

## JUDICIAL APPOINTMENTS MECHANISM IN INDIA AND INDEPENDENCE OF JUDICIARY - A CRITICAL ANALYSIS

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### I. INTRODUCTION

Independent and impartial judiciary is the *sine qua non* of any democratic constitution. The judiciary, in order to effectively exercise the constitutional power of judicial review, must act without any fear and favor during administration of justice and interpretation of the Constitution and other laws. The appointment of judges, their tenure, and their relation with the other agencies of government, separation of judiciary from the interference and influence of the executive<sup>1</sup> and other similar considerations are important factors in maintaining the independence and integrity of the judiciary.<sup>2</sup> The appointment of the judges at the higher judiciary came for judicial scrutiny by the Supreme Court in various cases that resulted into the formation of 'Judges Collegium' to recommend judicial appointments in Higher Judiciary, which has been subsequently intended to be replaced by 'National Judicial Appointments Commission' through an amendment in the Constitution and also a separate enactment. This paper revisits and analyses the Constitutional framework, the two decade old system of the 'Judges' Collegium' for judicial appointments and also examines 'National Judicial Appointments Commission', which subsequently has been declared unconstitutional by the Supreme Court.

### II. INDEPENDENCY OF JUDICIARY

The doctrine of 'Independence of Judiciary' requires that judges must be able to decide a dispute before them, according to law without any fear, favor or influence of any other factor. Hence, Independence of Judiciary means and requires a complete independence of each and every judge in the state. The doctrine of 'Independence of Judiciary' is dependent upon the doctrine of

'Separation of Powers' between the Judiciary, the Executive and the Legislature.<sup>3</sup> It entails the independence of the judiciary from the other organs of the state. However, this meaning of independence indicates merely an institutional autonomy of the judiciary from the other two organs of the state without regard to the complete independence of judges in exercise of their judicial functions. Therefore, Independence of Judiciary requires a complete freedom of every individual judge from the personal, substantive and collective controls of all organs of the state, in addition to Separation of Powers.<sup>4</sup> Shimon Shetreet<sup>5</sup> advocates that, 'the independence of the individual judges and the collective independence of the judiciary as a body is distinct from each other and they together constitute Judicial Independence'. He observed that, 'the independence of the individual judge consists of the judge's substantive and personal independence.' Substantive independence refers to exclusive subjection of the judge to the law without any other influence in the exercise of judicial or official functions, whereas, personal independence refers to adequate security of the terms, tenure and other conditions of the service, and also includes independence from their judicial superiors and colleagues.

Shetreet's doctrine of independence of the judiciary lays down two principles, Firstly, the judiciary as an organ of the state should be independent of other two organs, and Secondly, the independence of each and every single judge in the performance of his role as judge should be maintained. These two principles are mutually dependent, and accomplishment of one is impossible without the accomplishment of the other. Therefore, although they are different, together they should be pursued so as to ensure a complete independence of the judiciary.<sup>6</sup>

To summarize, concept of independence of judiciary includes: *Firstly*, the institutional independence of the judiciary from other organs/branches of the state; *Secondly*, the organizational independence of the judiciary from politicians, political parties, political ideology, public pressure, ethnic or sectarian loyalties, etc.; and *Thirdly*, individual independence of the judge from internal influence (direct or indirect), including the influence of superior judges or equal colleagues, in the exercise of judicial function.<sup>7</sup>

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<sup>1</sup> The Constitution of India, Article 50. It provides that, the State shall take steps to separate the judiciary from the executive in the public services of the State. See also *Indira Gandhi v. Raj Narain*, AIR 1975 SC 1590 (The Supreme Court asserted the *Kesavananda Bharati* ruling and upheld the separation of powers doctrine as the basic structure of the Constitution).

<sup>2</sup> Atin Kumar Das, *Independence of Judiciary In India: A Critical Analysis*, available at <<http://mulnivasiorganiser.bamcef.org/?p=482>>(last visited on October16, 2017) (suggesting that, 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).

<sup>3</sup> *Kumar v. Union of India*, AIR 1997 SC 1125 (Holding that, the independence of the judiciary and judicial review are part of the basic structure or basic features of the Indian Constitution).

<sup>4</sup> Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in S. Shetreet & J.Deschenes (eds.), *JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE* (1985) pp. 590-681; M.P. Singh, *Securing the Independence of the Judiciary-The Indian Experience*, 10(2) INT'L & COMP L REV 245, 247, 248 (2000).

<sup>5</sup> Shimon Shetreet (1985), *Ibid*.

<sup>6</sup> *Ibid*.

### III. JUDICIAL APPOINTMENTS UNDER THE INDIAN CONSTITUTION

The Indian Constitution under Articles 124(2) and 217(1) provides for the President to appoint the Chief Justice of India and other Judges of the Supreme Court, after consultation with such of the Judges of the Supreme Court and High Courts in the States as the President may deem necessary for the purpose<sup>8</sup> and the Judges of the High Court, after consultation with the Chief Justice of India, the Governor of the State, and the Chief Justice of the High Court (except when the Chief Justice of the High Court himself is to be appointed).<sup>9</sup> Further, the President is always required to consult the Chief Justice of India in case of appointment of the Judges other than the Chief Justice.<sup>10</sup>

At this point, it is essential to note some of the observations and suggestions made by scholars and members of the Constituent Assembly while writing the above-mentioned provisions of the Constitution. Justice H. J. Kania, ex-Chief Justice of the Federal Court, emphasized that in the appointment of High Court judges, the Chief Justice of the High Court should be in direct contact with the Governor and the intercession of the provincial Home Ministry should be avoided in order to exclude the influence of local politics in the selection procedure and to secure the independence of the judiciary.<sup>11</sup> Further, the suggestions were made to the effect that, the President shall appoint a High Court judge in concurrence of the Chief Justice of India. A similar provision was suggested in case of the appointment of the judges of the Supreme Court. Many such suggestions were made at time of framing of the Constitution but the Drafting Committee adopted none.<sup>12</sup> Mehboob Ali Baig Sahib, a member of the assembly, wanted to move the amendment to the effect that, the appointment of the judge should always be made with the concurrence of the Chief Justice of India, which was rejected.<sup>13</sup>

While discussing on the issue of judicial appointments Dr. Babasaheb Ambedkar, the Chairman of Drafting Committee, referred to the executive

<sup>7</sup> See, United States Institute of Peace, JUDICIAL APPOINTMENTS AND JUDICIAL INDEPENDENCE (January 2009), available at <http://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf> (last visited on October 21, 2017).

<sup>8</sup> The Constitution of India, Article 124(2).

<sup>9</sup> The Constitution of India, Article 217(1)

<sup>10</sup> The Constitution of India, Article 124(2) and 217(1).

<sup>11</sup> Granville Austin, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (Clarendon Press, Berkeley, 1966).

<sup>12</sup> See for detailed discussion, M.P. Singh (2000), *supra* n. 4, p. 263.

<sup>13</sup> Mehboob Ali Baig, Member, Constituent Assembly of India, The debate on the draft provisions of the Constitution on the Supreme Court (Tuesday, the 24<sup>th</sup> May, 1949) in, CONSTITUENT ASSEMBLY DEBATES-VIII available at <http://indiankanon.org/doc/1538555/> (last visited on October 21, 2017).

controlled practice of appointments in England, and executive-legislative model of judicial appointments (appointment by the executive with the approval of the Senate) in the United States, concluded that:

...it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the legislature is also not a very suitable provision. Apart from its being cumbersome, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course.....<sup>14</sup>

The suggestions were rejected and the provision in the present form was retained, and placed in Articles 124 and 217 of the Constitution. Article 124 (2) of the Constitution provides that, every Judge of the Supreme Court shall be appointed by the President after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary for the purpose, provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. This indicates that, the President, which in effect the Central Government, is empowered by the Constitution to appoint Judges of the Supreme Court, provided Consultationis done as required.

Article 217 (1) of the Constitution provides that, every Judge of a High Court shall be appointed by the President 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. This indicates that, the power of appointment of Judges of High Courts also vests in the Central Government, but such power is exercisable only after consultation with the Chief Justice of India, the Governor of the State, and, the Chief Justice of the High Court.

The above constitutional provisions indicate that, the President has to appoint *puisse* Judges of the Supreme Court after consultation with the Chief Justice of India and other Judges of the Supreme Court and, at his discretion, with the Judges of High Courts in the States, as the President may deem necessary for the purpose. It is because, the Chief Justice of India may be

<sup>14</sup> B. R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly, reply to the debate on the draft provisions of the Constitution on the Supreme Court, (May 24, 1949) in, CONSTITUENT ASSEMBLY DEBATES-VIII, available at <http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm> (last visited on October 21, 2017).

drawn from one of the provinces of the country and might not be able to suggest as to who should be appointed as Judges of the Supreme Court. The President would not be able to get the necessary advice from the Chief Justice alone and would have to consult the Judges of the various High Courts.<sup>15</sup> It further means that, the outgoing Chief Justice need not be consulted in case of the appointment of the Chief Justice who is to be his successor; on the contrary, the President is supposed to consult *puisne* judges, as there is no higher-grade person than the Chief Justice who may be consulted. But, there is no reason why the sitting Chief Justice should not be consulted while appointing the successor of the Chief Justice of India.<sup>16</sup> However, the new Memorandum of Procedure for appointment of Chief Justice of India and Supreme Court Judges drafted recently requires the senior-most Judge of the Supreme Court to be considered fit to hold the office and the Union Minister of Law, Justice and Company Affairs is required to seek the recommendation of the outgoing Chief Justice of India for the appointment of the next Chief Justice of India.<sup>17</sup> The Supreme Court in *S.P. Gupta* held that, the Chief Justice and the other Judges to whom the Central Government may deem it necessary to consult, 'are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Central Government.'<sup>18</sup> However, this particular interpretation has been denied in subsequent judicial decisions.

#### IV. CONTROVERSY OVER THE 'CONSULTATION'

The Constitution of India provides for compulsory consultation by the President with the Chief Justice and other judges in the appointment of Chief Justice and other judges of the Supreme Court and High Courts. Accordingly, the judges of the higher judiciary were being appointed by the President who acted under Article 74 on the aid and advice of the Council of Ministers after mandatory consultation of and not in concurrence with the opinion of Chief Justice of India and any other judge. Although, the issue of whether the appointment of judges by the President should be in concurrence with the opinion of the Chief Justice and other judges was discussed in the Constituent Assembly and the view that the President shall appoint the judges in concurrence with the Chief Justice was rejected, the issue was further considered in various Supreme Court cases.

<sup>15</sup> See, CONSTITUENT ASSEMBLY DEBATES-VIII, *supra* n. 13.

<sup>16</sup> *Ibid.*

<sup>17</sup> Memorandum showing the procedure for Appointment of the Chief Justice of India and Judges of the supreme court of India, available at <<http://doj.gov.in/appointment-of-judges/memorandum-procedure-appointment-supreme-court-judges>>(last visited on November 15, 2017).

<sup>18</sup> *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

In *Samsher Singh v. State of Punjab*<sup>19</sup> the Supreme Court ruled that, the consultation with the Chief Justice of India under Articles 217 & 124 is obligatory and such consultation should be accepted by the Government of India. It further stressed that, the Chief Justice of India should have the last word (primacy), and the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order, empowers the court to examine whether any other extraneous circumstances had entered into the verdict of the executive.<sup>20</sup>

In *Union of India v. Sankalchand Himatlal Sheth*,<sup>21</sup> in the matter of transfer of High Court judges under Article 222 the Supreme Court held that, 'the consultation within the meaning of Art. 222(1) means full and effective, not formal or unproductive consultation.' The consultation, in order to be real, substantial and effective must be based on full and proper materials placed before the Chief Justice by the Government. It is a constitutional duty on the President to communicate to the Chief Justice all the materials he has and the course he proposes. On the other hand, it is also duty of the Chief Justice, 'to deliberate on the information he possesses and proceed in the interests of the administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the justice system.' The court further held that, the advice given by the Chief Justice is not binding on the President because, the Constitution requires is consultation with the Chief Justice, not his concurrence. However, it was ruled that, 'although the opinion of the Chief Justice of India may not be binding on the Government, it is entitled to great weight and is normally to be accepted by the Government because the power under Art. 222 cannot be exercised whimsically or arbitrarily.'<sup>22</sup> It was further observed that, 'the Government may differ from him and for cogent reasons may take a contrary view. In other words, the advice is not binding on the Government invariably and as a matter of compulsion in law.'<sup>23</sup>

#### A. FIRST JUDGES CASE –THE ROOTS OF 'JUDICIAL COLLEGIUM'

The issue of appointment and transfer of judges again came for scrutiny before the five judges' bench of the Supreme Court in *S.P. Gupta* case popularly known as the First Judges Case. The Supreme Court reaffirmed the decision in *Sankalchand Himatlal Sheth Case* and held that the term 'consultation' must

<sup>19</sup> AIR 1974 SC 2192

<sup>20</sup> *Ibid.*

<sup>21</sup> AIR 1977 SC 2328.

<sup>22</sup> 1978 SCR (1) 423.

<sup>23</sup> 1978 SCR (1) 423, 506.

be full and effective ‘consultation’ and must precede the actual transfer of the Judge, failure to which, the transfer would be unconstitutional.<sup>24</sup>

The Supreme Court, while rejecting the contention of the petitioners that, in the consultative process, the Chief Justice of India should be given primacy, held that, each of the constitutional functionaries was entitled to equal weightage. The court concluded that, it is mandatory for the Central Government to consult the Chief Justice, but the Central Government is not bound to act in accordance with the opinion of the Chief Justice of India, even though, his opinion was entitled to great weight. It was therefore held, that the ultimate power of appointment, rested with the Central Government.<sup>25</sup>

In *Subhash Sharma v. Union of India*,<sup>26</sup> the Supreme Court while referring to the majority view in *S.P. Gupta* held that, the decision has not only denuded the primacy of the position of the Chief Justice of India in the consultative process but also whittled down the very significance of ‘Consultation’ as required to be understood in the Constitutional Scheme and context.<sup>27</sup> The Court held that, the recommendations finalised by the Chief Justice of India, barred in exceptional cases, should not be reopened except with the approval of the Chief Justice of India. It held that, this aspect dealt with in *Gupta’s* case requires re-consideration by a larger bench. The judicial appointment is the result of collective, constitutional process and a participatory constitutional function and not merely an executive act. Bestowing the executive with the sole power of appointing judges would be subversive of the doctrine of judicial independence.<sup>28</sup> It further held that:

...the word “consultation” is used in the constitutional provision in recognition of the status of the high constitutional dignitary who formally expresses the result of the institutional process leading to the appointment of judges. ...The purpose of the ‘consultation’ is to safeguard the independence of the judiciary and to ensure selection of proper persons. “Consultation” should have sinews to achieve the constitutional purpose and should not be rendered sterile by a literal interpretation.<sup>29</sup>

It is the above judgment of *Subhash Sharma* in which the Supreme Court has attempted to cut down the powers of the government in judicial appointments. As per the directions of Supreme Court in this case, the issues

<sup>24</sup> *Supra* n. 18, para 589.

<sup>25</sup> *Id.*, para 30.

<sup>26</sup> AIR 1991 SC 631.

<sup>27</sup> *Id.*, para 9.

<sup>28</sup> *Id.*, para 9,10 & 16.

<sup>29</sup> *Id.*, para 14.

relating to the appointment and transfer of judges including the position of the Chief Justice of India with reference to primacy in appointment of higher judiciary were referred to the bench of nine Judges of the Supreme Court in *Supreme Court Advocates-on-Record Assn. v. Union of India*,<sup>30</sup> popularly known as the Second Judges Case.

### ***B. THE SECOND JUDGES CASE - COLLEGIUM OF TWO SENIOR-MOST JUDGES AND CHIEF JUSTICE***

The Supreme Court in second judge’s case, rejecting the majority view in *S.P. Gupta’s* case, held that, ‘in case there is conflict of opinions between the constitutional functionaries, the opinion of the judiciary ‘symbolized’ by the view of the Chief Justice of India and formed in the manner indicated, has primacy.’<sup>31</sup> It observed that, the judiciary being the best suited and having the best opportunity to adjudge performance, ability and traits of the candidates and assess true worth and fitness for appointment as judges, and also being responsible for the functioning of the courts and more accountable for any unsuitable appointment and its consequences arising out of criticism from the vigilant Bar, the constitutional purpose of selecting the superior Judges is best served by ascribing to the judiciary, as a consultee, a more significant role in the process of appointment.<sup>32</sup> Hence, the Chief Justice of India, in the process of consultation under the Constitution, must have the last word and the executive is bound by his opinion.<sup>33</sup> It went on to hold that, “the President’s power under Articles 124(2) and 217(1) to appoint the Judges in accordance with the aid and advice of the Council of Ministers under Article 74(1) is not absolute and it is checked, circumscribed and conditioned by the requirement of prior consultation with the three Constitutional functionaries.”<sup>34</sup> The Court recognized the established constitutional convention, holding that, the Chief Justice of India in the consultative process of judicial appointments, has to form the opinion after taking into account the views of the two senior-most judges of the Supreme Court before making his recommendation,<sup>35</sup> and such opinion of the Chief Justice of India is entitled to have the primacy.<sup>36</sup> The Supreme Court observed that, the Rule of Law is the basic feature of the Constitution and independence of the judiciary is an essential attribute of Rule of Law, and an integral part of the constitutional structure. It requires that, the influence of political considerations should be

<sup>30</sup> (1993) 4 SCC 441

<sup>31</sup> *Id.*, para 80.

<sup>32</sup> *Id.*, para 44, 53.

<sup>33</sup> *Id.*, para 483, 485.

<sup>34</sup> *Id.*, para 392.

<sup>35</sup> *Id.*, para 68.

<sup>36</sup> *Id.*, para 295.

prevented in making the appointments of the superior judiciary, in order to ensure independence of the Judges.

The court, while reversing the decision of *S P Gupta*, departed from the Constituent Assembly's decision to reject the primacy of Chief Justice of India in judicial appointments, based its findings on experience and the situations before it, calling it liberal and meaningful interpretation.<sup>37</sup> However, on the another instance in the same case, the Court, took a 'U' turn from its own logic and imposed limits on the power of executive in judicial appointments in order to secure 'Independence of Judiciary', relied on the views expressed by the Constituent Assembly.<sup>38</sup>

Ahmedi J. in his dissent rightly observed that, the constitutional scheme does not warrant any hierarchy amongst the consultees,<sup>39</sup> 'the opinions of the consultees both under Article 124(2) and 217(1) are intended to act as checks on the exercise of discretion by the executive which will be accountable to the people.'<sup>40</sup> He pointed out that, a 'great weight should be attached to the opinion of the Chief Justice of India,' but it is difficult to say that, 'amongst the consultees his word will be final.' Any such attempt of interpretation of the constitutional provisions would tantamount to re-writing the Constitution under the guise of interpretation and such submission cannot be accepted unless the Constitution is amended. Although the views of Chief Justice of India may be entitled to great weight, the President is not bound to act according to his views.<sup>41</sup>

### C. THE THIRD JUDGES CASE - COLLEGIUM OF FOUR SENIOR-MOST JUDGES AND CHIEF JUSTICE

The controversies which arose in the appointments and transfer of judges leading to litigations,<sup>42</sup> led the President to refer the matter to the Supreme Court for its opinion under Article 143 of the Constitution on the nine issues relating to the appointments and transfer of judges and also to clarify the doubts raised about the Supreme Court's decision in *Second Judges Case*. The Supreme Court reiterated its majority decision in the *Second Judges Case* that, the opinion of the Chief Justice of India which is formed after taking into account the view of some other Judges who are traditionally associated with

<sup>37</sup> *Id.*, para 424, 426.

<sup>38</sup> *Id.*, para 485. The Supreme Court held that, 'The Framers of the Constitution placed a limitation on the power of Executive in the matter of appointment of Judges to the Supreme Court and the High Courts. The requirement of prior "consultation" with the superior Judiciary is a logical consequence of having an "independent Judiciary" as basic feature of the Constitution.'

<sup>39</sup> *Id.*, para 404.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> M.P. Singh (2000), *supra* n. 4, p. 274.

this function is reflective of the opinion of the judiciary, as it has the element of plurality in its formation and has primacy in the matter of all higher judicial appointments. It being so, 'all judicial appointments have to be in conformity with the final opinion of the Chief Justice of India formed in the manner indicated.'<sup>43</sup> The Court held that, the Chief Justice of India must make a recommendation in consultation with the four senior-most *puisne* Judges of the Supreme Court, the views of the Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion. The opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy and the Government is not obliged to act thereon.<sup>44</sup> It also clarified that, if the final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by him, that person should not be appointed.<sup>45</sup> It put some limitations on the judicial review of appointments, making it available only on the ground of failure to comply with the conditions of consultation and decision making as stated by the Court or for lack of eligibility.<sup>46</sup>

The court in both the cases failed to lay down the parameters for nominating, short-listing of and selection of candidates. It says that the judiciary is best suited for assessing the performance of a candidate but it is silent on how the performance shall be assessed, what are the considerations and parameters to be adopted while nominating a candidate for his appointment as judge of the Supreme Court/High Court. Lack of appropriate parameters for nomination and selection of a candidate gives scope for personal prejudices, manipulations or extraneous considerations *inter alia* political, communal or social factors, as rightly pointed out by Justice Krishna Iyer, 'the Judiciary is 'handpicked confidentially in dark room operations, secret bargains and mutual adjustments.'<sup>47</sup> Such a scenario violates Rule of Law and affects the democratic and secular fabric of the Constitution.

The Supreme Court has restricted the scope of judicial review only to the procedural requirements; *inter alia*, consultation, concurrence and eligibility. This particular view has diluted the effect of the most powerful weapon in the hands of sufferers and activists to enforce their rights and avoid their injustices. This decision itself affects the basic structure of the Constitution, as 'judicial

<sup>43</sup> *In re Presidential Reference*, AIR 1999 SC 1, para 15.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Id.*, para 25.

<sup>46</sup> *Id.*, para 35.

<sup>47</sup> V R Krishna Iyer, *The Higher Judiciary: Appointments and Disappointments*, in V.R. Krishna Iyer (ed.), *RHETORIC VERSUS REALITY: ESSAYS ON HUMAN RIGHTS, JUSTICE AND DEMOCRATIC VALUES* (Hope India, Gurgaon, 2004) p. 96, Ashutosh Hajela, *Transparency in Appointments to Higher Judiciary in India: Imperative of the Hour*, 2(2) CALQ 4-22 (2015).

review' is thinned out.<sup>48</sup> It indicates that the Court has conveniently avoided the review on the ground of extraneous considerations in making appointments, it may be done by overlooking the performance, quality, experience, seniority, past record, etc. or even adverse records.<sup>49</sup> The lack of transparency in the short-listing of candidates, consultation procedures between the collegium and the Government and consultation within the collegium gives lot of scope for discriminations and favors. The power to select the judges of higher judiciary trapped in handful of persons facilitates enhanced scope for personal settlements between the consultees. The whole process of nominating, short-listing and recommending candidates is left for personal satisfaction of only a few persons, as the judicial review is possible only on the ground of non-consultation and not possible on wrongful consultation or unreasonableness. The instances of refusal to review the wrongful appointment of the judge<sup>50</sup> and also appointing judges ignoring the seniority and performance<sup>51</sup> shows that, the guidelines of the apex court in *Second Judges Case* and *Third Judges Case* are inappropriate, on the contrary, it permits arbitrary exercise of constitutional powers by the Judicial Collegium and also by the Executive. There is no reason why the judicial review of appointment judges' is not available on the grounds under Article 14 and 21 of the Constitution such as lack of just, fair and reasonable decision or arbitrary, fanciful or oppressive decision, laid down by the Supreme Court in various cases.<sup>52</sup> Consequently, the arbitrary exercise of power or extraneous considerations while nominating candidates will remain unchallenged giving a free hand to the Collegium. Such a blanket power conferred on Chief Justice of India and other senior judges and the intransparent and opaque process of nomination/recommending the names for judicial appointments is unreasonable, hence, unconstitutional. Further, challenging such a consultation process before the forum which itself is party to it i.e. Supreme Court, amounts to gross violation of the principles of natural justice, as there may exist personal or official/departmental bias.

In the *Second* and *Third judges* cases the Supreme Court though seems to have safeguarded the institutional independence of judiciary, however, it has compromised with the individual independence of judges, ultimately affecting independence of judiciary. Under the guise of interpretation, they have established the judicial supremacy by adding words to the original

<sup>48</sup> See *Keshavanda Bharati v. State of Kerala*, AIR 1973 SC 1461 (Judicial Review has been held to be basic structure of the Constitution).

<sup>49</sup> *Shanti Bhushan v. Union of India*, (2009) 1 SCC 657.

<sup>50</sup> Ashutosh Hajela (2015), *supra* n. 47.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Maneka Gandhi v. Union of India* 1978 SCC (1) 248. See also *Union of India v. M. Selvakumar*, AIR 2017 SC 740.

Constitution, which in fact is the prerogative of the Parliament.

#### D. THE EMERGENCE OF NJAC

The working of the new collegium could not go well and the President of India while appointing four judges expressed his concern for not having appropriate social representation.<sup>53</sup> It could neither prevent tainted additional judge Ashok Kumar from getting permanent judicial seat in High Court nor could it help Justice A.P. Shah to find a place in Supreme Court even after having good career record and seniority.<sup>54</sup> The process of appointment, after *Second Judges Case* and *Third Judges case* has been totally taken away by the judiciary in such a way that, the judiciary declined to give reasons to the Prime Minister Office (PMO) for its neglect to consider seniority of Justice Shah, Justice Patnaik and Justice Gupta while appointing Justice Dattu, Justice Ganguly and Justice Lodha to the Supreme Court.<sup>55</sup> The constitutional provision also provides for appointment of a distinguished jurist as Judge of the Supreme Court,<sup>56</sup> however, not a single such jurist has been appointed as a Judge of the Supreme Court till date. It doesn't mean that distinguished jurists do not exist in India. Rather it shows that, the Judiciary has categorically excluded the academicians from the Judicial Appointments and restricted the entry only for advocates and Judges, making the relevant constitutional provision a dead wood. Further, the complaints are coming about *the elevation as judges* who are relatives, children, friends, former colleagues and juniors of Judges. *It has been blamed that, such selections are based on considerations other than merit and integrity of the candidate.* A well-known activist-advocate Indira Jaising,<sup>57</sup> admitted that, *judicial dynasties* are being created by the collegiums by recommending names of their children or those who are close to them or have worked almost continuously with them. She opined that, 'a judiciary which claims independence from the executive must also be independent from vested interests and powerful caste and class lobbies.' Although, theoretically, the process of appointment seems to be just and fair, but, in fact it was suffering from opacity, arbitrariness and autocracy.<sup>58</sup>

The National Commission to Review the Working of the Indian Constitution recommended the establishment of the Judicial Appointments

<sup>53</sup> M.P. Singh (2000), *supra* n. 4, p. 278.

<sup>54</sup> Ashutosh Hajela, (2015), *supra* n. 47.

<sup>55</sup> Diwakar & Dhananjay Mahapatra, *PMO returns 3 names mooted for SC Judges*, THE TIMES OF INDIA, New Delhi, November 11, 2008.

<sup>56</sup> The Constitution of India, Article 124(3)(c).

<sup>57</sup> Indira Jaising, *Supreme Court and Narendra Modi Govt's Latest Bone of Contention: Judicial Dynasties*, THE FIRST POST, New Delhi, August 01, 2016.

<sup>58</sup> Ashutosh Hajela, *supra* n. 47.

Commission for the appointment, transfer and removal of judges of higher courts, so as to restore equal and effective participation of both executive and judiciary in the appointment of judges.<sup>59</sup>

The Law Commission of India in its 214<sup>th</sup> Report severely criticized the three cases, *First*, *Second* and *Third judges cases* for rewriting the Constitution. The Law Commission rightly observed that, the Court has wrongly interpreted the Constitution while conferring primacy on the Chief Justice of India, in fact the Constitution has not conferred any primacy on the Chief Justice of India neither it mentions anything about 'Collegium' nor does it fix the number of judges to be consulted, which, in fact is a sole discretion of the Executive i.e. President. It observed that, 'any addition of words in the Constitution would not be permissible under the interpretive jurisdiction of the Supreme Court.' It further commented that, under the Constitution, it is the President who can consult the Chief Justice of India and other judges at his discretion and not for the Chief Justice of India to consult other judges. The Supreme Court has to interpret the Constitution as it is and it cannot add any new words to the Constitution. It felt an immediate need to reconsider these three judgments in order to bring about clarity and consistency in the process of appointment of Supreme Court and High Court Judges.<sup>60</sup>

Dissatisfied with the ongoing mechanism and process of judicial appointments after the *Second Judges case* and with an objective to restore the 'check and balance' envisaged by the Constitution, the Constitutional (120<sup>th</sup> Amendment) Bill was introduced, which proposed to replace the existing collegium system with the Judicial Appointments Commission,<sup>61</sup> leaving it for the Parliament to provide for the functional and procedural aspects of the Commission. Unfortunately, the Constitution (120<sup>th</sup> Amendment) Bill lapsed with the conclusion of the term of Lok Sabha.<sup>62</sup> The lapsed bill again revived in 2014, resulting into the enactment of Constitution (Ninety Ninth Amendment) Act, 2014<sup>63</sup> and the National Judicial Appointments Commission Act, 2014 (NJAC Act). However, it is noteworthy to mention here that, the Ninety Ninth Constitution Amendment (which authorizes the Parliament to make law so as to

<sup>59</sup> National Commission, REVIEW OF THE WORKING OF THE INDIAN CONSTITUTION (2002).

<sup>60</sup> Law Commission of India, 214<sup>th</sup> REPORT ON PROPOSAL FOR RECONSIDERATION OF JUDGES CASES I, II AND III – SP GUPTA V. UOI (2002).

<sup>61</sup> See, The Constitution (120<sup>th</sup> Amendment) Bill, 2014.

<sup>62</sup> Available at <http://www.prsindia.org/billtrack/constitutional-amendments/lapsed/> (last visited on October 21, 2017)

<sup>63</sup> The Constitution (121<sup>st</sup> Amendment) Bill, 2014 enacted as the Constitution (99<sup>th</sup> Amendment) Act, 2014.

establish NJAC) and the NJAC Act, both were passed simultaneously, as if the father and the son born on the same day.<sup>64</sup>

### (i) *The National Judicial Appointments Commission (NJAC)*

The Constitution (Ninety Ninth Amendment) Act, 2014 amends Article 124 of the Constitution to provide for the National Judicial Appointments Commission (NJAC) to make recommendations to the President for appointments of judges at Supreme Court and High Courts and seeks to confer constitutional status to the Commission. The NJAC comprises of the Chief Justice of India as Chairperson; two other senior Judges of the Supreme Court, the Union Law Minister; two eminent persons (one of the eminent person shall be belonging to the SCs, the STs, OBCs, Minorities or Women) to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition. It also empowers the Parliament to regulate the procedure for the appointment of Judges and empowers the Commission to lay down the procedure for the discharge of its functions, the manner of selection of persons for appointment, etc.<sup>65</sup>

The National Judicial Appointments Commission Act, 2014 provides for the establishment of the NJAC to recommend appointments and transfer of Judges of Higher Judiciary. The NJAC Act provides for the senior-most Judge of the Supreme Court to be appointed as the Chief Justice of India. The Chief Justice of a High Court is to be appointed on the basis of *inter se* seniority of High Court Judges plus ability, merit and other criteria of suitability as specified by regulations. And for the post of the Supreme Court Judge, the eligible<sup>66</sup> persons may be recommended on the basis of their ability, merit and other criteria specified by regulations framed by the NJAC under the NJAC Act.<sup>67</sup> It is further provided that, in case of appointment of the Judge of the High Court, apart from seniority, the ability and merit of such Judge shall be considered.<sup>68</sup> While appointing the judge of the High Court, the Commission has to seek nominations from the Chief Justice of the concerned High Court.<sup>69</sup> Furthermore, the Commission cannot recommend the appointment of judge, if two members of the Commission are not agreed with.<sup>70</sup> The Commission shall on the basis of ability, merit and other criteria of suitability as may be specified by regulations,

<sup>64</sup> H.G. Kulkarni, in his speech at State Level Conference on 'National Judicial Appointments Commission – Issues & Perspectives', held on 29<sup>th</sup> February – 1<sup>st</sup> March 2016, at N B Thakur Law College.

<sup>65</sup> The Constitution of India, Article 124C.

<sup>66</sup> The Constitution of India, Article 124.

<sup>67</sup> Section 5, NJAC Act, 2014.

<sup>68</sup> *Id.*, section 6(1).

<sup>69</sup> *Ibid.*

<sup>70</sup> *Id.*, section 5(2).

nominate names for appointment as a Judge of a High Court from amongst persons who are eligible to be appointed as such under clause (2) of Article 217 of the Constitution and forward such names to the Chief Justice of the concerned High Court for its views.<sup>71</sup> After receiving views and nominations as above, the Commission may recommend for appointment, the person who is found suitable on the basis of ability, merit and any other criteria of suitability as may be specified by regulations.<sup>72</sup> The Chief Justice of the concerned High Court, while making such nominations or giving its views should consult two senior-most Judges, such other Judges and eminent advocates of that High Court.<sup>73</sup> Further, the Commission is bound to draw in writing the views of the Governor and the Chief Minister of the State concerned before making such recommendation.<sup>74</sup> The President, on the recommendations made by the Commission, may either act (appoint) or send it back for reconsideration, if he considers it necessary. However, once the NJAC makes a recommendation after reconsideration, the President is bound to make the appointment accordingly.<sup>75</sup> The Commission is also authorized to recommend for transfer of Chief Justices and other Judges of High Courts, according to the regulations and the procedure laid down by the NJAC.<sup>76</sup>

The Commission is empowered to make regulations in respect of the criteria of suitability with respect to appointment of a Judges of the Supreme Court and High court; the procedure and conditions for their selection and appointment; the procedure for transfer of Chief Justices and other Judges, etc.<sup>77</sup>

The Constitution (99<sup>th</sup> Amendment) Act, 2014 and the NJAC Act has introduced a new body (NJAC) to recommend to the President, the appointments of judges at the higher judiciary, in lieu of the previous judicial collegium. Some of the important aspects of the NJAC Act need special attention. Firstly, the Commission contains an executive element, i.e. the Union Minister of Law and Justice, Secondly, the Commission comprises two eminent persons to be appointed by the Committee but the NJAC Act does not describe the qualifications of the 'eminent persons', Thirdly, the Commission is not permitted to make any recommendation if two members are not agreeing with. The Law Minister and two eminent persons may perform a crucial role and may use veto. This particular

<sup>71</sup> *Id.*, section 6(3).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Id.*, section 6(1).

<sup>74</sup> *Id.*, section 6(7).

<sup>75</sup> *Id.*, section 7.

<sup>76</sup> *Id.*, section 9.

<sup>77</sup> *Id.*, section 12.

aspect is absent in the 99<sup>th</sup> Amendment. Fourthly, the ability, merit and other criteria of suitability for appointment of the judges is not defined by Act and it is left for the Commission to provide for. The Act endows the Commission with blanket powers.

The presence of Law Minister and two eminent persons in the NJAC and power of veto for any two members raised various constitutional questions and the matter knocked the door of Supreme Court in the matter of *Fourth Judges*<sup>78</sup> case wherein a group of petitions challenged the validity of the Constitution (99<sup>th</sup> Amendment) Act, 2014 and the NJAC Act, on the ground of infringement of basic structure of the Constitution. The court concluded that, in the matter of selection, appointment and transfer of Judges to the higher judiciary, the primacy in the decision-making inevitably rests with the Chief Justice of India. The involvement of Law Minister and two outsiders (eminent persons) in the final process of appointments of judges is undesirable and it erodes the primacy of judiciary. The Court concludes that:

without primacy to the opinion of Chief Justice of India the whole consultation process contemplated under Articles 124 and 217 would only become ornamental enabling the executive to make appointments in its absolute discretion, most likely based on considerations of political expediency. Such a process would be antithetical to the constitutional goal of establishing an independent judiciary.<sup>79</sup>

The Court held that, the primacy of judiciary is integral to the independence of judiciary, separation of powers, federalism and democracy, rule of law and supremacy of the Constitution. The Constitution (99<sup>th</sup> Amendment) Act 2014 and the NJAC Act, that would adversely impact primacy of the judiciary, is violative of the basic structure of the Constitution and liable to be set aside.

It is rightly held that, the NJAC Act confers a monarchical power on the eminent persons to veto a decision that is taken unanimously or otherwise by the Chief Justice of India in consultation with other judges. The (99<sup>th</sup> Constitution Amendment) Act, 2014 does not postulate a veto being conferred on any person in the NJAC; however such a provision exists in the NJAC Act.<sup>80</sup> This is certainly not what the Constitution, as framed, postulated or intended.<sup>81</sup> The entire scheme of appointment of judges postulated by the Constituent Assembly is made *topsy-turvy* by the (99<sup>th</sup> Constitution Amendment)

<sup>78</sup> (2016) 5 SCC 1.

<sup>79</sup> Per J. Chelameswar, *id.*, para 52.

<sup>80</sup> *Id.*, para 510.

Act, 2014 and the NJAC Act, destroying the basic structure of the Constitution.<sup>82</sup>

However, one of the arguments which later formed the bases for the decision of Supreme Court in *Fourth Judges Case* that the new regime denies the primacy to the opinion of the Chief Justice of India, as primacy of the judiciary is the basic structure of the Constitution, itself is not in consonance with the Constitutional mandate under the pre-amended Articles 124 & 217, although, it is in accordance with the previous Supreme Court judgments. This particular view of the Supreme Court is also contrary to intention of the framers of the Constitution.

The Supreme Court overturned the new law proposed to replace the Judicial Collegium and the tussle between the Judiciary and the Executive continued even further,<sup>83</sup> although, the court agreed to change the Memorandum of Procedure of Appointment of Judges to make it more transparent, however, the power to take final call has been retained by the Collegium.<sup>84</sup> As a major step towards transparency, the Collegium of Supreme Court started uploading on its website the decisions of its Collegium on appointments and transfers in the higher judiciary.

However, in two recent matters, the working of Collegium and also the Supreme Court itself came in discussions. The objectionable behavior of Justice C. S. Karnan of Madras High Court<sup>85</sup> and subsequent action by Supreme Court, and the transfer of Justice Jayant Patel and his subsequent resignation.<sup>86</sup> Justice C.S. Karnan stayed his own transfer order and subsequently when matter reached the Supreme Court, he apologized for the same.<sup>87</sup> Later, he leveled allegations of corruption, atrocity and harassment against various sitting judges. The Supreme Court ignored the allegations and initiated *suomotu* contempt proceedings and punished him with six-months imprisonment.<sup>88</sup> In second matter,

<sup>81</sup> *Id.*, para 491.

<sup>82</sup> *Ibid.*

<sup>83</sup> Shishir Tripathi, *Supreme Court and Narendra Modi Govt's Latest Bone of Contention: Judicial Dynasties*, THE FIRST POST, New Delhi (August 01, 2016).

<sup>84</sup> See, *Collegium To Take Call On 61 Names For High Court Judges Elevation*, available at <https://www.ndtv.com/india-news/collegium-to-take-call-on-61-names-for-high-court-judges-elevation-1751324> (last visited on November 21, 2017).

<sup>85</sup> Smita Chakraborty, *The Curious Case of Justice Karnan*, 52(18) EPW (2017). See also Bhairav Acharya, *A Legal Vacuum Enabled Justice Karnan's Bad Behaviour*, THE WIRE (May 04, 2017).

<sup>86</sup> *Justice Jayant Patel's Resignation Marks A Moment of Crisis for the Judiciary*, THE WIRE, September 27, 2017.

<sup>87</sup> Kian Ganz, *The System Wasn't Built For This: Justice C S Karnan Vows Criminal Complaint Vs. CJI, Wants Contempt Stayed, Doubles Down On Corruption Allegations*, available at <http://www.legallyindia.com/supreme-court/the-system-wasn-t-built-for-this-justice-cs-karnan-vows-criminal-complaint-vs-cji-wants-contempt-stayed-doubles-down-on-corruption-allegations-read-letter-20170211-8303> (last visited on November 22, 2017).

Justice Jayant Patel, senior most judge of Karnataka High Court after Chief Justice, who was having a chance of being appointed as Chief Justice after retirement of sitting Chief Justice, has been transferred by the Collegium to the Allahabad High Court making him third in seniority. He resigned from the post in protest. It is perceived that he has been punished for CBI probe in Ishrat Jahan encounter case when he was acting Chief Justice of Gujarat High Court, which led to arrest of a large number of police officers from Gujarat for their involvement in a planned killing.

These matters revived the discussions on the way judges are selected, the behavior of a sitting judge and mechanism for action against such judges and principles of natural justice. It realized us the need for an independent mechanism not only for appointment but also to entertain and dispose the matters by and against sitting judges of the higher judiciary. The Supreme Court although empowered to decide the contempt cases including contempt of Supreme Court, the question comes how the Supreme Court (it being a party to it) can decide the matter specifically when allegations are leveled against the sitting judges of the Supreme Court and the High Courts? How a judge can be punished for contempt of court when he is holding the office of a High Court Judge? Whether the allegations made by Justice Karnan leveled against sitting judges will be inquired into by an impartial and independent way? This matter pours fuel to the demand for an independent mechanism to entertain and dispose of the complaints by and against the sitting judges. These issues being outside the scope of this paper, needs to be investigated separately.

## V. CONCLUSION

The Constitution of India provides for 'check and balance' between the organs of the state and incorporates into it the principle of independence of judiciary. Accordingly, the Indian Constitution requires the President to consult the Chief Justice of India while appointing the judges at the higher judiciary. However, the controversy arose with respect to the meaning of the word 'consultation'. Although, the *First Judge's Case* denied the primacy to the judiciary in consultation process, the subsequent judgments accorded superior position to the judiciary as compared to the executive under the guise of maintaining the independence of judiciary and held that, the opinion of the Chief Justice of India should have primacy and is binding on the President. The Court evolved the 'Judicial Collegium' of Chief Justice of India and two senior most

<sup>88</sup> Livelaw News Network, *Breaking: SC Finds Justice Karnan Guilty of Contempt of Court, Awards Six Months Jail Term*, Livelaw May 09, 2017, available at <http://www.livelaw.in/breaking-sc-finds-justice-karnan-guilty-contempt-court-gets-six-months-jail-term/> (last visited on November 22, 2017).

judges, which subsequently in *Third Judges Case* changed to four senior-most judges with Chief Justice of India, to recommend the President in matters of appointment and transfer. The 99<sup>th</sup> Amendment to the Constitution replaced this Collegium System with the NJAC, and the ‘primacy of judiciary’ in judicial appointments has been done away with. However, the Supreme Court in *Fourth Judges Case* struck down this new regime holding that, ‘primacy of the judiciary’ in judicial appointments and transfer is an integral part of the independence of the judiciary and denial of primacy to the opinion of Chief Justice of India under the new regime is violative of the basic structure of the Constitution. Further, the presence of Minister of Law and Justice and two outsiders, namely, the eminent persons, in NJAC affects the doctrine of Separation of Powers envisaged by the constitution.

However, the constitutional framers never intended to confer primacy on the Chief Justice of India, on the contrary, such a view has been out rightly rejected by the Constituent Assembly after a detailed discussion on this issue. Ahmedi J. has logic in his dissenting view that; ‘to say that the Chief Justice of India has a primacy in the matter of judicial appointments is not possible unless the Constitution is amended.’<sup>89</sup>

Then the question arises, whether the present Judicial Collegium evolved by the Supreme Court ensures independence of judiciary, in the sense it is composed of four senior most judges who are subordinate to the Chief Justice of India. Are they sufficiently independent in decision making and expressing their views? Is this collegium able to prevent an unsuitable or tainted person from entering into the judiciary? If the Law Minister or two eminent persons can influence the Chief Justice of India and two senior most judges, on similar logic, what guarantee that the Chief Justice of India cannot influence his subordinate colleagues? The elevation of J. Ashok Kumar, J. Dinkaran, etc. and denial to elevate Justice A. P. Shah as a judge of Supreme Court ignoring his seniority, a good judicial carrier record and reputation as a judge, indicates that the present collegium system is not able to prevent the unsuitable person from entering the higher judiciary. The process of nomination, selection and appointment of higher judiciary are not regulated by any criteria or guidelines, leaving full discretion to the Chief Justice of India. The process of appointment and transfer has become opaque and leave scope for arbitrary and unreasonable exercise of powers. There is neither any logic in composition of collegium, i.e. Chief Justice of India and four senior-most judges, nor in their selection based on seniority. This makes the present collegium system and its process of

consultation undemocratic and hence unconstitutional.

The judiciary and the executive are struggling to retain the power of judicial appointments. While doing so, the Supreme Court has imported the new words like ‘Concurrence’, ‘Primacy’, and installed into the Constitution in order to grasp the power; while the executive amended the Constitution to replace the ‘Consultation’ process with the Chief Justice of India including Collegium with the NJAC. One of the important aspects of independence of judiciary, i.e. decisional independence of individual judge from his superiors or other colleagues is conveniently ignored by the ‘Protector of the Constitution’, i.e. the judiciary. Further, the judiciary shows disregard to the views of Dr. Babasaheb Ambedkar and other members of Constituent Assembly in the matter of judicial appointments. In this dichotomy between the executive and the judiciary, the cardinal principle of independence of judiciary has been lost. Neither the NJAC nor the Judicial Collegium proves sound on the principles of independence of judiciary and Rule of Law.

In order to have a rational and most democratic process of appointments without harming the ‘independence of the judiciary’ a comprehensive mechanism needs to be constituted. Care should be taken that the power of the appointment shall not vest only in few hands. It should also not be with the executive, legislature or the judicial collegium. A middle way may be adopted so as to ensure the ‘check and balance’ and ‘Rule of Law’ without compromising the independence of judiciary. A Judicial Council with a good number of members comprising seating judges in rotation, retired judges, renowned academicians and jurists in the legal field, having no connection with political parties or political activities, in equal proportion, to be appointed by the President, to nominate, select and recommend the names for appointments of judges, after evaluating their performance, background, ability, experience, and expertise, according to the criteria devised by the council. It is to be ensured that the nominations of advocates and jurists for elevation as judge of the High Court and the Supreme Court should not be restricted only for advocates and judges and it should be opened for academicians too.

Such Judicial Council should also be authorized to hear the complaints by and against the sitting judges, as the judges of Supreme Court or High Courts themselves cannot hear complaints by or against their fellow colleagues. Such Judicial Council should be empowered to draft Memorandum of Procedure for appointments of judges at higher judiciary and also procedure for hearing complaints by and against sitting judges.

<sup>89</sup> *Supra* n. 39, para 404.