

JUDICIAL APPOINTMENTS IN INDIA –A CRITICAL ANALYSIS TOWARDS AMELIORATION

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ABSTRACT

An Independent Judiciary is always considered as the most important part of any democratic setup as democracy, written constitution and separation of power are often considered as interdependent on each other and it is the Independent Judiciary which ensures the spirit of constitutionalism.

The manner of appointments of judges in any nation decides the extent of Independence of Judiciary. India being the world's largest democratic republic with the lengthiest constitution has its own manner and procedure of judicial appointments. The bare text of the Constitution mentions that the President of India in consultation with the Chief Justice of India shall appoint the Judges of the High Courts (hereinafter referred as HC) and the Supreme Court (hereinafter referred as SC). After 3 decades of enforcement of the Constitution, a question aroused as to what exactly the Constituent assembly intended with regards to the judicial appointments? The verdicts of the Judges case and Advocates-on-Record Association v Union of India (NJAC verdict) gave a new dimension to the judicial appointments in India.

Right from the First judges case in 1981 upto the NJAC verdict in 2015, the question still has no clear answer as to who should have the final say in the judicial appointments, the judges themselves through collegium or the President of India. The Hon'ble SC although has clearly interpreted article 124 and Article 217 in a broad manner giving the upper hand to the CJI along with the collegium but this didn't windup the issue. The existing procedure faces criticism due to slow and non transparent system of appointment.

This paper aims at suggesting a method of appointment which is most suitable for facilitating an independent, efficient and transparent judiciary along with the speedy appointments for filling the vacant positions and to reduce the plethora of pending cases across the nation.

Key Words: Independent Judiciary, Collegium, NJAC, Judicial Appointments, High Court and Supreme Court judges.

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INTRODUCTION:

An independent judiciary is the most important and crucial pillar of a democratic establishment. Democracy, written constitution and separation of power are interdependent on each other. It is the judiciary which keeps alive the above mentioned concepts, both in practice and in theory. The independence of judiciary largely depends on the procedure of judicial appointments. A transparent and efficient appointment system for this high integrity institution is thus very significant.

The Constitution of India mentions that the appointments of the Judges of High Courts and the Supreme Courts shall be made by the President of India in consultation with the Chief Justice of India, giving the supremacy to the President in appointments of the higher judiciary. The Supreme Court however turned the interpretation upside down by inserting the collegium through the judges case, giving the primacy to the Chief Justice. The collegium system certainly is not flawless.

Right from the First judges case³ in 1981 up to the NJAC verdict in 2015, the question still has no clear answer as to who should have the primacy in higher judiciary appointments, the judges themselves by way of the Chief Justice of India or the government through the President. The Hon'ble Supreme Court although has clearly interpreted article 124⁴ and Article 217⁵ in a broader manner giving primacy to the CJI along with the collegium, but this has not closed the debate. The issue which arises is that whether the SC being the final interpreter, while interpreting the provisions of the Constitution can go beyond such an extent that by way of broader interpretation the very meaning of the text itself shall be changed.

The government since 1991 has been trying to establish a Judicial Appointments Commission but the apex court quashed the NJAC Act and the 99th Constitutional Amendment Act⁶ on October 2015. A midway solution by way of a Memorandum of Procedure (MOP) with the consent of the government as well as the judiciary and the initiative by the apex court to publish the reasons given by the collegium while considering the candidature for judicial appointments and accepting or rejecting the names has raised a new hope.

The existing system requires restructuring for give some weightage to the executive's opinion. This shall end the tussle between the judiciary and executive. The dissertation aims to provide several suggestions for facilitating better, transparent and efficient appointments in the higher judiciary.

The first chapter shall describe the process and evolution of the judicial appointments in India since the constituent assembly debates and the difference in the system prior to the judges case and after it. The judges cases would be critically analysed in this chapter.

³ S.P. Gupta v. Union of India 1981 (Supp) SCC 87

⁴ The Constitution of India 1950, Article 124.

⁵ The Constitution of India 1950, Article 217.

⁶ Constitution of India (99th Amendment) Act, 2015

The second chapter shall critically analyse the collegium system and the NJAC verdict. The emphasis would be on the shortcomings of the collegium and its working. The study aims to find and discuss the reasons behind the unconstitutionality of the NJAC and its composition

The third chapter shall provide several suggestions and alternative methods for appointments in the higher judiciary. This shall ensure the establishment of time bound, transparent and efficient system for negating the scope of favouritism.

RESEARCH METHODOLOGY

The methodology followed in the research is doctrinal in nature. The research has been done with the aid of different materials found both online and offline. The analysis of the judicial pronouncements, legislations and literatures are the main tools of research. The sources being referred to are both primary and secondary sources. Primary sources include the Constitution of India, the case laws, Constituent Assembly Debates and Reports. Whereas secondary sources includes books given by different authors, journals and commentaries.

RESEARCH QUESTION

1. How has the judicial appointments process in the Indian constitution been altered over the period of time?
2. The limitations of collegium and the NJAC verdict - A critical analysis.
3. Prospective methods of appointment in the higher judiciary : Suggestions and way forward.

THE EVOLUTION OF JUDICIAL APPOINTMENTS IN INDIA - A CONSTITUTIONAL PERSPECTIVE.

The Constitution of India is the most elaborative written constitution. The quasi federal structure of the constitution defines and elucidates all the powers, functions, duties, rights and limitations of the three organs of state. The judiciary being one of the three organs, derives its origin, authority and restrictions from the constitution. The procedure for appointments of judges is a constitutionally mandated mechanism which time and again has been altered through the evolution of the collegium system. The original constitution didn't provide for this appointment process which prevails since last three decades. Hence it is necessary to study and analyze the very intention of the constituent assembly and the constitutional provisions with respect to the appointments of the judges of Supreme Court and High Courts. This chapter shall describe the evolution of judicial appointments since the enactment of the constitution and through the judges case.

PROVISIONS OF THE CONSTITUTION FOR APPOINTMENT OF JUDGES:-

The constituent assembly members while drafting the constitution of India had analyzed the social, economical, political and legal aspects of each and every provision very academically and after consensus of the assembly, it was adopted on behalf of 'WE THE PEOPLE'. There were some significant discussions on criterion to appoint judges and there was distinct consensus on the process of selection and appointment of judges. Jawaharlal Nehru was of the view that the judges would be "highest integrity" and who would be "persons who can stand up against the executive, the legislature or whosoever might come in their way." The assembly agreed that the judiciary's independence was important, but not its "insulation"⁷.

Echoing this view, Dr. B.R. Ambedkar strongly criticized a proposal to make the opinion of Chief Justice of India in the matter of appointing judges binding on the executive, in a speech that accurately captures the dangers of this move – "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 position. With regard to the questions of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no appointment of judges is really to transfer the authority to the

Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore think that is also a dangerous proposition."⁸

These debates saw fruition in the form of Articles 124 and 217 (for appointment of Judges to the Supreme Court and High Court respectively) that embody a consultative system of appointment of judges – one where the power, although residing with the executive was exercisable only after consultation with the Chief Justice of India for Supreme Court appointments, and the Chief Justice of the High Court for High Court appointments. It was felt that a multiplicity of high constitutional authorities, some of whom were apolitical, would ensure that judges of the highest quality would be appointed.

Article 124(2) reads:

'Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.'⁹

⁷ Constituent Assembly Debates, 24th May, 1949; Vol. VIII

⁸ Constituent Assembly Debates, 24th May, 1949; Vol. VIII

Article 217(1) reads:

‘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.’¹⁰

These constitutional provisions have been incorporated after meaningful debate on fundamental issue of judicial independence that took place in constituent assembly on 24th and 27th of May, 1949. The constituent assembly after long debate adopted the system by which the president would appoint judges, though mandatorily consulting the Chief Justice of India. This entrustment of the constitutional role to the Chief Justice of India was done with an intention to create a check on politically motivated selection in appointment. However, Dr. Ambedkar, speaking in the assembly, carefully stressed that consultation did not amount to a veto, since that would result in an unrestricted power being vested in a single person.

In this way, a careful inter-institutional equilibrium in the process of judicial appointments was envisaged by the Constituent Assembly - a multiplicity of authorities across the wings of government, checking and balancing each other to ensure that the dignity of the judiciary was maintained and judicial independence remained sacrosanct.

Law Commission of India in its 14th report titled ‘Reform of Judicial Administration’ raised concern on the constitutionally envisaged system of appointment that the role of executive, especially in the state, was leading to the erosion of the independence of the judiciary. Probably, this was the beginning of a belief that the judiciary itself, through its representatives, was best placed to decide on its own composition, and thereby secure judicial independence.¹¹

THE DISINTEGRATION OF AN INDEPENDENT JUDICIARY:-

In its initial years, the system of appointing judges remained without controversy or conflict. A collaborative system had emerged between constitutional functionaries. Despite political pressure, Presidents did not act except with the concurrence of the Chief Justice of India in appointments. Granville Austin, in fact, went so far to proclaim that the Chief Justice of India during Nehru’s tenure as a Prime Minister, owing to convention and the strength of his character “virtually had a veto power over appointment decisions¹².” From the 1970’s onwards however, Indian constitutional framework changed in response to political actions, ultimately resulting in the Supreme Court seizing the power to appoint judges (in the 3 Judges Case discussed later), in effect, accepting the proposal rejected by the Constituent Assembly. This usurpation of the power by the judiciary coincided with the weakening of political power at the Centre and happened in several important steps.

⁹ Constitution of India 1950, a 124

¹⁰ Constitution of India 1950, a 217

¹¹ Law Commission of India Report, *Lawcommissionofindia.nic.in*, 2018 <<http://lawcommissionofindia.nic.in/1-50/Report14vol1.pdf>> accessed 10 March 2018.

¹² Granville Austin, *Working A Democratic Constitution* (Oxford Univ Press 2012)

Between 1950 and 1973, four confrontations took place between the executive and the judiciary, and with each confrontation, the court grew increasingly estranged narrow majority of six to five that Part III of the Constitution, containing the Fundamental Rights, could not be curtailed in any way. Rumours spread that the government intended to pack the Court to have the Golak Nath decision over-ruled. This paved the way for the fourth and most momentous confrontation in 1972-73 in *Kesavananda Bharati v State of Kerala*¹³, where an unprecedented 13-Judge Bench of the Supreme Court held, by a slim seven to six majority, that the Constitution had an 'unamendable' or entrenched 'basic structure'. The very next day, All India Radio announced that the next Chief Justice would be AN Ray, the fourth most senior judge of the Supreme Court at the time, effectively demolishing the convention of seniority followed by the Court since its inception.¹⁴

A 1976 order to transfer sixteen judges of various high courts was set aside by the Gujarat High Court as the CJI had not been consulted. Meanwhile, in the Habeas Corpus case¹⁵ (*ADM Jabalpur*), in what is perhaps the lowest point of India's constitutional history, a 5 Judge Bench of the Supreme Court held that the writ of habeas corpus would not be available to arbitrarily arrested and detained individuals during the emergency. Justice HR Khanna wrote the lone courageous dissent, but paid the price when the Government, after Justice AN Ray's retirement, instead of appointing Justice Khanna as the Chief Justice being the next senior most judge, appointed Justice MH Beg who was next in the line of seniority.¹⁶

This paved the way for the trinity of cases – the three Judges cases – by the last of which, the Supreme Court completely usurped the power of appointment of judges.

THE FIRST JUDGES CASE

In this 1981 case of *S.P. Gupta v. Union of India*¹⁷, also known as the First Judge's case, a seven judge constitution bench, in a 4:3 majority presided over by Justice P.N Bhagwati held that the recommendations of the CJI were constitutionally not binding on the Government. The majority refused to entertain 'primacy' and its implications into the consultation process. Each of the seven bench members issued a separate opinion in the First Judges Case, resulting in judgements that totalled nearly half a million words¹⁸ and obscured, to some extent, the law on judicial appointments and transfers.¹⁹

Until the late 1970s, the Supreme Court and high courts would entertain writ petitions only by people who were victims of an illegality or whose legal rights had been violated. However, in the First "judges Case, the PIL took firm root. Locus standi was extended forever.

¹³ (1973) 4 SCC 225

¹⁴ Bar Bench, 'Supersession, Seniority And The Country's Next Chief Justice - Bar & Bench' (*Bar & Bench*, 2018) <<http://barandbench.com/supersession-seniority-chief-justice-72390/>> accessed 10 March 2018.

¹⁵ 1976 AIR 1207

¹⁶ "H.R. Khanna, A Courageous And Firm Judge" (*The Hindu*, 2018) <<http://www.thehindu.com/todays-paper/tp-national/ldquoH.R.-Khanna-a-courageous-and-firm-judgerdquo/article15179443.ece>> accessed 10 March 2018.

¹⁷ 1981 (Supp) SCC 87

¹⁸ N. A Palkhivala, *We, The People* (UBS Publishers' Distributors 2008) p 222.

¹⁹ Granville Austin, *Working A Democratic Constitution* (Oxford Univ Press 2012) p 527.

The Supreme Court refused to adhere to its strict rules of ‘standing’, holding that the cause of justice can never be allowed to be thwarted by any procedural technicalities’.²⁰

The most important issue on which the court ruled in the First Judges Case was the dynamics of power between the executive and the judiciary in appointing judges. The court held that the CJI’s opinion in appointing judges of the high court and Supreme Court was not to receive primacy. The CJI did not possess a veto in making judicial appointments. In fact, the majority gave the executive the final say in making appointments to the higher judiciary. Interestingly, the majority also refused to strike down the law minister’s circular, stating that it had ‘no constitutional or legal sanction.’²¹

From a position where the appointment power was balanced between the executive and the judiciary, the First Judges Case placed the executive in the driver’s seat. Given that this occurred so soon after the Emergency, where the very same power of judicial appointments had been misused by the government to severely undermine judicial independence, one wonders why the court chose to compromise its independence by not retaining convention.

This had set the ground for the Second Judges case.

THE SECOND JUDGES CASE:-

The questions on judicial appointments and transfers were therefore referred to a nine-judge bench of the Supreme Court in *Supreme Court Advocates-on-Record Association v. Union of India*²² (Second Judges Case). Five separate opinions were delivered by the bench and the majority overruled the earlier decision of the Supreme Court in the First Judges Case.

The Second Judges Case achieved the following in the area of judicial appointments: first, it overturned the decision in the First Judges Case and gave the last word on appointments to the judiciary; and second, it decentralized the power conferred upon the CJI granting this power to a plurality of judges—the collegium.

The rationale behind the Supreme Courts judgement in the Second Judges Case was to minimize political influence in judicial appointments and reduce the individual discretion of the chief justices of the Supreme Court and high courts by introducing the decentralized, collegium system. In effect, the Supreme Court moved from one extreme (the government making judicial appointments) to the other (judges becoming the supreme authority in the judicial appointments process). Why? Perhaps it was an overcompensation—an exaggerated remedial measure to rectify the ‘self-inflicted wound’²³ caused by the Supreme Court’s judgment in the First Judges Case.

²⁰ First Judges Case at para. 17 (judgement of Justice Bhagwati)

²¹ *First Judges Case* at para. 44 (judgement of Justice Bhagwati).

²² AIR 1994 SC 268

²³Datar, *Commentary on the Constitution of India*, p. 1153.

There is no doubt that the decision in the Second Judges Case virtually rewrote some provisions of the Constitution.²⁴ The expression ‘consultation (with the CJI, in relation to appointing judges) was tactfully changed to concurrence’.

THIRD JUDGES CASE:-

The next confrontation between the judiciary and the executive over the issue of judicial appointments took place in 1997-98. The CJI, Justice M.M. Punchhi, recommended the names of five people for appointment to the Supreme Court. The executive refused to do so, expressing doubts about whether recommended people were fit to be appointed as Supreme judges. As a result, President K.R. Narayanan sought the Supreme Court’s opinion under Article 143 on nine questions, covering three broad issues: (1) Consultation between the CJI and his brother judges for deciding on appointments to the High Courts and the Supreme Court, (2) Judicial review of the transfer of judges, and (3) The relevance of seniority of high court judges in making appointments to the Supreme Court.

A nine-judge bench of the Supreme Court delivered a unanimous opinion while answering the questions.²⁵ The court emphasized that judicial appointments would have to take place according to the principles enunciated in its decision in the Second Judges Case the only revision it made was that for the appointment of judges to the Supreme Court, the collegium would consist of the CJI and four (as against two) senior-most colleagues. The judgment did not do much more than reiterate, endorse and perpetuate the collegium system of judicial appointments.

THE THREE JUDGES CASE- ANALYSES

In 1973, the executive interfered with the existing framework and appointed Justice A. N. Ray as Chief Justice of India superseding three senior judges to him. However, in 1975, another Justice H.M. Beg was appointed Chief Justice of India, replaced Justice Khanna. The judiciary stung by such misuse of powers, got an opportunity in the judge’s cases to take it right in 1981, 1993 and 1998. As a result of the three judge’s cases, the collegium system came into existence. It has almost ended the role and authority of the executive in the appointments to the higher judiciary. For this the Indian judiciary has achieved with regard to the appointment of judges. No judiciary got that freedom to appoint judges elsewhere in the world. This had set the grounds for the National Judicial Appointments Commission.

THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION:-

The National Commission to Review the Working of the Constitution of India²⁶ was set up in 2000 to review the working of the Indian Constitution after 50 years of its commencement. The commission submitted its report in 2002 and recommended that the collegium system is a non transparent practice

24 Durga Das Basu, Shorter Constitution of India, 13th ed. (Nagpur: Wadhwa Nagpur, 2001), p. 777.

25 In Re: Under Article 143(1) of the Constitution of India (AIR 1999 SC 1).

26 ‘Report Of The National Commission To Review The Working Of The Constitution Of India’ (Ministry of Law, Justice and Company Affairs, Department of Legal Affairs, New Delhi 2002)

which may lead to appointment of inefficient judges. In the report, a 5 member National Judicial Appointments Commission was recommended which would consist of the Chief Justice of India, 2 senior most judges, the law minister and 1 eminent person to be nominated by the President of India after the consulting the Chief Justice of India. It was after the recommendation of this commission that the government of India in the year 2002 for the first time started the efforts to replace the collegium with the NJAC.

THE NJAC VERDICT

The 99th constitutional amendment act²⁷ and the accompanying NJAC act were passed in 2014. According to the act, the NJAC was to consist of six members

- The CJI
- Two senior most judges of the Supreme Court
- The Law Minister and
- Two eminent persons (to be selected by a committee comprising the CJI, the Prime Minister and the Leader of Opposition in the Lok Sabha).

However, this Act was struck down by the Supreme Court in the case of Supreme Court Advocates-on-Record Association v Union of India²⁸, by a majority of 4:1, as being unconstitutional. It was held that the very composition and functioning of the NJAC was intended to interfere with the judicial independence which shall infringe the basic structure. The sole dissenting opinion was offered by Justice Chelameswar. Today, the position of the appointments of judges is the same as confirmed in the third judges case i.e. collegium of CJI and the four senior most judges have the primacy on judicial appointments. The critical analysis on the working and limitations of collegium system shall be made in the next chapter.

THE LIMITATIONS OF COLLEGIUM AND NJAC- A CRITICAL ANALYS

The procedure for appointment of Judges of the Supreme Court and the transfer from one High Court to another had to be followed according to Article 124, 217 and 222 of the Constitution of India. Initially the appointment of the judges was made by the President in consultation with chief justice and other judges. Even President only sustained power to transfer. In the matter of choosing judges, the Constituent Assembly ensured that the executive does not have discretion and complete control over the appointment of process. The purpose of assembly was to create independent and efficient judiciary. The Constitution provides under Article 124(2) for appointment of Supreme Court judges.²⁹ It provides that President is required to appoint by a warrant under his hand and seal after the consultation with the Chief Justice of India. The interpretation of these provisions with regard to appointment of judges has been an issue on which a huge debate has break out over judicial independence in India.

²⁷ The Constitution (Ninety Ninth Amendment) Act 2014

²⁸ Writ Petition no. 13 of 2015, SC

²⁹ Constitution of India 1950, a 124(2)

The three judge's cases led to huge political debate over the judicial control of the appointment process. The decision's entertained the judiciary complete and unchecked power over its own functioning. Various Constitutional amendment proposals were formally made to undo these decisions. In this chapter, the analytical part is divided further into two parts. Part I examine the flaws of the NJAC judgment and Part II evaluates the shortcoming of collegium as a whole system.

NJAC JUDGMENT: A CRITICAL ANALYSIS

The Ninety- ninth amendment³⁰ and the National Judicial Appointment Commission Act³¹ were challenged as violating the Constitution's basic structure in NJAC judgment. On 16th October 2015, the Supreme Court passed its judgment and by 4:1 majority struck down the Amendment as violating the basic structure doctrine.³² The fundamental issue in this judgment before the Supreme Court was whether judicial independence required the judiciary to have primary in the appointments process.

OPINION OF THE JUDGES

The opinion of Kehar J, contains a detailed history of the development of independence of judiciary in India and of debates which were discussed on appointing process, answered this question and highlighted three important points. First, he stated the mistake to characterise the collegium system as giving exclusive power to judges. He drew attention to memoranda for the appointments procedure drawn by the Ministry of Law, Justice and Company Affairs in 1999 after following three judge's cases, which clearly revealed that the political executive did play a part in determining how judges were appointed.³³

Secondly, Kehar J. suggested that a careful examining of constitutional history, with regard to judicial appointment considering Dr. B. R. Ambedkar's principal concerns that 'judiciary must have independence from executive'. Here Kehar J. argued that the word 'consultation' in Articles 124 and 217, aimed that appointments were not the free will of the executive. Thirdly, Kehar J. held that judiciary's primacy was done away with by the composition and structure of the NJAC. It is emphasizing on two members other than that of the judiciary and executive to be included in the appointments commission. The constitutional requirement of judicial independence only permitted the Union Minister for Law and Justice to play a consultative role. Thus, the inclusion of 'the two eminent citizens' goes against the very constitutional idea.

Another opinion made by Lokur J. where he highlighted Ambedkar's concern with executive primacy over the appointment process, and held that a single person would control the process of appointment was the principal fear of Constituent Assembly. Lokur J noted that prior to the Ninety- Ninth Amendment, the process was participatory in two ways. At the pre- recommendation stage, it consisted of the Chief Justice and certain other members of the Supreme Court. In the post recommendation stage, it was participatory

³⁰ The Constitution (Ninety Ninth Amendment) Act 2014

³¹ National Judicial Appointment Commission Act 2014

³² Supreme Court Advocates- on- Record Association v Union of India [2015] SCC, SC 964

³³ Memorandum showing the procedure for appointment of the Chief Justice of India and judges of the Supreme Court of India <<http://doj.gov.in/default/files/memosc.pdf>>, accessed April 2018

because the executive could offer its objections to a particular recommendations or any other opinion. Even Lokur J pointed out that the judicial primacy in appointment process was a constitutional convention that had existed since the Government of India Act 1935. The NJAC with its composition was mentioned in both constitutional text and history. Both the honourable, Lokur J and Kehar J, offered a criticism on NJAC's judgment.³⁴ The two 'eminent members' had effective veto over the entire judiciary.

Goel J. noted on the process that the primacy of the judiciary in the appointment process was a part of the basic structure of the Constitution. Without this, the executive and legislature could effectively control the process. Another judge Joseph J, emphasized on separation of powers and the structural consequences of the impugned Amendment. Though, Chelameswar J, did not deny the importance of judicial independence or challenge its place in India. However, he suggested that the primacy of the judiciary in the appointment process could not be the sole process toward the creation of an independent judiciary. His opinion on Kesavananda Bharati and the cases that followed drew a distinction between the basic features and the basic structure of the Constitution. The basic structure of the Constitution was consisted basic features. If there is a change in single basic feature of Constitution, it may not necessarily destroy the basic structure of the Constitution. It was argued with an instance by Chelameswar J, that while democracy was a basic feature of the Constitution, a minor change in the voting age would be constitutional. Based on basic features Chelameswar J, argued that basic feature of Constitution was with executive in appointment process without exclusive and absolute power, it was not with Chief Justice of India or the Collegium. This fact remained unchanged by Amendment and therefore was Constitutional.

SUPREME COURT'S VERDICT ON NINETY- NINTH AMENDMENT

After striking down of Ninety-Nine Amendment, the Supreme Court was in the opinion of earlier method of appointment, that is, the collegium system, would revive. The majority accepted the revive of collegium system which should be improved. Furthermore, it listed hearing where the collegium system could be remedied. While there is no doubt that the collegium system could be improved and even Supreme Court has also accepted but prior to this system it was a reaction to the political dominance over the appointment process of Supreme Court Judges that was entertained during the tenure of Prime Minister Indira Gandhi. During that period if any judges who communicate inconvenience to the Government of India, had to suffer suppression to the high office of Chief Justice of India and also unilateral transfer.³⁵ However, the collegium system managed to eliminate this kind of political interference. Moreover, the apex court's decision to strike them down has restored the independence in judiciary.

³⁴ Supreme Court Advocates- on- Record Association [1051] (n 31) (Lokur J.)

³⁵ Supersession of Justice Grover, Justice Hegde and Justice Shelat in 1993 by appointing Justice AN Ray as CJI and appointment of Justice MH Beg as CJI by superseding Justice HR Khanna, the most senior judge in 1977; there was also the transfer of a number of High Court judges during the period.

SHORTCOMINGS OF COLLEGIUM SYSTEM

The Collegium system of appointment, which makes judiciary absolutely independent from the executive suffers from some shortcomings. Commissions, committees and eminent personalities has objected collegium system which are summarized as follows:

1. The appointment process of the judges by the collegium system was completely opaque and procedure for checking was not reasonable for appointment.³⁶
2. There was a lack of accountability on the part of Judiciary.³⁷
3. Lack of implementation, which was the major reason for the vacancy in the courts and resulted pendency of cases.³⁸
4. The collegium system was broadly considered to be unconstitutional as the Constitution provided for the appointment by the President in consultation with the judiciary and not vice versa.³⁹

Primacy of the chief justice of India, on which the whole system of independent judiciary is under Constitution of India, had proved disastrous during the Internal Emergency of June 1975 to January 1977. On that period Chief Justice A. N. Ray had directed transfers of judges from one high courts to another, not on the basis of work in one high court or other but solely because these judges decided certain important cases which was politically against central government or the relevant state government. They were known as 'punitive' transfers. Though in the collegium process it is not good that judges are or were not appointed to the Supreme Court but sometimes better judges are overlooked or ignored.

So over the years many of the recommendations of this five- member collegium have been 'good', some have been 'not so good' or could have been much better. So there are flaws in collegium system, it didn't work well, neither the system of appointments between 1981 and 1992 nor the post 1993 system of appointments. In England the last lord chancellor had mooted proposals for greater 'people participation' in the selection of judges. Selection on merit to the higher judiciary in England is no longer restricted to persons who are invited to accept. In India, ideal system of appointment lies not necessarily in the number or type of persons who select. The important is there must be greater transparency in the method and procedure of appointment of judges to the higher judiciary. As under our Constitution it is the Supreme Court of India that is the final interpreter of the Constitution and of laws. By method and procedure, it means once system is in place and the method and procedure of appointment within judiciary must be left to the justices. Therefore, the problem in collegium system is not enough attention is given to the important task of recommendation judges for appointment to the

³⁶ H. R. Bhardwaj, 'Collegium system has failed' *The Hindustan Times* (2008)

³⁷ Second Administrative Reforms Commission, *Fourth Report Ethics in Governance* (P. 50)

³⁸ Sadanand Gowda, Union Law Minister, *The Times of India* (2014)

³⁹ Report of the Law Commission of India (214th p. 59)

Supreme Court, simply because the five judges at the top are too busy deciding cases that come before them.⁴⁰

The 1993 judgment was very much misunderstood and misused. Therefore, some kind of rethink is required. The appointment process of high court and Supreme Court judges is basically a joint or participatory exercise between the executive and the judiciary, both taking part in it. India has one of the most detailed constitutions in the world. In spite of this, the judiciary has had to step in on many occasions to ensure that Constitution was not misused. In Indian Constitution, the process of judicial appointments was meant to establish a system of checks and balance, where merits were the prior consideration. If executive had discussed with the CJI in all cases without political compulsions. Then there would not be any struggle to find some sense of balance in the appointment procedure today. The current era lacks institutionalized system of making recommendations for the appointment of judges. The lack of transparency in the process has impacted the legitimacy of Supreme Court as it preserves legitimacy. Many who were associated with Second Judges case later expressed that there is a real threat to the Indian judiciary.⁴¹ However, it is a time to attain balance of power in appointing members of the most powerful institution in India. In Constitutional theory, judicial appointment power cannot be vested in Supreme Court.

The Attorney General of India Mr. Mukul Rohtagi while appearing for the respondent Union of India asserted on the fact that there was no provision in the Constitution of India either when it was originally drafted, or at any stage thereafter, which authorises the judges themselves to appoint the judges of the higher judiciary. It was advocated that the judiciary had no jurisdiction to assume to itself, the role of appointment of judges to the higher judiciary and it is the Parliament alone, which represents the citizenry and the people of this country, and has the exclusive jurisdiction to legislate on matters. Accordingly, it was argued that the decisions in the Second and Third Judges cases, must be viewed as legislation without any jurisdictional authority.⁴²

The court accepted the fact that the collegium needs to undergo refinement and it is certainly not the best method of appointment. To go by the original constitution, if the executive would have consulted the Chief Justice in a free and fair manner, without any political biasness or mala fide intentions, perhaps we would not have been struggling to find some sense of balance in the appointments procedure today.⁴³

The American Jurist and law professor Alexander Bickel's book 'The Least Dangerous Branch' gave the term 'counter-majoritarian and anti democratic' for the judiciary. The appointment of judges across the world is done by independent commissions or by the elected governments following the majoritarian principle. But, the extensive and self acclaimed powers of the Supreme Court of India, particularly in the context of collegium, enunciates its counter-majoritarian character.

⁴⁰ Fali S. Nariman, *Before Memory Fades* (first published 2010, Hay House 2014) 390.

⁴¹ Shourie, 'Mrs. Gandhi's Second Reign' p. 249

⁴² Samaraditya Pal, *India's Constitution : Origins and Evolution*: Vol. 6 (LexisNexis 2016) 267.

⁴³ Arvind Datar, *Commentary on the Constitution of India*, Vol. 1 (LexisNexis 2010) 1160.

In India, the Supreme Court exercises extensive powers in reviewing government actions and strike down laws when it is necessary and even the amendments in Constitution made by the Parliament. However, judges in most other countries are appointed by independent commissions or by elected governments. Though, legal scholars have suggested creating a National Judicial Commission which would have the authority to appoint judges of the higher judiciary.⁴⁴ Mostly proposals for a National Judicial Commission have been introduced in Parliament but it didn't materialise. At this moment, a commission of this nature is require to restore the system of checks and balances in judicial appointments.

PROSPECTIVE METHOD OF APPOINTMENTS IN THE HIGHER JUDICIARY : SUGGESTIONS AND WAY FORWARD.

The collegium consists of the Chief Justice and the 4 senior most judges of the Supreme Court. The primary responsibility of the judges including these five judges is to adjudicate, deliver justice and also to dispose of the plethora of cases. The CJI is also the administrative head of the judiciary. This is an inescapable fact that the judges of the Supreme Court are over burdened with these foremost responsibilities which they need to perform as a part of their constitutional obligation and national duty. The top five judges have a furthermore duty to be performed i.e. for ensuring the selection and appointment of independent and efficient judges. This has been a widely accepted fact by the judiciary, the legislature, the executive and the legal fraternity in toto that the present collegium system needs reforms. But, the mere recording of reasons given by the members or minutes of the meetings of the collegium aren't adequate. This chapter intends to suggest with several reforms for the amelioration of the collegium system and ensuring the unquestionable integrity and impeccable honesty in the appointments process.

ENLARGING THE ELIGIBILITY CRITERIA : CREATION OF A POOL

The Supreme Court in the NJAC verdict declared the 99th Constitution of India (Amendment) Act⁴⁵ and the NJAC Act⁴⁶ as unconstitutional but along with it agreed to the issue of amelioration of collegium system. There are various aspects on which the five judges bench had given the emphasis, eligibility criteria being one of them.

The eligibility criteria for appointment as High Court judges as provided by the constituent assembly and as it stands today in Article 217 (2)⁴⁷ :

- (a) has for at least ten years held a judicial office in the territory of India; or
- (b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession.

⁴⁴ Janak Raj Jai, *Commission and Omissions in the Administration of Justice* (Regency New Delhi 2003) 79

⁴⁵ The Constitution (Ninety-Ninth Amendment) Act, 2014

⁴⁶ National Judicial Appointments Commission Act, 2014

⁴⁷ Constitution of India 1950, a. 217

To ensure a transparent and efficient appointment procedure, these criterion needs to be expanded. An amendment should introduce a new clause which shall make the advocates practising in the District and Sessions Court eligible for the appointment as High Court judges. Other than the existing eligibility condition of ten years of practice as an advocate of the High Court, and additional condition should be inserted for 15 years or more practice as an advocate of a District and Sessions Court. This shall open the forum for considering the advocates of the lower court to be made eligible for appointment. There is a fundamental difference between the advocates of High Courts and that of the District Courts. The High Court lawyers seldom get to experience those procedural and practical aspects of what is gained by the lawyers and judges of lower courts in the day to day functioning of the trial courts. The advocates practising efficiently in the lower courts are experts of the procedural laws such as the Criminal Procedure Code consisting of matters including the law of bail, etc. Therefore they should be included in the eligibility criteria. In this regard, equal number of elevations must be made both from the bar and the bench. More number of elevations from the lower courts, both in the form of judicial officers as well as the advocates shall facilitate the process of early disposal of pending cases.

FLAWS IN THE EXISTING ELIGIBILITY CRITERION :

The existing conditions as well as the new proposed condition creates an ambiguity as these eligibility criterion are way too general in nature and creates a pool of excessive number of eligible candidates. This in fact makes the selection process more cumbersome and gives the scope for discretion to be exercised in an opaque system without considering any specific parameters. This paves the way for favouritism and conservatism. Therefore it is necessary to fix certain parameters to be considered as additional eligibility criteria and then making a pool of eligible candidates who shall be considered for appointment to the High Courts.

ADDITIONAL PARAMETERS FOR CONSIDERATION :

The following quantifiable eligibility criterion shall ensure integrity, bring transparency and efficiency in the selection process :

- Contribution to legal education : The person should have some direct or indirect contributions made towards the development of legal education. Such as any books, journal articles, etc. being published and also some guest lectures on number of hours in teaching.
- Additional Educational Qualifications (If Any) : Although the basic minimum requirement for being an advocate or a judge is to be a law graduate but preference shall be given to the persons with higher education, doctorates and other additional qualifications of specializations.
- Role in the development and training of the juniors and interns.
- The amount of income tax paid in the last three financial years.
- Number of cases undertaken and also the success ratio of the candidate.
- In case of consideration of judicial officers, the judgements and orders passed shall be reviewed.

- A clean track record without any criminal charges or disciplinary actions.

PROCEDURE OF APPLICATION AND SELECTION :

It is an inevitable fact that unlike the other public services examination, the selection and appointments in the higher judiciary cannot be organised in the same manner. Based on the above mentioned criterion, the applications shall be called from the eligible candidates and after a preliminary scrutiny of the applications, a pool of eligible candidates shall be prepared. Members of pool shouldn't have any legitimate expectation that they will definitely be selected. It is just an eligibility criteria. Open applications shall be called upon for the appointments against the vacancies for the High Court judges and only the members from the pool would be allowed to apply for the vacancies.

To cite an example for this process, the very purpose of the 'UGC National Eligibility Test' conducted for the eligibility to be appointed as Assistant Professors is to create a pool of eligible candidates who shall directly apply for the post of assistant professors in the universities and educational institutions. But, mere clearing of the examination and becoming a part of the pool of eligible candidates doesn't give a conformity or legitimate expectation to be appointed as assistant professors. It is made mandatory for the universities (mostly government universities) to select the suitable person only and exclusively from this pool of eligible candidates to be appointed for filling the vacant positions.⁴⁸

One of the sitting High Court judges shall be allocated as the In-charge for each respective District and Sessions Court by the Chief Justice of respective High Courts. The responsibility of these judges shall be to keep a supervision and to consider the eligible candidates for the pool by periodically consulting the members of the district bar and the judicial officers of the respective District and Sessions Court. This shall prove to be an effort to bring the best candidates from the ground level.

These respective Judges shall be assisted by the staff of the secretariat and a report after considering the names by each judge shall be recommended to the secretariat of High Courts. Further this shall be the task of the respective secretariats to send the final recommendations to the collegium. The shortlisted candidates shall be called for interview by the collegium for the final selection and appointment.

SECRETARIAT OF JUDICIAL APPOINTMENTS :

The reforms being suggested for making the process more participatory and transparent, would need an elaborative procedure for appointments. Thus, with the introduction of these reforms, there is an absolute need for the formation of an independent secretariat, both at the Supreme Court and each of the High Courts.

⁴⁸ UGC NET (CBSE NET 2018) <<https://cbsenet.nic.in/cms/public/home.aspx>> accessed 20 April 2018

STRUCTURE OF THE SECRETARIAT :

This would be a two tier constitutional body, one at the Supreme Court of India and the second at all the High Courts. These shall be a constitutional body to be invoked by a constitutional amendment.

I. THE SECRETARIAT OF JUDICIAL APPOINTMENTS (SUPREME COURT OF INDIA) :

Chairman – A Judge of The Supreme Court of India to be nominated by the Collegium.

Members (Ex-Officio) : 1. Union Minister of Law and Justice

2. Chairman of Bar Council of India

3. President of Supreme Court Bar Association

Member (Fixed Term of 2 years) – A Senior Advocate/Jurist to be nominated by the Collegium.

*The Supreme Court shall provide the secretariat with the staff and officers as per the requirement.

II. THE SECRETARIAT OF JUDICIAL APPOINTMENTS (FOR EACH HIGH COURTS) :

Chairman (Ex-officio) – Chief Justice of The High Court.

Members (Ex-Officio) : 1. Minister of Law and Justice (Of Respective States)

2. Chairman of The State Bar Council.

3. President of The High Court Bar Association

Member (Fixed Term of 2 years) – A Member of the Bar Council of India to be nominated by the Bar Council of India.

* The respective High Courts shall provide the secretariat with the staff and officers as per the requirement.

TASK OF THE SECRETARIAT :

The task of the secretariat would be to facilitate the collegium in the procedure of selection and appointment of the judges in the higher judiciary. The primary duty would include the following :

- i. Creation of a pool of eligible candidates to be considered for appointment.
- ii. Recommendation of the shortlisted candidates to the collegium for conducting interviews before final selection and appointments.
- iii. The Secretariat of the Supreme Court shall recommend the names to be considered for the elevation as Judges of The Supreme Court.

FIXING THE TIME FRAME :

Amongst the flaws of the collegium, one of those is the time frame. The composition and working of the collegium is the result of the Second and Third Judges case. These broader constitutional interpretation of Article 124 and Article 217 gave the primacy for appointment to the collegium headed by the CJI in all spheres. The government can for once send back the recommended names to the collegium for reconsideration but if the collegium sends it back to the government then there is no option left with the government but to appoint those who have been recommended. There is one specific flaw and loophole in this whole system which the executive misuses as its own discretionary power. There is no fixed time frame in which the government has to respond on the recommendations of the collegium or the duration in which the government has to mandatorily appoint those who have been recommended. This is one of the biggest reasons for the failure of collegium as an efficient system. Though the government is bound by the decision of the collegium, but due to the lack of any fixed time frame, the government at various instances chooses to sleep over the files and obstructing the appointments of judges. This is an unreasonable obstacle in the working of an efficient appointments system. In the recent times, staggeringly high number of more than 143 names are pending before the Ministry of Law and Justice for the appoint of recommended names as judges of High Courts.⁴⁹ Thus, for overcoming this shortcoming it is mandatory to fix a time frame on which both the collegium as well as the government have to respond and accordingly act on the recommendations. A fixed time frame for the secretariats is also required. This shall facilitate the process of fast and efficient appointments by negating the unnecessary delays.

An independent judiciary is absolutely necessary for the delivery of justice and ensuring the constitutionalism. This is not a matter of doubting the credibility of the Indian Judiciary but absolute exclusion of the judiciary from the other two wings and continuing the process of '*Judges appointing the Judges*' can't be considered as a factor ensuring independence. The suggested reforms in this chapter are not an addition to the already existing cumbersome procedure. The intention is to ensure efficient and transparent appointments, to minimise the scope of favouritism and maximize the extent of considering the most eligible candidates, in terms of integrity, efficiency and honesty.

CONCLUSION :

The Makers of the Constitution while drafting the grundnorm of the land had a vision to make a living document which can survive with the changing times. To ensure that the changing and amending nature of the constitution is not being misused, a strong and independent judiciary is imperative. But, there has to be a distinction between independence and insulation of judiciary. The appointment of the judges plays a significant role in deciding the independence of the judiciary. Since the judges are not elected but are appointed on the basis of their eligibility and capabilities, so the process of selection and appointment is a key factor. Empowering any one organ with the exclusive power of appointment shall prove to be suicidal

⁴⁹ Live Law News Network(Live LAw, 14 March 2018) <<http://www.livelaw.in/exclusive-judges-appointment-a-ping-pong-game-is-indefinite-sitting-over-the-files-choking-the-judicial-system/>>accessed 19 April 2018

for the democracy. Hence a balanced approach was adopted and accordingly article 124 and 217 secured their places in the enacted constitution as the provisions for judicial appointments in the Supreme Court and the High Courts.

The provision for appointment reads as 'The judges shall be appointed by the President of India and the Chief Justice of India shall always be consulted. Since the provision was not very clear as to who shall have the final say, the executive assumed it to be that of the President. When the matter went to the Supreme Court, the court reconfirmed this assumption and held that the President has the primacy on the appointment procedure and hence the consultation with the Chief Justice became a mere formality. The misuse of this literal interpretation by the executive was evident as favourable appointments were being done. A decade later, the court then adopted a liberal approach of interpretation of these provisions and turned the position upside down. Now the Chief Justice along with his 2 colleagues i.e. the two senior most judges of the Supreme Court shall work as a collegium and will have the final and irrefutable words in all the judicial appointments and transfer of judges in the superior courts. As the court took the power in its own hand by way of such broad interpretation, conflicts between the judiciary and executive were anticipated. One such conflict went to the Supreme Court as a question of constitutional law. The validity of the collegium was upheld with the addition of 2 more judges making the total members of collegium to be 5 in number.

By the time, the Constitution of India completed 50 years of its enactment calling for a review of its working. The reviewing of the most controversial part was crucial enough hence, constituting a 5 member National Judicial Appointments Commission to replace the collegium for judicial appointments was recommended. It was after this report that the Indian legal system was introduced to the NJAC model for judicial appointments and this is the point from where all the debate started. The government of India for the 1st time introduced the NJAC bill in the parliament to replace the collegium system, but the bill couldn't be passed. Later in the coming years, the nation witnessed the names of some senior high court judges indulged in corruption which again brought into public the debate of inefficient and incompetent appointments by the collegium. The parliament as always had to watch the scenario as an incapable institution, the only power being the impeachment process involves such lengthy procedure due to which not even a single judge has been impeached till date. This made the judiciary in complete isolation with the other organs. The issue being raised was who will watch the watchers. The government made a second attempt to introduce the NJAC act in the parliament, but it again failed. Finally in 2014-15, the government was successful in getting the 99th constitutional amendment act and the NJAC act enacted in the parliament. The act was notified in the month of April-May 2015, but within few months, the matter went to a constitution bench of the Supreme Court to decide the constitutional validity of both the acts and the NJAC model. The 5 judges bench in October 2015 declared both the acts and the NJAC model to be unconstitutional bringing back the position of collegium. This verdict faced a lot of conflicts and since the unconstitutionality was on the basis of basic structure doctrine, the 42 years old doctrine propounded by the Supreme Court is now under the requirement of being revisited.

The NJAC verdict given by the Supreme Court of India has started a dual debate. Now along with the exigency for revisiting the collegium system, reviewing of the basic structure doctrine has also become significant. These are the 2 areas with which the Supreme Court is operating to create the environment of judicial tyranny. The very purpose of insertion of the basic structure doctrine as well as the collegium system was to strengthen the democratic spirit in the constitution and to safeguard it from the misuse of a majority elected executive and legislature but with the passage of time, the judiciary has rather become a counter majoritarian problem. The judiciary has all the rights and powers to keep a check and balance on each and every sphere of the other two organs, right from their appointment and elections, to the decisions, orders and laws passed by them, everything is open for being scrutinised. It is indeed applaudable but then the concern is that why the 3rd and the most important organ, the Judiciary needs to keep itself confined in closed doors with no transparency. Even though the Supreme Court is the final interpreter of the Constitution and has all rights and authorities to do so, but then such outermost interpretation of the bare texts of the Constitution, changing the very meaning and purpose of the provisions and completely deviating from the view and idea of the makers of constitution must be outlawed. The study, therefore aims to find the answer to the question of 'Who should judge the judges'. In this context the suggestions has been made for the establishment of secretariat, both at the Supreme Court and the High Courts. A balanced approach and a midway solution has been suggested for making the appointment procedure inclusive of the opinion of the executive without affecting the independence of the judiciary. The suggested methods aim to strengthen the independence of the judiciary, without affecting the efficiency and integrity of the judicial appointments.

