

**JUDICIAL APPOINTMENTS IN INDIA AND THE NJAC  
JUDGEMENT: FORMAL VICTORY OR REAL DEFEAT**

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**ABSTRACT**

*The tussle between the Judiciary vis a vis the Parliament and the Executive has come a long way since the internal emergency period of the history of our country which reached its culmination in 2015 and 2016. In 2015 99<sup>th</sup> constitutional amendment regarding National Judicial Appointment Commission (NJAC) was declared unconstitutional. In 2016 Memorandum of Procedure (MoP) remained controversial. The trust deficit between these organs of the government has once again put into a sharper relief. Forty odd years have lapsed since the imposition of committed judges policy in CJI AN Ray Case (1973), the ghosts of deep suspicion between Judiciary and the other two organs echoes even today. The appointment of judges is one such grey area where the executive and the judiciary are at loggerheads. It is necessary to map the changes in the policy of judicial appointments which balances on the precarious scale of judicial accountability on one side and judicial independence on the other.*

*The research paper is divided into seven heads. First head introduces the difficulties and differences of policy regarding judicial appointments. Second head explores the original intention of the constitutional framers. It is followed by third head i.e. "The Judicial Attitude" where the inconsistent application of the original policy of*

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*judicial independence has been critically evaluated. How the anxious political parties interfered in the sustainability of judicial policy of appointment of judges has been discussed in the fourth head "National Judicial Appointment Commission: Evolution." The apparent shortcomings of NJAC are examined in the fifth head under "The Drawbacks of National Judicial Appointment Commission." Sixth head deals with the NJAC judgement and dispute regarding Judicial Independence versus Democratic Legislation. Seventh part entitled "Conclusion and suggestions" covers suggestions to improve collegium as discussed in the Supreme Court.*

## **I. Introduction**

AN INDEPENDENT AND impartial judiciary is *sine qua non* if, democracy based on rule of law and fundamental freedoms is to sustain. For a federal democracy it has added significance. Though, the principle and policy of judicial independence rests on various pillars, appointment of judges is the central pillar of the edifice. Persons in power have practiced two policies of judicial appointments *i.e.*, committed judges policy and independent judges policy. Those who advocate the committed judiciary policy base their argument on the moot point that it envisages judiciary and the judges committed towards the laws and public policy made by the democratic representatives who best know the interests and demands of the people. The policy highlighted the commitment of a judge towards the democratic institutions of legislature and executive and not towards the specific individuals wielding the power. The Judicial Procedures Reform Bill of 1937 proposed by President Franklin D. Roosevelt was a legislative endeavour to add more justices to the U.S. Supreme Court so that favorable rulings regarding New Deal legislation <sup>1</sup> could be ensured. The plight of the

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<sup>1</sup> President Roosevelt in 1932 had promised the American people the New Deal based on the assumption that the power of the federal government was needed to get the country out of the depression. Roosevelt's administration saw the passage of banking reform laws, emergency relief programs, work relief programs, and agricultural programs. Later, a

forgotten masses might fall deaf on the ears of the judges in their ivory towers, yet this policy never intended to compromise appointments in judiciary. On the other hand independent judges policy holders do not advocate any compromise in appointment in judiciary even if elite judges may not appreciate the plight of forgotten men.

The appointment of judges, therefore, has been a question of great deliberation since it involves an extremely important question with regards to the structure of Indian State, i.e., whether Indian Judiciary is independent or not. Time and again this debate has been brought into limelight and detailed discussions have taken place. From primacy of the executive to the setting up of the collegium and then to the setting up of the National Judicial Appointment Commission, the question with regards to the independence of judiciary has come a long way, and surprisingly as well as regrettably is still unsolved. Throughout the democratic years of this country various questions have been raised to determine the status of appointment and transfer of judges which has been discussed under various heads.

The primary function of the judges is to adjudicate. However the appointment of judges is a purely administrative function. Thus the judges involved in the collegium had double responsibility on their back as they had the obligation and the duty of their office to

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second New Deal was to evolve; it included union protection programs, the Social Security Act, and programs to aid tenant farmers and migrant workers. Many of the New Deal enactment and policies were criticised by Supreme Court of USA, *available at*: <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/depwwii/newdeal/> (last accessed on Feb 28, 2016).

Opposed to the traditional American political philosophy of *laissez-faire*, the New Deal generally embraced the concept of a government-regulated economy aimed at achieving a balance between conflicting economic interests. Certain New Deal laws were declared unconstitutional by the U.S. Supreme Court on the grounds that neither the commerce nor the taxing provisions of the Constitution granted the federal government authority to regulate industry or to undertake social and economic reform, *available at*: <http://www.britannica.com/event/New-Deal>, (last accessed on Feb 28, 2016).

hear various matters and decide them expeditiously and to recommend future judges and transfer of judges. They have obligations under Appellate Jurisdiction, Original Jurisdiction, Advisory Jurisdiction etc. At the same time they are chairperson or members of various committees like legal aid committee, PIL committee.<sup>1A</sup>

Thus, this was considered to be over-burdening of the judges. Secondly, many unreasonable and arbitrary practices had crept in the appointment process. Nepotism was one such phenomenon which dogged the process of appointment of judges. National Judicial Appointment Commission is said to bring about transparency in the process of appointments and transfer of judges. The development of a structure for the appointment of judges has been going on since the making of the Constitution itself. Hence it becomes pertinent to observe this process from its inception.

After a very stormy journey, the Constitutional Amendment which was one of the leading promises made by the winning political party was passed on August 13, 2014. It sought to bring about major amendments in the Article 124, Article 217 and Article 222 of the Constitution of India. This amendment added Articles 124A, 124B and 124C after article 124. Hence the amendment is merely to facilitate the formation of a National Judicial Appointment Commission. By introducing these articles and laying down the composition of the Commission this amendment gave the National Judicial Appointment Commission a Constitutional character.<sup>2</sup>

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<sup>1A</sup> See, [http://supremecourtfindia.nic.in/sites/default/files/committees\\_1.pdf](http://supremecourtfindia.nic.in/sites/default/files/committees_1.pdf).

<sup>2</sup> The Constitution of India art. 124A(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

National Judicial Appointment Commission therefore was a constitutional body.

It becomes a necessary practice to understand the whole debate surrounding the National Judicial Appointment. Another reason is that it creates a dialogue between the two wings of our Government, the Executive and the Judiciary. Whether independence of judiciary should supersede the democratic legislative process? Whether independence of judiciary is a necessary facet of any democratic country? Whether the inclusion of Executive in the appointment procedure of the judges would necessarily undermine the independent structure of the judiciary? The binary of consultation versus concurrence and a bunch of other important questions which sadly even after the passing of the most recent judgment has been able to give justice to them properly.

The matter of appointment of judges has been analyzed in extreme depth by both the legislature as well as the judiciary. The debates of the constituent assembly on judicial appointment give a wonderful insight on the legislative intent of the creators of the Constitution. While constituent assembly was divided on what ought to be the correct procedure for appointment of judges, it was sure that the power and procedure to appoint judges cannot rest exclusively with one organ. However, when we try to unearth the judicial intent on the interpretation of the process of appointment, we find appointment of judges was one more area where judicial decisions have completely overlooked the intention of framers of the

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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.

constitution.<sup>3</sup> This makes it mandatory to inquire what prompted judiciary to avoid the 'original intent theory' and to plunge in confrontationalist plank leading to ever-evolving judicial legislation in the area of appointment of judges.

## **II. Intent of the Makers of the Constitution**

Dr. Ambedkar summed down the three issues which prevailed with regards to appointment of judges. Firstly, the Judges of the Supreme Court should be appointed with the concurrence of the Chief Justice. Secondly, the appointments made by the President should be subject to the confirmation of two-thirds vote by Parliament; and thirdly, that they should be appointed in consultation with the Council of States. He sought to pave out a middle way solution to this problem and it is hence that we find out the original intentions of the fathers of our Constitution. He points out:<sup>4</sup>

It seems to me in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United State, 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 the Legislature is also not a very suitable provision. He was also not in favour of subjecting the appointment of judges to the concurrence of the Chief Justice of India. He opined that the Chief Justice of India is also a human being after all, liable to err, and vesting such a power singularly on him would not be desirable.<sup>5</sup>

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<sup>3</sup> Other areas where judicial decisions have gone beyond the intention of framers are interpretation of Article 21, basic feature theory, Article 32, judicial review etc.

<sup>4</sup> See, Constituent Assembly Debates (Proceedings), Volume VIII, Tuesday 24<sup>th</sup> May, 1949.

<sup>5</sup> *Ibid.*

The conclusion of all the discussions made and done which should be inferred in the present provision of Article 124(1) is that no absolute power can be transferred to any constitutional functionary. It is against the very basic tenets of the rule of law. Hence it is the consultative process between the Constitutional functionaries which effects and finally brings about the appointment of judges, thus ensuring the independence of judiciary in a democratic nation.

### III. The Judicial Attitude

For the first twenty three years of the constitution the judicial appointments were made through the process provided under Article 124 and the spirit of Dr Ambedkar was followed by the governments in the appointments. The appointments of judges were made with the consultative process and the opinion of CJI was hardly avoided. The senior most judge of the Supreme Court was made the CJI and the executive (president) respected the constitutional convention of appointing the senior most judge a CJI till 1973.<sup>5A</sup> In 1973 this convention was deliberately violated and Justice A.N. Ray was made CJI superseding three senior most judges. This was beginning of the application of 'committed judges theory.' The same was repeated in 1977 when Justice H.R. Khanna(the senior most judge) was not the CJI because of his dissenting remark against the government in *ADM Jabalpur* case<sup>6</sup>. This was the worst attempt of neutralizing the 'independent judges theory'. The tussle between the Judiciary and the Executive reached its high point and culminated into the famous case of *S.P. Gupta v. Union of India*.<sup>7</sup> The judgment faced flak from all the supporters of independence of judiciary as it subverted the intent of our

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5A. Anil Diwan, "A trojan horse at the judiciary's door," *The Hindu*, 14 June 2013, available at: <http://www.thehindu.com/todays-paper/tp-opinion/a-trojan-horse-at-the-judiciarys-door/article4812743.ece>, (last accessed on Sept 24 2017).

<sup>6</sup> *A.D.M. Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207.

<sup>7</sup> AIR 1982 SC 149.

constitution makers. But the 2<sup>nd</sup> *Judges* case nullified and overturned the effect of the *S.P. Gupta* case and the system of collegium was conceived.

*Difference between 2<sup>nd</sup> Judges case<sup>8</sup> and the 3<sup>rd</sup> Judges case<sup>9</sup>*

At the very outset the *SCAORA case* or popularly known as the 2<sup>nd</sup> *Judges case* was conventional dispute between two parties which had to be settled by the Court whereas the 3<sup>rd</sup> *Judges case* was a Presidential reference made to the Supreme Court under article 143<sup>10</sup> of the Constitution. Hence the statuses of both the cases differ from each other. The former is the law of the land as declared under Article 141<sup>11</sup> of the Constitution whereas the latter is merely an advice tendered by the Supreme Court on the request of the President. It has been categorically held by Chandrachud J. that opinion tendered to the President under article 143 should be held in the highest regard however it shall not have a precedential value attached to it and has no binding effect.

The 3<sup>rd</sup> *Judges case* is nothing but a detailed inspection of the 2<sup>nd</sup> *Judges case*. It reiterates various points covered under the majority judgment of the 2<sup>nd</sup> *Judges case*. The undertaking given by the Attorney General of India that no review of the 2<sup>nd</sup> *Judges case* is sought is a clear indication of the fact that this reference is merely to further the judgment delivered in the 2<sup>nd</sup> *Judges case*.<sup>12</sup>

Difference between the two cases is the increase in the number of judges in the collegium set up to recommend the names of the judges for appointment. The Court agreed that the opinion of

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<sup>8</sup> *Supreme Court Advocates on Record Association v. Union of India* (1993) 4 SCC 441, hereinafter referred as 2<sup>nd</sup> *Judges case*.

<sup>9</sup> *In re Special Reference No.1 of 1998* (1998) 7 SCC 739, hereinafter referred as 3<sup>rd</sup> *Judges case*.

<sup>10</sup> Art. 143: Power of President to consult Supreme Court

<sup>11</sup> Art. 141: Law declared by Supreme Court to be binding on all courts

<sup>12</sup> *Ibid.*

the Chief Justice of India is "reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation"<sup>13</sup>. It further goes on to opine that instead of two, four senior most puisne judges should be consulted in the appointment process.

Thirdly, the *3<sup>rd</sup> Judges* case makes a clarification as to the phrase used in *2<sup>nd</sup> Judges* case i.e. legitimate expectation. All that was intended to be conveyed was that it was very natural that senior High Court Judges should entertain hopes of elevation to the Supreme Court and that the Chief Justice of India and the collegium should bear this in mind.<sup>14</sup> The Court agreed that merit shall be the predominant consideration for the purpose of appointment.<sup>15</sup> The single unanimous judgment pronounced in the *3<sup>rd</sup> Judges* case is nothing but the projection of the intent of the Court in upholding the majority judgment pronounced in the *2<sup>nd</sup> Judges* case.

#### *The Question of Primacy revisited*

It has been categorically declared by the Supreme Court in the *2<sup>nd</sup> Judges* case that the process of appointment of judges has to be a participatory consultative process. The intention of our constitution makers was inferred as such that the executive and the judiciary both will be involved in the process of judges' appointment. However the majority judgment of the *2<sup>nd</sup> Judges* case stated that if in any case of conflict between the opinion of the collegium and the executive, deliberations should be made to come to a unanimous decision, otherwise as a healthy convention the recommendation made by the collegium will have primacy and the executive will be bound to appoint the recommended. The question of primacy will

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<sup>13</sup> *Supra* Note 9 para 6.

<sup>14</sup> *Supra* Note 8 para 478.

<sup>15</sup> *Supra* Note 9, para 25.

be a secondary question. The majority decision in the 2<sup>nd</sup> *Judges case* is as following:<sup>16</sup>

However, if there be any disagreement even then between them which cannot be ironed out by joint effort, the question of primacy would arise to avoid stalemate.

The distinction between making an appointment in conformity with the opinion of the Chief Justice of India, and not making an appointment recommended by the Chief Justice of India to be borne in mind. Even though no appointment can be made unless it is in conformity with the opinion of the Chief Justice of India, yet in an exceptional case, where the facts justify, a recommendee of the Chief Justice of India, if considered unsuitable on the basis of positive material available on record and placed before the Chief Justice of India, may not be appointed except in certain situations.<sup>17</sup>

If the person recommended by the Chief Justice of India is not appointed then the reasons for his being unsuitable for the post should be disclosed to the Chief Justice of India, so that he may reconsider and withdraw his recommendation on the considerations provided.

The 3<sup>rd</sup> *Judges case* reiterates with the views expressed by the majority in the 2<sup>nd</sup> *Judges case*. The general rule is that the appointment shall be made on a general consensus within the collegium. No appointment can be made without the confirmation of the Chief Justice of India. However if the question arises of Chief Justice of India being in minority and the majority of senior most puisne judges disfavours the particular appointment, then the problem ensues. The majority judgment in the 2<sup>nd</sup> *Judges case* very aptly has given a solution to such a logjam situation:<sup>18</sup>

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<sup>16</sup> *Supra* Note 8 paras 439-40.

<sup>17</sup> *Id.* at 703 para 478.

<sup>18</sup> *Id.* at 704 para 478.

The final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by the Chief Justice of India and the senior Judges are of the view that the recommended is unsuitable for stated reason, which are accepted by the President, then the non-appointment of the candidate recommended by the Chief Justice of India would be permissible.

However it was assumed that such a contingency would not be a very obvious possibility. The chances of such a spearhead situation were minimal. Also it was interpreted that if after due deliberations of the reasons disclosed to the Chief Justice of India with regards to the unsuitability of the recommended the Chief Justice of India reiterates the recommendation along with the unanimous agreement of the Judges of the collegium, giving reasons for not withdrawing the recommendation, the appointment must be made as a healthy convention.<sup>19</sup>

*The Composition and the Fixation of the Number of the Puisne Senior-Most Judges in the Collegium*

The court stated in the *2<sup>nd</sup> judges case* that by the opinion of Chief Justice it meant the opinion in plurality of judges and thus propounded that while making the recommendation the Chief Justice of India should consult two senior most judges of the Supreme court for the reason that they are best acquainted with the persons which are to be recommended as they might have appeared as attorneys before them in their long tenure and thus have the capability of understanding the proposed recommendations the most. It was pointed out by the Attorney General that in a precedent the Chief Justice had consulted 5 senior most puisne judges in making an appointment of a Supreme Court judge<sup>20</sup>. The court took

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<sup>19</sup> *Supra* Note 9 para 23.

<sup>20</sup> *Id.*, at para 14.

due consideration of the same and stated that it would be better to raise the number of judges to be consulted from two to four as it would ensure a better selection process.<sup>21</sup>

Also the Court stated that if the successor Chief Justice is not one of the four senior most puisne judges of the Supreme Court then he must invariably be made the part of the collegium since it would ensure the transparency and accountability in the appointment of judges. Thus those who are “traditionally associated” with the function of appointing the judges should be involved in the collegium.

The Court was extremely clear in its stance with regards to the question of plurality and the number of Judges in the collegium. It stated that the vacancies are not singular and hence the prospective candidates who would fill these vacancies could hail from various High Courts. Thus it would be practically impossible to include the senior most puisne judges of all those High Courts.<sup>22</sup>

### *The Issue of Seniority*

Seniority is certainly a factor upon which the appointment of judges takes place. However the Court clarified the debate regarding seniority by presenting the concept of legitimate expectation. It stated that a senior judge has a legitimate expectation to be elevated as a Supreme Court judge. However those judges who are meritorious also have a legitimate expectation to be elevated. The Court held,<sup>23</sup> “Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court.”

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<sup>21</sup> *Id.*, at para 17.

<sup>22</sup> *Id.* at para 18.

<sup>23</sup> *Id.* at para 25.

Hence in the 2<sup>nd</sup> *Judges case* the Court categorically stated that the person to be appointed shall be the 'best' and 'suitable' for the prestigious position of the judge.<sup>24</sup> Hence seniority will play its role but not at the cost of merit. The Court in the 2<sup>nd</sup> *Judges case* has stated:<sup>25</sup> "Obviously, this factor applies only to those considered suitable and at least equally meritorious by the Chief Justice of India for appointment to the Supreme Court."

#### *Judicial Review in the Matters of the Appointment of the Judges*

The Court held in the *SCAORA case* and reiterated in the *Presidential reference* that a great power to check any arbitrary action has already been provided in ample amount as the appointment of judges will not be a task for a singular person. The presence of the senior most judges and the approval of executive shall act as a check on any absolute power that may be exercised. However the Court also held that judicial review in the case of an appointment, or a recommended appointment, to the Supreme Court or a High Court is, therefore, available if the recommendation concerned is not a decision of the Chief Justice of India and his senior most colleagues, which is constitutionally requisite.

#### *The obligations of the Chief Justice of India*

The first and foremost obligation of the Chief Justice of India is to make such a recommendation to the Executive who is acceptable to it as the best and suitable choice.<sup>26</sup> This obligation exists on the shoulder of the Chief Justice since the proposal of making an appointment shall be moved by the Chief Justice. The recommendation shall be made in written and all the just and cogent

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<sup>24</sup> *Supra* Note 8.

<sup>25</sup> *Id.* at 764 para 17.

<sup>26</sup> *Id.* at 743.

reasons for the recommendation must be laid down along with the views of other judges and prominent members of the bar consulted for the recommendation so made.<sup>27</sup> The Memorandum on the Appointment of Judges<sup>28</sup> which was made after the 3<sup>rd</sup> Judges case also has laid down the obligations of the Chief Justice of India. Apart from the above numerated obligations, the Chief Justice of India has to duly take cognizance of the advices tendered by the senior most judge of the parent High Court of the candidate. But he should not confine himself to just that, he should duly take into consideration the opinions of the judges who have, on transfer, occupied the office of a judge or Chief Justice of that high Court.

The Chief Justice should make a memorandum of the advices tendered by a non judge on which reliance has or even has not been taken and should submit it to the Government of India.<sup>29</sup>

#### **IV. National Judicial Appointment Commission: Evolution**

The debate of an independent judiciary has a continuing existence and snippets of the demands of a judicial commission can be seen throughout the legal history. The Constituent assembly had appointed an *ad hoc* committee to recommend the best method of the appointment of judges. The purpose of this committee was to ensure an independent yet committed judiciary. It unanimously laid down that there should be a panel of 11 members which would comprise of the some Chief Justices of High Courts and few members of both the houses. The nomination would be confirmed by at least 7 of those members and then shall be presented to the President for

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<sup>27</sup> *Ibid.*

<sup>28</sup> Memorandum Showing the Procedure for the Appointment of the Chief Justice of India and Judges of the Supreme Court of India, June, 6, 1999, available at: <http://www.lawmin.nic.in/> (accessed on Sept. 23, 2015).

<sup>29</sup> *Ibid.*

confirmation.<sup>30</sup> A very nascent form of this judicial commission may be observed here.

*Ad Hoc Committee Report (1949)*

An *ad hoc* committee was constituted by the constituent assembly to suggest the method for the appointment of judges. It unanimously recommended a panel of judicial and parliamentary members to nominate future judges. The President had to confirm these nominations.<sup>31</sup> The constituent assembly did not consider these suggestions and discussed more democratic methods of appointment of judges.

*121<sup>st</sup> Law Commission Report (1987)*

The Commission makes elaborate references to Missouri Plan of United States of America, which was not followed in the U.S. Constitutional setup.<sup>32</sup> It desired the Chief Justice of India with three senior most judges, the predecessor to the office of Chief Justice of India, i.e., who has retired from the post of Chief Justice of India to whom the Chairman has succeeded, three Chief Justices of High Courts according to their seniority, Union Law Minister and Attorney General of India and an outstanding law academic as member.

*Venkatchalaiah Committee Report (2003)*

On the basis of the Law Commission of India report of 1987 National Judicial Commission was proposed in the Constitutional

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<sup>30</sup> *Supra* Note 4.

<sup>31</sup> *Ibid.*

<sup>32</sup> National Commission to Review the Working of Constitution, a Consultative Paper on Superior Judiciary.

(67<sup>th</sup> Amendment) Bill, 1990. The 1998 opinion indeed enlarges the 'collegium'. In this sense, the purpose of the said Amendment Bill is served.<sup>33</sup>

In 2003 the National Judicial Commission Bill had been introduced through Constitution (98<sup>th</sup> Amendment) Bill. The Bill lapsed due to the dissolution of the Lok Sabha. After the formation of the 14<sup>th</sup> Lok Sabha(2004-2009) National Advisory Council (NAC) prepared a concept paper on a National Judicial Commission. The Constitution (120<sup>th</sup> Amendment) Bill, 2013 and the Judicial Appointments Commission (JAC) Bill, 2013 were introduced in the Rajya Sabha in August 2013. The Standing Committee submitted its report on the JAC Bill, 2013 in December 2013. This was passed by the Rajya Sabha but lapsed with the dissolution of the 15<sup>th</sup> Lok Sabha. The JAC Bill, 2013 was withdrawn on August 11, 2014.

*The Differences between the 120<sup>th</sup> Constitutional Amendment Bill, 2013 and the 99<sup>th</sup> Constitutional Amendment Bill, 2014*

Hence the amendment was not made necessary to be affected. The Constitution (121<sup>st</sup> Amendment) Bill, 2014 and the National Judicial Appointment Commission Bill, 2014 were introduced in the Lok Sabha on August 11, 2014.

The predecessor of this Bill of 2014 was the Constitution (120<sup>th</sup> Amendment) Bill, 2013. This Bill, which was passed by Rajya Sabha lapsed due to the dissolution of the 15<sup>th</sup> Lok Sabha. The Standing Committee of 2013 had submitted its report with regards to the Judicial Appointment Commission Bill, 2013. But, this bill also lapsed due to the dissolution of 15<sup>th</sup> Lok Sabha.

The Bills of 2013 differed in a few aspects from the Bills of 2014. Various additions were made to the Bills of 2014 referring to the recommendations made by the Standing Committee of 2013. It is

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<sup>33</sup> *Ibid.*

nevertheless important to note the variations brought in the 2014 Bills which were passed by both the Houses. The 2013 Bill was silent on certain points, while on many other points the 2014 simply mirrors the previous bill. For instance, the functions of the Commission under the Bill of 2013 have been incorporated in the Bill of 2014 *verbatim*. The composition of National Judicial Appointment Commission remained the same from 2013 Bill to the 2014 Bill. The Bill of 2014 however, added the recommendations made by the Standing Committee that one of the eminent persons shall be nominated from amongst the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or women.

The lapsed Constitution (120<sup>th</sup> Amendment) Bill, 2013 left the composition and functions of the Judicial Appointment Commission to be determined by law made by the Parliament. The Bill of 2014 again incorporated the recommendation of the Standing Committee which stated that the composition and functions of the Judicial Appointment Commission shall be included in the Constitution while the procedure to be followed by the commission shall be determined by law made by the Parliament.

The Powers of the President to require reconsideration was not addressed by the Bill of 2013. However, the Bill of 2014 specifically incorporated this aspect. The President may require the Commission to reconsider the recommendations made by it. If the Commission makes a unanimous recommendation after such reconsideration, the President shall make the appointment accordingly.

The Bill of 2013 had imparted the power to initiate the appointment proceedings and the short listing of the candidates on The Union Secretary of the Department of Justice who will initiate the process by inviting recommendations from the Chief Justices of High Courts, the central and state governments. However, this aspect was changed in the 2014 Bill, where the specific procedure of short listing of candidates for Chief Justice of India and the judges of

Supreme Court. The Judicial Appointment Commission is imparted the power for initiating the proceedings of appointment. The veto power of two members of the commission was not mentioned in the Bill of 2013 but was incorporated in the passed Bill of 2014.

#### **V. The Drawbacks of National Judicial Appointment Commission**

A detailed reading of both the 99<sup>th</sup> Amendment and the NJAC Act of 2014 brings forth many factors that can be said to undermine the primacy of the judiciary in appointment and transfer matters.

##### *Predominance to the Executive*

The first which can be pointed out is the insertion of Article 124C in the Constitution by the 99<sup>th</sup> Amendment. The very wordings of the article give an impression of the predominance of executive in the appointment matters. Article 124C states that Parliament shall be the one to regulate the process of appointment of the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts by enacting statutory provisions and it shall 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. For the furtherance of this article the Parliament indeed enacted the National Judicial Appointment Commission Act, 2014 and empowered the Commission to make rules and regulations with regards to the procedure of appointment of judges.<sup>34A</sup>

##### *Initiation of the Process of Appointment*

A major departure from the pre-established norm was seen through the Section 4 of the National Judicial Appointment

Commission Act<sup>34</sup> where the Commission was made the initiator of the proceedings of the appointment of judges which since the times of the Constituent Assembly Debates was the prerogative of the Chief Justice of India along with the consultation of other judges. In the most recent *4<sup>th</sup> Judges case*<sup>35</sup> Goel J. in his concurring judgment clearly points out to this anomaly. He states:<sup>36</sup>

Convention of initiation of proposal by Chief Justice for the High Courts and CJI for the Supreme Court and other scheme as reflected in the memoranda earlier mentioned and as laid down in decisions of this Court has been replaced.

The Memorandum on the Appointment of Judges, 1999 had clearly laid down that the Chief Justice of India would be the initiator in the proceedings of appointment of judges.<sup>37</sup>

#### *Composition of the Commission*

This brings us to the vital question of the composition of the Commission. Article 124A of the Constitution lays down the composition of the Commission. The precedent which was set by the *2<sup>nd</sup> Judges case* and then re-affirmed by *the Presidential reference of 1998* had laid down the formation of a collegium of 5 senior most puisne judges of the Supreme Court including the Chief Justice of India. The infiltration of the executive is evident from the fact that the present Commission consists of only 3 judges representing the judiciary

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<sup>34A</sup> 10. (1) The Commission shall have the power to specify, by regulations, the procedure for the discharge of its functions. (2) The Commission shall meet at such time and place as the Chairperson may direct and observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meeting), as it may specify by regulations.

<sup>34</sup> National Judicial Appointment Commission Act, 2014, sec. 4.

<sup>35</sup> *Supreme Court Advocates on Record Association v. Union of India*, 2015 S.C., available at: <http://www.judis.nic.in/> (accessed on Sept. 23, 2015).

<sup>36</sup> *Id.* at 932.

<sup>37</sup> *Supra* Note 29.

including the Chief Justice of India out of the total 6 members. The number has been brought down from 5 to 3. Not only that the committee that would nominate the two eminent members to the collegium has only one representative from the judiciary and that is the Chief Justice of India. The paradigm shift in the balance of power between the executive and the judiciary is imminent.

*Position of Chief Justice of India*

But this is not the only reason why the advocates of judicial independence are arguing against the setting up of the Commission. Second proviso to Section 5<sup>38</sup> and Section 6(6)<sup>39</sup> of the National Judicial Appointment Commission Act, 2014 state that the recommendation shall not be made if any two members of the Commission do not conform to it. It conveniently left the question open as to the position of the Chief Justice of India with regards to the appointment or non appointment of the recommended. In other words if the three members of the collegium and the law minister recommends on the suitability of a prospective judge, the two eminent members (who may be from a non law background) may neutralize the recommendation. Extra legal or non judicial factors have all potential to dominate through this *veto* in the judicial process of appointment of judges. In 4<sup>th</sup> Judges case (NJAC judgment) this was one of the most objectionable rationale of the majority.

*Federal element of the Appointment of Judges*

The federal characteristic of the appointment of High Court judges has also been watered down to a very great extent. The

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<sup>38</sup> National Judicial Appointment Commission Act, 2014, sec. 5.

<sup>39</sup> National Judicial Appointment Commission Act, 2014, sec. 6(6).

constitutional amendment has upgraded the presence of central executive and downgraded the presence of State executive.

- i. **Absence of the Governor:** The new Article 217 has removed the need of consultation with the Governor of the State with regards to the appointment of judges to the particular High Court.<sup>40</sup> Section 6 of the 99<sup>th</sup> Amendment Act, 2014<sup>41</sup> very smoothly divests the Governor of his consultative powers. Although complacency may be seen in Section 6(7) of the National Judicial Appointment Commission Act, 2014<sup>42</sup> where the Commission is asked to entertain the views of Governor and the Chief Minister of the State concerned before making any recommendation. Nevertheless the role of the State Constitutional Machinery has been devolved from an important constitutional status to a mere formality ensured in a statute.
- ii. **Absence of State law ministers:** Another questionable point is the logic of presence of union law minister in the appointment of High Court judges. Only the Central Executive finds its representation in the Commission through the Federal (Central) Law Minister, while State Law Ministers do not find any role in the new setup for the appointment procedure.

The current debate on the appointment of judges and the independence of judiciary revolve around the aforementioned issues. Adding spice to the ensuing brouhaha is the refusal of the Chief Justice of India to be a part of the Commission, defying the

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<sup>40</sup> Constitution of India, 1950, art. 217(1): Appointment and conditions of the office of a Judge of a High Court

(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years.

<sup>41</sup> Constitution Amendment Act, 2014, sec. 6.

<sup>42</sup> National Judicial Appointment Commission Act, 2014, sec. 6 (7).

very Constitutional provision constructed by the Parliament he is avowed to protect and it seems the situation is only gaining a directionless momentum.

## **VI. Judicial Independence *versus* Democratic Legislation: NJAC Judgement**

*Substantial issue: The Appointment of Judges*

On 16<sup>th</sup> October, 2015 the judiciary took a tough stand and stuck down the 99<sup>th</sup> Constitutional Amendment of 2014 in the *Supreme Court Advocates on Record Association v. Union of India (4<sup>th</sup> Judges case)*<sup>43</sup>; a move which is celebrated by many pro-judicial independence supporters and frowned upon by those who believed the democracy to be the heart and soul of the Constitution. There are various problems which have been voiced against the recent judgment. The amendment was declared unconstitutional by a majority of 4:1 with Chelameswar J. giving a dissenting opinion in favour of the retentionist view.

Although the judgment does manages to maneuver a way to uphold the collegium structure as the foreword to the independence of judiciary which is a basic structure of the Constitution, but it raises few extremely important questions to consider. One view holds that this verdict upholds an extra constitutional device created by the Supreme Court's own members to meet its own ends rather than accepting a system lawfully enacted by a popular elected Parliament.<sup>44</sup>

The judgment may be celebrated for the fact that it has upheld the independence of judiciary as the basic structure of the Constitution and it is a well established fact now that the basic

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<sup>43</sup> *Supreme Court Advocates on Record Association v. Union of India*, (2015) 11 Scale 1.

<sup>44</sup> Suhrith Parthasarathy, "An Anti-Constitutional Judgment", *The Hindu*, Oct. 30, 2015.

structure of the Constitution cannot be violated or be taken away.<sup>45</sup> However, the doctrine of basic structure itself remains on very flimsy ground. The judiciary has vested upon itself to be the sole determinant of the various components that can be the part of the basic structure of the Constitution.<sup>46</sup> Hence, the unease of the parliament is not completely unjustified.

Coming to the judgment, Khehar J. along with Lokur J., Kurian J. and Goel J. has heavily relied on the combined reading of the case of *Samsher Singh v. State of Punjab*<sup>47</sup> and *Sankalchand Himatlal Sheth v. Union of India*.<sup>48</sup> In the former case, as relied by Khehar J. the Supreme Court had held that while making the appointment of the judges to the High Courts or the Supreme Courts under Article 124 and Article 217 respectively, the President had to compulsorily rely on the advice tendered by the Chief Justice of India. This stance of the Supreme Court was also reiterated in the *Sankalchand's case*.<sup>49</sup> But this precedent was very conveniently ignored in the First Judges case. And thus, the Supreme Court in the recent decision has upheld the primacy of the chief Justice of India in the matters of appointment. The court has relied upon the Constituent assembly debates and has upheld the interpretation granted to them in the 2<sup>nd</sup> Judges case and the 3<sup>rd</sup> Judges case.

Khehar J. plied heavy reliance on the Memorandum of Procedure on the Appointment of Judges, 1999 which involves a highly interactive role of the Executive during the process of selection of a judge. However, the inadequate participation on the part of the executive has led to this affair becoming a judiciary dominated sphere. But executive is the only one to be blamed for its

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<sup>45</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>46</sup> *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

<sup>47</sup> *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192.

<sup>48</sup> AIR 1977 SC 2328.

<sup>49</sup> *Sankalchand H. Sheth v. Union of India*, AIR 1977 SC 2328.

inaction despite the participative role they have been assigned with.<sup>50</sup>

*The Dissenting Opinion and the Basic Feature Doctrine*

Chelameswar J. gave a dissenting opinion and claimed that although independence of judiciary is the basic structure of the Constitution. With regards to the non-reviewable status of the Second Judges case and Third Judges case he states,<sup>51</sup> “It appears to have been a joint venture in the subversion of the law laid down by the 2<sup>nd</sup> Judges case and 3<sup>rd</sup> Judges case by both the executive and the judiciary which neither party is willing to acknowledge.”

He poses a question that whether there is any difference between the ‘basic feature’ of the Constitution and the ‘basic structure’ of the Constitution.<sup>52</sup> And he states that there is a clear distinction between the two concepts. He states:<sup>53</sup>

These cases only indicate that: (i) the expressions ‘basic structure’ and ‘basic features’ convey two different ideas, (ii) the basic features are components of basic structure. It also follows from these cases that either a particular article or set of articles can constitute a basic feature of the Constitution. Amendment of one or some of the articles constituting a basic feature may or may not result in the destruction of the basic structure of the Constitution. It all depends on the context.

Abrogation from a basic feature will not be an *ab initio* invalid act like the violation of the basic structure of the Constitution. He stated that the basic feature of the Constitution is not the primacy of the Chief Justice of India, rather the fact that no Constitutional

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<sup>50</sup> *Supra* note 44 at para 70.

<sup>51</sup> *Id.* at para 60.

<sup>52</sup> *Id.* at para 69.

<sup>53</sup> *Id.* at para 78.

functionary shall be vested with any kind of absolute power, be it the President of India or the Chief Justice of India.

This judgment voices the growing concern around judiciary's unchecked, unhindered power to create laws and strike down laws at its discretion. With judiciary usurping the role of the sole interpreter of the Constitution, lack of an effective system of checks and balance over judiciary poses fundamental questions on the democratic and separation of powers setup of our nation. On the issue of appointment of judges the majority expressed its serious concern on the defects of the collegium system and the Supreme Court has invited opinions on improving the collegium.

## VII. Conclusion and Suggestions

The Supreme Court had invited suggestions to improve the collegium in order to make it more efficient and enhanced. On 3<sup>rd</sup> November, 2015 the Supreme Court released an order with regards to the compilation of all of the suggestions.<sup>54</sup> Additional Solicitor General Pinky Anand and Senior Advocate Arvind P. Datar made a report on this behalf. The crux of all the suggestions could be summed up into three major heads. These are the most pressing changes that have to be brought in the collegium to free it from the many evils it festers. They are as following:

- i. Transparency
- ii. Eligibility of the judges
- iii. Secretariat
- iv. Complaint Mechanism

Firstly, the collegium post 1998 was said to be a secretive and opaque body whose decisions and the rationale behind those decisions were not laid open for any kind of scrutiny. Hence a number of suggestions strived to make the collegiums, a transparent

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<sup>54</sup> Writ Petition (Civil) No. 13 of 2015, available at: <http://judis.nic.in/> last visited on Nov. 12, 2015.

and accountable body. There must be well defined criteria to appoint a judge and the same should be made publicly accessible on the Supreme Court's official website. The candidates should duly reveal all their relations in the judicial fraternity so as to avoid any nepotistic bias that may arise. Fali S. Nariman has however pointed out that too much transparency would also be a hindrance in the process of appointment.<sup>55</sup>

Secondly, few suggestions pointed out that the eligibility of the judges must be clearly demarcated. They should be interviewed by the collegium and the zone of consideration should be made wider and should not give sole consideration to the relatives of the judges. The judges of tribunals and District Courts should also be considered to be elevated.

Thirdly, it was realized that the Judges of the collegium were already burdened with the primary task of adjudication of cases; hence the extra administrative work of the appointment of judges would be cumbersome to perform. Hence, the preliminary tasks of collecting the data with regards to the candidates of appointment, for instance their eligibility and the number of judgments they have delivered, the quality of the judgments etc. This would reduce the burden on the judges of collegium and efficiency would be ensured.

Lastly, there is an imminent need for a complaint mechanism for the collegium. If there is any complaint as to the working of the collegium, it shall be duly addressed. Also, if there is a complaint which is *prima facie* correct, it shall be directly dealt by the Executive. However, frivolous and mischievous complaints should be rejected decidedly.<sup>56</sup>

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

These repetitive confrontations between the judiciary and the executive have failed to give a concrete solution to the problem of the appointment of judges. There exists over 400 vacancies in total of the posts of judges in the Supreme Court and all the High Courts combined. This problem is a more pressing issue and would seriously undermine the efficiency of judiciary. The question which all the constitutional functionaries should ask themselves while determining the fate of the appointment of judges is, that what is a more dire need, the independence of judiciary or the efficiency of judiciary? Are these two factors, the independence and the efficiency, two completely separate factors or instead are totally inter dependent on each other? Should independence of judiciary depend upon the efficiency of judiciary and vice versa? From the inception of this debate, that is, from the inception of the constitution itself, there has been no actual focus on the efficiency of judiciary. It has forever been treated on sidelines of the major issue and that is of the primacy of opinion and the independent judiciary. But the issue of efficiency of judiciary has to be at the epicenter of any kind of debate involving the independence of judiciary. With the vacancies in the courts and the heavy backlog of the cases, there has to be some quick action taken to solve these problems. An efficient judiciary is the need of the day.

The latest 4<sup>th</sup> *Judges case* might have given the upper hand to the Judiciary in the matter of appointment of judges, but it has raised substantial question on its slowly growing power of judicial review. Indian judiciary has emerged out to be one of the most powerful judiciaries in the world. And example can be seen in this case itself. Judiciary being the sole interpreter of the Constitution and the determinant of the basic structure has endowed itself with such exemplary power which is not healthy for any democratic country. But, to say that the judiciary must be docile to the whims and fantasies of the Parliament and executive, is also a poison to the democracy, because then the whole structure of checks and balance

would come blithering down. Thus, all the three organs of the government should try to realize the true spirit of our Constitution which was summed up by Dr. B.R. Ambedkar that the absolutism of any kind would result into a stunted growth of the nation. Participative harmony between all the organs of the government is the need and requirement for any healthy democratic nation. It is up to these organs to give up their collective egos and move forward with the thought of the greater good in mind. This greater good is nothing but the all-round development of our nation with social, economic and political justice rendered to all.

On 3<sup>rd</sup> October, 2017 the collegium made a historic move by deciding to upload its recommendations and reasons of recommendations or reasons of rejection of selection of judges.<sup>57</sup> It was appreciated by all, though a few termed it 'cosmetic.' But soon the conflict between right to reputation and right to information emerged. As the reasons of rejections contained adverse remarks against the judges or advocates, this may go against their reputation. This may be resolved if reasons of rejections is personally communicated to the candidates. A greater transparency would bring greater credibility and quality to judicial appointments.

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<sup>57</sup> Available at: <http://supremecourtindia.nic.in/pdf/collegium/2017.10.03-Minutes-Transparency.pdf> (last accessed on Dec 26, 2017).