According to Justice Khehar, that the Chief Justice and two other senior Justices could "consider a nominee worthy of appointment to the higher judiciary" and that "the concerned individual may still not be appointed would be out-rightly obnoxious to the primacy of the judicial component."[113] This was exacerbated, in his view, by the fact that two "eminent persons," who would not necessarily have any legal training, could veto nominees advanced by the Justices on the Commission. Justice Khehar later held that the lack of qualification requirements for the "eminent persons" in the Ninety-Ninth Amendment rendered it unconstitutionally vague[114].

The second issue concerned the Union Minister of Law and Justice. The Court identified a potential conflict of interest arising from the minister's participation in the judicial appointments process as a member of the NJAC[115]. Because the government is the most frequent and prominent litigant in the higher courts, the minister is an interested party and therefore might not have been impartial in his nominations to the higher judiciary. The Court concluded that, although the minister exercised no veto power or determinative vote, his mere presence on the NJAC undermined judicial independence and separation of powers—another tenet of the Constitution's basic structure.

4.3.2. Judicial Independence in the Indian Constitution

The NJAC Judgment relies primarily on two points of constitutional interpretation:

- First, that the Indian Constitution requires judicial primacy for appointments to the higher judiciary; and
- Second, that such primacy is part of the Constitution's basic structure[116].

A. Judicial Primacy in the Constitution

[111] *Ibid* at 437- 438
[112] *Ibid* at 326
[113] *Ibid* at 357
[114] *Ibid* at 380
[115] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 369
[116] *Ibid* at 338-339

Article 124(2) of the Constitution states, *"Every Judge of the Supreme Court shall be appointed by the President after consultation with such of the Judges of the Supreme Court and of the High Court's"*. The Chief Justice of India shall always be consulted."[117] The NJAC Judgment largely hinged on the meaning of "consultation."[118] If the term were defined as it is in the dictionary, where it is synonymous with "discussion,"[119] then the President would not be required to follow the judges' advice in making appointments[120]. However, if "consultation" were considered a term of art, intended to bind the President to the judges' advice, then judicial primacy in appointments would prevail under the Constitution, just as the Supreme Court held in the NJAC Judgment[121].

1. The Constituent Assembly Debates

To resolve this issue, the Court first looked to the Constituent Assembly Debates (CADs)[122]. The Constituent Assembly, which for nearly three years, from 1946 to 1949, debated and drafted India's post-independence Constitution, discussed the judicial appointments process only briefly. The main debate took place on May 24, 1949, when the Constituent Assembly discussed draft Article 103[123]. In draft form, this article closely resembled the present Article 124[124]. It empowered the President of India to nominate judicial candidates in consultation

[117] *Article 124(2) of the Indian Constitution; Article 217(1) of the Indian Constitution similarly requires "consultation" with the Chief Justice of India, the Governor of the state, and the Chief Justice of the High Court when the President makes High Court appointments*.
[118] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 127-131, 347.
[119] Definition of Consultation, MERRIAM-WEBSTER, available at http://www.merriam-webster.com/dictionary/consultation (March 23, 2018) (Time- 06:00 PM).
[120] *Article 124(2) and 217(1) of the Indian Constitution*
[121] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 341
[122] The Constituent Assembly Debates (CADs) are widely used in Indian constitutional law and scholarship to ascertain the original meaning of constitutional provisions. "The speeches in the Constituent Assembly can be referred to for finding the history of the constitutional provision and the background against which said provision was drafted. The speeches can also shed light to show the mischief sought to be remedied and what was the object sought to be attained in drafting the provision." While the CADs are authoritative, they are not binding on Indian courts; H.R. Khanna, MAKING OF INDIA'S CONSTITUTION, 2nd Edition, 2008, pp. 184.
[123] This would become Article 124 in the Indian Constitution; Constituent Assembly Debates Vol. VIII, at 230–31 (May 24, 1949).
[124] *Article 124 of the Indian Constitution*

with Supreme Court and High Court Justices. It further provided that the Chief Justice must be consulted in all appointments other than for the position of Chief Justice.

Several members of the Constituent Assembly proposed amendments to this provision. Three are noteworthy. First, Professor Shibban Lal Saksena from the United Provinces suggested that a two-thirds majority in both houses of Parliament should confirm all judicial appointments[125]. He explained that this would insulate potential judicial nominees from unwarranted executive influence and therefore safeguard the judiciary's independence[126]. A second proposal, with a similar justification, was put forth by B. Pocker Sahib from Madras[127]. In his view, the best "safeguard against political and party pressure" would be to require the Chief Justice's "concurrence" for all judicial appointments. Finally, Professor K.T. Shah from Bihar suggested substituting consultation with Justices for consultation with the "Council of States."[128] Once again, the proffered explanation centered on judicial independence: the Council of States—India's upper house of Parliament at the time— would offer a check on unfettered executive power[129]. Shah pointed for support to the "obvious precedent of the United States," where the President appoints U.S. Supreme Court Justices with the "advice and consent of the Senate[130].

Dr. B.R. Ambedkar, chairman of the drafting committee, offered a rebuttal to these proposals. He said that there could be no question that the judiciary must be both "independent of the executive" and yet competent in its own right[131]. To achieve these objectives, Ambedkar cautioned against adopting either the British system-where the Crown, through the executive, has absolute authority- or the American system of judicial selection. While the former leaves too much discretion in executive hands, the latter involves the legislature, which would be "cumbrous" and might import "political pressure and political considerations" into the process. The draft article, as Ambedkar pointed out, "steers a middle course." It does not give the President sole authority to make appointments; rather, it requires her to consult with the Chief Justice and other judges who are "well qualified to give proper advice" in these matters. Thus, Ambedkar disposed of both Saksena's and Shah's amendments.

Ambedkar then turned to Pocker Sahib's amendment to require "concurrence" from the Chief Justice. He pointed out that, while the Chief Justice would be "a very eminent person," he

[125] Constituent Assembly Debates, Volume VIII, at 231
[126] *Ibid* at 231-232
[127] *Ibid* at 232
[128] *Ibid* at 234
[129] *Ibid* at 234-235
[130] *U.S. Constitution Article II Section 2 Clause 2*
[131] Constituent Assembly Debates ,Volume VIII, at 258

would nonetheless have all of the human "failings, sentiments and prejudices" that afflict everyone else. Ambedkar, therefore, concluded that to give the Chief Justice a "veto" over appointments would be a "dangerous proposition," as it would vest too much authority in a single individual.

Ambedkar exerted enormous influence over the drafting process and his words are still taken very seriously in determining the meaning of constitutional provisions. In the NJAC Judgment, for example, the Supreme Court largely relied on Ambedkar in its analysis of the term "consultation."[132] However, its conclusion that "consultation" essentially requires the President to follow the Chief Justice's advice is not supported by Ambedkar's statements or by the Constituent Assembly's actions[133].

Following Ambedkar's speech, all three amendments were put to the votes and all were rejected[134]. This means that the Constituent Assembly considered replacing "consultation" with "concurrence" in draft Article 103, but declined to do so. In his NJAC Judgment majority opinion, Justice Khehar glossed over this important fact[135]. Instead, he stressed that Ambedkar sought to limit political influence in the appointments process. As Justice Khehar rightly noted, Ambedkar was skeptical of proposals that vested appointment authority solely in the executive or jointly in the executive and legislature because of the risk of political influence[136]. Justice Khehar, therefore, concluded that "consultation" in Articles 124 and 217 was meant to "curtail the free will of the executive."[137]

However, Justice Khehar proceeded to exaggerate the import of these specific remarks and therefore misconstrued the meaning of "consultation." He later noted, for instance, that the "real purpose sought to be achieved by the term 'consultation' was to *shield the selection and appointment of Judges from executive and political involvement*."[138] Thus, "the term 'consultation' was meant to be understood as something more" than the ordinary, dictionary definition of the term. Shortly thereafter, Justice Khehar concluded, "The entire discussion and logic expressed during the debates of the Constituent Assembly vests primacy with the judiciary"[139].

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[132] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 137- 145
[133] Constituent Assembly Debates VOL. VIII, at 258; *Article 124(2) and 217(1) of the Indian Constitution*
[134] Constituent Assembly Debates VOL. VIII, at 258
[135] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 141-147
[136] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 146 - 47
[137] *Ibid* at 146
[138] *Ibid* at 148
[139] *Ibid* at 149

The CADs do not support the inferences drawn above. As a preliminary matter, there is nothing in Ambedkar's remarks to suggest that he or the Constituent Assembly sought to "shield" the appointments process from all political involvement[140]. Rather, as Justice Khehar had previously noted, the objective was more modest: to "curtail" executive discretion[141]. By conflating "shield" with "curtail," he overstates the purpose of "consultation." As Ambedkar's statement made clear, while the President would ultimately decide whom to appoint to the higher judiciary, Articles 124 and 217 would require her to obtain the input of judges who are "well qualified" to dispense advice on these matters[142].

A more serious flaw in Justice Khehar's reasoning arises from his conclusion that the CADs establish judicial primacy over appointments[143]. This simply ignores what Ambedkar said at the end of his remarks[144]. After he rebutted proposals for Parliament and the Council of States to confirm judicial appointments, Ambedkar similarly rejected Pocker Sahib's proposal to require the Chief Justice's "concurrence". In so doing, Ambedkar specifically cautioned against giving any actor, including the apolitical Chief Justice, a veto on appointments. In his dissent from the NJAC judgment, Justice Chelameswar pointed out this inconsistency[145], summarizing the "salient features" in Ambedkar's statement, and correctly noting that "providing for the concurrence of the Chief Justice in substance means transferring the power of appointment without any limitation." He added that the Constituent Assembly "thought it imprudent to confer" similar, sole authority on the President. Thus, Justice Khehar's statement that the "entire discussion and logic" of the CADs vests primacy in the judiciary is false[146]. To the contrary, much of the Constituent Assembly's discussion revolved around how to involve multiple actors in the appointments process to prevent any single actor or branch of government-including the Chief Justice and judiciary-from exercising unchecked authority in this area[147].

2. An Autonomous Role for the President

Justice Khehar's discussion of the term "consultation" in Articles 124 and 217 proceeds against the backdrop of Article 74, which delineates Presidential authority[148]. Article 74

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[140] Constituent Assembly Debates Vol. VIII, at 258 (May 24, 1949).
[141] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 146
[142] *Article 124(2) and 217(1) of the Indian Constitution*
[143] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 341
[144] Constituent Assembly Debates Vol. VIII, at 258
[145] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 497-500 (Chelameswar, J., dissenting)
[146] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 149
[147] Constituent Assembly Debates Vol. VIII
[148] *Article 74(1) of the Indian Constitution*

established a "Council of Ministers," headed by the Prime Minister, to "aid and advise" the President in exercising his functions. In its original form, Article 74 was ambiguous as to whether the President was required to follow his ministers' advice[149]. The CADs and early constitutional analyses do not fully clarify this relationship but provide some useful insights.

B.N. Rau, a prominent jurist who served as constitutional advisor to the Constituent Assembly, is particularly insightful on this matter. The Assembly appointed a Union Constitution Committee to "report on the 'main principles' of the Constitution."

As Rau noted, the British executive—a cabinet drawn from Parliament that must sustain a majority's confidence to remain in power—was "the one with which we are most familiar in India." Perhaps as a result of this familiarity, the five—out of fifteen— Union Constitution Committee members favored adopting the British model. Rau subsequently prepared a Memorandum on the Union Constitution, along with a draft of several constitutional provisions that would ultimately form the basis of India's Constitution. Rau thus assumes an important role in establishing the contours of Presidential authority under the Constitution.

Article 10 of Rau's memorandum formed the basis for what would become Article 74 of the Constitution, with one significant modification. It provided, "There shall be a Council of Ministers, with the Prime Minister at the head, to aid and advise the President *except in so far as she is required by this Constitution to act in her discretion*." Rau added in an explanatory note that "the appointment of Judges" would be an appropriate matter for the President to exercise this discretionary power.

In June 1947, based on Rau's recommendations, the Union Constitution Committee decided that India should adopt "the Parliamentary System of Constitution, the British type of Constitution, with which we are familiar." The committee, however, rejected the notion of discretionary powers for the President. As noted historian Granville Austin put it, these powers were "too reminiscent of arbitrary, imperial authority." Yet, this did not settle what the President's role would be. Would she be merely a figurehead like the British monarch? Or would she still exercise some independent constitutional authority, as Rau's memorandum envisioned? When this matter came before the Constituent Assembly, its members cautioned against unchecked executive authority.

This caution took two different forms. Minority groups, particularly Muslim leaders, voiced concern that a Council of Ministers drawn from a majority in Parliament would marginalize

[149] *Article 74 of the Indian Constitution*

or exclude minorities[150]. In response, the drafting committee put together an "Instrument of Instructions" for the President that would, *inter alia*, require the President to include in her cabinet as many members of important minority communities as possible. In a subsequent Instrument of Instructions, Ambedkar included a provision for an "Advisory Board," comprised of members of Parliament and chosen through proportional representation, which would advise the President on judicial appointments and appointments to various independent commissions. But would the President have to follow the advice of her ministers and other advisors? Here, a second concern emerged: if the Constitution left this ambiguous, the President might disregard their advice and therefore might not be responsible to Parliament.

Ultimately, however, Ambedkar and the drafting committee agreed to leave these details unspecified and the Constituent Assembly declined to adopt any of the "Instruments of Instruction." This meant that the majority party or coalition in Parliament would have plenary authority to select the Council of Ministers to "aid and advise" the President under Article 74[151]. It also meant that, in the Westminster tradition, the Constitution would rely on unwritten convention to bind the President to the advice of her ministers. As early constitutional scholar B. Shiva Rao pointed out, there was widespread agreement that the President would be liable to impeachment if she did not act pursuant to the ministers' advice. Thus, there was "no necessity for setting out in detail what the functions and incidence of responsible government would be".

Rajendra Prasad, who would become India's first President in 1950, challenged this conventional view. In April 1948, he wrote to B.N. Rau stating that he did not find a constitutional provision "laying it down in so many terms" that the President is bound by his ministers' advice. In August, Prasad wrote to Rau again asking whether a Governor could withhold his assent to a legislative bill and, if that Governor were to refer the bill to the President, whether the President had the discretion to withhold assent as well.

When Prasad became President, the issue of presidential discretion arose again. In 1951, Prasad wrote to Prime Minister Jawaharlal Nehru to state his intention to rely on his own discretion— and not just the advice of his ministers—in assenting to parliamentary bills, sending messages to Parliament, and returning bills for reconsideration. Nehru referred these issues to Attorney General M.C. Setalvad and former Advocate General of Madras A.K. Ayyar, who firmly opposed Prasad's position. The attorney general replied that Article 74 of the Constitution required the President to consult with her Council of Ministers "in all

[150] Constituent Assembly Debates Vol. VIII, at 230–31 (May 24, 1949).
[151] *Article 74 of the Indian Constitution*

matters." Ayyar concurred, noting that the Indian President is "analogous to the Constitutional monarch in England."

B.N. Rau, writing a few years later in the widely circulated English daily *The Hindu*, set out in detail the powers of the President under the Constitution. He noted that the Indian President is elected and is eligible for re-election to a second term[152]. The President is, therefore, answerable to her constituents and must have some independent power. Moreover, Rau pointed out that certain constitutional provisions might be rendered meaningless if the President had no discretion at all. For instance, Article 111 of the Constitution allows the President to withhold assent from a bill and return it to Parliament for reconsideration. Rau correctly noted that the President's Council of Ministers, drawn from the majority in Parliament, would not recommend that the President withhold assent from bills that they supported. Thus, she must retain some independence in this area.

The President might also have some discretion if her council of Ministers advise her to act unconstitutionally. The President takes an oath to "preserve, protect and defend the Constitution."[153] Notably, no other government officials in India, except for state Governors[154], are required to take this or a similar oath to uphold the Constitution[155]. This suggests, at a minimum, that the President has a constitutional duty to inform her ministers to reconsider their advice if she believes they advised her to act contrary to the laws or Constitution of India.

He provided the example of a parliamentary bill that, in the President's view, would violate India's treaty obligations. According to Rau, whether a bill violates the law "is a matter of opinion," and the Council of Ministers would presumably have arrived at the "considered opinion" that this bill would not infringe any treaty obligations. Thus, for Rau, the President would not violate the Constitution by accepting the minister's advice "in the last resort." Rau does not address the possibility of ministers advising the President to adopt a bill that was unquestionably unconstitutional. In this situation, the President could plausibly choose to ignore the ministers' counsel to fulfill her broader obligation to "preserve, protect and defend the Constitution."[156]

In any event, this issue was conclusively resolved in 1977 with the adoption of the Forty-Second Amendment to the Constitution, which altered the language of Article 74(1) to

[152] *Article 54 and 55 of the Indian Constitution*
[153] *Article 60 of the Indian Constitution*
[154] *Article 159 of the Indian Constitution*
[155] Third Schedule to the Indian Constitution (Forms of Oaths or Affirmations)
[156] *Article 60 of the Indian Constitution*

provide that the President "shall act in accordance" with the advice of her ministers[157]. It further provided that the President may ask the ministers to "reconsider" the advice provided, but "shall act in accordance with the advice tendered after such reconsideration." Thus, the amendment codified what Rau had believed was the convention— the President may question her advisors, but ultimately must accept their advice. This meant that an autonomous role for the President, along the lines Prasad envisioned, was no longer possible.

3. Presidential Authority in the NJAC Judgement

In Part VII of the NJAC Judgment majority opinion, Justice Khehar compared Articles 124 and 217 of the Constitution to other constitutional provisions on presidential appointments[158]. Article 124 directs the President to consult with "such of the Judges of the Supreme Court and of the High Court's" as she deems necessary in making judicial appointments[159]. It also mandates that the Chief Justice "always be consulted."[160] By contrast, Justice Khehar pointed out that in other appointment-related provisions, including Articles 148, 155, 280, and 316, the President is not required to consult any additional authorities[161]. Thus, Justice Khehar concluded that these appointments are subject only to the "aid and advise" of the ministers provided for in Article 74[162]. As he put it, "For all intents and purposes, the authority vested in the President truly means that the power of such appointment is vested in the parliamentary executive"[163].

Justice Khehar then analogized Article 74 to Articles 124 and 217. Specifically, he compared the "aid and advise" clause in Article 74 with the term "consultation" in Articles 124 and 217[164]. For Justice Khehar, "a process of 'consultation' is really the process of 'aid and advise'. Neither of the two can be understood to convey, that they can be of a binding nature."[165] He said that both are couched in polite, non-binding language out of respect for the President and the "exalted position" that she occupies[166]. As he put it, "It would have been discourteous to provide that the President was to discharge his functions in consonance with the directions, command, or mandate of the executive." Justice Khehar concluded that since "aid and advise" and "consultation" have the same meaning, if either of them is

[157] *Article 74(1) of the Indian Constitution*
[158] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 163-73
[159] *Article 124(1) of the Indian Constitution*
[160] *Article 124(2) of the Indian Constitution*
[161] *Articles 148, 155, 280, 216 of the Indian Constitution*
[162] *Article 74(1) of the Indian Constitution*
[163] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 164
[164] *Article 124(2) and 217(1) of the Indian Constitution*
[165] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 169-70
[166] *Ibid* at 170

practically, if not formally, binding, then the other must be as well. He referred here to the Forty-Second Amendment, which, in his view, simply clarified the original understanding that the President is bound to follow her ministers' advise. Thus, if "aid and advise" in Article 74 is binding, then the "consultation" with the Chief Justice in Articles 124 and 217 is similarly binding and "in all conceivable cases will and should be accepted."[167]

This analysis is flawed for at least two reasons. First, there is no evidence in the CADs that "aid and advise" and "consultation" were intended to have similar meanings[168]. Indeed, Justice Khehar does not cite any evidence, yet concludes they are similar based on his common sense analogy[169]. As discussed, however, the Constituent Assembly chose the term "consultation" instead of "concurrence" precisely to prevent the Chief Justice from having a determinative role in judicial appointments. In Article 74, the Constituent Assembly decided to adopt the British parliamentary executive, which included a cabinet selected from a majority in Parliament to advise the President[170]. While the Constituent Assembly declined to adopt an "Instrument of Instructions" for the President, it relied on the Westminster convention to bind the President, for the most part, to her ministers' advise. There was no such convention requiring the President to follow the Chief Justice's advise against which Articles 124 and 217 were meant to be interpreted[171].

Second, Article 74 was amended in 1977 to explicitly require the President to act on her ministers' advise[172]. Even if this amendment was merely "clarificatory in character,"[173] it supports the conclusion that Article 74, following the British precedent, did not originally envision an autonomous role for the President[174]. Articles 124 and 217 have not been similarly amended[175]. If Parliament wanted the President to obtain the Chief Justice's concurrence, as Pocker Sahib and others had suggested in the CADs, it could have amended these provisions to impose such a requirement[176]. The Indian Constitution is not difficult to

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[167] *Ibid* at 170-72

[168] Constituent Assembly Debates Vol. VIII, at 258 (May 24, 1949); *Articles 74(1), 124(2) and 217(1) of the Indian Constitution*

[169] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 169-70

[170] *Article 74(1) of the Indian Constitution*

[171]Kate Malleson, Appointment, Discipline and Removal of Judges: Fundamental Reforms in the United Kingdom, in JUDICIARIES IN COMPARATIVE PERSPECTIVE, pp. 117–19, H.P. Lee (ed.), 2011 (describing the appointments process in the United Kingdom in which, prior to 2005, the Lord Chancellor had the final word on judicial appointments).

[172] *Article 74(1) of the Indian Constitution* as amended by The Constitution (Forty-second Amendment) Act, 1976

[173] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 170

[174] *Article 74(1) of the Indian Constitution*

[175] *Articles 124 and 217 of the Indian Constitution*

[176] Constituent Assembly Debates VOL. VIII, at 231–32 (May 24, 1949).

alter; it has been amended one hundred times since 1950[177]. Thus, Justice Khehar's claim that an amendment to Article 74, which pertains to executive power and uses the phrase "aid and advise," also implicitly altered or affected Articles 124 and 217, which are concerned with judicial appointments and quite deliberately use the term "consultation," is tenuous at best[178]. Nevertheless, Article 74 might still provide a tenable argument as to why the Constitution as it is today should be read to require judicial primacy under Articles 124 and 217. Assume for the sake of argument that Article 74 originally left the President some discretion in performing her constitutional functions[179]. Assume further that this discretion allowed her to put forward judicial nominees on her own accord, without relying on her Council of Ministers. Or perhaps this discretion allowed her to independently select nominees from a list provided by her ministers. In these scenarios, judicial appointments would be insulated from the sort of political influence that both members of the Constituent Assembly and a majority of the Justices in the NJAC Judgment feared[180]. However, with the passage of the Forty-Second Amendment in 1977, any such discretion was eliminated and the President was ultimately bound by her cabinet's advise[181]. Thus, the argument goes, judicial primacy should be read into Articles 124 and 217 after 1977 to prevent a small group of parliamentarians—the cabinet— from exerting too much influence over the appointments process[182].

B. Judicial Primacy as Part of the Constitution's "Basic Structure"

Assuming the Constitution requires judges to have the last word on judicial appointments, the NJAC would still be lawful. After all, it was enacted through a constitutional amendment, which altered the language of Articles 124 and 217, among others, to bind the President to the NJAC's recommendations. Justice Khehar, therefore, had to further establish that judicial primacy in appointments was part of the Constitution's basic structure and therefore could not be amended.

1. The Emergence of Basic Structure

In 1965 in ***Sajjan Singh v State of Rajasthan***, two Supreme Court Justices, in concurring opinions, first intimated that constitutional amendments could be *ultra vires*[183]. These dicta

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[177] The Constitution (Amendment) Acts, INDIA CODE, available at http://indiacode.nic.in/coiweb/coifiles/amendment.htm (March 12, 2018) (Time - 07:00 PM).
[178] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 170-72
[179] *Article 74(1) of the Indian Constitution*
[180] Constituent Assembly Debates VOL. VIII, at 231–32; *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 356–59.
[181] *Article 74 of the Indian Constitution*
[182] *Articles 124(2) and 217(1) of the Indian Constitution*
[183] *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845

would become law in ***Golaknath v State of Punjab***[184]. Petitioners in Golaknath argued that the Seventeenth Amendment, and the related First and Fourth Amendments, to the Constitution violated certain fundamental rights granted under Chapter III[185]. Article 13 of the Constitution provides: "The State shall not make any law which takes away or abridges the rights conferred by Chapter III."[186] While this provision clearly applies to laws enacted by Parliament or State governments, the issue before the Supreme Court was whether it also applied to constitutional amendments[187].

The Supreme Court, by a narrow six-to-five margin, adopted the broader view of Article 13 and held that the First, Fourth, and Seventeenth Amendments were unconstitutional. However, Justice Subba Rao's majority opinion was careful to limit the decision's scope[188]. He held that Article 368 did not grant Parliament the power to amend the Constitution, but simply set forth the procedures for amendment[189]. Justice Subba Rao further held that amendments enacted under Article 368 were "laws" under Article 13 and were therefore subject to judicial review[190]. Justice Subba Rao also stipulated that this judgment did not actually affect the validity of the impugned constitutional amendments—under the doctrine of "prospective overruling," the judgment only applied to future cases. Thus, it left the First, Fourth, and Seventeenth Amendments on the books, even though it declared them unconstitutional[191].

This case set into motion a structural revolution: by limiting the Parliament's amendment power, the Court asserted its supremacy over constitutional interpretation to an unprecedented extent. As Austin put it, Golaknath "began the great war, as distinct from earlier skirmishes, over parliamentary versus judicial supremacy." This battle for supremacy emerged not only from Golaknath's substantive content but also from its timing. It was released just after Indira Gandhi, the daughter of India's first Prime Minister Jawaharlal Nehru, became Prime Minister. Gandhi was intent on furthering her father's socialist agenda and the Supreme Court represented the greatest obstacle to these objectives.

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[184] *I.C. Golaknath v State of Punjab* (1967) 2 SCR 762
[185] *Ibid* at 808-09
[186] *Article 13 of the Indian Constitution*
[187] *I.C. Golaknath v State of Punjab* (1967) 2 SCR at 763
[188] Raju Ramachandran, The Supreme Court and the Basic Structure Doctrine, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA, pp. 107, 111–12, B.N. Kirpal, et al. (eds.), 2000.
[189] *I.C. Golaknath v State of Punjab* (1967) 2 SCR at 763
[190] *I.C. Golaknath v State of Punjab* (1967) 2 SCR at 764
[191] Manoj Mate, "Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective", 12 SAN DIEGO INTERNATIONAL LAW JOURNAL (2010), pp. 175, 182–83.

The dispute between Gandhi and the Court concerned two major issues: the power to amend the Constitution; and control over the judicial appointments process. Though Gandhi struck the first blows, the Court eventually scored a decisive victory on both fronts.

Following Supreme Court decisions that invalidated the Gandhi government's Bank Nationalization Act and efforts to abolish princely titles and privileges[192], Gandhi made concerted efforts to limit the Court's authority. Her government promulgated several constitutional amendments of which the Twenty-Fourth Amendment (1971) is most significant. It altered Articles 13 and 368 to reinstate parliamentary supremacy on constitutional amendments[193].

This amendment, along with two others that insulated certain land reform laws from judicial review, was challenged in ***Kesavananda Bharati v Union of India[194]***. The Supreme Court in that case issued eleven opinions containing at least three rulings. First, it overruled Golaknath by noting that constitutional amendments could not violate fundamental rights because the term "'law'" in Article 13 of the Constitution was limited to ordinary, legislative acts. Second, it nonetheless held that constitutional amendments are invalid if they violate the Constitution's "basic structure."[195] Justice Khanna's majority opinion focused on the phrases "this Constitution" and "the Constitution shall stand amended" in Article 368. He found that these terms suggested the existence of a core constitutional identity that Parliament could not alter through amendments[196]. Finally, with respect to the constitutional amendments at issue, the Court struck down a section of the Twenty-Fifth Amendment that, *inter alia*, made non-enforceable Directive Principles of State Policy superior to certain justiciable Fundamental Rights, thereby altering the Constitution's basic structure.

Kesavananda Bharati made clear that the superiority of Fundamental Rights vis-a-vis Directive Principles was a feature of the basic structure[197]. However, it did not clearly establish what other features might also be included. Chief Justice Sikri's opinion in the case

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[192] *R.C. Cooper v Union of India* AIR 1970 SC 564; *Madhav Rao Scindia v Union of India* AIR 1971 SC 530

[193] *Article 13(4) of the Indian Constitution* as amended by The Constitution (Twenty-Fourth Amendment) Act 1971; *Article 13(4) now provided, "Nothing in this article shall apply to any amendment of this Constitution made under article 368."* Similarly Article 368 of the Indian Constitution was also amended by The Constitution (Twenty-Fourth Amendment) Act, 1971; *Article 368, following this amendment, read as follows: "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article."*

[194] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225

[195] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC at 253-68

[196] *Ibid* at 258

[197] *Ibid* at 225

suggested five essential features[198]. Sudhir Krishnaswamy has put forth a similar list—secularism, democracy, rule of law, federalism, and the independence of the judiciary—along with two possible additions: socialism and equality.

2. The Battle over Judicial Appointments

Kesavananda Bharati established that judicial independence formed part of the Constitution's unamendable basic structure[199]. The institutional conflict between the Supreme Court and Gandhi's government continued, but the battleground now shifted to judicial appointments and transfers[200]. The day after Kesavananda Bharati was decided, President Fakhruddin Ali Ahmed, on the advice of Indira Gandhi, his Prime Minister, nominated Justice A.N. Ray for Chief Justice. This was a controversial appointment as Ray, a pro-government nominee, was promoted ahead of three senior Justices who ruled against the government in Kesavananda Bharati. When Ray retired, Gandhi advised the President to pass over Justice Khanna, the senior Justice, who had opposed a number of her initiatives, for the pro-government nominee, Justice Beg.

Gandhi and her ministers also advised the President to transfer High Court Judges as retribution for ruling against the government. One Justice challenged the constitutionality of his transfer in ***Union of India v Sankalchand Himatlal Sheth*** (1977)[201]. The President, on Gandhi's advice, had transferred Justice S.H. Sheth of the Gujarat High Court to the High Court of Andhra Pradesh[202]. Justice Sheth complied with the order but simultaneously filed a writ petition before the Supreme Court[203]. The petition claimed, *inter alia*, that the order was issued without his consent, which he argued was implicitly required in Article 222(1) of the Constitution[204]. The Supreme Court held that, while such consent is not constitutionally required, it is recommended in all cases[205]. According to the Court, if the President effected transfers without obtaining the consent of the Justices involved, it would "bring about devastating results and cause damage to the tower of judiciary and erosion in its

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[198] *Ibid* at 170
[199] *Ibid* at 768
[200] The dispute over amendment power continued. Gandhi sought to nullify Keshavananda Bharati through the Forty-Second Amendment (1977), which barred the Supreme Court from reviewing constitutional amendments. However, the Janata Party government that defeated Gandhi's Congress Party in the 1977 elections subsequently repealed this provision.
[201] *Union of India v Sankal Chand Himatlal Sheth* (1977) 4 SCC 193
[202] *Ibid* at 209-10
[203] *Ibid* at 210
[204] *Article 222(1) of the Indian Constitution states that "The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court".*
[205] *Union of India v Sankal Chand Himatlal Sheth* (1977) 4 SCC at 193, 226-28

independence."[206] A Justice punitively transferred would be "working constantly under a threat that if he does not fall in line with the views of the executive or delivers judgments not to its liking, he would be transferred, may be to a far-off High Court."[207]

The Court was concerned about untrammelled Presidential authority, but it noted that the Constitution included safeguards to restrict the President's discretion, as follows:

"A provision empowering the President to transfer a Judge from one High Court to another can in no way be regarded as marring the independence of the judiciary, given the gloss we have given to it. It will be noticed that the power under Article 222 is hedged in by several safeguards. In the first place, the power rests in such a high authority as the President who acts on the advice of the Council of Ministers; secondly, the power can be exercised only in consultation with the Chief Justice of India. This is not an empty ritual or an idle formality but is a matter of moment and must be fully effective".[208]

A few years earlier, the Court similarly discussed judicial independence in the context of gubernatorial authority. ***Shamsher Singh v State of Punjab*** concerned two judicial officers, the appellants, on probation in Punjab, whose services were terminated by the Punjab Government[209]. The termination was executed in the name of the Governor of Punjab and on the recommendation of the Punjab and Haryana High Court[210]. The appellants contended that this was unconstitutional: in their view, the Governor could only terminate their services in his personal capacity[211]. The Supreme Court dismissed this claim and, importantly, elaborated on the nature of executive power in India[212]. Chief Justice Ray's majority opinion drew comparisons between Governors and the President[213]. It concluded that the President is a ceremonial head of State because India adopted the British Parliamentary Executive[214]. The Court held that "real executive powers" were vested in the Council of Ministers, whose advice, the President as well as Governors must accept in all executive and legislative matters[215].

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[206] *Ibid* at 285
[207] *Ibid* at 243
[208] *Ibid* at 269
[209] *Shamsher Singh v State of Punjab* (1974) 2 SCC 831
[210] *Ibid* at 845-46
[211] *Shamsher Singh v State of Punjab* (1974) 2 SCC 831 at 846
[212] *Ibid* 846-60
[213] *Ibid* at 848-54
[214] *Ibid* at 828
[215] *Ibid* at 829

In a concurring opinion, Justice Krishna Iyer agreed that, for all practical purposes, the President is bound by her cabinet's advise, but added an important dictum[216]. For Justice Iyer, the Council of Ministers should not have the final word on judicial appointments. Rather, "in all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India.

This dictum would play an outsized role in the NJAC Judgment. To show that Supreme Court precedent had established judicial primacy in appointments, Justice Khehar relied on Shamsher Singh[217]. He specifically cited the passage above as evidence that the Chief Justice has the final word on judicial appointments. However, Justice Khehar's description of this quote is misleading[218]. He stated that a "seven-Judge bench held" that the Chief Justice's counsel must be followed "in all conceivable circumstances."[219] This is false on two counts: first, the quoted language appears in a concurring opinion that Justice Krishna Iyer wrote on behalf of Justice Bhagwati and himself, not in the five-Justice majority opinion; and second, the quote is merely judicial dicta and does not constitute a legal holding. Shamsher Singh concerned a Governor's discretion under the Constitution[220]. The resolution of this case did not directly involve Presidential powers, much less the President's authority to make judicial appointments. Thus, Justice Iyer's observations about the appointments power have no binding authority.

Justice Khehar later observed in the NJAC Judgment that Sankalchand Himatlal Sheth confirmed this view of judicial appointments[221]. In that case, Justice Chandrachud's majority opinion cited with approval Justice Iyer's concurring opinion in Shamsher Singh[222]. However, the context suggests that this reference was not intended to establish *de jure* judicial primacy in appointments. Sankalchand concerned the transfer of a High Court justice without his consent[223]. The Court held that consent was not constitutionally required, but recommended that the President obtain consent to safeguard judicial independence[224]. Indeed, Justice Chandrachud essentially conceded this immediately before and after quoting Justice

[216] *Ibid* at 873(Iyer, J., concurring).
[217] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 148-49
[218] *Ibid* at 148
[219] *Ibid* at 152
[220] *Shamsher Singh v State of Punjab* (1974) 2 SCC 831
[221] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 152-53
[222] *Union of India v Sankalchand Himatlal Sheth* (1977) 4 SCC 193 at 228–29
[223] *Ibid* at 209-10
[224] *Ibid* at 228-30

Iyer's concurrence[225]. Prior to the quote he said, "It is open to the President to arrive at a proper decision of the question whether a Judge should be transferred because, *what the Constitution requires is consultation with the Chief Justice, not his concurrence*."[226] Afterward, Justice Chandrachud expressed his wish that "these words will not fall on deaf ears and since normalcy has now been restored, the differences, if any, between the executive and judiciary will be resolved by mutual deliberation."[227] In other words, while the Chief Justice's advice on appointments must be taken seriously, and the President should generally follow it; there is nothing in the Constitution to bind the President to that advise.

Thus, neither of these cases provides precedent for judicial primacy in appointments[228]. At most, they include dicta that points towards judicial primacy[229]. But even such dicta, in its proper context, hardly support the proposition that the judiciary, led by the Chief Justice, has the final word on judicial appointments. In any event, the dicta certainly do not suggest that judicial primacy is part of the Constitution's basic structure.

3. Establishing Judicial Supremacy: The *Three Judges Cases*

While Shamsher Singh and Sankalchand Himatlal Sheth laid the foundation for the NJAC Judgment, Justice Khehar's analysis focused primarily on the Three Judges' Cases[230]. The First Judges' Case, ***S.P. Gupta v. Union of India*** (1982), raised a number of concerns pertaining to judicial independence[231]. The various writ petitions filed in this case challenged, *inter alia*, the appointment of several additional justices to the High Courts[232]. Prime Minister Indira Gandhi, who returned to power in 1980, advised the President to make these

[225] *Ibid* at 228-29
[226] *Ibid* at 228
[227] *Ibid* at 229
[228] *Shamsher Singh v State of Punjab* (1974) 2 SCC 831
[229] *Union of India v Sankalchand Himatlal Sheth* (1977) 4 SCC 193 at 228–89; *Shamsher Singh v State of Punjab* (1974) 2 SCC 831 at 882 (Iyer, J., concurring).
[230] *S.P. Gupta v Union of India* (1981) 1 SCC 87 (First Judges' Case); *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268 (Second Judges' Case); *In re: Appointment and Transfer of Judges* AIR 1999 SC 1 (Third Judges' Case).
[231] *S.P. Gupta v Union of India* (1981) 1 SCC at 87
[232] *Ibid* at 195-203

appointments under Article 224(1) of the Constitution[233]. Article 224(1) allows for temporary judicial appointments of up to two years in response to a "temporary increase" in a High Court's workload[234]. Petitioners, including senior advocates in several High Courts, challenged these appointments on the basis that they constituted part of a government policy to weaken judicial independence[235]. After all, temporary appointments might allow the government to pack the bench with judges that favored its agenda while removing protections such as fixed tenure[236].

One argument petitioners advanced was that the Chief Justice should be given primacy in appointments to prevent this potential political manipulation[237]. Justice Bhagwati rejected this argument. He relied on Sankalchand and Ambedkar's statements at the CADs to conclude that "consultation" in Articles 124 and 217 means precisely that[238]. He said, "The Central Government is entitled to come to its own decision as to whether or not to appoint the particular person as a Judge. It is not bound to act in accordance with the opinion of the Chief Justice of India".

In the NJAC Judgment, Justice Khehar conceded that the First Judges' Case does not support judicial primacy[239]. However, he minimized its importance by referring to it as "the solitary departure" in a chain of five cases from Shamsher Singh to the Third Judges' Case that vested primacy in the judiciary under Articles 124, 217, and 222[240]. This is an exaggeration. Both Shamsher Singh and Sankalchand Himatlal Sheth concerned different legal issues and did no more than refer to judicial primacy in dicta. Moreover, the latter actually held that the President is not constitutionally required to follow the Chief Justice's counsel, which is why Justice Bhagwati cited it with approval to reach the same conclusion in the First Judges' Case[241].

The Second Judges' Case (1994), however, reversed course and instituted judicial primacy[242]. Unlike its predecessors, this case squarely addressed whether the Chief Justice has primacy in

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[233] *Article 224(1) of the Indian Constitution*

[234] *Article 224(1) of the Indian Constitution states: - "If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify."*

[235] *S.P. Gupta v Union of India* (1981) 1 SCC at 87and 196–97

[236] *Article 124(2) and 217(1) of the Indian Constitution*

[237] *S.P. Gupta v Union of India* (1981) 1 SCC at 231

[238] *Ibid* at 230

[239] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 127

[240] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 127, 130-31

[241] *S.P. Gupta v Union of India* (1981) 1 SCC at 230

[242] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268 at 41

judicial appointments and transfers[243]. Justice Verma's majority opinion explicitly reversed the First Judges' Case, finding that "the view of Bhagwati, J. (as he then was) in the First Judges' Case conflicts with this constitutional scheme, and, with respect, does not appear to be a correct construction of the provisions in Article 124(2) and 217(1)."[244] For Justice Verma, the term "consultation" in these constitutional provisions was intended to create a deliberative process between the executive and judicial branches[245]. The "primary aim" of this process would be to take "into account the views of all the consultees, giving the greatest weight to the opinion of the Chief Justice of India who is best suited to know the worth of the appointee."[246] Ideally there should be consensus and no need for any actor to assume primacy; if disagreements emerge, however, primacy is vested "in the final opinion of the Chief Justice of India, unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable."

This case established the "collegium" system, where senior Supreme Court Justices, led by the Chief Justice, have the final say on judicial appointments and transfers[247]. The Third Judges' Case (1999) confirmed this arrangement and prescribed the contours of the "consultative process" that are in place today[248]. Importantly, as Justice Khehar pointed out in the NJAC Judgment, the central government did not challenge the constitutionality of the collegium in that case[249]. The Attorney General instead asked the Court to expand the collegium from three to six Justices[250]. The Court settled on a compromise: the collegium would consist of the Chief Justice and the next four most senior Justices[251]. The Court further held that "if the majority of the collegium is against the appointment of a particular person, that person shall not be appointed."[252] Thus, a majority of Justices—not the Chief Justice or the President—would have the final say on judicial appointments.

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[243] *Ibid* at 2; This case originated from a writ petition demanding that judicial vacancies be filled. The Court referred the case to a nine-judge constitutional bench to re-examine the appointments power; Burt Neuborne, "The Supreme Court of India", INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, Vol. 1, Issue 3, 2003, pp. 476, 484.

[244] *Ibid* at 39

[245] *Ibid* at 40-41; Justice Verma found that "consultation" (rather than "concurrence") was adopted "merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as an individual."

[246] *Ibid* at 41

[247] *Ibid* at 68; The Second Judges' Case prescribed a process in which the Chief Justice consults with the next two most senior Supreme Court Justices before recommending nominees for judicial office.

[248] *In re: Appointment and Transfer of Judges* AIR 1999 SC 1 at 14-19

[249] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 131; "The Union of India was not seeking a review, or reconsideration of the judgment in the Second Judges' Case. It is therefore apparent that judicial primacy was conceded, by the Union of India, in the Third Judges' Case".

[250] *In re: Appointment and Transfer of Judges* AIR 1999 SC 1 at 12

[251] *Ibid* at 14

[252] *Ibid* at 19

The Second and Third Judges' Cases constitute binding precedent for the proposition that the Constitution requires judicial primacy in appointments[253]. But do they hold that such primacy is part of the Constitution's basic structure? The Third Judges' Case makes no reference to basic structure whatsoever[254]. Justice Verma's majority opinion in the Second Judges' Case refers to it only once, as follows:

The question of judicial primacy has to be considered in the context of the independence of the judiciary, as a part of the basic structure of the Constitution, to secure the "rule of law" essential for the preservation of the democratic system, the broad scheme of separation of powers adopted in the Constitution, together with the Directive Principle of "separation of judiciary from executive" even at the lowest strata, provide some insight to the true meaning of the relevant provisions in the Constitution relating to the composition of the judiciary. *The construction of those provisions must accord with these fundamental concepts in the constitutional scheme to preserve the vital and promote the growth essential for retaining the Constitution as a vibrant organism*[255].

This statement confirms that judicial independence is part of the basic structure. It is less clear, though, whether the judgment holds that judicial primacy in appointments, too, falls within the basic structure. Justice Verma clearly links judicial primacy to judicial independence when, for instance, he states that filling judicial appointments only with candidates approved of by the Chief Justice is "intended to secure the independence of the judiciary."[256] Similarly, in the NJAC Judgment, Justice Khehar states that vesting primacy in the Chief Justice and the collegium is an "integral constituent" of Articles 124, 217, and 222[257]. But merely making this connection does not place judicial primacy within the basic structure.

The basic structure doctrine is intended to prevent structural changes to the Constitution that would alter its core identity[258]. It is difficult to argue that judicial primacy, which did not exist prior to the Second Judges' Case in 1993, could form part of this core identity. The burden becomes more onerous in light of Sankalchand Himatlal Sheth and the First Judges' Case, which held to the contrary[259].

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[253] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268; *In re: Appointment and Transfer of Judges* AIR 1999 SC 1

[254] *In re: Appointment and Transfer of Judges* AIR 1999 SC 1

[255] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268 at 8

[256] *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268 at 72

[257] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 338

[258] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225 at 768

[259] *Union of India v Sankalchand Himatlal Sheth* (1977) 4 SCC 193 at 226–28; *S.P. Gupta v Union of India* (1981) 1 SCC 87 at 230

Yet, Justice Khehar made no attempt to explain how judicial primacy in appointments is part of the basic structure. Following his analysis, albeit mistaken, of the CADs and the relevant precedents, he simply assumed away the controversy and held:

"Therefore, when a question with reference to the selection and appointment of Judges to the higher judiciary is raised, alleging that the 'independence of the judiciary' as a 'basic feature/ structure' of the Constitution has been violated, it would have to be ascertained whether judicial primacy had been breached."[260]

By reaching this conclusion with no supporting argumentation or convincing evidence, Justice Khehar and the NJAC Judgment majority fail to make a coherent case for judicial primacy as part of the unamendable basic structure. Indeed, much of the evidence, particularly the CADs and early constitutional analyses, suggests that judicial primacy is not even required under the Constitution[261].

C. *The Collegium System in India*

In India, what if the collegium system functions effectively and promotes judicial independence? Justice Chelameswar's dissent in the NJAC Judgment leaves little doubt on this score. He noted that after the Second Judges' Case established the collegium, India "witnessed many unpleasant events connected with judicial appointments—events which lend credence to the speculation that the collegium system is perhaps not the best system for securing an independent judiciary."[262]

Justice Chelameswar discussed two events that highlight the collegium's flaws. The first involves a writ petition filed by Senior Advocate Shanti Bhushan challenging the constitutionality of a judicial appointment to the Madras High Court[263]. As Justice Chelameswar pointed out, neither Bhushan's precise claim or the Court's findings are clearly spelled out in the judgment, but the claim appears to be that the Chief Justice did not consult the collegium in making the impugned appointment[264]. The Court dismissed this claim

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[260] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 348

[261] The Judgment further identified several other supposed constitutional defects in the Ninety-ninth Amendment and the National Judicial Appointments Commission Act. These included the powers and qualifications of the "eminent persons" and the presence of the union minister of law and justice on the Commission.

[262] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 505 (Chelameswar, J., dissenting) (citing a 2011 speech by former Supreme Court Justice Ruma Pal in which she criticized the secrecy, horse-trading, and "growing sycophancy and lobbying within the system" that "compromised" judicial independence).

[263] *Shanti Bhushan v Union of India* (2009) 1 SCC 657

[264] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 506–07 (Chelameswar, J., dissenting).

without much discussion[265]. What Justice Chelameswar omitted is that shortly thereafter, Bhushan's son, Senior Advocate Prashant Bhushan, claimed in an interview with *Tehelka Magazine* that eight of the past sixteen Chief Justices of India were corrupt[266]. This led to contempt charges and proceedings against Prashant Bhushan[267]. Shanti Bhushan filed an affidavit in this case on behalf of his son, which included evidence that purported to show that at least eight—and perhaps even ten—of the past sixteen Chief Justices were in fact corrupt. Further judicial misconduct in appointments has been reported over the past few years[268]. In 2014, for instance, former Supreme Court Justice Markandey Katju claimed on Facebook that three former Chief Justices had confirmed and granted an extension to a corrupt judge[269].

The second event involved the promotion of High Court Justice P.D. Dinakaran to the Supreme Court[270]. Justice Dinakaran was serving as Chief Justice of the Karnataka High Court when the collegium recommended his elevation to the Supreme Court[271]. However, this recommendation was met with allegations of corruption and judicial misconduct from members of the Bar Council of India, including senior advocates Shanti Bhushan, Anil Divan, and Fali Nariman, as well as former Union Minister of Law and Justice Ram Jethmalani. Specifically, they alleged that Justice Dinakaran acquired large amounts of land in Tamil Nadu that exceeded the limit prescribed by the state's land reform laws[272]. The collegium then recommended transferring him to the Sikkim High Court—a move that was questioned by the Prime Minister and criticized by the Sikkim Bar Association[273]. Finally,

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[265] *Shanti Bhushan v Union of India* (2009) 1 SCC 657

[266] Shoma Chaudhury, "Half of the Last 16 Chief Justices Were Corrupt", TEHELKA MAGAZINE, Vol. 6, Issue 35 (Sept. 5, 2009), available at http://www.tehelka.com/2009/09/half-of-the-last-16-chief-justiceswere-corrupt (April 12, 2018) (Time-08:30 PM).

[267] Shanti Bhushan, "Eight of the Last Sixteen Chief Justices of India Were Definitely Corrupt", OUTLOOK (Sept. 16, 2010), available at http://www.outlookindia.com/website/story/eight-of-the-lastsixteen-chief-justices-of-india-were-definitely-corrupt/267128 (April 13, 2018) (Time- 09:00 PM).

[268] T.R. Andhyarujina, "Disciplining the Judges", THE HINDU (February 19, 2010), available at http://www.thehindu.com/opinion/lead/disciplining-the-judges/article109167.ece (April 14, 2018) (Time - 09:30 PM).

[269] Apoorva Mandhani, "Judgment in Shanti Bhushan and another v. Union of India (2007) Echoes Justice Katju's Allegations", LIVE LAW (July 22, 2014), available at http://www.livelaw.in/6-year-old-judgment-echoes-katjus-allegations (April 15, 2018) (Time – 08:00 PM).

[270] *P.D. Dinakaran v Judges Inquiry Committee* (2011) 8 SCC 380

[271] R. Sedhuraman, "Judge's Integrity in Question: Proposed Elevation of Karnataka CJ to SC Draws Ire of Senior Advocates", THE TRIBUNE (Sept. 15, 2009), available at http://www.tribuneindia.com/2009/20090915/main3.htm (April 16, 2018) (Time - 07:00 PM).

[272]Special Correspondent, "CJI Summoned Justice Dinakaran to Delhi", THE HINDU (Sept. 16, 2009), available at http://www.thehindu.com/todays-paper/article184471.ece (April 17, 2018) (Time - 07:30 PM).

[273] J. Venkatesan, "Justice Dinakaran Shifted to Sikkim High Court", THE HINDU (July 30, 2010), available at http://www.thehindu.com/news/national/karnataka/article542259.ece; PTI, "Sikkim Bar Association Protests Justice Dinakaran's Transfer", THE HINDU (Apr. 9, 2010), available at http://www.thehindu.com/news/national/other-states/article392924.ece (April 18, 2018) (Time - 06:30 PM).

facing a three-member panel inquiry into his conduct, Justice Dinakaran resigned from the Sikkim High Court[274].

Justice Chelameswar aptly summarized the lesson to be drawn from this episode. He said the recommendation of Justice Dinakaran to the Supreme Court "certainly exposed the shallowness of the theory propounded by this court that the Collegium are the most appropriate authorities to make an assessment of the suitability of candidates for appointment as judges."[275]

In September 2016, after he was appointed to the Supreme Court Collegium, Justice Chelameswar publicly declined to attend its meetings, citing the lack of transparency in the process[276].

The Supreme Court rejected proposed reforms that would increase transparency[277]. Shortly after the NJAC Judgment was issued, the Court asked the government to draft a Memorandum of Procedure, which would include improvements to the existing collegium system[278]. Among other changes, the government proposed that the collegium should follow a tradition of seniority in appointments; provide reasons, in writing, in support of its nominations; and require dissenting judges to record their objections to nominees in writing. The Court has rejected all government proposals thus far.

The NJAC Judgment also ruled that any involvement of political actors in judicial appointments would violate the independence of the judiciary. This is a startling claim, especially since the President's cabinet effectively had the final say on judicial appointments until the Supreme Court instituted the collegium system in the Second Judges' Case of 1993[279].

It is also startling in light of the experience of several other democracies, where the involvement of political actors in the appointments process is not considered per se

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[274] J. Venkatesan, "Justice Dinakaran Resigns", THE HINDU (July 29, 2011), available at http://www.thehindu.com/news/national/justice-dinakaran-resigns/article2305932.ece (April 19, 2018) (Time - 06:00 PM).

[275] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 508 (Chelameswar, J., dissenting).

[276] G.S. Vasu, "Justice Chelameswar Skips SC Collegium Meet for Want of Transparency in Judges' Appointments", THE NEW INDIAN EXPRESS (Sept. 2, 2016), available at http://www.newindianexpress.com/nation/TNIE-Exclusive-Justice-Chelameswar-skips-SC-Collegium-meet-for-want-oftransparency-in-judges-appointments/2016/09/02/article3608194.ece (April 20, 2018) (Time - 05:30 PM).

[277] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1

[278] Sheela Bhatt, "Memorandum of Procedure: Behind the Scenes, Govt and SC in Tug of War over Appointments—and Turf", THE INDIAN EXPRESS (July 15, 2016), available at http://indianexpress.com/article/india/india-news-india/supreme-court-high-court-judge-appointment-procedurecriteria-collegium-government-judiciary-2914823 (April 21, 2018) (Time - 05:00 PM).

[279] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 521

detrimental to judicial independence. Many countries maintain a role for the executive in judicial appointments, often a determinative one. The reforms over the last thirty years have checked political discretion in this realm by creating commissions and other independent bodies to assist in judicial appointments. However, these bodies usually include both representatives from the executive and legislative branches, and none excludes political actors completely.

The Attorney General raised this comparative perspective in the NJAC case, but Justice Khehar seemed to misunderstand its import[280]. In his majority opinion, Justice Khehar considered the evidence submitted on judicial appointment systems around the world. He drew attention to a submission from the Attorney General showing that fifteen countries in Europe and North America make "the executive the final determinative/appointing authority."[281] He further discussed an influential academic paper that tracked and analyzed the trend towards independent appointments commissions or councils[282]. The paper finds little evidence to suggest that such commissions actually improve the quality or independence of judges. It explains their recent popularity in institutional terms, attributing it to their promise that "no one institution can easily dominate the judiciary. The councils, once created, provide an arena for competition and the eternal struggle to calibrate independence and accountability." This is an important gloss, which likely explains why so many jurisdictions have multiple, competing institutional players involved in judicial selection[283].

In summarizing the comparative evidence, Justice Khehar acknowledged that the global trend is "to free the judiciary from executive and political control and to incorporate a system of selection based purely on merit."[284] But he then conflated "the diminishing role of executive and political participation" in appointments with exclusion of political actor's altogether[285]. As he put it, the mere "participation" of the Union Minister of Law and Justice on the Commission, and of the Prime Minister and Opposition Leader in selecting "eminent persons" to sit on the Commission, would be "a retrograde step, and cannot be accepted."

The NJAC Judgment, therefore, retains for the judiciary the power to make judicial appointments and ignores the core lesson of the comparative experience: that a single

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[280] *Ibid* at 360-67

[281] *Ibid* at 360

[282] *Ibid* at 372; Nuno Garoupa & Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence", 57 AMERICAN JOURNAL OF COMPARATIVE LAW, 2009, pp. 103.

[283] This is true both with independent commissions, which usually involve members of the executive, legislative, and judicial branches, and in some long-established systems, such as in the United States, where federal judicial appointments are proposed by the president and confirmed by the U.S. Senate.

[284] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 366

[285] *Ibid* at 370

institution, even if it is the judiciary, should not have sole authority over judicial appointments. It also proves that having judges control judicial appointments has not effectively secured judicial independence in India.

4.4. Merits of the National Judicial Appointments Commission

The National Judicial Appointments Commission which has been established by virtue of the Constitution (Ninety-Ninth) Amendment Act 2014 and the National Judicial Appointments Commission Act 2014 will recommend to the President, names of the eligible persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto. The new body which is to be headquartered in New Delhi is to be headed by the Chief Justice of India. The compositional structure of the Commission makes crystal clear that the judiciary has an active or one can even say a superior role in whole exercise of the recommending power of the commission. As per the NJAC Act, the commission is to be a six member body, including the Chairman, which is to be the Chief Justice of India. The body will comprise of the Chief Justice of India, two senior most Judges of the Supreme Court of India, Union Law Minister and two eminent personalities belonging to schedule caste/tribe or women community. The Act lays down the procedure for selection of these two eminent persons wherein a body comprising of the Prime Minister, Leader of Opposition (in case, there is no leader of opposition, then the leader of the largest opposition party) and the Chief Justice of India shall collectively decide on their nomination in the body. Hence looking into the numerical strength of all the three organs of the state in the composition of the commission, the judiciary is represented by 3 members, while the Executive is represented by only one member, i.e. the Law Minister. The selection process of two eminent members has an active role of judiciary in addition to the common consensus of the ruling and opposition party. Hence minutely studying the composition of the commission, there is not a single chance of Executive abusing its power with malafide intention to influence the judiciary. Hence speculations of loss of judicial independence by enactment of NJAC hold no serious ground.

The Act also provides ample room for ensuring federal spirit in the procedure for appointment of Judges and Chief Justice of the High Courts, where the Commission shall take into consideration the views of the Governor and Chief Minister of the concerned state where appointments are to be made.

The Act also ensures that the Commission doesn't take up an arbitrary shape where members using their numerical strength and other kind of malafide influence get the recommendation

passed by the Commission. Accordingly the Act states that no recommendation of the Commission shall be valid, if it has been vetoed by any of the two members of the commission. Hence a consensus is required amongst the members regarding the recommendation to be made to ensure a non partisan and transparent process of appointment of judges[286]. Hence the veto provision is an important key to ensure that the judiciary role is not diminised and it is being counter-balanced by giving the executive, legislature and the civil society a say in the appointment of judges and ensure check and balance within the system. This arrangement is perfectly in tune with the original constitutional provision for appointment laid down under Article 124 of the Constitution.

The creation of the NJAC has also solved the problem of judicial accountability as the judiciary will now be accountable to the other branches of the government in the matter of its appointments.

Another major benefit the NJAC sought to provide was that it would remove the elements of nepotism and favouritism and appoint candidates based on merit and experience[287].

Hence the setting up of the National Judicial Appointments Commission for judicial appointments is beyond doubt a benevolent, balanced and a perfect method for appointing the persons of integrity to the temples of justice[288].

4.5. Demerits of the National Judicial Appointments Commission

4.5.1. Preamble and Object

The preamble of the National Judicial Appointments Commmission Act 2014 states that: "*to regulate the procedure to be followed by the National Judicial Appointments Commission for the purpose of recommending persons for appointment as Chief Justice of India and other Judges of the Supreme Court, Chief Justices and other Judges of High Courts, its functions, procedure to be followed by it and for matters connected therewith or incidental thereto."*[289]

The preamble of the Act is underspecified and does not adequately articulate the motivations and the legislative intent of this major constitutional reform.

4.5.2. Procedure for Discharge of National Judicial Appointments Commission Functions Inadequate

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[286] Satyam Rathore and Ankita Rituraj, "National Judicial Appointment Commission: An Analysis of NJAC's Effect on Judicial Independence in India", LAW MANTRA JOURNAL, Volume 2 Issue 8, pp. 5.

[287] Sameeksha V Salimath, Sanmathi Dayanand & Rajath Francis Vithayathil, "National Judicial Appointments Commission: A Comprehensive Review", INTERNATIONAL JOURNAL FOR LEGAL DEVELOPMENTS AND ALLIED ISSUES, Volume 1 Issue 4, pp. 7.

[288] Satyam Rathore and Ankita Rituraj, "National Judicial Appointment Commission: An Analysis of NJAC's Effect on Judicial Independence in India", LAW MANTRA JOURNAL, Volume 2 Issue 8, pp. 5.

[289] *Preamble of the National Judicial Apppointment Commission Act 2014*

The procedure for the National Judicial Appointments Commission in discharging its functions is specified in Section 10(1) and (2) of the National Judicial Appointments Commission Act 2014. It merely states that the National Judicial Appointments Commission has the power to specify, by regulations, the procedure for discharge of its functions[290]. This is highly inadequate. The Act has to clarify the procedure of the National Judicial Appointments Commission in discharging its functions but as it currently stands, the Act has entirely delegated this authority to the realm of rules.

4.5.3. Merit Based Appointment

While Article 124(3) and Article 217(2) of the Constitution prescribes the minimum requirement of a person to be eligible to be appointed as a Supreme Court and High Court Judge, the Constitution (Ninety-Ninth) Amendment Act 2014 and Section 5(2) and Section 6 (3) of the National Judicial Appointments Commission Act, 2014 prescribes that the Commission shall on the basis of "ability and integrity" and "ability, merit and any other criteria of suitability as may be prescribed by the regulations" nominate name for appointment as a Judge of the Supreme Court and the High Court which will continue to afford sufficient amount of nepotism and favoritism to the members of the National Judicial Appointments Commission. This leads to an absurd situation where the eligibility of Supreme Court and High Court Judges will be determined not just by the Constitution but by "regulations" of the Commission[291]. These are the only provisions which hint at the need for a merit based criteria for appointment[292].

There should have been standardized criteria for evaluating merit. The American Judicature Society and the American Bar Association administer an official performance evaluation of the Judges. The recommended performance evaluation criteria include-: legal ability, integrity and impartiality, communication skills, professionalism and temperament, administrative capacity, necessary skills for jurisdiction of court[293].

4.5.4. Diversity

Under the Constitution (Ninety-Ninth) Amendment Act 2014 and the National Judicial Appointments Commission Act 2014, there is no mention of a mandate to ensure a diverse judiciary or diversity. The constitution of the National Judicial Appointments Commission is itself not guided by any principles of diversity.

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[290] *Section 10 of the National Judicial Appointment Commission Act 2014*

[291] Mohd. Shakeib Naru and Shristi Mathur, "Who Will Choose the Judges? The Debate around NJAC and Collegium System", JOURNAL OF LEGAL STUDIES AND RESEARCH, Volume 1 Issue 2 (2015), pp. 11.

[292] Ms. Vidhi Agarwal, "JUDICIAL INDEPENDENCE IN JUDICIAL APPOINTMENTS: A NECESSITY?", LAW MANTRA JOURNAL, Volume 2 Issue 6, pp. 6

[293] *Ibid*

The Acts should have encouraged diversity in appointment, in terms of gender, religion, caste and ethnicity, like it is done in the UK[294] and South Africa[295]. A diverse background of Judges ensures wider considerations regarding any subject matter, which, in turn, helps in achieving the basic objectives of a fair, just and independent judicial system[296].

4.5.5. Independence of the Judiciary

The Constitution (Ninety-Ninth) Amendment Act 2014 and the National Judicial Appointments Commission Act 2014 poses a great extent to the independence of the judiciary. The involvement of members other than members of judiciary in the commission has defeated the provision of the Constitution which separated the judiciary from the executive so that the sanctity of the justice giving institution can be maintained. The Act is a carefully crafted legislation designed to create a bureaucratised and subservient judiciary. Further, the government is one of the largest litigants in the country and if the government itself appoints the judges and has a dominant role in the appointment of judges, then it would definitely lead to the question of biasness in the judgement given by the court. It would then be difficult to call the judges of the Supreme Court or High Court independent in their workings and discharge of their duties, thus leading to the erosion of the very principle and basic feature of the Constitution i.e. the independence of Judiciary and the democracy. In addition, the ability of two members of the commission to exercise veto powers will cause much consternation. If two members disagree, then the appointment does not take place. The political element in the appointment system would always gravitate towards the spoils system, which continues most unabashedly across party lines[297].

4.5.6. Article 124C of the Indian Constitution

Article 124C of the Indian Constitution is the most sinister and enables Parliament to empower the commission to make regulations to carry out the provisions of the Act. Thus, constitutional provisions and safeguards can easily be thwarted by regulations framed by the commission[298].

4.5.7. Eminent Persons

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[294] *Section 64 of the Constitutional Reforms Act 2005*
[295] *Section 174(2) of the South African Constitution*
[296] Ms. Vidhi Agarwal, "JUDICIAL INDEPENDENCE IN JUDICIAL APPOINTMENTS: A NECESSITY?", LAW MANTRA JOURNAL, Volume 2 Issue 6, pp. 6.
[297] Preeti Sharma, "Judiciary in India, No Longer Independent: A Critical Analysis", INTERNATIONAL JOURNAL OF LAW AND LEGAL JURISPRUDENCE STUDIES, Volume 1 Issue 6, pp. 6.
[298] Mohd. Shakeib Naru and Shristi Mathur, "Who Will Choose the Judges? The Debate around NJAC and Collegium System", JOURNAL OF LEGAL STUDIES AND RESEARCH, Volume 1 Issue 2 (2015), pp. 11.

The Constitution (Ninety-Ninth) Amendment Act 2014 and the National Judicial Appointments Commission Act 2014 does not prescribe any qualifications or the specialised knowledge that is to be possessed by the eminent persons[299]. In absence of such a criteria being laid down the committee consisting of the Prime Minister, the Leader of Opposition and the Chief Justice shall be free to appoint persons without accountability of merits and other factors which will, in effect, lead to abuse of the provision. Most importantly, there is no provision for stating the reasons for selection of either "eminent persons" mentioned in the act.

4.5.8. Appointment of High Court Judges

The National Judicial Appointments Commission Act 2014 in Section 6 requires that for the appointment of High Court judges, the commission shall seek nomination from the Chief Justice of the concerned High Court who in turn is required to consult two-senior most Judges of the High Court and such other Judges and eminent advocates of that High Court. The qualification for eminent advocates is not being specified and it is to be determined by the regulations.

Further, the commission shall elicit in writing the views of the Governor and the Chief Minister of the State concerned before making any recommendation in such manner as may be "prescribed by the regulations." However, the Act is silent as to what happens if the Governor or Chief Minister or both object to such nomination and the manner of eliciting the views of the Governor and the Chief Minister[300].

4.5.9. No Reasons for Recommendation of Candidate

The Constitution (Ninety-Ninth) Amendment Act 2014 and the National Judicial Appointments Commission Act 2014 stipulates that the main function of the National Judicial Appointments Commission is to recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts without any provision for stating reasons for recommendation of candidates. This can lead to abuse of powers by the members.

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[299] *Ibid*

[300] Mohd. Shakeib Naru and Shristi Mathur, "Who Will Choose the Judges? The Debate around NJAC and Collegium System", JOURNAL OF LEGAL STUDIES AND RESEARCH, Volume 1 Issue 2 (2015), pp. 12.

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CHAPTER V

COMPARATIVE ANALYSIS OF THE LAW RELATING TO JUDICIAL APPOINTMENT IN OTHER COUNTRIES

A search for a new model must inevitably impel a bird's eye view of the models in vogue in various countries of the world. It may be that a particular model may not be suitable for a country like India. Any new model must be such as to be suitable to the needs and demands of consumers of justice of a developing country like India where a sizeable segment of consumers of justice comes from illiterate or semi-literate class of the society. It must however be remembered that every country may have devised its own model either a new or by historical developments to suit its requirements. Therefore, when making the choice, other factors will have to be kept in view such as level of development of the society, percentage of literacy in the society, its per capita requirement of institution for dispensing justice, the

capacity of the marginal class to spend for the service of rendering justice and other allied factors.

The foregoing part makes clear that constitutional text, history, and precedent do not support judicial primacy in appointments. Perhaps, however, the NJAC Judgment could be defended on empirical grounds. The Indian Supreme Court, led by Justice Khehar, repeatedly emphasized the dangers to judicial independence posed by the executive[301]. The court held not only that undue executive influence should be removed from the selection process, but also that any executive role in judicial appointments would violate judicial independence[302].

This part seeks to examine the validity of that claim. Drawing from democratic constitutions around the world, it advances three claims:

(1) That the executive has historically played a decisive role in judicial appointments in several countries, including those with parliamentary systems;

(2) That to the extent countries are moving away from politicized appointment processes, they have moved towards independent commissions and greater transparency;

5.1. The Executive Role in Judicial Appointments

A. USA

Executives around the world play a role in selecting judges. In the United States, Article II, Section 2 of the U.S. Constitution empowers the President to nominate judges to the federal judiciary, and those nominees must be confirmed by the U.S. Senate[303]. The U.S. President, unlike her Indian counterpart, presides over a separate branch of government and is not beholden to a council of ministers[304]. Thus, while the U.S. President has far more autonomy, she is also an overtly political actor[305]. It is well documented that Presidents appoint judges who they believe will vote in their favor on contentious legal issues. It has also been shown that judges tend to vote in line with the party whose President appointed them to the bench. The U.S. appointments process becomes particularly politicized when the Senate majority is

[301] *Supreme Court Advocates-on-Record-Association and Another v Union of India* (2016) 4 SCC 1 at 356-59
[302] *Ibid* at 368-69
[303] *Article II Section 2 Clause 2 of the U.S. Constitution*
[304] *Article II of the U.S. Constitution*
[305] Mark Tushnet, Judicial Selection, Removal and Discipline in the United States, in JUDICIARIES IN COMPARATIVE PERSPECTIVE, pp. 134 and 136, H.P. Lee (ed.), 2011.

drawn from the political party opposing the President[306]. These situations are often characterized by a vicious cycle in which Senate obstructionism is countered by presidential recess appointments[307], leading to greater obstructionism, and so on[308].

However, the politicization of the appointments process does not necessarily harm judicial independence. That is, the fact that President choose judges who they think will share their constitutional or legal philosophy does not always or even consistently lead to judges who vote as the President would like[309]. Moreover, the fact that the U.S. Senate must confirm all nominees recognizes that judicial appointments are inherently political[310]. Introducing a legislative check reduces the potential for executive misconduct, while the quality of appointments and transparency of the process should increase[311].

B. Australia

Turning from the U.S. presidential system to long-established parliamentary systems, similarly, the executive maintains a role in judicial appointments. In Australia, the Governor-General—a figurehead executive who represents the Queen—appoints federal judges, while Governors—the ceremonial state executives—appoint state-level judges[312]. At both levels, the executive acts on the advice of the Attorney General. Attorney General conventionally consults the Chief Justice and other sitting judges, but, for the most part, such consultation is not statutorily required and does not always occur[313]. Australia, therefore, has a system very similar to India's prior to the Second Judges' Case, in which a largely ceremonial executive, advised by the government, has the final word on appointments[314].

C. New Zealand

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[306] *Ibid* at 139-40

[307] *Article 2 Section 2 Clause 3 of the U.S. Constitution states that: - "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next session."*

[308] Michael C. Tolley, Legal Controversies over Federal Judicial Selection in the United States: Breaking the Cycle of Obstruction and Retribution over Judicial Appointments, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, pp. 80–82, Kate Malleson & Peter H. Russell (eds.), 2006.

[309] David A. Yalof, Filling the Bench, in THE OXFORD HANDBOOK OF LAW AND POLITICS, pp. 469 and 474, Keith E. Whittington, et al. (eds.), 2008 (noting that Chief Justice Warren and Associate Justices Brennan, Blackmun, and Souter "confounded the Presidents who appointed them by taking unexpected positions on high-profile issues").

[310] Mary L. Clark, "Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments", 71 LOUISIANA LAW REVIEW, No. 2, 2011, pp. 451-502.

[311] *Ibid* at 459-65

[312] H.P. Lee, Appointment, Discipline and Removal of Judges in Australia, in JUDICIARIES IN COMPARATIVE PERSPECTIVE, pp. 27and 28, H.P. Lee (ed.), 2011.

[313] *Ibid* (noting that such consultation is statutorily prescribed for high court appointments).

[314] *Article 74 of the Indian Constitution states: - President of India "shall act in accordance with the advice" of the President's Council of Ministers.*

In New Zealand, the Attorney General determines most judicial appointments[315]. For High Court appointments, the Attorney General consults with the Chief Justice, various other Judges, and the Presidents of the New Zealand Bar Association and Law Society[316]. The nominees are selected from a list drawn by the Solicitor General, the Chief Justice, and the President of the Court of Appeal. Thus, while judges have an important role in judicial nominations, the appointments power is vested solely in the executive.

D. Canada

Canada, too, vests the executive with sole authority over judicial appointments. The Constitution Act, 1867 empowers the federal government—the Governor-General, on the cabinet's advice—to nominate judges to the Supreme Court of Canada, the Federal Court, and the Tax Court[317]. Section Ninety-Six of the Act further empowers the federal government to make appointments to the provincial superior courts. Section Ninety-Two of the Act created the remaining provincial courts, and provincial governments nominate judges to those courts. Thus, Canada is a parliamentary democracy in which the executive makes judicial appointments and, unlike in Australia and New Zealand, it does so without any requirement—legal or conventional—to consult with sitting judges.

5.2. Recent Judicial Reforms: Toward Independent Commissions and Greater Transparency

Many countries have reformed their judicial appointment procedures in recent years. They are as follows:-

A. United Kingdom

The United Kingdom instituted sweeping reforms through the Constitutional Reform Act 2005. This Act not only created a U.K. Supreme Court, which replaced the House of Lords as the country's highest judicial authority, but also transformed the appointments process. Prior to 2005, the Lord Chancellor, a high-ranking cabinet official, had the authority to make judicial appointments. The Constitutional Reform Act 2005 transferred the appointments power to two independent commissions, one for judges in England and Wales and another for

[315] The only exceptions are for New Zealand's Chief Justice, who is appointed by the prime minister, and the judges of the Maori Land Court, who are appointed by the Minister of Maori Affairs; Philip A. Joseph, Appointment, Discipline and Removal of Judges in New Zealand, in JUDICIARIES IN COMPARATIVE PERSPECTIVE, pp. 66 and 67, H.P. Lee (ed.), 2011 (clarifying that this system has been in place since 1999; prior to 1999, the minister of justice recommended district court appointments).

[316] *Ibid* at 68 (noting that the past attorneys general have consulted the opposition "shadow" attorney general as a symbolic gesture of nonpartisanship).

[317] F.L. Morton, Judicial Appointments in Post-Charter Canada: A System in Transition, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, pp. 56 and 57, Kate Malleson & Peter H. Russell (eds.), 2006.

Supreme Court Justices. The Lord Chancellor retains the limited authority to reject judicial nominations on the basis that candidates are not suitable for the relevant positions. However, even this residual power has been the subject of potential reforms, and subsequent parliamentary bills proposed removing it altogether.

These reforms were intended to modernize judicial appointments in the United Kingdom. In particular, the commissions were designed to reduce the influence of partisanship and political patronage in judicial appointments[318]. The Judicial Appointments Commission (JAC), which appoints judges to the English and Welsh courts, is statutorily required to: select candidates only on merit; select only people of good character; and encourage diversity in the selection process[319]. It is comprised of fifteen members, including six "lay people," five judges, one solicitor, one barrister, one magistrate, and one tribunal judge. By including members with varied backgrounds and qualifications, the JAC is designed to promote merit-based selection among candidates for judicial office.

B. South Africa

South Africa has similarly reformed its judicial appointments process. The Constitution of South Africa (1996) established a Judicial Services Commission (JSC) that, *inter alia*, handles judicial appointments for all South African courts except the Constitutional Court[320]. It is chaired by the Chief Justice and, like the British JAC, it comprises a range of political, judicial, and lay members[321]. Its twenty-three members include: representatives from professional legal bodies, a law teacher, ten members of South Africa's Parliament, and four members nominated by the President in consultation with opposition leaders. The JSC fills judicial vacancies through a standard procedure that involves a call of applications in which potential candidates must complete a detailed questionnaire pertaining to their personal and

[318] Kate Malleson, The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, pp. 40–45, Kate Malleson & Peter H. Russell (eds.), 2006 (noting that increasing diversity and quality in appointments were also among the purposes in establishing the Judicial Appointments Commission).

[319] *Article 63-64 (Chapter 4, Part 4, Chapter 2) of the Constitutional Reform Act 2005*

[320] *Article 174 of the South African Constitution 1996*

[321] *Article 178(1) of the South African Constitution 1996*

professional lives[322]. After a rigorous and deliberative process, the JSC recommends candidates to the President, who officially makes the appointments, but is required to follow the JSC's advice[323].

For constitutional court vacancies, the process is more involved[324]. The JSC recommends a list of nominees to the President, who may select any of them after consulting with the Chief Justice and the leaders of all major political parties[325]. In this context, the President may refer the list of nominees back to the JSC if she feels that the nominees are unacceptable[326]. However, once the JSC suggests additional nominees, the President must make appointments from the revised list[327]. This is much like Article 74 of the Indian Constitution, under which the President may ask the cabinet to reconsider its advice, but is ultimately bound by that advice[328]. However, unlike the collegium system that has developed in India since 1993, the South African President merely consults the Chief Justice on appointments to the constitutional court, and an independent commission has the final word on appointments[329].

Several other countries have also instituted independent judicial commissions in recent years, including Belgium and Denmark in 1999 and Slovakia in 2002[330]. In all three countries, the commissions play a determinative role in judicial appointments and include both judicial and non-judicial members[331].

C. Canada

In Canada, Judicial Appointments Advisory Committees (JAACs) were established in all provinces beginning in the 1980s. The JAACs screen candidates for judicial appointments and rate each candidate as "recommended," "highly recommended," or "unable to

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[322] Hugh Corder, Appointment, Discipline and Removal of Judges in South Africa, in JUDICIARIES IN COMPARATIVE PERSPECTIVE, pp. 96 and 101, H.P. Lee (ed.), 2011.
[323] *Ibid* at 101-02; *Article 178(2) of the South African Constitution 1996*
[324] *Article 174 of the South African Constitution 1996*
[325] *Article 174(3) and 174(4)(a) of the South African Constitution 1996*
[326] *Article 174(4)(b) of the South African Constitution 1996*
[327] *Article 174(4)(c) of the South African Constitution 1996*
[328] *Article 74 of the Indian Constitution*
[329] *Article 178 of the South African Constitution 1996*
[330] THE BELGIAN HIGH COUNCIL OF JUSTICE, available at http://www.hrj.be/en; The Judicial Appointments Council, DENMARK HIGH COUNCIL OF JUSTICE, available at http://www.domstol.dk/om/otherlanguages/english/thedanishjudicialsystem/judicialappointmentscouncil/Pages/default.aspx; THE JUDICIAL COUNCIL OF THE SLOVAK REPUBLIC, available at http://www.sudnarada.gov.sk/home-page (May 20, 2018) (Time – 08:00 PM).
[331] The Danish Government is not required to follow recommendations of the Judicial Appointments Council, but always does so in practice; Maurice Adams and Benoit Allemeersch, Re-Forming a Meritorious Elite. Judicial Independence, Selection of Judges and the High Council of Justice in Belgium, in FAIR REFLECTION OF SOCIETY IN JUDICIAL SYSTEMS—A COMPARATIVE STUDY, pp. 65, 71–73, Sophie Turenne (ed.), 2015 (noting that in establishing the High Council of Justice, Belgium sought to safeguard judicial independence by transferring important powers like those over judicial appointments away from the executive and that, by doing so, it joined countries like Italy, France, and Spain where "comparable institutions" have existed since 1947, 1958 and 1977 respectively).

recommend." In 2006, however, the conservative government in Canada, led by Prime Minister Stephen Harper, eliminated the "highly recommended" category[332]. Harper's government also added a police representative to each of the JAACs and permitted the judicial representative to vote only as a tiebreaker. In sum, these reforms have given the government greater control over judicial selection and politicized the process.

In British Columbia, Alberta, and Ontario, the government can only make appointments from a pool of candidates selected by the JAAC. In other provinces, the JAAC merely gives its recommendation on candidates selected by the Attorney General. The latter model has been criticized and there have been calls to make all judicial appointments in Canada less politicized by empowering JAACs to have a role in the appointments process, and not simply at the screening stage[333].

In 2016, Prime Minister Justin Trudeau and Canada's new Liberal government established the Independent Advisory Board for Supreme Court of Canada Judicial Appointments[334]. It consists of three members: a retired judge nominated by the Canadian Judicial Council; two lawyers nominated by the Canadian Bar Association and the Federation of Law Societies of Canada, respectively; and a legal scholar nominated by the Council of Canadian Law Deans. This body is independent and nonpartisan[335]. Its mandate is to provide "non-binding merit-based recommendations" to the Prime Minister on Supreme Court appointments.

D. Australia

Australia retains a politicized appointments process where the Governor-General (at the federal level) and Governors (at the state level) appoint judges on the advice of the Attorney General. Over the years, this process has come under scrutiny for alleged corruption, lack of diversity in judges appointed, and the opacity of the process[336]. However, despite calls for

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[332] Martin L. Friedland, Appointment, Discipline and Removal of Judges in Canada, in JUDICIARIES IN COMPARATIVE PERSPECTIVE, pp. 46 and 55, H.P. Lee (ed.), 2011.

[333] Jacob Ziegel, Promotion of Federally Appointed Judges and Appointment of Chief Justices: The Unfinished Agenda, in JUDICIAL INDEPENDENCE IN CONTEXT, pp. 151, 152–53, Adam Dodek & Lorne Sissin (eds.), 2010 (arguing that Judicial Appointments Advisory Committees should play a role in the appointments process and not simply issue recommendations on potential candidates).

[334] New Process for Judicial Appointments to the Supreme Court of Canada, JUSTIN TRUDEAU, PRIME MINISTER OF CANADA (August 2, 2016), available at http://pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada (May 18, 2018) (Time-07:30 PM).

[335] Independent Advisory Board For Supreme Court of Canada Judicial Appointments, REPORT OF THE INDEPENDENT ADVISORY BOARD FOR SUPREME COURT OF CANADA JUDICIAL APPOINTMENTS (AUGUST–SEPTEMBER 2016) (Nov. 25, 2016), available at http://www.fja-cmf.gc.ca/scc-csc/Report-Independent-Advisory-Board-for-the-Supreme-Court-of-Canada-Judicial-Appointments-(November2016)_en.pdf (May 15, 2018) (Time – 06:00 PM).

[336] Elizabeth Handsley, 'The Judicial Whisper Goes Around': Appointment of Judicial Officers in Australia, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, pp. 122, 125–31, Kate Malleson & Peter H. Russell (eds.), 2006 (noting that corruption charges arose in the 1980s when several judicial officers were tried for administration of justice-

reform to increase the quality of candidates and transparency in procedures, the Australian political establishment has not moved beyond legislative committee reports and proposals for change[337].

E. Israel

In Israel, the present system of judicial appointments has been in place since the Judges Act 1953[338]. The Act created a nominations committee comprised of three judges, two representatives from the Israel Bar Association, two cabinet ministers, and two members of the Knesset[339]. Thus, while the "judicial" members outnumber the "political" members five to four, only three of those judicial members are sitting judges[340]. The Committee nominates candidates to Israel's President, who is required to follow its recommendations[341].

In 2000, following conservative political attacks on the Israeli judiciary, a committee headed by former Supreme Court Justice Itzhak Zamir re-examined the appointments process. The committee mostly praised the existing system but suggested modest reforms to make the process more transparent and professional[342]. The reforms included publicizing the names of candidates more widely and appointing a subcommittee within the nominations committee to interview each candidate. The committee had always allowed the public to submit objections against particular candidates within a twenty-one day window, and the proposed reform sought to increase public participation in the process. Thus, even in a country that has long relied on an independent commission to appoint judges, recent reforms have focused on improving transparency and obtaining feedback from a wider range of stakeholders.

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related crimes; also noting that two diversity issues were raised in the 1990s when male judges made controversial comments in sex crime cases, leading to demands for more female judges).

[337] *Ibid* at 133-34 (describing a Senate Committee Report on Gender Bias and the Judiciary published in 1994, which recommended that the criteria for judicial selection be made public and that all jurisdictions strive to increase diversity in appointments).

[338] Eli M. Salzberger, Judicial Appointments and Promotions in Israel: Constitution, Law, and Politics, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, pp. 241and 243, Kate Malleson & Peter H. Russell (eds.), 2006.

[339] *Ibid* at 247-48

[340] *Ibid* at 247

[341] *Ibid* at 252-53

[342] *Ibid* at 253

CHAPTER VI

RECENT CONTROVERSIES OF THE COLLEGIUM SYSTEM OF THE APPOINTMENT OF JUDGES IN INDIA

6.1. A Cathartic Episode for the Higher Judiciary in India

There is no doubt that January 12, 2018 will become a significant date in the judicial history of India. On the occasion of the birth anniversary of Swami Vivekananda, could it be that the four Hon'ble judges adopted his teaching of *"Arise, awake and not stop till the goal is reached"*[343]. It is the first time that sitting Justices of the Supreme Court of India have

[343] Rajesh Inamdar, "SC Judges' Press Conference: A Dark Day Or A Beacon Of Light?", available at http://www.livelaw.in/sc-judges-press-conference-dark-day-beacon-light (February 14, 2018) (Time -03:00 PM).

directly addressed the media to draw attention to their concerns about the inner workings of this institution. The stakes have been raised considerably since this act of public criticism has come from the four senior-most Justices and could be narrowly construed as one that is specifically directed at the present Chief Justice of India (CJI). On the other hand, this act of public criticism can also be interpreted as one motivated by concerns related to the preservation of institutional integrity. The letter that was jointly released to the press by Justices Chelameshwar, Gogoi, Lokur and Joseph raises two issues that directly relate to judicial administration. The first of these is the allocation of sensitive matters to benches headed by relatively junior Justices while overlooking the senior-most Justices. The second issue is that of considerable delay in the finalization of the Memorandum of Procedure (MoP) for facilitating appointments and transfers in the Higher Judiciary[344].

Terming the press conference held by four senior Supreme Court Judges on the 12 of January historic, Senior Advocate Indira Jaising has said the real heroes are the insiders who speak from within the system for its reformation. She drew parallels from the likes of Edward Snowden, who fight systemic decay from within. The activist-lawyer was speaking in Kochi in the 'Hot Seat' event organized by the All-India Professionals Congress on the topic "Judiciary: Vanguard of Democracy", hosted by Dr. Mathew Kuzhalnadan, the state President of All India Professionals Congress. The underlying theme of her talk was the need to protect judicial independence from the overarching influence of the executive, and to preserve constitutional values from the assault by new breed of "poisonous" majoritarianism. According to her, the press conference made by the senior Judges showed loss of confidence in the administration of the Supreme Court by the CJI. It was a historic moment because, for the first time, criticism emerged from within, vindicating the stand taken by several lawyers, activists and civil society members that all was not well with the Supreme Court. If the functioning of the Supreme Court in its administrative capacity is compromised, its impact will be felt in its functioning in a judicial capacity as well[345].

In the matter of judges-selection, the issue is far more complex and multi-layered. The 'collegium' model for supervising appointments and transfers in the higher judiciary has evolved through the expansive interpretation of the applicable constitutional provisions in two verdicts rendered during the 1990s. In many ways, this was the higher judiciary's long-

[344] Siddharth Chauhan, "A Cathartic Episode for the Higher Judiciary in India", available at http://www.livelaw.in/cathartic-episode-higher-judiciary-india (February 14, 2018) (Time – 07:00 PM).

[345] Manu Sebastian, "Real Heroes Are the Insiders Who Speak from within the System: Indira Jaising", available at http://www.livelaw.in/real-heroes-are-the-insiders-who-speak-from-within-the-system-indira-jaising (April 30, 2018) (Time – 05:00 PM).

term reaction to the evident interference by the executive branch which was most pronounced in the years leading up to the internal emergency of 1975-1977. Providing for the 'concurrence' of the CJI and the next four senior-most judges as part of the 'collegium' was construed as a check against domination by the executive branch. However, in recent years, there has been trenchant criticism of the 'collegium' model as well. The core of this criticism is that while the 'collegium' model was conceptualized in order to protect judicial independence in the institutional sense, there are increasing concerns about how its actual functioning over the last two decades has led to the undermining of the 'personal' independence of judges in several cases. While it is understandable that factors like inter-se seniority among serving judges and equitable regional representation are being considered, there has been growing skepticism about members of the collegium acting on considerations that are not directly linked to the capacity for judicial work. In a few instances, there have been apprehensions about personal friendships and dislikes playing a more determinative role than the publicly verifiable track-record of the person being considered for appointment to a High Court or promotion to the Supreme Court. Furthermore, the 'collegium' had earlier insisted on maintaining secrecy when it came to the contents of its deliberations[346].

Additional Solicitor General Pinky Anand batted for overturning the current system of appointment of judges terming it a 'disaster'. She was speaking at the Rule of Law Convention, 2018 organised by Bar Association of India on the topic *'Collegium System – Is there a need to have a relook'?*

"The paradox we are facing today is that problem resolvers are the problem makers", said Anand in her speech[347].

It was in this context that the present Union government had proposed the establishment of the National Judicial Appointments Commission (NJAC) which would replace the 'collegium' with a body consisting of the three senior-most Justices, the Union Law Minister and two 'eminent persons' selected by a high-powered committee. However, the constitutional amendment and the enabling legislation dealing with the same were invalidated by a five-judge bench in a case decided in October 2015. The main ground for this decision was the apprehension of undue influence by the representatives of the executive branch. The effect of the same was that the 'collegium' model has continued. However, the judges who

[346] Siddharth Chauhan, "A Cathartic Episode for the Higher Judiciary in India", available at http://www.livelaw.in/cathartic-episode-higher-judiciary-india (February 14, 2018) (Time – 07:00 PM).

[347] Murali Krishnan, "Problem resolvers are the problem makers, that is the paradox", ASG Pinky Anand, available at https://barandbench.com/problem-resolvers-problem-makers-collegium-system-proved-disaster-asg-pinky-anand (February 11, 2018) (Time – 05:00 PM).

decided the NJAC case invited suggestions from the public to improve the functioning of the collegium, especially in the direction of transparency. Since then, there has been a frequent back-and-forth between the senior-most Justices and the Union Government on the framing of a Memorandum of Procedure (MoP) to better regulate the process of judges-selection[348].

6.2. Judges Appointment-A Ping Pong Game? Is Indefinite Sitting Over The Files Choking The Judicial System?

Protracted delays in finalizing the MoP has led to an escalation in the number of judicial vacancies, especially at the level of the High Court's which in turn is leading to the huge pendency of cases at the courts. As per the vacancy position as on the 1st May 2018, there are 413 vacancies in various High Courts[349]. The frustration of various stakeholders over the ever-growing judicial vacancies has led to hunger strike and cease-work at Karnataka, Calcutta and Orissa High Courts in order to express its *"anxiety"* regarding non-appointment of judges. The data collected about the different High Courts shows a very sad state of affairs regarding the status of appointment of judges to the High Courts. The data shows that the Calcutta High Court is currently functioning at less than half its strength, with only 33 judges as opposed to a sanctioned strength of 72 judges. The shortage is only going to contribute further to the 2.2 lakh pendency of cases at the court[350]. Further, more than 60% of the posts of the Karnataka High Court are currently lying vacant and the court has been functioning with 24 judges as against a sanctioned strength of 62[351]. Following a hunger strike staged by Karnataka lawyers for filling up vacancies, the Centre notified the appointment of five judges to Karnataka High Court.

The Telangana High Court Advocates' Association and the A.P. High Court Advocates' Association have also protested against judicial vacancies at the High Court of Judicature at Hyderabad. The Associations also highlighted the fact that the High Court hasn't had a regular Chief Justice for nearly three years now. Several appointments to the High Court have

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[348] Siddharth Chauhan, "A Cathartic Episode For The Higher Judiciary In India", available at http://www.livelaw.in/cathartic-episode-higher-judiciary-india (February 14, 2018) (Time – 07:00 PM)

[349] Devashish Bharuka, "Judicial Emergency", available at http://www.livelaw.in/judicial-emergency (May 06, 2018) (Time – 7:47 PM).

[350] Apoorva Mandhani, "Calcutta Lawyers Announce 5-Day Cease Work To Protest Against Judicial Vacancies", available at http://www.livelaw.in/calcutta-lawyers-announce-5-day-cease-work-protest-judicial-vacancies (February 17, 2018) (Time – 05:30 PM).

[351] Apoorva Mandhani, "Post Hunger-Strike by Lawyers, Centre Notifies the Appointment of 5 New Judges in Karnataka HC", available at http://www.livelaw.in/post-hunger-strike-lawyers-centre-notifies-appointment-5-new-judges-karnataka-hc-read-notification (February 09, 2018) (Time – 10:00 PM).

been cleared by the Collegium but have been pending with the Centre for a while now[352]. *The data collected reveals that a staggeringly high number of more than 143 names are pending for judicial appointment*. Most of such names are pending at the Government level, after clearance by the Supreme Court Collegium[353].

The data shows that Governmental inaction is at a height when it comes to appointment of judges and filling of vacancies in the judiciary. The integrity of the judges is put to disrepute, because the common man, without understanding the huge pressure of workload on judges due to lack of adequate number of judges, attributes the case pendency to the effectiveness and attitude of the judges. This puts a former CJI to much stress, and that was what the nation witnessed when CJI Thakur failed to veil his emotions at a public function and had to dry his eyes, while speaking of the judicial workload. The CJI of this country had to literally plead to the government to fill judicial posts and to appoint adequate number of judges. The Prime Minister Narendra Modi who witnessed the candid disclosure of feelings by the Hon'ble CJI, responded in his usual masterly style stating that he was not a person who would merely walk away from issues of importance; the Prime Minister assured that he would study the matter seriously and would find a way. All this happened in April 2016. The "way" is yet to be unravelled. Thus, judicial appointments have taken a backseat priority.

Though the Central Government is bound by the recommendation of the collegium, there is no stipulation as to the time frame within which the collegium recommendations have to be considered. It appears that the Central Government is making use of this loophole of lack of time-limit by sitting over files time and again to defeat collegium recommendations. Similarly, there are many names pending before Supreme Court collegium and decision is not taken in a time bound manner[354].

6.2.1. Definite Timelines for Judicial Appointments

[352] Apoorva Mandhani, "Telangana and AP Advocates Demand Supreme Court Bench at Hyderabad, Speedy Appointment of CJ and Judges to HC", available at http://www.livelaw.in/telangana-ap-advocates-demand-supreme-court-bench-hyderabad-speedy-appointment-cj-judges-hc (February 27, 2018) (Time – 11:30 PM).

[353] Live Law News Network, "Exclusive: Judges Appointment-A Ping Pong Game? Is Indefinite Sitting Over The Files Choking The Judicial System?", available at http://www.livelaw.in/exclusive-judges-appointment-a-ping-pong-gameis-indefinite-sitting-over-the-files-choking-the-judicial-system (March 14, 2018) (Time – 07:30 PM).

[354] Live Law News Network, "Exclusive: Judges Appointment-A Ping Pong Game? Is Indefinite Sitting Over The Files Choking The Judicial System?", available at http://www.livelaw.in/exclusive-judges-appointment-a-ping-pong-gameis-indefinite-sitting-over-the-files-choking-the-judicial-system (March 14, 2018) (Time – 07:30 PM).

The Supreme Court of India in the case of ***Sunil Samdaria v UOI Through its Secretary, Ministry of Law and Justice and Others***[355] observed that in the interest of all the stakeholders, including the judiciary, definite timelines should be drawn for each stage of the process of appointment of judges so that process of appointment is accomplished within a time-bound manner.

Expressing the concern over the delay on appointment of judges and huge pendency of cases before the court, Justice A.K. Sikri and Ashok Bhushan said;

"In ***Supreme Court Advocates-on-Record Association and Others v Union of India***[356]*, the court expressed in categorical terms that the process of appointment must be initiated at least one month prior to the date of an anticipated vacancy. It was done to achieve an ideal situation, namely, to ensure that the post is filled up immediately after the occurrence of the vacancy so that no time is lost. Unfortunately, it still remains a far cry".*

"In the first instance, names are not forwarded by the HC in time. What to talk of sending the names one month before the occurrence of an anticipated vacancy, names are not forwarded even much after the vacancy has occurred. It is also seen that once the names are forwarded, they remain pending at the Executive level for unduly long time, before they are sent to the Collegium of the SC for approval along with the inputs of the Executive. Even after the clearance of the names by the Collegium, these remain pending at the level of the Executive. All this results in inordinate delay".

The Bench also noted that: - *"Sometimes, it takes more than one year to complete the process from the date of forwarding the names till appointment. There are instances where time consumed is much more than one year even. In the case of judicial officers of subordinate judiciary, who are recommended for appointment to the HC, this process of consuming so much time adversely affects their tenure. It is a matter of common knowledge that most of the judicial officers get a chance for elevation when only few years' service is left. Thus, when unduly long time is taken, even this lesser tenure gets further reduced. It also gives rise to the situation like the present one. Equally, members of the Bar, whose names are recommended for elevation to the HC, undergo hardships of a different kind".*

The Bench also observed that it is unjust that the fate of such persons remains in limbo for indefinite periods and gives rise to unnecessary conjectural debates. It leads to unpleasant situations which can be avoided.

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[355] *Sunil Samdaria v UOI Through its Secretary, Ministry of Law and Justice and Others* WP (C) No. 835 of 2017

[356] *Supreme Court Advocates on Record Association and Others v Union of India* (1993) 4 SCC 441

"It is more so, to keep hope and aspiration of litigants alive and to fulfil the commitment of providing a speedy justice, the process of appointment of judges of the High Court needs more expedition at the hands of all who have to discharge the constitutional obligation entrusted by the Constitution of India".

The Bench was hearing a petition challenging the appointment of two District Judges as High Court Judges, who had retired from judicial service in 2016. Upholding the appointment, the Bench ruled that retired judicial officers can be appointed as High Court judges under Article 217(2)(a).

"Appointment of Additional Judges was envisaged as appointment to cope with the increased work load of cases in different High Courts. The temporary increase in the business of the HC or by reason of arrears of work therein was a reason for appointment or reason for invoking power under Article 224, although as noted by Constitution Bench in S.P. Gupta's case by lapse of time the use of Article 224 has been substantially changed. But there is no denying that to cope with the increase in business of the HC and the arrears of cases emergent steps are needed by all to fulfil the object and purpose for which constitutional provision was brought in place, enormous delay in appointment of judges of the HC's not only frustrate the purpose and object for which Article 224(1) was brought into the Constitution but belies the hope and trust of litigant who comes to the HC's seeking justice and early disposal of their cases", observed the Bench[357].

The Madras Bar Association (MBA) has filed a writ petition in the case of ***Madras Bar Association v Union of India***[358] in the Supreme Court calling for strict timelines to be implemented at every stage of the process of judicial appointments.

The petition calls for directions to the Centre to process recommendations made by the Supreme Court and High Court Collegia. It states,

"The arbitrary and inordinate delay by the Executive in appointment of judges to the Higher Judiciary is violative of Articles 14, 19 and 21 of the Constitution".

It is no secret that the Executive has failed to act on a large number of recommendations made by the Supreme Court Collegium. The petition points out that more than a hundred appointments to the High Courts are in limbo, having been stuck at various stages of the appointment process. This, it is contended, amounts to an exercise of indirect veto by the Executive.

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[357] Live Law News Network, "Definite Timelines Should Be Drawn for Each Stages of Appointment Process of Judges: SC", available at http://www.livelaw.in/definite-timelines-drawn-stages-appointment-process-judges-sc-read-judgment (February 23, 2018) (7:19 PM).

[358] *Madras Bar Association v Union of India* Writ Petition (Civil) of 2018

With a view to preventing this from happening any longer, the Court has been urged to set specific timelines in the Memorandum of Procedure (MoP) for appointment of judges.

"…the existing MOPs are entirely silent on the timelines for appointment of judges to this Hon'ble Court and Permanent Judges to the High Courts, thus giving the Executive a carte blanche to stonewall the recommendations sent by the respective Collegia".

It is further argued that though the MoPs do not provide a specific timeframe within which appointments must be processed, the Supreme Court in the Second Judges case stressed that undue delay must be avoided. That judgment states,

"On initiation of the proposal by the Chief Justice of India or the Chief Justice of the High Court, as the case may be, failure of any other constitutional functionary to express its opinion within the specified period should be construed to mean the deemed agreement of that functionary with the recommendation, and the President is expected to make the appointment in accordance with the final opinion of the Chief Justice of India…"

The petition also highlights the burgeoning vacancies across the twenty-four High Courts in the country, as a result of the stalling of appointments. As per the latest statistics, 420 High Court posts are lying vacant, while the Supreme Court has 8 vacancies.

"…the failure to fill up the vacancies has exponentially increased the workload on the sitting Hon'ble Judges of the Higher Judiciary. As a result, the quality of justice delivery system has been adversely impacted, and further delays would render the functioning of courts unmanageable…"

Reference is also made to strikes held at the High Courts of Karnataka and Calcutta protesting the number of the vacancies.

It has therefore been prayed that the Supreme Court fix definitive timelines, wherever absent, for every step of the process for appointments of judges to the Apex Court and the High Courts.

The petition has been drawn by advocates Rahul Unnikrishnan and N Sai Vinod and will be argued by Senior Advocate Arvind Datar. The matter has been listed for July 2 – the day the Court reopens – before the Bench headed by Chief Justice of India Dipak Misra[359]. A Supreme Court Bench headed by Chief Justice Dipak Misra and Justices Khanwilkar and DY Chandrachud observed that "some progress" has been made in relation to judicial

[359] Aditya AK, "PIL filed in Supreme Court seeking definitive timelines for judicial appointments", available at https://barandbench.com/pil-filed-supreme-court-calling-definitive-timelines-judicial-appointments (June 28, 2018) (01:02 PM).

appointments. "We have made some progress", remarked Justice Misra. The Bench also remarked that some appointments have already gone through before adjourning the matter for August[360].

6.3. Appointment to Supreme Court: Case of Justice K.M. Joseph and Senior Advocate Indu Malhotra

As per the Hindu Report, on January 10, 2018 the Supreme Court Five Judge Collegium comprising Chief Justice Dipak Misra and Justices Chelameswar, Ranjan Gogoi, Madan B Lokur and Kurian Joseph has unanimously recommended to the Law Ministry the names of Senior Advocate Indu Malhotra and Uttarakhand Chief Justice KM Joseph for appointment as Supreme Court Judges[361] and the collegium recommendations has been published in the Supreme Court website[362]. Indu Malhotra is the first woman Supreme Court lawyer who has been recommended from the bar for appointment as Supreme Court Judge[363]. After considering names of Chief Justices and other judges of the High Courts, the Collegium has seen it fit to recommend Justice KM Joseph for elevation as a Supreme Court Judge, despite his not featuring high on the seniority list. The resolution states,

"The Collegium considers that at present Mr. Justice K.M. Joseph, who hails from Kerala High Court and is currently functioning as Chief Justice of Uttarakhand High Court, is more deserving and suitable in all respects than other Chief Justices and senior puisne Judges of High Courts for being appointed as Judges of the Supreme Court of India."

The resolution had, in fact, specifically mentioned that the decision was being taken after considering the combined seniority of Chief Justices and senior puisne Judges of High Courts, apart from their merit and integrity[364].

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[360] Murali Krishnan, "We have made some progress", CJI Dipak Misra on judicial appointments", available at https://barandbench.com/made-progress-cji-dipak-misra-judicial-appointments (July 02, 2018) (Time – 08:31 PM).

[361] Live Law News Network, "In a First a Woman Lawyer Recommended For SC Judgeship: SC Collegium Recommends Names of Sr. Ad. Indu Malhotra and Justice KM Joseph", available at http://www.livelaw.in/in-a-first-a-woman-lawyer-recommended-for-sc-judgeship-sc-collegium-recommends-names-of-sr-ad-indu-malhotra-and-justice-km-jospeh (February 11, 2018) (Time – 08:30 PM).

[362] Live Law News Network, "Breaking: Collegium Recommendations for Two Supreme Court Judges and HC Chief Justices Published in SC Website", available at http://www.livelaw.in/breaking-collegium-recommendations-two-supreme-court-judges-hc-chief-justices-hc-published-sc-website (February 01, 2018) (Time – 08:00 PM).

[363] Live Law News Network, "In a First a Woman Lawyer Recommended For SC Judgeship: SC Collegium Recommends Names of Sr. Ad. Indu Malhotra and Justice KM Joseph", available at http://www.livelaw.in/in-a-first-a-woman-lawyer-recommended-for-sc-judgeship-sc-collegium-recommends-names-of-sr-ad-indu-malhotra-and-justice-km-jospeh (February 11, 2018) (Time – 08:30 PM).

[364] Apoorva Mandhani, "Centre and SC Lock Horns over Judicial Appointments in Open Court", available at http://www.livelaw.in/centre-and-sc-lock-horns-over-judicial-appointments-in-open-court (May 05, 2018) (Time – 07:15 PM).

The Collegium had also considered names from the Bar, and ended up choosing Malhotra for elevation, stating,

"We have also considered the names of eminent members of the Bar. In our considered opinion, at present, Ms. Indu Malhotra, Senior Advocate, is eminently suitable for being appointed as a Judge in the Supreme Court."[365]

The Judiciary and the Executive have been at loggerheads over judicial appointments for a very long time is no secret[366] and the standoff between the Government and the Judiciary has been continuing ever since the Constitution Bench of the Supreme Court declared the National Judicial Appointments Commission (NJAC) unconstitutional in October, 2015[367]. The names of Justice K. M. Joseph and Indu Malhotra, Senior Advocate, has been in the pipeline for quite some time now and have been pending with the Government after their recommendations to elevation as SC judges by collegium during January 2018 and to avoid a decision on the matter, the files are kept in a limbo. The reasons for the same are unclear as of now[368]. Reportedly, the Centre is not favouring the elevation of Justice Joseph, and is objecting to his elevation for no reasons. However, the real reason for the objection is widely speculated as the Centre's unhappiness over Justice Joseph rendering judgment against the Centre by quashing imposition of Presidential rule in Uttarakhand in May 2016. The artificial objection on seniority/regional communal representation by the Centre does not hold water, and appears to be an empty ruse to block the elevation of Justice Joseph[369]. Because, in the majority opinion of the Second Judges case, it was held, *"It is beyond controversy that merit selection is the dominant method for judicial selection and the candidates to be selected must possess high integrity, honesty, skill, high order of emotional stability, firmness, serenity, legal soundness, ability and endurance."* The same position was reiterated in the Third

[365] Aditya AK, "CollegiumResolutions: Indu Malhotra, KM Joseph recommended for elevation to SC", available at https://barandbench.com/collegium-indu-malhotra-km-joseph (February 01, 2018) (Time – 07:30 PM).

[366] Aditya AK, "Will the Centre (again) defy the Collegium's call to elevate KM Joseph J?", available at https://barandbench.com/centre-collegium-elevation-km-joseph (February 14, 2018) (Time – 12:00 AM).

[367] Apoorva Mandhani, "Centre and SC Lock Horns over Judicial Appointments in Open Court", available at http://www.livelaw.in/centre-and-sc-lock-horns-over-judicial-appointments-in-open-court (May 05, 2018) (Time – 07:15 PM).

[368] Varun Chirumamilla, "Law Ministry sends back Collegium's recommendation to elevate Indu Malhotra, KM Joseph J to SC", available at https://barandbench.com/law-ministry-indu-malhotra-km-joseph (February 31, 2018) (Time – 05:30 PM).

[369] Live Law News Network, "Exclusive: Judges Appointment-A Ping Pong Game? Is Indefinite Sitting Over The Files Choking The Judicial System?", available at http://www.livelaw.in/exclusive-judges-appointment-a-ping-pong-game-is-indefinite-sitting-over-the-files-choking-the-judicial-system (March 14, 2018) (Time – 07:30 PM).

Judges Case in 1998[370] where it was categorically stated that *merit was the predominant consideration for appointment as SC judge. Where, therefore, there is outstanding merit, the possessor thereof deserves to be appointed regardless of the fact that he may not stand high in the all India seniority list or in his own High Court– This was the pronouncement in 'Third Judges Case'.* It is clear from the Collegium resolution on January 10 that it is aware of his position in the all-India seniority list, and yet recommended him, in view of his "outstanding merit"[371].

In light of these facts, the Centre's defiance of the Collegium's recommendations stands on shaky ground, and the allegation that it still holds a grudge against Joseph J for the President's Rule judgment does not seem too far-fetched[372]. The Centre's response to recommendations of Justice Joseph and Indu Malhotra will act as *litmus test* to its reverence to judicial independence[373].

Justice Kurian Joseph has penned a strongly worded letter dated April 9, 2018 to Chief Justice of India, Dipak Misra while urging him to act on non-appointment of judges by the Central government by stating that the *"very life and existence"* of the Supreme Court of India is under threat. The letter states that *"history will not pardon us"* if the court doesn't respond to the government's unprecedented act of sitting on the Collegium's recommendation to elevate Justice KM Joseph and Indu Malhotra. The letter further states that it is the *"first time in history of this court where nothing is known as to what has happened to a recommendation after three months."*[374] Justice Joseph has also urged the CJI to constitute a Bench of seven senior-most judges to take up the matter *suo motu* on the judicial side. Justice Joseph has also stated that, *"government owes a duty to take a call on the recommendation as soon as the same is sent from the Collegium. Failure to discharge their duty by sitting over on the recommendations of the Collegium doing nothing, in administrative law, is abuse of power."* The letter states that the act of the executive in not clearing the names, sends the message that if judges don't tow the line of the government,

[370] Aditya AK, "Will the Centre (again) defy the Collegium's call to elevate KM Joseph J?", available at https://barandbench.com/centre-collegium-elevation-km-joseph (February 14, 2018) (Time – 12:00 AM).
[371] Live Law News Network, "Exclusive: Judges Appointment-A Ping Pong Game? Is Indefinite Sitting over the Files Choking the Judicial System?", available at http://www.livelaw.in/exclusive-judges-appointment-a-ping-pong-gameis-indefinite-sitting-over-the-files-choking-the-judicial-system (March 14, 2018) (Time – 07:30 PM).
[372] Aditya AK, "Will the Centre (again) defy the Collegium's call to elevate KM Joseph J?", available at https://barandbench.com/centre-collegium-elevation-km-joseph (February 14, 2018) (Time – 12:00 AM).
[373] Live Law News Network, "Exclusive: Judges Appointment-A Ping Pong Game? Is Indefinite Sitting over the Files Choking the Judicial System?", available at http://www.livelaw.in/exclusive-judges-appointment-a-ping-pong-gameis-indefinite-sitting-over-the-files-choking-the-judicial-system (March 14, 2018) (Time – 07:30 PM).
[374] Bar and Bench, "Very life and existence" of Supreme Court under threat, Justice Kurian Joseph writes to CJI Dipak Misra", available at https://barandbench.com/kurian-joseph-supreme-court-existence-threat-letter-dipak-misra (April 12, 2018) (Time – 06:00 PM).

they will suffer. *"More than anything else, it sends a wrong message which is loud and clear to all Judges down the line not to cause any displeasure to the Executive lest they should suffer. Is this not a threat to the independence of the judiciary?"*[375]Appealing for intervention by the Supreme Court, Justice Joseph states that *"if there is no normal delivery on completion of the gestation period, what is urgently done is a Caesarean section. Unless such a surgical intervention is made at an appropriate time, the child in the womb dies."*[376] Therefore, in the interest of this great institution and independence of judiciary it is proper to have an appropriate Bench constituted forthwith before the child dies.

Justice Jasti Chelameswar in a recent interview with Karan Thapar had also shared his concern about the government sitting over the files of Justice KM Joseph and Indu Malhotra without taking a decision[377].

Justice Chelameswar had also addressed a letter to CJI Dipak Misra calling for a full court on the judicial side to discuss the matter of government interference in appointment of judges to High Courts and how it meddles with the functioning of the judiciary.

More particularly, he had condemned the practice of the Centre directly communicating with the High Courts and had asserted that *"bonhomie"* between the Judiciary and the Government *"sounds the death knell to Democracy"*.

Justice Chelameswar has protested the manner in which an elevation to the Karntaka High Court was interfered with by the government. He then goes on to reveal how Chief Justice of the Karnataka High Court Dinesh Maheshwari was contacted directly by the Executive to reassess the recommendation of the Supreme Court Collegium to elevate then District and Sessions Judge, P. Krishna Bhat. And the manner in which Bhat's elevation was being stymied has, in Chelameswar J's words, led to "dismay and disbelief".

By way of background in 2014, when Bhat was District and Sessions Judge in the Belagavi District of Karnataka, he had sent a report to the High Court relating to the misconduct of Ms. Shashikala, then a Judicial Magistrate of First Class. The High Court registered a vigilance case, but did not choose to act upon the same till February 2016.

Once Bhat's name came up for elevation as a High Court judge, Shashikala made a complaint against him. The allegations were investigated by former Chief Justice S.K. Mukherjee, who

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[375] Murali Krishnan, "Save the child before it dies in womb, Read full text of letter by Kurian Joseph J. to CJI Dipak Misra", available at https://barandbench.com/save-baby-dies-womb-read-full-text-letter-written-kurian-joseph-j-cji-dipak-misra (April 12, 2018) (Time – 10:30 PM).

[376] Bar and Bench, "Very life and existence" of Supreme Court under threat, Justice Kurian Joseph writes to CJI Dipak Misra", available at https://barandbench.com/kurian-joseph-supreme-court-existence-threat-letter-dipak-misra (April 12, 2018) (Time – 06:00 PM).

[377] *Ibid*

found that the same were concoted and incorrect and that Shashikala had made her allegations only to malign Bhat.

Subsequently, the Supreme Court Collegium had recommended Bhat and five others for elevation to the Karnataka High Court. Having established that the allegations against Bhat were bogus, the collegium did not take them into account. However, the Centre chose to withhold Bhat's elevation while accepting the other five. As Chelameswar J points out, it is a classic case of the Centre "sitting on the file" due to vested interests. The letter states, "Now comes what is unpredictable and unthinkable. If the government had any reservations or misgivings about Shri Krishna Bhatt's nomination, it could have sent back the recommendation for our consideration- a well established though long forgotten practice. Instead, it sat tight on the file. In other words, our recommendation still retained its validity and legitimacy". Instead the government has sent a communication to the Chief Justice of the Karnataka High Court "to look into the issue". The Chief Justice acts on it and convenes a meeting of the Adminsitrative Committee and decides to reinvestigate the issue, thus burying the previous Chief Justice's findings on the same issue.

Thus, Justice Chelamswar concludes by stating that *"We only have to look forward to the time, which may not be far-off if not already here, when the executive directly communicates with the High Court's about the pending cases and what orders to be passed. We can be happy that much of our burden is taken away. And an Honorable CJ like Dinesh Maheswari may perhaps be ever willing to do the executive bidding, because good relations with the other Branches is a proclaimed constitutional objective".*

However, the letter written by Justice Chelameswar has prompted Maheshwari J to drop the investigation into the complaints against Bhat[378].

However, interestingly on the same day as supersession i.e. April 26, 2018 is proving to be a black day of Indian Judiciary once again. In a move that could well be the final death knell in the already strained relationship between the Centre and the Judiciary[379], the Central Government has refused to clear the name and unabashedly returned the collegium recommendation led by CJI for its reconsideration for the elevation of Chief Justice of Uttarakhand High Court, Justice K. M. Joseph to the Supreme Court. The collegium had

[378] Aditya AK, "Bonhomie between Judiciary and Government sounds the death knell to Democracy; Chelameswar J in letter to CJI", available at https://barandbench.com/bonhomie-between-judiciary-and-government-sounds-the-death-knell-to-democracy-chelameswar-j-in-letter-to-cji (March 29, 2018) (Time – 11:45AM).

[379] Apoorva Mandhani, "Centre Sends Back Recommendation For Justice K.M. Joseph's Elevation To The Supreme Court", available at http://www.livelaw.in/breaking-centre-sends-back-recommendation-justice-k-m-josephs-elevation-supreme-court (April 26, 2018) (Time – 06:30 PM).

recommended the names of Justice K.M. Joseph and Senior Advocate Indu Malhotra for appointment as Supreme Court judges[380]; the Government after more than three months has cleared the file of Indu Malhotra and notified her appointment to the Supreme Court on April 26 and ordered swearing in of Senior Advocate Ms. Indu Malhotra alone as a Judge of the Supreme Court, severing the collegium recommendation, thereby ousting Justice K.M. Joseph. This had led to a huge outcry with many in the legal fraternity alleging that this was a payback by the Centre for the judgment by Justice K.M. Joseph, striking down Presidential rule in the State of Uttarakhand in 2016. Echoing the sentiment of Supreme Court's SR Bommai (1994) judgment, Justice Joseph wrote: *"The Government when it takes action under Article 356 is expected to be completely non partisan but the Centre had imposed President's Rule contrary to the law laid down by the Apex Court"*. The Government's refusal to accept the Collegium's verdict of Justice KM Joseph is continuation of the naked politics of the executive and its nebulous role in the process of judicial appointments[381].

Senior Counsel Indira Jaising had even mentioned the matter before CJI Dipak Misra and demanded that there should be a stay on the warrant of appointment of Indu Malhotra till the file of Justice Joseph is cleared and the petition be listed and heard urgently. *We agree that Ms. Malhotra is an eminent member of the bar and we stand by her elevation…but we are concerned about the splitting up of the names*, argued Senior Advocate Indira Jaising[382]. However, the SC refuses urgent hearing on a plea regarding non-elevation of Justice KM Joseph and held that it can't stay the warrant of a constitutional functionary as it is inconceivable and unimaginable.

On this recent development happening on the same day, the words of Justice Kurian Joseph can be reminded, who recently opined *"that Centre's inaction would send a 'wrong message' to Judges that they would 'suffer' if they don't tow the Centre's line."*[383]

The recommendation of Justice K.M. Jospeh has been rejected by the Law Minsitry noting that it would *"not be fair and justified to other more senior, suitable and deserving Chief Justices and senior Puisne Judges of various High Courts."* In its letter to the collegium, the

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[380] Swapnil Tripathi, "April 26-Revisiting The Black Day Of Indian Judiciary", available at http://www.livelaw.in/april-26-revisiting-black-day-indian-judiciary (April 26, 2018) (Time – 09:00 PM).

[381] Santosh Paul, "The Politics of the Executive in Judicial Appointments", available at https://barandbench.com/politics-executive-judicial-appointments (March 25, 2018) (Time – 11:25 AM).

[382] Mehal Jain, "Can't Stay The Warrant Of A Constitutional Functionary: SC Refuses Urgent Hearing On A Plea Regarding Non-elevation Of Justice KM Joseph", available at http://www.livelaw.in/cant-stay-warrant-constitutional-functionary-sc-refuses-urgent-hearing-plea-regarding-non-elevation-justice-km-joseph (April 26, 2018) (Time – 07:30 PM).

[383] Swapnil Tripathi, "April 26-Revisiting the Black Day of Indian Judiciary", available at http://www.livelaw.in/april-26-revisiting-black-day-indian-judiciary (April 26, 2018) (Time – 09:00 PM).

Centre points out that Justice Joseph is placed at serial number 42 in the All India High Court Judges' Seniority List, with eleven Chief Justices of various High Courts currently senior to him. Besides, it also seeks to assert that the Apex Court has not had any representation from the Scheduled Castes and Scheduled Tribes for a while now and therefore the Centre would probably want to appoint one instead of Justice Joseph. The Centre further points out that while at least ten High Courts are not represented in the Supreme Court currently, Justice Joseph's elevation to the Supreme Court would mean the Supreme Court would have two Judges from Kerala High Court and that fair representation required nominees from other states instead. It even stresses on the fact that Kerala High Court has *"adequate representation"* within High Courts as well, with two other Chief Justices- Justice T.B. Radhakrishnan (Chhattisgarh High Court) and Justice Antony Dominic (Kerala High Court)- belonging to the same High Court.

It then refers to the judgments in the Second and Third Judges' cases, and explains, *"At this stage, elevation of one more judge from Kerala High Court as a Judge of the Supreme Court of India does not appear to be justified as it does not address the legitimate claims of the Chief Justices and Puisne Judges of many other High Courts and forestalls the claim of other senior Chief Justices and Puisne Judges. It is also, in our considered view, not in accord with the parameters laid down by the Supreme Court itself in the Second Judges' Case and reiterated in Third Judges' case."*

With regard to the consideration paid to seniority, it asserts, *"It may be stated that the Collegium System is a creation of judicial decision of the Supreme Court……From our records, it is evident that to ensure regional representation, seniority may not have been taken as an important consideration but in case where the High Court concerned is adequately represented in the Supreme Court and also as Chief Justices of different High Courts, then this consideration cannot be, and should not be, ignored all together to the detriment and prejudice of other senior judges."* The Centre also justifies segregation of the proposal, *"in the interest of expeditious action on appointments and filling up of vacancies"*, thereby approving Ms. Malhotra's elevation while sending back Justice Joseph's[384].

The recent issue of Centre's non-approval of the collegium recommendation of Justice KM Joseph was also highlighted by Senior Advocate Indira Jaising. *"The government cannot pick and chose judges from the list forwarded by the Collegium of Judges. The collegium is not a*

[384] Apoorva Mandhani, "Centre Sends Back Recommendation For Justice K.M. Joseph's Elevation To The Supreme Court", available at http://www.livelaw.in/breaking-centre-sends-back-recommendation-justice-k-m-josephs-elevation-supreme-court (April 26, 2018) (Time – 06:30 PM).

search committee which forwards a list of names from which the government can select a person," she said. According to her, such cherry-picking of Judges hits at the heart of the independence of judiciary. She recollected that the erstwhile CJI RM Lodha had responded assertively when the government had attempted to block the elevation of Gopal Subramanium by segregating him from the list approved by collegium. However, the Supreme Court did not respond positively to the petition moved by her against the appointment of Indu Malhotra alone excluding Justice KM Joseph, thereby missing an opportunity to assert judicial independence[385].

An extraordinary meeting of the Supreme Court Bar Association (SCBA) has been sought for on April 26, 2018 to pass a resolution against the Centre's exclusion of Justice KM Joseph from elevation to the Supreme Court, ignoring the recommendations of the SC collegium. The proposed resolution expressed deep anguish at the non-inclusion of Justice KM Joseph and condemned the *"selective approach of the Executive"* and it calls upon the Supreme Court to take appropriate steps to restore the independence of judiciary[386]. Later it has been called of and scheduled on 7th May 2018.

With the rift between the Centre and the Supreme Court widening, the two recently had a face-off in open Court on May 05, 2018 over the delay in appointment of judges. What ensued was a heated exchange between the Centre's top law officer and the Supreme Court Bench. Mr. Venugopal complained that the collegium wasn't recommending enough names for the High Courts, which are currently working at 60% of their sanctioned strength. To this, the Bench remarked that this didn't give the Centre the liberty to sit over names that had been recommended long back. Justice Lokur then enquired about the number of collegium recommendations pending with the Government. When the AG said that he did not have the data, the Bench shot back, *"This is the problem with you (the government). When it comes to attacking (the) judiciary, you have the data. But when it comes to the government then you say you don't have the figures."* The exchange prompted Mr. Venugopal to remark jocularly: *"I think NJAC was a better option to have."* The Court did not respond to that. Mr. Venugopal, nevertheless, went on to blame the collegium for not making enough recommendations, saying, *"Collegium has to look at the future. Recommendations need to be*

[385] Manu Sebastian, "Real Heroes Are the Insiders Who Speak from within the System: Indira Jaising", available at http://www.livelaw.in/real-heroes-are-the-insiders-who-speak-from-within-the-system-indira-jaising (April 30, 2018) (Time – 05:00 PM).

[386] Manu Sebastian, "SC Lawyers Seek Extra-Ordinary Meeting of SCBA to Protest against Exclusion of Justice KM Joseph", available at http://www.livelaw.in/sc-lawyers-seek-extra-ordinary-meeting-scba-protest-exclusion-justice-km-joseph (April 26, 2018) (Time – 02:00 PM).

made keeping in mind vacancies that will arise six months later……The collegium doesn't send us the names and the government is told it is being tardy in processing."[387]

However, on 11th May 2018, Supreme Court Collegium has decided to back Chief Justice of the Uttarakhand High Court Justice KM Joseph for the elevation to Apex Court despite Government spurning his nomination last month. The move is certain to further strain the already frayed relationship between the executive and the top judiciary. Collegium comprising of CJI Dipak Misra, and Justice J Chelameswar, Justice Ranjan Gogoi, Justice MB Lokur and Justice Kurian Joseph stated that they had, *"on principle, unanimously agreed that the recommendation for appointment of Justice KM Joseph as a judge of the Supreme Court should be reiterated"*. The SC Collegium meeting comes in the backdrop of a letter written by Justice J. Chelameswar, the senior-most judge of the Apex Court to the CJI asking him to convene a meeting of the collegium so that it could urgently reiterate its recommendation to the Centre that Chief Justice of the Uttarakhan High Court, Justice K.M. Joseph be elevated to the Supreme Court. With the collegium clearing his name, it will be difficult for the government to say no a second time, although it can take as much time as it wants before it decides on this. Further, Justice Kurian Joseph, during his visit to Kerala had also reportedly made it clear that he was in favour of reiterating the recommendation of the collegium on the issue of elevation of Chief Justice of Uttarakhand High Court, Justice K.M. Joseph as Judge of the Supreme Court. *"The Collegium might have to reiterate its recommendation furnishing facts and figures, and citing precedent, which have not been put in perspective by the Government when it returned his name,"* Justice Kurian Joseph told the Indian Express[388].

6.4. Collegium Vs Centre: Facts And Figures Show That Centre's Reasons for Non-elevation of Justice KM Joseph Are Weak

The Narendra Modi government's argument in withholding the elevation of Justice K.M. Joseph– currently Chief Justice of the Uttarakhand High Court – to the Supreme Court was that he was 'junior' to 41 High Court Judges, that Kerala was already represented in the Apex Court and that fair representation required nominees from other states instead.

However, data reveals that Law Minister Ravi Shankar Prasad was grossly unjustified in raising the objections he did in his letter to Chief Justice of India Dipak Misra while returning

[387] Apoorva Mandhani, "Centre and SC Lock Horns over Judicial Appointments in Open Court", available at http://www.livelaw.in/centre-and-sc-lock-horns-over-judicial-appointments-in-open-court (May 05, 2018) (Time – 07:15 PM).

[388] Apoorva Mandhani, "SC Collegium Likely to Reiterate Recommendation for Justice K.M. Joseph's Elevation: Justice Kurian Joseph", available at http://www.livelaw.in/sc-collegium-likely-to-reiterate-recommendation-for-justice-k-m-josephs-elevation-justice-kurian-joseph (April 30, 2018) (Time – 05:00 PM).

Justice Joseph's name since there have been many instances in the past both of states being given a higher representation of judges and of judges of lower or comparable seniority level to Justice Joseph in seniority making it to the apex court.

Incidentally, Justice Kurian Joseph, the lone judge from Kerala in the Apex Court right now, is due to retire on November 29, 2018 and so the Centre's resistance to the appointment of Justice K.M. Joseph on grounds of "fair representation" of regions appears all the more unfounded[389].

6.4.1. Nine instances when two or more judges in Supreme Court were from Kerala

The chart below – prepared on the validity of the Centre's decision to block Justice K.M. Joseph – clearly shows that the argument furnished by Prasad that his elevation would take the number of judges from Kerala in Supreme Court to two was weak to say the least. There have been nine instances in the past when two or more Judges in Supreme Court have been from Kerala[390].

Sr. No.	Total Judge Strength in Kerala High Court was	Number of Judges in the Supreme Court at the relevant time were	Name of Judge (s) in the Supreme Court
1	11	2	Justice C.A. Vaidyialingam and Justice K.K. Mathew
2	11	2	Justice K.K. Mathew and Justice V.R. Krishna Iyer
3	13	2	Justice V. Balakrishna Eradi and Justice V. Khalid
4	17	2	Justice T.K. Thommen and Justice M. Fathima Beevi
5	19	2	Justice K.S. Paripoornan and Justice K.T. Thomas
6	21	2	Justice K.T. Thomas and Justice K.G. Balakrishnan

[389] Gaurav Vivek Bhatnagar, "Collegium Vs Centre: Facts And Figures Show That Centre's Reasons for Non-elevation of Justice KM Joseph Are Weak", available at http://www.livelaw.in/collegium-vs-centre-facts-and-figures-show-that-centres-reasons-for-non-elevation-of-justice-km-joseph-are-weak (May 04, 2018) (Time – 04:00 PM).

[390] *Ibid*

7	29	2	Justice K.G. Balakrishnan and Justice P.K. Balasubramanyan
8	38	3	Justice K.G. Balakrishnan, Justice Cyriac Joseph and Justice K.S.P. Radhakrishnan
9	38	2	Justice KSP Radhakrishnan and Justice Kurian Joseph

On eight of these occasions, there were two judges from the state in the Supreme Court. These judges have been Justice C.A. Vaidyialingam and Justice K.K. Mathew, Justice K.K. Mathew and Justice V.R. Krishna Iyer, Justice V. Balakrishna Eradi and Justice V. Khalid, Justice T.K. Thommen and Justice M. Fathima Beevi, Justice K.S. Paripoornan and Justice K.T. Thomas, Justice K.T. Thomas and Justice K.G. Balakrishnan, and Justice K.G. Balakrishnan and Justice P.K. Balasubramanyan, Justice KSP Radhakrishnan and Justice Kurian Joseph.

There was also an instance, when three judges from Kerala – Justice K.G. Balakrishnan, Justice Cyriac Joseph and Justice K.S.P. Radhakrishnan – had served in the Apex Court at the same time[391].

6.4.2. Delhi has had more judges in SC despite lower judiciary strength

The data punches another hole in Prasad's argument because High Courts with lower judge strength than Kerala have in the past sent more judges to the Supreme Court. One such example was of Delhi High Court, which despite having judge strength of 36 as against 38 of Kerala, at one point in time had three judges in the Supreme Court i.e. Justicce Y.K. Sabharwal, Justice Dalveer Bhandari and Justice D.K. Jain.

Likewise, the Gauhati High Court with judge strength of just 24 had two judges in the Supreme Court in Justice Ranjan Gogoi and Justice Amitava Roy.

In fact, apart from the two instances of Kerala and Delhi cited above, there have been two more in which three judges from a state have made it to the Supreme Court at the same time. One of these was when Justice S.N. Variava, Justice B.N. Srikrishna and Justice S.H. Kapadia from the Bombay High Court were together in the Supreme Court and the other was when Justice Ruma Pal, Justice Tarun Chatterjee and Justice Altamas Kabir from the Calcutta

[391] Gaurav Vivek Bhatnagar, "Collegium Vs Centre: Facts And Figures Show That Centre's Reasons for Non-elevation of Justice KM Joseph Are Weak", available at http://www.livelaw.in/collegium-vs-centre-facts-and-figures-show-that-centres-reasons-for-non-elevation-of-justice-km-joseph-are-weak (May 04, 2018) (Time – 04:00 PM).

High Court served in the Apex Court, all at the same time. So clearly there is no rule or precedent which prohibits a second Judge from a state as big as Kerala from finding a place in the Supreme Court.

It had also been argued earlier that the Centre's regional representation logic is not on a firm footing because at present too the representation of judges in the Supreme Court is not proportional[392]. While out of the 25 apex court judges, three each are from Delhi High Court and Bombay High Court; two each are from the Allahabad, Madhya Pradesh, Karnataka and Andhra Pradesh High Courts; and one each from the High Courts of Kerala, Odisha, Gauhati, Punjab & Haryana, Madras, Patna and Himachal Pradesh.

On the other hand, as many as 10 High Courts have no representation in the Supreme Court. These include Calcutta, Chhattisgarh, Gujarat, Rajasthan, Jharkhand, J&K, Uttarakhand, Sikkim, Manipur and Meghalaya.

6.4.3. Seniority argument is also not correct

The "seniority" argument presented by the Centre to stonewall Justice K.M. Joseph's elevation – he is at 42 in the all-India seniority list of High Court Judges – also does not hold water because when Justice Ruma Pal of the Calcutta High Court was made a Supreme Court Judge she was at number 70 on the seniority list.

And there have been four other instances when judges who were lower than 30 in the seniority list made it to the Supreme Court. This included Justice B.N. Srikrishna (seniority level 33) and Justice S.H. Kapadia (38) of the Bombay High Court; Justice Amitava Roy (35) of Calcutta High Court, and Justice P.K. Balasubramanayan (seniority 38) of the Kerala High Court. Clearly, the variance in seniority has in the past never had a role to play in a High Court Judge's elevation to the Supreme Court.

6.4.4. Centre's argument on filling the post with a SC/ST judge also weak

The Centre's argument to fill the post with a SC/ST Judge was also weak since there were at least four more vacant posts in the Supreme Court.

Moreover, with six more Judges due to retire during this year, the Modi government would have anyway got several opportunities to press for filling up of some of these slots with Judges from these historically under-represented categories.

Terming the denial of promotion to Justice Joseph as "unfortunate," many of them had clearly blamed the Centre for stalling the Judge's appointment to the Supreme Court because

[392] Gaurav Vivek Bhatnagar, "Collegium Vs Centre: Facts And Figures Show That Centre's Reasons for Non-elevation of Justice KM Joseph Are Weak", available at http://www.livelaw.in/collegium-vs-centre-facts-and-figures-show-that-centres-reasons-for-non-elevation-of-justice-km-joseph-are-weak (May 04, 2018) (Time – 04:00 PM).

he had overturned President's Rule in Uttarakhand, much to the annoyance of the Central Government. They had insisted that the *"settled convention is that the government cannot segregate the names"* of nominees recommended by the collegium[393].

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CHAPTER VII

CONCLUSION

7.1. Findings

The judiciary in India enjoys power more than ever before and is the most powerful judiciary of the world. Its work is not just limited to the judicial review as provided in the Constitution. Judiciary interferes in every aspect of the social and political life through the tool of judicial activism. It enjoys immense public authority. The fact is that, in a democratic republic, power of the individual enjoying it along with accountability is essential to avert any kind of disaster in any democratic system.

Independence of judiciary is the basic requisite for ensuring a free and fair exercise of powers by the different organs of the Government in a democratic system. The framers of the Indian Constitution at the time of framing of our Constitution were concerned about the kind of judiciary they wanted to have. This concern of the members was responded by Dr. Ambedkar in the following words: *"There can be no difference of opinion in the house that our judiciary*

[393] Gaurav Vivek Bhatnagar, "Collegium Vs Centre: Facts And Figures Show That Centre's Reasons for Non-elevation of Justice KM Joseph Are Weak", available at http://www.livelaw.in/collegium-vs-centre-facts-and-figures-show-that-centres-reasons-for-non-elevation-of-justice-km-joseph-are-weak (May 04, 2018) (Time – 04:00 PM).

must be both independent of the executive and must be competent in itself"[394]. However, a controversy always lies between the judiciary and the executive over the appointment of judges from the outset of the Constitution. This controversy is the outcome of follies committed by both these organs in the past.

Appointment of Judges is a cardinal process in a democratic country like India and is an integral aspect of judicial independence and it should be done with utmost care and caution. The significance of every single appointment to the Supreme Court or a High Court was emphasized in the majority opinion in ***K.Veeraswami v Union of India and Others***[395] where it was held that *"A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system…a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof"*. The system of judicial appointment in India has been a very topsy-turvey jouney. Prior to 1993, a collaborative model of judiciary-executive appointment was followed. However, due to certain instances of controversial appointments, the system of appointments underwent a sea change with the introduction of a judicial collegium. India is the only country of the world where judges possess the right of appointing themselves in the name of independence of judiciary and basic structure of the Constitution of India. The framers of our Constitution decided not to give the ultimate power to the judges. Dr. Ambedkar, the Father of the Indian Constitution, never envisaged that the power of judicial appointment would vest in any one organ of the government, that is, either the executive or the judiciary. It was the intention of the framers of the Constitution to evolve a system that would include the participation of both the organs of the government. This multiplicity of authorities was proposed so as to ensure checks and balances. The Constitution also postulates a consultative and participatory process between the constitutional functionaries for appointing the best possible person as a judge of SC and HC. The ***First***[396]***, Second***[397] and the ***Third Judges Case***[398] highlighted the flaws which plagued the system of judicial appointments and transfers; thereby resulting in these cases. The Collegium System was afflicted by problems like lack of transparency, accountability and more than anything else; the basis on which judges were chosen was unclear. Granville

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[394] Dr. B.R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly and later Law Minister of India Reply to the debate on the draft provisions of the Constitution on the Supreme Court (May 24, 1949) in CONSTITUENT ASSEMBLY DEBATES, Vol. VIII, p. 258.

[395] *K.Veeraswami v Union of India and Others* 1991 SCR (3) 189: 1991 SCC (3) 655

[396] *S.P. Gupta v Union of India* AIR 1982 SC 149

[397] *Supreme Court Advocates on Record Association v Union of India* AIR 1994 SC 268

[398] *In re Presidential Reference* AIR 1999 SC 1

Austin has observed that the act of recommendation or non-recommendation of names for judicial selections on "undisclosed criteria" has been the norm since the inauguration of the Constitution[399]. In this backdrop, the establishment of the National Judicial Appointments Commission, an independent public institution, having a representative nature comprising of members of the executive, legislature, judiciary and eminent persons is a welcome, benevolent and positive step ahead of the collegium sytem in the direction of judicial reforms, transparency, integrity and judicial accountability calculated to give better security to the independence of judiciary and to maintain public confidence in the appointment system, while preventing disregard of meritorious judges through false objective criteria. Independence of the judiciary must remain intact along with accountability of the judges. Sanctity of the judiciary depends upon its fair and impartial conduct which should be free from arbitrary powers. The supremacy of the Constitution can be maintained only if along with separation of powers, the system of checks and balances is also implemented. In a democratic society, where legislature is accountable to the people and the executive has an accountability towards the legislature, Judiciary too must be accountable to the people in a constitutional manner which doesn't effects its ability of imparting free and non partisan justice. As it is said, absolute power corrupts absolutely; we the citizens of this magnificent country should make sure that all the three organs of the state work in a harmonious way abiding by the Constitution and having checks and balances over each other. Hence establishment of the NJAC not only makes the judiciary accountable and representative but also strengthens its professionalism and independence from any kind of malafide activities and partisan character, by making it more transparent, democratic and open to public scrutiny in accordance with the intentions of our founding fathers. This reform would effectively restore parity between executive and judiciary in appointment of judges, which is constitutional and in conformity with rule of law, democracy and separation of powers and to ensure the appointment of the best-qualified people to judicial office. The Constitution (Ninety-Ninth) Amendment Act and the National Judicial Appointments Commission Act, 2014 has a bigger objective to achieve i.e. the overriding effect of the JAC over the practices such as seniority while deciding the Chief Justice of India, judges sitting in the panel to decide their own fate etc., which have attained the status of custom over the years.

However, an analysis of both these systems reveals that neither of the two is foolproof. The NJAC has the potential to become an ideal system but in the current form it suffers from

[399] Granville Austin, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE, 1st ed. 1999, pp. 125.

some defects. The Act leaves a lot to the regulations to be framed by the Commission and is heavily inflated with words and phrases like "ability, integrity, merit and any other criteria of suitability" or "Commission can, by regulations, specify such other procedure for selection and appointment of a Judge of Supreme Court and High Court", or "Commission can make regulations with regard to any other matter" etc. which keeps several aspects of the appointment process subject to the manipulation by the Commission. The Act thus, needs re-evaluation and some significant changes in the composition of commission, procedure and the criteria for appointments in order to make it an error free. Thus, the following reforms are suggested in order to make it an efficient and effective mechanism.

7.2. Recommendations

A. Preamble and Object

The preamble of the National Judicial Appointments Commission Act 2014 states that: "*to regulate the procedure to be followed by the National Judicial Appointments Commission for the purpose of recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto."* The preamble of the Act is underspecified and does not adequately articulate the motivations and the legislative intent of this major constitutional reform. A purposive and holistic interpretation of provisions of law requires a clearly stated preamble to it.

Given that the preamble and the object of the Act is currently inadequate, it is recommended that it be framed broadly and in conformity with the UN Basic Principles on the Independence of the Judiciary, 1985. The object of the legislation should mandate the equal participation of Judiciary and Executive in the appointment of a competent, independent and impartial judiciary capable of upholding constitutionalism and rule of law in the country, through a process that ensures selections solely on merit and encourages diversity in the

range of persons appointed, so as to enhance public confidence in the institution and make the system of appointments more accountable.

B. Procedure for Discharge of National Judicial Appointments Commission Functions Inadequate

The procedure for the National Judicial Appointments Commission in discharging its functions is specified in Section 10(1) and (2) of the National Judicial Appointments Commission Act 2014. It merely states that the National Judicial Appointments Commission has the power to specify, by regulations, the procedure for discharge of its functions. This is highly inadequate. The Act has to clarify the procedure of the National Judicial Appointments Commission in discharging its functions but as it currently stands, the Act has entirely delegated this authority to the realm of rules.

It is therefore recommended that the Act should clarify- (a) regulations and quorum for meetings of NJAC in taking decisions; (b) provisions for removal of the members of the NJAC when necessary; (c) a basic framework for making appointments such as the process of inviting applications, eligibility for applications, criteria for short-listing of candidates based on merits and ensuring diversity in candidates can be included within the legislation instead of delegating it to executive decision making; (d) the power of the NJAC to reconsider or review its nominations; (e) the number of nominations to be sent by the NJAC to the President; (f) the regulations may propose a specified time frame during which vacancies should be filled or recommendations be made.

C. Qualifications for Appointment: Ensuring Merit and Diversity in Appointments

- **Merit Based Appointment**

The Constitution (Ninety-Ninth) Amendment Act 2014 and the National Judicial Appointments Commission Act 2014 states that "the person recommended is of ability, integrity, merit and any other criteria of suitability." This is the only provision in the Act which hints at the need for a merit based criteria for appointment.

It is therefore suggested that there should be a standardized criteria for evaluating merit. For example, the American Judicature Society ("AJS") and the American Bar Association ("ABA") administer an official performance evaluation of the judges. The recommended performance evaluation criteria include-: legal ability, integrity and impartiality, communication skills, professionalism and temperament, administrative capacity, necessary skills for jurisdiction of court.

The South African Constitution mandates that that an "appropriately qualified" and "fit and proper" person may be appointed. While realizing the difficulty in interpreting such wide

phrases, the Judicial Services Commission in 2010 created supplementary criteria to select meritorious candidates. The criteria are:

1. Is the proposed appointee a person of integrity?

2. Is the proposed appointee a person with the necessary energy and motivation?

3. Is the proposed appointee a competent person?

(a) Technically competent

(b) Capacity to give expression to the values of the Constitution

4. Is the proposed appointee an experienced person?

(a) Technically experienced

(b) Experienced in regard to values and needs of the community

5. Does the proposed appointee possess appropriate potential?

6. Symbolism. What message is given to the community at large by a particular appointment?

It is therefore recommend that there needs to be a shift from the seniority-based appointment practice towards a merit-based appointment. Meritorious quality of appointment is central to the aims and objectives of such legislation and this cannot be left to be stipulated by delegated legislations. Provisions asserting this must be clearly stated in the Act similar to Constitutional Reforms Act of 2005 in the United Kingdom where Section 63(2) states that the "Selection must be solely on merit." and Section 63(3), "A person must not be selected unless the selecting body is satisfied that he is of good character".

- **Diversity Mandate**

Under the Constitution (Ninety-Ninth) Amendment Act 2014 and the National Judicial Appointments Commission Act 2014, there is no mention of a mandate to ensure a diverse judiciary. A diverse judiciary can have a powerful symbolic value in promoting public confidence in the fairness of courts, thus important in terms of access to justice. Diversity and merit are not contradictory; rather in a pluralistic society like ours, diversity makes the judiciary more representative, thus fostering impartiality and enhancing the moral legitimacy of the institution. The Act however makes no mention of diversity. The constitution of the National Judicial Appointments Commission is itself not guided by any principles of diversity.

It is therefore recommend that the Acts should encourage diversity in appointment, in terms of gender, religion, caste and ethnicity. In Constitutional Reforms Act, 2005 of the United Kingdom, Section 64 specifies the need for "Encouragement of diversity". It states that, subject to the condition of merit and good character, "The Commission, in performing its

functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments." Similarly, the South African Constitution requires that persons appointed as judges must reflect the racial and gender composition of the country. Thus a similar approach should be adopted in the Acts as well.

D. Restructuring in the Composition of the National Judicial Appointments Commission

Articke 124A of the Indian Constitution prescribes the composition of the National Judicial Appointents Commission and it shall consist of the following, namely:-

a) The Chief Justice of India, Chairperson, *ex-officio*;
b) Two other senior Judges of the Supreme Court next to the Chief justice of India- Members, *ex officio*;
c) The Union Minister in charge of Law and Justice – Member, *ex-officio*;
d) Two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People - Members:

However, in order to make it more effective, the South African Model of a Judicial Service Commission should be followed. The South African Commission established under the Constitution of 1996 consists of the following 23 members:

(a) The Chief Justice, who presides at the meetings of the Commission;

(b) The President of the Supreme Court of Appeal;

(c) One Judge President designated by the Judges President;

(d) The Cabinet member responsible for the administration of justice, or an alternate designated by that cabinet member;

(e) Two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(f) Two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;

(g) One teacher of law designated by teachers of law at South African universities;

(h) Six persons designated by the National Assembly;

(i) Four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;

(j) Four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and

(k) When considering matters relating to a specific High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned[400].

Evidently, the South African Commission consists of Judges, the Minister of Justice, practising and academic lawyers, members of the National Assembly including a substantial number of opposition members, members of the Provincial Parliaments, persons nominated by the President of South Africa after consulting leaders of all political parties represented in the National Assembly and in some cases the Premier of the Province or the Premier's nominee. Thus the composition of the Commission is representative in nature and is not under the exclusive control of the executive government.

The system used by the South African Judicial Service Commission in appointing judges is credited with having 'a fair degree of openness' and is notable for the public nature of the consultation process. When a vacancy occurs in a court the head of that court informs the commission.The Commission identifies a list of meritorious candidates by publishing the vacancy and receives applications and nominations. A subcommittee reviews the applications and decides on a short list. At this point the names of the persons who will be interviewed, those on the short list, are published.

As part of preparation for the interview the Commission contacts professional organizations and the candidates own employer for evaluations. If any of the individuals or organizations contacted by the Commission make a negative comment on a candidate that candidate is invited to respond to the comment. All candidates are interviewed even if the number of candidates is equal to the number of posts open. The interviews are held in public, as if in 'open court' and the transcripts are posted on the Internet. It 'must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President' who 'may make appointments from the list'[401]. The President 'must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made'[402]. The Commission then 'must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list'[403]. This shows that the Commission has even greater authority in the appointment of all judges. In effect, the Commission has the appointment power. In all

[400] *Section 178 of the South African Constitution 1996*
[401] *Section 174(4)(a-b) of the South African Constitution 1996*
[402] *Section 174(4) (b) of the South African Constitution 1996*
[403] *Section 174 (4)(c) of the South African Constitution 1996*

instances, the Commission's decisions require the support of a simple majority of its members.

It is therefore recommended that the National Judicial Appointments Commission under the NJAC Act 2014 should be modelled in line with the South African Judicial Service Commission which is representative in nature comprising of members of the judiciary, representatives of the legal profession, academics and politicians, transparent and open to public scrutiny and effectively ensures the appointment of the best qualified people to judicial office.

E. Article 124C of the Indian Constitution

Article 124C of the Indian Constitution is the most sinister and enables Parliament to empower the commission to make regulations to carry out the provisions of the Act.

It is therefore recommended that the Article should be completely struck down by way of an amendment because it confers huge discretionary powers upon the Commission to regulate the important matters with the help of regulations.

F. Qualifications for Eminent Persons

The Constitution (Ninety-Ninth) Amendment Act and the National Judicial Appointments Commission Act 2014 does not prescribe any qualifications or the specialised knowledge that is to be possessed by the eminent persons. Most importantly, there is no provision for stating the reasons for selection of either "eminent persons" mentioned in the act.

It is therefore recommended that the Acts should specify clear cut qualifications and criteria for the eminent persons along with the stated reasons for the appointememt of the eminent persons.

G. Appointment of High Court Judges

The National Judicial Appointments Commission Act 2014 in Section 6 requires that for the appointment of High Court judges, the commission shall seek nomination from the Chief Justice of the concerned High Court who in turn is required to consult two-senior most Judges of the High Court and such other Judges and eminent advocates of that High Court. The qualification for eminent advocates is not being specified and it is to be determined by the regulations.

It is therefore recommended that the Act should clearly specify as to who can be regarded as an eminent advocates and what qualifications should they possess.

Further, the commission shall elicit in writing the views of the Governor and the Chief Minister of the State concerned before making any recommendation in such manner as may

be "prescribed by the regulations." However, the Act is silent as to what happens if the Governor or Chief Minister or both object to such nomination and the manner of eliciting the views of the Governor and the Chief Minister.

It is thereby recommended that the Act should clearly specify the manner of eliciting the views of the Governor and the Chief Minister and as to what happens if the Governor or Chief Minister or both object to such nomination instead of leaving it to be determined by the regulations made by the Commission.

H. No Reasons for Recommendation of the Candidates

The Constitution (Ninety-Ninth) Amendment Act 2014 and the National Judicial Appointments Commission Act 2014 stipulates that the main function of the National Judicial Appointments Commission is to recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts without any provision for stating reasons for recommendation of candidates.

It is thereby recommended that the Act should clearly specify the reasons for the recommendation of particular candidates.

I. Review and Casting of Vote

It may be recommended that after the judicial appointment is done, a specific 3 years time should to be given to the appointee. After the period of 3 years is complete, his/her work should be reviewed on the following criteria:-

I. Is the appointee a person of integrity?

II. Is the appointee a person with the necessary energy and motivation?

III. Does the appointee exhibit expected performance?

Once the commission receives the report on the review of the working of appointee, the appointee should be given a fair chance to present himself for the queries of the commission. When it's done the commission after thorough discussion, should cast a vote so as 'to allow the appointee further to carry on with his/her work or to call back'. This way the result will be that, appointee will be more accountable. The review of his/her work by the commission, will allow the commission to appoint the judges having the requisite qualities.

J. No Appointment to Profitable Offices

If the National Judicial Appointments Commission's aim is to achieve success and transparency then the members especially from judiciary side after their retirement, should not be given any position in Government's profitable offices because any such future perks of working might have effect while appointing the present judges.

If the above suggestions are effectively implemented, the National Judicial Appointments Commission is the best of the available models and an effective mechanism of judicial appointment. It is a novel shift into an institutional niche allowing for a transparent collaborative process between the executive and the judiciary and making our higher judiciary more competent and trustworthy and deserving of the lustre it once had.

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