REVIVAL OF COLLEGIUM SYSTEM: A CRITICAL EVALUATION

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ABSTRACT:

The National Judicial Appointment Commission law, passed in 2014 by both Houses of Parliament almost with dissent, and by 20 states assemblies subsequently, clearly represents the overwhelming will of the people of India. This does not mean the court cannot strike it down on grounds of unconstitutionality, but it will certainly make the collegium system of appointing judges impossible to defend or revive. The Constitution five judges Bench headed by Justice JS Khehar by 4;1 majority of the Supreme Court declared in its Judgement, that the Constitution (Ninety-ninth Amendment) Act, 2014, and the National Judicial Appointments Commission Act, 2014, is unconstitutional and void as it violates Basic Structure of Constitution of India. The consequence is that the collegium system existing prior to the Constitution (Ninety-ninth Amendment) Act, 2014, is declared operative.[2] Justice Chelameswar disagreed with the four other judges 'Ruling that the amendment and the Act would affect the independence of the judiciary, which was a basic structure of the Constitution, and the 22 year old collegium system, should not be replaced with NJAC. The Five Judges Bench also acknowledged that all was not well with the 22 year old collegium system and offered to take "appropriate measure" to improve its functioning.[3] Collegium system lacks transparency, accountability and objectivity as observed by Justice Chelameswar. The Bench said the Collegium could begin the appointment process immediately without waiting for the proposed modifications in the system for making its functioning more transparent and credible.

Keywords: National Judicial Appointments Commission, collegium, Constitution

INTRODUCTION

The Supreme Court five-judge Constitution Bench to strike down as "unconstitutional and void" the 99th Constitutional Amendment Act and the National Judicial Appointments Commission (NJAC) Act 2014 legislated to replace the two-decade old collegium system of judges appointing judges. Ordering the revival of the collegium system, which allowed judges to appoint new judges since 1993, the Bench rejected the government's plea to refer the case to a larger Bench. The apex court has simultaneously invited suggestions to improve the collegium system. NJAC was indeed enacted after a broad political consensus,

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[2] The Tribune, October 17, 2015.
[3] Ibid.

which evolved after several commissions and parliamentary committees, found flaws in the collegium system over the years. It was ratified by Parliament as well as 20 state legislatures.

Earlier Dr. B.R. Ambedkar also pointed out that "There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself. But the question is how these two objects can be secured"[4] Also in a country like India, the independence of the judiciary is of utmost importance in upholding the pillars of the democratic system hence ensuring a free society. It is so because it is a known fact that the independence of judiciary is the basic requirement for ensuring that there is a free and fair society under the rule of law. Which is responsible for good governance of the country and it can be done through unbiased judiciary. The doctrine of Separation of Powers which also provides for a check or make boundaries for the functioning of all the three organs of the country i.e.: Executive, Legislature and the Judiciary. It provides the judiciary to act as a guardian for the protection of law and it also act as body that checks that Legislature and Executive are working within their limits and they are not interfering in the functioning of each other and the task given to the judiciary to supervise the doctrine of separation of powers cannot be carried on in true spirit if the judiciary is not independent in itself. An independent judiciary supports the base of doctrine of separation of powers to a large extent.[5] Under NJAC the commission to select judges is composed equally of judges and non-judges, which should prevent power vesting exclusively with either judges or the political class. Present paper is an attempt to critically analyse the NJAC as well as the Collegium System.

SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

For a democratic government, rule of law is a basic requirement. The rule of law runs like a golden thread through every provision of the Constitution and indisputably constitutes one of its basic features, which requires that every organ of the state must act within the confines of powers conferred upon it by the Constitution and the law. The principle of separation of powers deals with the mutual relations among the three organs of the government, namely legislature, executive and judiciary. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle. This doctrine signifies the fact that one person or body of persons should not exercise all the three powers of the government. Montesquieu, a French scholar, found that concentration of power in one person or a group of persons results in tyranny. And therefore for decentralization of power to check arbitrariness, he felt the need for vesting the governmental power in three different organs, the legislature, the executives, and the judiciary. The principle implies that each organ should be independent of the other and that no organ should perform functions that belong to the other. [6]Our founding fathers gave place of prominence to this doctrine in the Indian Constitution. The Indian

[4]Retrieved from http://hanumant.com/Judiciary.html visited on July 26, 2016 at 3P.M
[5]Legal India, *Independence of Judiciary,* April 24, 2012, Retrieved from http://www.legalindia.com/independency-of-judiciary/ visited on July 26, 2016 at 3P.M.
[6] Retrieved from shodhganga.inflibnet.ac.in/bitstream/10603/32340/.../10_chapter%204, visited on June 12, 2016.

Constitution does not speak of the functions of the three organs of State. Under the entire Constitution only executive power is vested in the President[7] while provisions are simply made for a Parliament and judiciary without expressly vesting the legislative and judicial powers in any person or body.

The question of Constitutional recognition of the doctrine of separation of powers was considered by the Supreme Court in *Indira Nehru Gandhi vs. Raj Narain* [8]*(popularly known as Prime Minister's election case).* Supreme Court ruled that the separation of powers is a basic feature of Constitution. C.J Ray has observed that, "our Constitution recognises division between three main organs of the State. Judicial power in the sense of judicial power of the state is vested in the judiciary. Similarly powers are vested in the Executive and the Legislature in their respective spheres". J. Beg has observed that, "separation of powers is a feature of the basic structure of the Constitution. None of the three separate organs of the Republic can take over the functions assigned to the other. This constitutional scheme cannot be changed even by resorting to amending process under Article 368 of the Constitution."Again J. Chandrachud observed that "political usefulness, of the doctrine of separation of powers is now widely recognised. No Constitution can survive without a conscious adherence to its fine checks and balances. Just as courts ought not to enter into problems entwined in the 'political thicket', Parliament must also respect the preserve of the Courts. [9]This view has been reaffirmed by it in several cases, yet there has been a constant turf war between Parliament and the executive on one side and the higher judiciary on the other.[10]

A contradiction between the rule of law and parliamentary sovereignty appears when we consider the concept of the 'independence of the judiciary' After the Constitution was enacted and in years immediately thereafter, Indian judges got appointed to Higher Judiciary at the will of the President. This had an overwhelming effect as the Judge's fate of promotion could be arbitrarily decided, who could be succeeded by someone junior simply because those Judges could not please the government. This fate befell upon four senior judges of the Supreme Court, as the consequence of 1973 judgment, who all were superseded by Justice Beg in which President for the first time had deviated from the customary practice of appointment.[11] How should a Judiciary be immune from the unfair means or prejudices have always been subject to ambiguities and conflicts. Also the involvements of other branches in its internal activities have raised considerable doubts as to the level of effectiveness with which it performs its functions. At times it has also been observed that when the Executive have enjoyed absolute control within its own sphere at such times it had even transgressed into the domain of legislature and monopolised its functioning, and astonishingly, the Judiciary had at such critical moments remained just a mute spectator, sometimes even affirming such initiatives. This was certainly the case during the reign of Indira Gandhi. No government has interfered more into the matters of Judiciary to the extent as had been done during Indira Gandhi's regime.

[7] Article 53, The Constitution of India.
[8] AIR 1975 SC 2299.
[9] Ibid. AIR 1975 SC 2299.
[10] Beant Singh Bedi, *Third, but pyhrrhic, win for long arm of law*, The Tribune, October, 19,2015.
[11] Utkarsh Pandey, *NJAC Controversy: Curtailing or expanding Justice Delivery Mechanism*, NLUA Law Review, Vol.1, No.1. P.68.

It was, undoubtedly, one of the most critical point where the Judiciary seemed helpless at every moment. Exercising its executive power and majority support in parliament, Mrs. Gandhi did everything she could do to bring all organs of the constitution under her absolute control.[12]

During the emergency years, Parliament and the executive ruled roost by passing 39th and 42nd Amendments, superseding three senior- most Supreme Court Judges and making punitive transfers of High Court Judges. But after emergency the Supreme Court struck back in the name of independence of judiciary and rule of Law. [13] The rule of law pervades over the entire field of administration.[14] Rule of law permeates the entire fabric of the Indian Constitution and indeed forms one of its basic features.[15] Law and rule of law are two different concepts. In Habeas Corpus case[16] an attempt was made to challenge the detention orders during emergency on the ground that they were violative of the principle of the rule of law as " the obligation to act in accordance with rule of law...is the central feature of our constitutional system and is a basic feature of the Constitution." The narrow issue before the Supreme Court was whether there was any "rule of Law" in India apart from Article 21 of the Constitution. The question was raised in several High Courts that whether a person can be stripped of his rights to seek writ of Habeas Corpus during National Emergency. The Courts held that person's right to move Courts for seeking writs can't be suspended while the proclamation of emergency is effective. As a result an appeal from this judgment lay before the Supreme Court. The Apex court negated HCs' decision by 4:1 majority (Ray, C.J., Beg, Chandrachud and Bhagwati JJ.) and observed that "The Constitution is the mandate. The Constitution is the rule of Law. There cannot be any rule of law other than the constitutional rule of law. There cannot be any pre- Constitution or Post-Constitution rule of law which can run counter to the rule of law embodied in the Constitution, nor there any invocation to any rule of law to nullify, the constitutional provisions during the time of emergency. Article 21 is our rule of law regarding life and liberty. No other rule can have separate existence as a distinct right, The rule of law is not merely a catchword or incantation. It is not a law of nature consistent and invariable at all times and in all circumstances. There cannot be brooding and omnipotent rule of law drawing in its effervescence the[17] emergency provisions of the Constitution." In this way the majority judgement stands for the proposition that the doors o courts during emergency are completely shut. However, it is gratifying to note that the concept of rule of law can be used as a legal concept. Justice P N Bhagwati, India's most quoted Indian judge on human rights issues, in the ADM Jabalpur vs. Shivkant Shukla case not only upheld the suspension of habeas corpus during the state of emergency but also wrote a flattering letter[18] to then Prime Minister Mrs Indira Gandhi. As a sitting judge of the Supreme Court, he described her comeback following the 1980 elections as ``the reddish glow of a golden sunrise''. The history of Indian judges shows

[12] Ibid.
[13] Beant Singh Bedi, *Third, but pyhrrhic, win for long arm of law*, The Tribune, October, 19,2015.
[14] A.K Kraipak v. Union of India, AIR 1970 SC 150.
[15] Bachan Singh v. State of Punjab, AIR, 1982 SC 1336.
[16] A.D.M .Jabalpur v. Shivakant Shukla AIR 1950 SC 27.
[17] For a scathing attack on the majority view see H.M Seervai, Emergency and Future Safeguards, 1977.
[18] Suhas Chakma, *Sepration of powers keeps judiciary safe*, The Tribune, October 19, 2015.

that Justice H R Khanna, the only judge who opposed the suspension of the right to habeas corpus during emergency in the ADM Jabalpur case, has been an exception.

Justice Khanna dissenting, and delivered judgement stating that 'no person has any locus to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ.'[19] Despite all the odds, J. Khanna in his dissenting view stated that; "The Constitution and the laws of India do not permit life and liberty to be at the mercy of the absolute power of the Executive ...What is at stake is the rule of law. The question is whether the law speaking through the authority of the court shall be absolutely silenced and rendered mute... detention without trial is an anathema to all those who love personal liberty."[20]Justice Khanna further emphasised in his celebrated dissenting opinion in the Habeas Corpus case[21], "A State of negation of rule of law would not cease to be such a state because of the fact that such a state of negation of rule of law has been brought about by statute. His lordship observed, " Rule of law is antithesis of arbitrariness in all civilizes societies...It has come to be regarded as the mark of free society. It seeks to maintain a balance between the opposite notions of individual liberty and public order. Even in the absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life or liberty without the authority of law." The dissenting voice J. Khanna had to pay its huge price. He was next in line to be the Chief Justice of India but he was superseded by H M Beg as a consequence of which he resigned.

So far as Dicey's doctrine of the Rule of law has been accepted and embodied in the Constitution of India. The Constitution is supreme[22] and all the three organs of the government that is legislature, executive and judiciary are subordinate to and have to act in accordance with it. Nobody doubted the competency or integrity of the judges appointed prior to the supersession of the three senior judges in 1973. When short-sighted Prime Ministers and Law Ministers came to power, the independence of the judiciary suffered irreparable damage. Supersession of three senior judges and the appointment of the fourth judge as the Chief Justice of India following the judgment in the famous Keshavananda Bharati case[23] denuding Parliament of its power to amend the basic structure of the Constitution were a blunder and an open challenge to the judiciary.

Independence of the judiciary is a basic feature of the Constitution and needs to be safeguarded unjealously. Unless the judges are fearlessly independent and upright, justice cannot be even-handed. The first judge's case in 1981 created a suffocating situation as the judiciary could not play an effective role in the selection of judges. After 1973 the relations between the judiciary on one side and the executive and

[19] J. M H Beg even went to the extent of stating that, 'We understand that the care and concern bestowed by the state authorities upon the welfare of detenues who are well housed, well fed and well treated, is almost maternal'.
[20] Excerpts from the dissenting opinion of J. H R Khanna in the decided case of Additional District Magistrate, Jabalpur v. Shivakant Shukla.
[21] A.D.M .Jabalpur v. Shivakant Shukla AIR 1950 SC 27.
[22] Keshwanand Bharti v. State of Kerala, AIR 1973 SC 1461
[23] Keshwanand Bharti v. State of Kerala, AIR 1973 SC1461..

legislature on the other were far from cordial. The Indian Bar is always vigilant and vocal. It is the lawyers who fight for justice for citizens and non-citizens alike in courts.[24]

COLLEGIUM SYSTEM IN INDIA- BACKGROUND

The method of selection of judges by a collegium of Supreme Court judges finds no place in the Constitution. The Constitution confers the power of appointment of judges on the President of India i.e. the Government of India to be made in consultation with the Chief Justice of India and other judges of the Supreme Court and the High Courts. The Judges of the Supreme Court are appointed by the President with the consultation of such of judges of the Supreme Court and the High Court as he deems necessary for the purpose. But in appointing other judges, the President shall always consult the Chief Justice of India. He may consult such other Judges of the Supreme Court and High Courts as he may deem necessary.[25]

When drafting the Constitution, the Constituent Assembly took great efforts to ensure that the judiciary was independent of any coercive political influence. To that end, it introduced a number of significant provisions in the Constitution. For example, the judges of the Supreme Court and the High Court's serve not at the pleasure of the President, but until they attain a fixed age; what's more, salaries and allowances of the judges are charged from the Consolidated Fund of the State (which is incapable of being a subject of a vote by a Legislative Assembly); discussion in the State legislatures on the conduct of any judge is expressly barred; powers are conferred on the High Court to punish for contempt of itself; and, significantly, judges of the higher judiciary can be removed only through a complicated process of impeachment by Parliament. But, as valued as judicial independence was to the Assembly, it did not see the vesting of the ultimate power of appointing judges on the executive as an infraction of that principle; on the contrary, it viewed such power as a vital cog in the checks and balances required to ensure a proper separation of powers. A broad process of consultation with several important authorities was mandated to further validate the system, but the ultimate authority was placed on the President. Such a system, the Assembly felt, would instil in the courts, which were given wide powers of judicial review including the power to strike down laws made by Parliament, democratic legitimacy, and would thereby serve as an effective check on judicial power.[26]

The collegium system consists of the appointment, removal and transfer of the judges by the Chief Justice of India (CJI) and four other Supreme Court judges. It is the system or process through which the decisions related to appointments and transfer of the judges of the Supreme court and High court is taken by a collegiums which consists of Chief Justice Of India, Four senior most judges of the Supreme Court and three members of the concerned High court (in the matter related to High court) including the Chief Justice of the High Court. However this system of appointing judges has been criticized for promoting nepotism,

[24] PP Rao, *Restoring Collegium not the best option*, The Tribune, October 17, 2015.
[25] Article 124(2) of Constitution of India.
[26] Suhrith Parthasarathy , *Safeguarding judicial autonomy*, August 25, 2014, The Hindu, opinion, http://www.thehindu.com/opinion/lead/national-judicial-appointments-commission-bill-safeguarding-judicial-autonomy/article6347268.ece.... Visited on July 27 ,2016

corruption and being non-transparent. The collegium was essentially criticized on the ground that the judiciary assumes complete control over its own composition. It is believed that though this system ensured independence of judiciary with no political interference but it has been criticized for being secretive with no prospective criteria mentioned for the appointment and removal of judges.[27]

The collegium method was created as a result of two judgments of the Supreme Court, first in 1993 (Supreme Court Advocate-on-Record Association case) and by a follow-up President's Reference to the Court in 1998. With the best of intentions of securing the independence of the judiciary, the Supreme Court rewrote the provisions of the Constitution for appointment of judges and appropriated the power to appoint judges by the judges. By the first case the power was vested in the Chief Justice of India in whom it was held the primacy lay in appointments assisted by two judges of the Supreme Court. In the second case the court took away the primacy of the Chief Justice of India and vested the power in a collegium of the Chief Justice of India and four senior-most judges of the Supreme Court.[28]

Till 1973, the practice was to appoint the senior most Judge of the Supreme Court as the Chief Justice of India. In 1956, the Law Commission headed by the then Attorney General M.C.Setalvad had criticised this practice and recommended that in appointing the Chief Justice of India the experience of a person as Judge, his administrative competence and merit should be judged and seniority should not only be the main consideration. The reports of the Law Commission were published as far back as in 1956. Since then 17 years had passed but no attempt was made by the Government to implement it. Instead, the Government continued to follow the principle of seniority as a matter of rule in appointing the Chief Justice of India. On April 25, 1973, however,, this 22 years old practice was suddenly broken by the Government of India. Mr. A.N.Ray, was appointed as Chief Justice of India superseding three of the senior colleagues, Justice Shelat, Hegde and Grover. After this, the three Judges resigned from the Supreme Court. [29] In 1977 general elections the Congress party was defeated and the Janata Party won with huge majority and formed the Government at the centre. The Janata party was opposed to the policy of the supersession of the Judges of the Supreme Court. They again revived the old practice of appointing the Chief Justice of the Supreme Court on the basis of seniority.[30] The appointment of Justice A.N.Ray became controversial and it ignited a controversy throughout the Country. The Government of India, however, defended the appointment and stated that it was made in accordance with the recommendations of the Law Commission of India. It further stated that in the appointment of the Chief Justice of India, the President had absolute discretion to appoint any one whom he found suitable for the post. It was said that Article 124(2) did not require the President to hold consultation with Judges while appointing the Chief Justice of India.[31]

[27] Parth Gupta ,*National Judicial Appointment Commission*, October 3, 2015, http://www.legalservicesindia.com/article/article/national-judicial-appointment-commission-act-1916-1.html
[28] T.R. Andhyarujina, Appointment of Judges by Collegium of Judges, Opinion, The Hindu, December, 18, 2009.
[29] Dr.J.N Pandey, *Constitutional Law of India*, Central Law Agency, 2006, p. 461.
[30] Ibid, p. 463.
[31] Prof. Narender Kumar, *Constitutional Law of India*, Allahabad Law Agency, 2006, p. 556.

The First judge's case in 1981 created a suffocating situation as the judiciary could not play an effective role in the selection of judges.[32] After 1973 the relations between the judiciary on one side and the executive and Legislature on the other side were far from cordial. In ***S.P.Gupta v. Union of India***[33], the Supreme Court unanimously agreed with the meaning of the term 'consultation' as explained by the majority in ***Sankalchand Sheth's*** case[34]. The meaning of the word 'consultation' in Article 124(2) is the same as the meaning of the word 'consultation' in Article 212 and Article 222 of the Constitution. The only ground on which the decision of the government can be challenged is that it is based on mala fide and irrelevant considerations, that is, when constitutional functionaries expressed an opinion against the appointment. This means the ultimate power to appoint judges is vested in the executive from whose dominance and subordination it was sought to be protected. It is submitted that the majority judgement of the Supreme Court in the Judges transfer was bound to have an adverse affect on the independence and impartiality of the judiciary which is the only hope for the citizens in democracy. Hence the second judges case ***S.C. Advocates –on-record Association v. Union of India***[35] a nine Judges bench of the Supreme Court by a 7-2 majority overruled its earlier judgement in ***S.P.Gupta v. Union of India***[36]**.** S.C lay down that the appointment to the office of the Chief Justice of India should be made on the basis of seniority and the senior most Judge of the Supreme Court, considered suitable to hold the office, be appointed as the Chief Justice of India. The Court said that the proposal in this respect should be initiated in advance by the outgoing Chief Justice of India. The court explained that the provision in Article 124(2) enabling consultation with any other Judge was to provide for such consultation, if there be any doubt about the fitness of the senior most Judges to hold the office, which alone might permit and justify a departure from the long standing convention. The court declared that the recommendations so made shall be binding on the executive.

The role of the executive was limited to seeking reconsideration of the recommendations by the collegium of judges in the light of the material in its possession which the collegium was bound to consider. The collegium was free to revise or reiterate its recommendations. In the second judgment of 1998 the Court went to the extent of extracting a statement from the government that it was not seeking a reconsideration of its earlier judgment of 1993, and government would also accept and binding the judgment it was delivering. In ***re Presidential Reference Case,***[37] a nine judges bench of the Supreme Court has unanimously held that the recommendations made by the Chief Justice of India on the appointment of judges of the Supreme Court and the High Court's without following the consultation process are not binding on the government The court also widened the scope of the Chief Justice's consultation process upholding the government's stand

[32] PP.Rao, *Restoring Collegium not the best option*, OPED , The Tribune, October, 17, 2015. P 11.
[33] AIR 1982 SC 149.
[34] AIR 1977 SC 2328.
[35] AIR 1994 SC 268.
[36] AIR 1982 SC 149.
[37]AIR 1999 SC 1.

on consultation process. The Court held that the consultation process to be adopted by the Chief Justice of India requires consultation of plurality of judges. The expression " consultation" with the Chief Justice of India in Articles 217(1) and 222(1) of the Constitution of India requires consultation of with plurality of Judges in the formation of opinion of the Chief Justice of India. The majority held that in regard to the appointment of judges to the Supreme Court under Article 124(2), the chief Justice of India should consult "a Collegium of four senior most Judges of the Supreme Court" and made it clear that "if two judges give adverse opinion the Chief Justice should not send the recommendation to the government." The collegium must include the successor Chief Justice of India. The recommendations of the collegium should be based on a consensus and unless the opinion is in conformity with that of the Chief Justice of India, no recommendations is to be made. The court held that the appointment of the judges of higher courts can be challenged only on the ground that the consultation power has not been in conformity with the guidelines laid down in the 1993 judgement and as per opinion given in the 1999 decision. The decision of the Supreme Court has struck a golden rule. It has made the consultation process more democratic and transparent.[38] The essential features of this judicially created system of appointments is that the collegium selects judges on their own assessment of the merits of a person and the government is bound to appoint the selected person except in a rare case of the collegium having overlooked some aspect of the incumbent not being a suitable judge. Even here, government's view can be disregarded by the collegium by reasserting its choice. The executive has little or no role in the appointment of judges as a result.[39]

NATIONAL JUDICIAL APPOINTMENT COMMISSION

In India proposals for the establishment of a National Commission for Judicial Appointments have been made at various times. The Law Commission in 1987 recommended a broad based body of judges and other person to make recommendations for the appointments of judges. A Constitutional Amendment Bill was tabled in Parliament for the establishment of such a Commissions in 1990 but it lapsed.[40] The then NDA Government led by A.B Vajpayee passed a resolution on 2nd February, 2000 constituting the National Commission to Review the Working of the Constitution,[41] to make suitable recommendations. It had as its Chairperson Mr. Justice M. N. Venkatachaliah, former Chief Justice if India. The Commission submitted its report to the government in which vide para 7.3.7, the report came to the following conclusion:

> "However, it would be worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making such recommendations. The Commission proposes the

[38] Dr.J.N Pandey, *Constitutional Law of India*, Central Law Agency, 2006, p. 461
[39] T.R. Andhyarujina, *Appointment of Judges by Collegium of Judges*, Opinion, The Hindu, December, 18, 2009.
[40] T.R. Andhyarujina, *Appointment of Judges by Collegium of Judges*, Opinion, The Hindu, December, 18, 2009.
[41] The Commission submitted its report in the form of two volumes, volume one dealt with the basic principles and recommendations for amending the Constitution whereas Volume two is sub-divided into three books, each comprising of consultation papers on various heads incidental to law and those affecting the structure of the Constitution. Volume 1 bears the recommendations regarding topic under deliberation, vide chapter 7. The copy of Report is available with the Law Ministry and can be retrieved from their official portal.

composition of the Collegium which gives due importance to and provides for the effective participation of both executive and the judicial wings if the state as an integrated scheme for the machinery for appointment of judges, this commission, accordingly, recommends the establishment of National Judicial Commission under the Constitution."

NDA Government has brought into force the National Judicial Appointments Commission (NJAC) Act, 2014 along with the 99th Constitutional Amendment Act, 2014. In this regard, notification to effect from 13 April 2015 was issued by the Union Law Ministry. With this new law the collegium system to appoint members to the higher judiciary has come to an end. Now President will appoint judges in the Supreme Court (SC) and 24 High Courts (HCs) in consultation with the NJAC.[42] The Constitution (Ninety Ninth Amendment) Act, 2014 provides for the composition and the functions of the proposed NJAC. It provides for the procedure to be followed by the NJAC for recommending persons for appointment as Chief Justice of India and other Judges of the Supreme Court (SC), and Chief Justice and other Judges of High Courts (HC)

The Acts provide for a transparent and broad-based process of selection of Judges of the Supreme Court and High Courts by the National Judicial Appointments Commission (NJAC). The NJAC would be chaired by the Chief Justice of India as in the earlier collegium system. The NJAC membership would include two senior most Judges of the Supreme Court, the Union Minister of Law and Justice, two eminent persons to be nominated by a committee of the Prime Minister of India, the Chief Justice of India, and the Leader of the Opposition in the House of the People, or if there is no Leader of the Opposition, then the Leader of the single largest Opposition Party in the House of the People. With a view to ensuring that the composition of the National Judicial Appointments Commission is inclusive, the Act provides that one of the eminent persons shall be nominated from amongst persons belonging to the Scheduled Caste, the Scheduled Tribes, Other Backward Classes, Minorities or Women. The NJAC will frame its own regulations.[43]

SALIENT FEATURES OF THE CONSTITUTION (121ST AMENDMENT) ACT, 2014 AND NATIONAL JUDICIAL APPOINTMENT COMMISSION: [44]

1. The Constitution (121st Amendment) Act, 2014 amends the provisions of the Constitution related to the appointment of Supreme Court and High Court judges, and the transfer of High Court judges.
2. Article 124 (2) of the Constitution provides that the President will make appointments of Supreme Court and High Court judges after consultation with the Chief Justice of India and other SC and HC

[42] http://currentaffairs.gktoday.in/national-judicial-appointment-commission-act-2014-force-04201521812.html.
[43] Press Information Bureau, Government of India, Ministry of Law & Justice , *National Judicial Appointments Commission Act* Notified , April 13, 2015. **http://pib.nic.in/newsite/PrintRelease.aspx?relid=118224**
[44] http://www.prsindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014-3359/

judges as he considers necessary. It amends Article 124 (2) of the Constitution to provide for a Commission, to be known as the National Judicial Appointments Commission (NJAC). The NJAC would then make recommendations to the President for appointments of SC and HC judges.

3. **Composition of NJAC:** A new Article inserted in the Constitution, Article 124A provides for the composition of the NJAC. The NJAC would consist of:
   (i) Chief Justice of India (Chairperson)
   (ii) Two senior most Supreme Court Judges
   (iii) The Union Minister of Law and Justice
   (iv) Two eminent persons (to be nominated by a committee consisting of the Chief Justice of India, Prime Minster of India and the Leader of Opposition in the Lok Sabha) Of the two eminent persons, one person would be from the SC/ST/OBC/minority communities or be a woman. The eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination.
4. **Functions of the NJAC**: A new Article, Article 124B, provides for the functions of the NJAC which include:
   (i) Recommending persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;
   (ii) Recommending transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and
   (iii) Ensuring that the persons recommended are of ability and integrity
5. Article 124C, enables Parliament to pass a law to:
   (i) regulate the procedure of appointments, and
   (ii) empower the NJAC to lay down the procedure for its functioning, and manner of selection of persons for appointment, through regulations.
6. The NJAC shall recommend the senior most judge of the Supreme Court for appointment as Chief Justice of India. This is provided he is considered fit to hold the office.
7. The NJAC shall recommend names of persons on the basis of their ability, merit and other criteria specified in the regulations.
8. The NJAC shall not recommend a person for appointment if any two of its members do not agree to such recommendation
9. The NJAC is to recommend a Judge of a High Court to be the Chief Justice of a High Court on the basis of seniority across High Court judges. The ability, merit and other criteria of suitability as specified in the regulations would also be considered.
10. **Appointment of other HC Judges**:

- Nominations shall be sought from Chief Justice of the concerned High Court for appointments of HC judges.
- The Commission shall nominate names for appointment of HC judges and forward such names to the Chief Justice of the concerned HCs for his views.
- In both cases, the Chief Justice of the HC shall consult two senior most judges of that HC and any other judges and advocates as specified in the regulations.
- The NJAC shall elicit the views of the Governor and Chief Minister of the state before making recommendations.
- The NJAC shall not recommend a person for appointment if any two members of the Commission do not agree to such recommendation.

11. **Transfer of Chief Justices and High Court judges**:
    - The NJAC is to make recommendations for transfer of Chief Justices and other judges of the High Courts.
    - The procedure to be followed will be specified in the regulations.
12. **Power of the President to require reconsideration**
    - The President may require the NJAC to reconsider the recommendations made by it.
    - If the NJAC makes a unanimous recommendation after such reconsideration, the President shall make the appointment accordingly.

SUPREME COURT STRUCK DOWN THE NJAC AND REVIVES COLLEGIUM SYSTEM IN ITS HISTORIC JUDGEMET:

The Supreme Court rejected the National Judicial Appointments Commission (NJAC) Act and the 99th Constitutional Amendment which sought to give politicians and civil society a final say in the appointment of judges to the highest courts. The Supreme Court declared on October 16, 2015 that the Constitution (Ninety-ninth Amendment) Act, 2014, and the National Judicial Appointments Commission Act, 2014, is unconstitutional and void and the consequence is that the collegium system existing prior to the Constitution (Ninety-ninth Amendment) Act, 2014, is declared to be operative.[45]

The Supreme Court considers that, the composition of the National Judicial Appointment Commission is unconstitutional. The reason given was that if the inclusion of any of the members of the NJAC is held to be unconstitutional, Article 124A will be rendered nugatory in its entirety. The court's reasoning was that the membership of the Chief Justice of India, Chairperson ex officio, and (a) and (b) of Article 124A (1) do not provide an adequate representation to the judicial component in the NJAC and are insufficient to preserve the primacy of the judiciary in the matters of selection and appointment of judges to

[45] The Hindu, October 17, 2015.

the higher judiciary. Similarly, clause (c) of Article 124A (1) is ultra vires the provisions of the Constitution because of the inclusion of the Union Minister in charge of Law and Justice as an ex officio member of the NJAC. It also held that the inclusion of two "eminent persons" as members of the NJAC is ultra vires the provisions of the Constitution[46]. The court has, however, held that the constitutional amendment alters the basic structure of the Constitution of India. "It is difficult to hold that the wisdom of appointment of judges can be shared with the political-executive. In India, the organic development of civil society has not as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the other organs of governance," Justice J.S. Khehar, the presiding judge on the five-judge Constitution Bench, explained in his individual judgment.

The Bench in a majority of 4:1 rejected the NJAC Act and the Constitutional Amendment as "unconstitutional and void." It held that the collegium system, as it existed before the NJAC, would again become "operative." The Bench admitted that all is not well even with the collegium system of "judges appointing judges", and that the time is ripe to improve the 21-year-old system of judicial appointments. "Help us improve and better the system. You see the mind is a wonderful instrument. The variance of opinions when different minds and interests meet or collide is wonderful," Justice Khehar told the government.[47]

The Bench underlined that the NJAC sought to interfere with the independence of the judiciary, of which appointment of judges and primacy of the judiciary in making such appointments were "indispensable" features. The court found objection to the situation where the decision of the Chief Justice of India is, in one sense, made to depend upon the opinion of two members of the NJAC, who may in a given case be the two eminent persons nominated to the NJAC in terms of Article 124A(1)(d) of the Constitution. These two eminent persons can actually stymie a recommendation of the NJAC for the appointment of a judge by exercising a veto conferred on each member of the NJAC by the second proviso to sub-section (2) of Section 5 of the NJAC Act, and without assigning any reason. In other words, the two "eminent persons" (or any two members of the NJAC) can stall the appointment of judges without reason. That this may not necessarily happen with any great frequency is not relevant – that such a situation can occur is disturbing. [48] As a result of this provision, the responsibility of making an appointment of a judge effectively passes over, in part, from the President and the Chief Justice of India to the members of the NJAC with a veto being conferred on any two unspecified members without any specific justification. To make matters worse, the President cannot even seek the views of anybody (other judges or lawyers or civil

[46] Rajindar Sachar , *CJI voting statistic, system needs to be fine-tuned*, The Tribune, October 17, 2015.

[47] The Hindu, *SC Bench strikes down NJAC Act as 'unconstitutional and void*, October, 20, 2015.

[48] Ibid. 43.

society) which was permissible prior to the 99th Constitution Amendment Act and a part of Article 124(2) of the Constitution prior to its amendment. [49]

COLLEGIUM SYSTEM: CRITICAL EVALUATION

The role of the executive was limited to seeking reconsideration of the recommendations by the collegium of judges in the light of the material in its possession which the collegium was bound to consider. The collegium was free to revise or reiterate its recommendations. Justices Madan B Lokur, Kurian Joseph and Adarsh K Goel wrote separate judgments supporting Justice Khehar's finding that "primacy of the judiciary has been rendered a further devastating blow by making it extremely fragile" by the introduction of NJAC. "There is no question of accepting an alternative procedure, which does not ensure primacy of the judiciary in the matter of selection and appointment of judges to the higher judiciary," they added. However, Justice J Chelameswar, writing a dissenting verdict, held that ever-rising pendency of cases warranted a "comprehensive reform of the system" and upheld the validity of the constitutional amendment. Differing with the majority, he said that primacy of the CJI is not a basic structure of the Constitution and judiciary's power over appointments was "not the only means for the establishment of an independent and efficient judiciary."[50] Justice Chelameswar Criticising the collegium system said that "proceedings of the collegium were absolutely opaque and inaccessible both to public and history, barring occasional leaks". His views on the collegium received partial support from the other judges, who noted that collegium system may need certain improvements. But Justice Khehar held that "the functioning of the "collegium system" may well not be as bad as it is shown to be".[51]

The need for checks and balances in the selection is indeed pressing. Justice Khehar has made an excellent suggestion which deserves serious thought. He said, to start with, one or more "eminent persons" even a committee of "eminent persons" can be assigned an advisory/consultative role, by allowing them to express their opinion about the nominees under consideration and added that the advisory committee could comprise eminent lawyers, eminent jurists, and even retired judges, or the like, having an insight into the working and functioning of the judicial system, ensuring that the participants have no conflict of interest. The collegium would not be bound by the opinion expressed, but would be obliged to keep the opinion in mind, while finalising the names of the nominated candidates. To ensure transparency and accountability, information about the selection may be made accessible to the public under the RTI Act after the appointments are made. The suggested method will minimise the scope for favouritism, nepotism, corruption, etc., and facilitate good appointments. [52] The government has also suggested bringing the

[49] In The Supreme Court of India civil Original Jurisdiction writ Petition (Civil) No. 13 OF 2015 Supreme Court Advocates –on-Record – Association and Another v. Union of India.
[50] The Indian Express, October, 17, 2015.
[51] Ibid.
[52] PP Rao, *How to Improve Collegium System,* The Tribune, November 2, 2015.

collegium under the RTI Act where all information related to selection of judges can be made public to bring transparency in the appointment process.

Justice J.S. Khehar, heading the five-judge bench hearing the case, said improvements to the system had to be within the parameters of earlier practices. The Supreme Court on November 3, 2015, will hear the suggestions from different stakeholders and most likely the government to improve the collegium system. The court, acknowledging the public discourse, asked lawyers involved in the case to consider four possible areas of improvement: transparency, an eligibility criteria, a secretariat to assist the collegium and dealing with complaints against persons being considered for appointment. The court said it received many suggestions that were "diverse" in purpose and intent. Among those who gave inputs was the government, which, however, clarified its suggestions are subject to its "reservation about the correctness of the judgment" of 16 October. In its written note, the government said, "to ensure public confidence and credibility", the collegium system of judicial appointments needed to be "efficient, transparent and accountable".[53]

CONCLUSION AND SUGGESTIONS

The Supreme Court has invalidated an attempt to provide a legislated alternative to its own collegium system of judicial appointments. After restoring the Collegium System, there is a need to come up with improvements that will enhance transparency in appointments and provide reasonable eligibility criteria for prospective judges. Supreme Court struck down the Constitutional amendment to set up a National Judicial Appointments Commission and admitted to serious shortcomings in the system it has been implementing for over two decades, the court has to take the next logical step of reforming the existing mechanism. It has embarked on a unique process to involve the entire society in the exercise by inviting suggestions from the public. For the first time, the average citizen is included in a process hitherto seen as arcane and solely within the domain of the government and the higher judiciary. It may not have been ideal in a democracy for something as important as criteria for appointments to the higher judiciary to be evolved through a court hearing merely after listening to key stakeholders — the government and the legal fraternity. This would have meant nothing more than a process of harmonising courtroom differences and evolving a common scheme. By widening the range of views to include the public at large, the court has made it as close to a democratic exercise as possible.[54] Recently , the Supreme Court on June 13, 2018 introduces some guidelines in order to improve and to make it more transparent and accountable the collegium system regarding the appointment of judges in the higher judiciary. In this regard, A five-judge constitution bench headed by Justice JS Khehar of the Supreme Court asked the central government to prepare and finalise a

[53]Shreeja Sen, *Supreme Court identifies four ways to improve collegium,* http://www.livemint.com/Politics/lXZxASF3QwbwOp6wXM5VvN/SC-identifies-four-points-for-considering-improvement-of-col.html

[54] The Hindu, *Courting the Peoples' View*, November, 10, 2015.

memorandum of procedure (MOP) in consultation with the chief justice of India. Memorandum of Procedure should be prepared with due diligence and considered five basic principles such as, "*eligibility criteria, transparency in appointment process, setting up of Secretariat for management of selection process, mechanism to deal with complaints against those who are being considered for appointment and to look into miscellaneous issues."*[55]

[55] Retrieved from https://www.firstpost.com/india/njac-supreme-court-issues-guidelines-to-make-collegium-system-more-transparent-2547860.html , visited on June 16, 2018.