JUDICIAL APPOINTMENT AND ACCOUNTABILITY: RECENT DEVELOPMENTS

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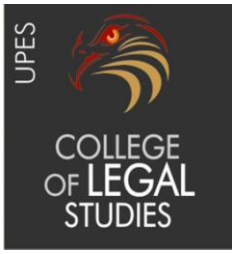
This dissertation is submitted in partial fulfillment of the degree of B.B.A., LL.B. (Hons)



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CERTIFICATE

This is to certify that the research work entitled **“** JUDICIAL APPOINTMENT AND ACCOUNTABILITY: RECENT DEVELOPMENTS**”** is the work done by Akshay Purohit under my guidance and supervision for the partial fulfillment of the requirement of B.B.A., LL.B. (Hons) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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DECLARATION

I declare that the dissertation entitled **"**JUDICIAL APPOINTMENT AND ACCOUNTABILITY: RECENT DEVELOPMENTS **"** is the outcome of my own work conducted under the supervision of Dr.Ashish Verma, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

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APPENDIX

Contents

ABBREVIATIONS

&	And
§ /S. /s.	Section
¶/ ¶¶'s	Paragraph or Paragraphs
A.C. / App. Cas.	Appeal Cases
Act	The National Judicial Appointment Commission Act, 2014
AIR	All India Reporter
AJS	American Judicial Society
All E.R.	All England Law Reports
Amendment	The Constitution (One Hundred and Twenty first) Amendment Act, 2014
Anr.	Another
Apr.	April
art.	Article
Bond L. Rev	Bond Law Review
C.L.R.	Commonwealth Law Reports

CanLII	Canadian Legal Information Institute
CCC	Caitlin City Council
Ch.	Chancery
Ch.D.	Chancery Division
CJI	Chief Justice of India
D.L.R.	Dominion Law Reports
DOC.	Document
et al.	*et alia*
H.L.	House of Lords
HC	High Court
HLR	Harvard Law Review
Hon'ble	Honorable
I.L.A.	International Law Association
Inc.	Incorporation
Indian J. of Const. L	Indian Journal of Constitutional Law
J.	Judge
K.B.	King's Bench
L.J.	Lord Justice

Lloyd’s Rep.	Lloyd's Law Reports
Ltd.	Limited
Mass.	Massachusetts
MERCER L. REV	Mercer Law Review
N.C.	North Carolina
No.	Number
Panel	Judicial Appointment panel
Q.B.	Queen’s Bench
REV.	Review
RTI	Right To Information
RMLNLU L. Rev	RMLNLU Law Review
SCC	Supreme Court Cases
SC .	Supreme Court
v.	Versus
Vol.	Volume

TABLE OF CASES

- P. Sambamurthy v. State of A.P. AIR 1987 SC 663
- Paschim Banga Khet Mazdoor Samity v. State of West Bengal AIR 1996 SC 2426

R

- R.C Cooper vs. Union of India, AIR 1970 S.C. 564

S

- State of Bihar vs. Bal Mukund Shah, AIR 2000 SC 1296
- S. P. Sampath Kumar v. Union of India AIR 1987 SC 386 : (1987) 1 SCC 124

U

- Union of India vs. Sankal Chand Himmatlal Sheth (1977) 4 SCC 193

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INTRODUCTION

Since independence of the nation, appointment of judges has always been a debatable issue. The appointment to the judiciary was primarily rested with the President, with consultation with the Chief Justice of India for the Supreme Court[1], and for High Court President shall appoint after consultation with Chief Justice of India, the Governor of the State, and in case of appointment of Judges other than Chief Justice, the Chief Justice of the respective High Court[2]. However, a varied practice was followed in the appointment of Judges, which in turn was completely deviated from the arrangement provided by the Constitution. The practice was developed by the Supreme Court in three cases which popularly came to be known as *First Judges Case*[3], *Second Judges Case*[4] and *Third Judges Case*[5]. A series can be drawn from these cases which shows the shift in authority for the appointment and which led to the development of the collegiums system. The development of collegium system[6] is an example, as to how the bare word of the constitution was molded to bring the complete control into the hands of judiciary and making the executive as mere puppet or a postman, whose duty was just to assimilate the decision taken by the member of collegium regarding the appointment of judges in higher judiciary. In visual contrast to constitution, the judiciary by such judgment[7] has tried to re-write the constitution, against the will of the constitution makers. The interpretation of

[1] As per The Constitution of India, Art 124, before the Constitution (One Hundred and Fiftieth Amendment) Act, 2013

[2] As per The Constitution of India, Art 217, before the Constitution (One Hundred and Fiftieth Amendment) Act, 2013

[3] S. P Gupta v. Union of India, AIR 1982 SC149

[4] SC Advocates on Record Association v. Union of India, AIR 1994 SC 268

[5] In re Reference. AIR 1999 SC1

[6] Collegium System of appointment of Judges was developed as a result of SC Advocates on Record Association v. Union of India, (AIR 1994 SC 268) and was further strengthened by In re Reference Case. (AIR 1999 SC1). In Second Judges Case, the SC gave the answer to the question raised in Subhash Sharma v. Union of India, AIR 1991 SC 631.

[7] Second Judges Case and Third Judges Case.

Article 124 of the Constitution done in the *Second Judges*[8] and *Third Judges*[9] whereby interpreting the word *consultation* as *concurrence* was contrary to the doctrine of check and balance.

Recently, the Parliament of India has passed National Judicial Appointments Commission Bill, 2014, which has led to a development of body called National Judicial Appointment Commission, it is responsible for the appointment and transfer of judges to the higher judiciary in India. Before this, the appointment of Higher Judges is based on a "Memorandum of Procedure for Appointment of Judges of the Supreme Court and High Courts" prepared in 1998 pursuant to the Supreme Court Judgment dated October 6, 1993 read with their Advisory Opinion of Apex Court delivered on October 28, 1998. Under the present mechanism, which is commonly known as "*Collegium*" system, the process of initiation of proposal for appointment of a Judge of a High Court rests with the Chief Justice of the concerned High Court and for appointment of a Judge in the Supreme Court, the same rests with the Chief Justice of India. Many judges even referred the system as '*best kept secret in the country'*[10] due to the hidden process and under the table appointment of the judges. The Law Commission has advocated for setting up of Judicial Commission[11], after the *S. P. Gupta Case*[12].

On the other hand, the judiciary of the India is of the opinion that the appointment of judges by judges is essential to safeguard the Independence of Judiciary which is one of the basic feature of the Constitution. The argument which is given is that if the control of appointment is given in the hands of the president than ultimately the power of appointment of judges will come into the hands of the Government at the day. Appointment of Judges is one of the most important element to secure Independence of Judiciary and therefore power of appointment of Judges must be with the Judiciary itself. Constitution of India have conferred power to every organ of the state and it is the duty of Judiciary to keep a check on other organs and correct them if there is any excessive use

[8] SC Advocates on Record Association v. Union of India, AIR 1994 SC 268

[9] In re Reference. AIR 1999 SC1

[10] Justice Ruma Pal of the Supreme Court said "the process of appointment of judges to the superior courts was possibly the best kept secret of the country."

[11] In its 121st Report, 1987

[12] AIR 1982 SC 149

of power than conferred upon it, with this judiciary makes the Rule of Law effective and meaning full.

This can only be done if the judiciary is independent from the other organs of the state, i.e. Independence of judiciary from the legislature and the executives. Independence of the Judiciary can be attained completely only by securing the Independence of Judges, so that a dispute can be decided without being influenced from any factor.

In India, traditionally judicial institutions have surrendered to political commitments as the final power of appointment was in the hands of an executive, the President of India[13] and in order to curb that and establishing independence of Judiciary, the judiciary has taken the power of appointment in its control.

I have divided my dissertation into 6 parts which are as follows:

I. ACTUAL SCHEME OF THE CONSTITUTIONAND THE SHIFT IN AUTHORITY

In this chapter, a detailed discussion will be made on the actual scheme of the Constitution of India; reference will also be made to the Constituent Assembly debates and the speeches made by the Hon'ble members before bringing Art.124[14]and 217[15] into existence. Than study will made on how the shift in authority of appointment of Judges took place, Three Judges Cases[16] will also be discussed.

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[13] Harsh Gagrani, Appointment or Disappointment: Historical Background and Present Problem in the Appointment of Judges in The Indian Judiciary, (2010) 1 NLIU Law. Rev.

[14]" *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*"

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

[16] S. P Gupta v. Union of India, AIR 1982 SC149; SC Advocates on Record Association v. Union of India, AIR 1994 SC 268**;** In re Reference. AIR 1999 SC1

Then finally, in this chapter I will discuss about the opinion of the legislature regarding the shift in authority of appointment.

I. DEFECTS IN THE PROCESS OF APPOINTMENT OF JUDGES BY JUDICIARY

In this chapter I will discuss some defects and problems in the process of appointment of judges by the Judiciary itself, for eg. lack of transparency, nepotism, delay in process etc.

II. STAND OF JUDICIARY TO SAFEGUARD THE COLLEGIUM SYSTEM

In this chapter discussion will be made on the stand of Judiciary to safeguard the collegiums system. Indian judiciary wants the power of appointment of judges to rest with it, as it ensures the Independence of Judiciary. This chapter will divided into 3 parts further in which firstly, I will explain the meaning of Basic structure doctrine, secondly, how Independence of Judiciary is part of Basic Structure doctrine and finally, why Independence of Judiciary includes appointment of Judges.

III. THE NATIONAL JUDICIAL APPOINTMENT COMMISSION ACT, 2014

The Government of India, has recently passed The National Judicial Appointment Commission Act, 2014, for the purpose of appointment of Judges, in this chapter provision of the act will be analyzed. Study will made on the composition of the panel, procedure for appointment of Supreme Court Judges, procedure for appointment of High Court Judges, etc.

IV. ARGUMENTS IN FAVOR AND AGAINST THE NATIONAL JUDICIAL APPOINTMENT COMMISSION

In this chapter I will discuss about the arguments in favor and against setting up Judicial Appointment Commission for the purpose of appointment and transfer of Judges in the Higher Judiciary.

V. PROCEDURE FOR APPOINTMENT JUDGES IN SOME DIFFERENT COUNTRIES

In this chapter, I will look into the mechanism adopted by the different countries having commission system for appointment of Judges, what is the composition of

commission, what is the procedure followed by them, what is the criteria on which appointments take place will also be analyzed.

VI. CONCLUION

This will be the last chapter of my dissertation work, after analyzing everything I will give my conclusion regarding the present procedure for the appointment of Judges, I will try to figure out some important changes brought in by the National Judicial Appointment Commission Act, 2014 and will also try give my recommendations if any.

The objective of my dissertation is to find out importance of setting up Judicial Appointment Commission, its purpose and objective in context of India, because in many countries a similar kind of model is adopted for the appointment and transfer of Judges in higher Judiciary.

CHAPTER: I

ACTUAL SCHEME OF THE CONSTITUTION AND THE SHIFT IN AUTHORITY

In this chapter I will discuss the following sub topics:

- Firstly, I will talk about the historical background, which will tell about the actual scheme of the Constitution for the purpose of appointment of Judges. In this sub topic reference will be made to the Constituent Assembly Debates and the speeches made by the members of the Constituent Assembly and finally how the appointment procedure of Supreme Court Judges and High Court Judges was formulated.
- Secondly, discussion will be done on the shift of authority of appointment. How Judges took the power of appointment of Supreme Court Judges and High Court Judges in their hand by molding the bare word of the Constitution of India. In this sub topic landmark ***Three Judges Cases***[17] will be discussed.
- Third sub topic will deal with the demand and the opinion of the executive branch for the purpose of appointment of Judges.

secondly, shift in the authority of appointment of Judges from the executive to the judiciary and lastly, the demand and the opinion of the executives.

Historical Background

One of the most debatable issue before the Drafting Committee of the Constitution was the procedure for the appointment of the Supreme Court and High Court Judges. Under the Government of India Act, 1935 and the earlier Government of India Act, 1919, it was prerogative of the crown to appoint the High Court judges and there was no specific provision for the consultation with the Chief Justice. Drafting Committee was not in the favor of this unquestioned discretion to rest with the executive.

In 1945 Sapru Committee in its Constitutional Proposal recommended that "the *justices of the Supreme Court and High Court should be appointed by the head of the state in*

[17] S. P Gupta v. Union of India, AIR 1982 SC149; SC Advocates on Record Association v. Union of India, AIR 1994 SC 268**;** In re Reference. AIR 1999 SC1

consultation with the Chief Justice of Supreme Court and in case of High Court Justices, in consultation additionally with the High Court Chief Justices and the head of the unit concerned"[18].

Even the Ad Hoc committee of the Union Constitution, in the beginning of 1947 reported that "*it did not think it expedient to leave the power of appointing judges….to the unfettered discretion of the President*" and recommended 2 alternative methods.[19]

- As per the first method, it authorized the President to nominate a person for the appointment to the Apex Court, with the consultation of the Chief Justice. This nomination will then require confirmation by a panel of seven to eleven members comprising of Members of Parliament, Law officers of the union and the Chief Jutices of the High Court.
- The other method required a recommendation of three person to come from the above panel, one of whom has to be appointed by the President in the consultation with the Chief Justice of India and the same procedure was to be followed for the appointment of the Chief Justice of India, except that the Chief Justice was not to be consulted.[20]

The Constitutional Advisor, Shri Benegal Narsing Rau, suggested in the Memorandum of Union Constitution, that "the *Judges should be appointed by the President with the approval of at least two-third of the Council of States, in which the Chief Justice of India was an ex-officio member.*"

The Union Constitution Committee also differed for the Ad Hoc Committee recommendations and further proposed that "*a judge of a Supreme Court shall be appointed by the President after consulting the Chief Justice and such other judges of the Supreme Court as also such judges of the High Court as may be necessary for the purpose*."[21]

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[18] G. Austin, The Indian Constitution: Cornerstone of a Nation, p176, (Oxford Clarendon Press, 1966)

[19] B.Shiva Rao, The Framing of India's Constitution: A Study, (IIPA, New Delhi), p.590

[20] ibid

[21] B.Shiva Rao, The Framing of India's Constitution: A Study, (IIPA, New Delhi), p.600

However, in the Constituent Assembly, there was unanimous opinion that the appointment of judges must be done by the President of India. Also, there were some debates regarding who should advice or recommend him/ her for the same. Some members suggested an approval of the Parliament or the Council of States whereas, some proposed concurrence of the Chief Justice.

Dr. Bhimrao Ramji Ambedkar, Chairman of the Constitution Drafting Committee, considered it very dangerous to leave the appointment of judges to the absolute discretion of the President. With this reference, he concluded:

"*Apart from its begin cumbersome, it (sole discretion of executive in appointing Judge) also involves the possibility of appointment being influenced by political pressure and political considerations. The draft article therefore steers a middle course. It does not make the President the supreme and absolute authority in the matter of appointments. It does not also import the influence of the Legislature…"*

"With regard to the question of the concurrence of Chief Justice, it seems to me that those who advocate that proposition seems to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief *Justice which we are not prepared to vest in the president or the Government of the day. I therefore, that this is also a dangerous preposition".*[22]

Therefore, a middle path was adopted which neither gave absolute power to the judiciary nor to the executives in the matter of appointment of judges and following two provisions were laid down:

- "*Article 124 (2) says that 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*

[22] Constituent Assembly Debate: Official Report, p.258 <www.parliamentofindia.nic.in>

appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted"[23]

- *"Article 217(1) says that Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two year"*[24]

Shift in the Authority of Appointment of Judges

Period between 1973 to 1983 has been regarded as deplorable decade; it saw unending tussles between the judiciary and the ruling party. The period saw suppression of two senior, competent and experienced judges for the post of Chief Justice of India and therefore, judiciary took the authority of appointment of judges in its hands to safeguard the principal of Independence of Judiciary. There is a series of cases through which this power of appointment was transferred from Executive to the Judiciary

First Judges Case

S.P. Gupta vs. Union of India[25], is regarded as the First Judges case as being the first case related to appointment of Judges. Different views were expressed by different judges related to appointment and transfer of Judges.

In this case the Hon'ble Supreme Court held that "*with regard to appointment of High Court Judges, that there must be full and effective consultation between Constitutional Functionary viz; the Chief justice of the High Court concerned, the Governor of the State, the Chief Justice of India and President. During such consultation, in case of any difference of opinion amongst these authorities, the opinion of the President will have an overriding effect and will prevail over other opinions*". Therefore, Supreme Court

[23] Constitution of India, Art. 124(2)

[24] Constitution of India, Art. 217(1)

[25] AIR 1982 SC 149

pronounced that the ultimate power of appointment of judges is in the hand of the President and it cannot be challenged in any court on any ground, may it be irrelevant consideration or mala fide intentions. Through this case, the Supreme Court of India gave President of India a veto power for the purpose of appointment of Judges.

Second Judges Case

S.C. Advocate on Record Association vs. Union of India[26], also known as the Second Judges case, this case was second case related to the appointment of judges. Public Interest Litigation was filled by the advocates of the Association questioning some of the most important issues related to the judges of Supreme Court and the High Court.

The judgment was pronounced by the majority opinion of the five judges out of the nine judges bench of the Supreme Court of India. It was observed that "*the consultative process envisaged in Art. 124(2) of the Constitution of India emphasized that the executive does not enjoy supremacy or absolute discretion in the matter of appointment of Judges*"[27].

The court observed that "*the indication is that in the choice of candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight. The selection should be made as a result of a participative consultative process in which the executive should have the power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose.*"[28]

Further Supreme Court observed, "*Appointment should not be made merely on the individual opinion of the Chief Justice, but by the collective opinion formed after taking into account the views of some other judges who are traditionally associated with this function….*"[29]

The below given points are summarized version of the judgment delivered by the nine judges bench of the Supreme Court of India, regarding the process of appointment of Judges od Supreme Court and High Court:-

[26] AIR 1994 SC 268

[27] Ibid, at 429

[28] Ibid., at 430

[29] Ibid., at 434

1. The Chief justice of India should initiate the proposal for appointment of Supreme Court Judges.
2. Other two senior judges must also be consulted before the appointment.
3. Conformity of the Chief Justice of India and the consulted judge must be there before the actual appointment of the judges of the Supreme Court.
4. Only in some exceptional cases, after recording cogent reasons, appointment recommended by the Chief Justice may not be made. If such reasons are acceptable by the Chief Justice and other judges, than it must take place in ordinary manner.
5. Opinion in writing must be taken of the judges of panel and other members involved in consultative process. It keeps the check on power given.
6. The senior- most judge of the Supreme Court of India, must be appointed for the office of the Chief Justice of India. If there are any doubts regarding his fitness than it must be recorded.
7. In appointment of Supreme Court Judges from High Court Judges, seniority must be considered.

Therefore, through this landmark judgment political influenced was minimized and the control of judiciary for the process of appointment was maximized.

Third Judges Case

In re, Presidential Reference[30], referred as Third Judges case, is a third case in a row related to the appointment of Judges. Supreme Court nine judges bench delivered that "*As to appointment of the Supreme Court Judges, the Chief Justice of India should consult a collegium of four senior most judges of the Apex Court. Even if two Judge give an adverse opinion, the CJI should not send the recommendation to the Government"*[31]

Further, court held that no appointment shall take place if the decision of appointment is not taken in majority by the judges of the collegium. The court also observed, that the

[30] AIR 1999 SC 1

[31] Raghul Sudeesh, Appointment of Supreme Court Judges, Stripped Law,<http://strippedlaw.blogspot.in/2009/10/appointment-of-supreme-court-judges.html> assessed on 1st March, 2015

Chief Justice of India shall not press appointment if strong views are given even by the two judges.

For the purpose of appointment of High Court Judges, the Chief Justice of the concerned High Court must initiate the process of appointment, after taking into consideration the views of other two senior judges of the that particular High Court. Now, the collegium of the Supreme Court, before making appointment, must consider the recommendation of the Chief Justice of that particular High Court, other senior judges of High Court and the Supreme Court Judges who may be conversant of that High Court,

The Judgment further says that, in case of any clash of opinion between the President of India and between the Chief Justice of Supreme Court, than opinion of the later will prevail.

Supreme Court in this case also gave judgment, regarding the rule of seniority of High Court Judges for the appointment to the Supreme Court. The 2 rules are as follows:

- A High Court Judge can be appointed as the Judge of the Supreme Court of India on the basis of this outstanding merit, regardless of his standing in seniority.
- A Judge of a High Court can be appointed as a Judge of Supreme Court among several other Judges of different High Court of equal merit on good reasons, *for eg*. There is no representation in Supreme Court from the High Court of a particular region.

By delivering this land mark Judgment, Supreme Court tried to establish 2 things.

1. No there was no role of the executive in the process of appointment of a Supreme Court Judge or a High Court Judge. Further, opinion of the collegium was final and its decision will prevail if there is any clash of opinion.
2. Secondly, by increasing the number of judges in the collegium, Supreme Court tried to abolish any kind of arbitrariness and making the procedure of appointment more transparent.

Opinion of The Executive

The executive wing of the country considers collegium system no less than a failure. They say so by citing some of the most controversial appointments to the High Courts and the Supreme Court of India.[32] Some of the examples are as follows:

- A person was appointed for the post of judgeship in Calcutta High Court when he was facing the proceedings of misappropriation in the same High Court.[33]
- Second example is of the Chief Justice of Karnataka, his name was considered and recommended for the Judge of the Supreme Court of India, at that time he was facing allegation of acquiring about 450 acres of land which were for distribution between the families of dalits.[34]
- Another example is of 2 judges of Punjab and Haryana High Court, who were involed in "Cash for Judge Scam" and "Provident Fund Case" in which 34 judges were facing allegation of misappropriation.[35]

Further, by introducing collegium system, the Judiciary has completely out casted the executives from the process of appointment of judges, now there is no watchdog or a supervising authority to monitor the process of appointment and therefore, accountability lack in this system.

Jackson JJ. of the Supreme Court of United States once observed "*We are not final because we are infallible; we are infallible because we are final*"[36]. After all Judges are also humans, it is true that they are highly intellectual but they can also commit error.

Once, one of the retired High Court Chief Justice of Delhi, remarked that "*What's Questionable about the current system is that it is carried out in secret.*"[37] By this

[32] Harsh Gagrani, Appointment or Disappointment: Historical Background and Present Problem in the Appointment of Judges in The Indian Judiciary, (2010) 1 NLIU Law. Rev.

[33] V.Venkatesan & S.S. Chattopadhday, Judges in the Dock, Frontline, p.32

[34] Prashant Bhushan, The Dinakaran Imbroglio, Appointment and Complaints against Judges, Economic And Political Weekly, 10th October, 2009

[35] Harsh Gagrani, Appointment or Disappointment: Historical Background and Present Problem in the Appointment of Judges in The Indian Judiciary, (2010) 1 NLIU Law. Rev

[36] Brown Vs. Allen, 344 US 443 (1953)

[37] Shobhitha Naithani, The Curious Incident of Underdog's Defence, Tehelka, 13th March, 2010

statement he meant that the current system of appointment has no specified criteria for the purpose of appointment of Judges.

The present system is a wholly unchecked system and therefore it can also lead to corruption at the highest level of the Judiciary. The Judiciary has failed completely in its task to secure transparency and accountability in judicial appointments and also to take action against the corruption done misconduct involved.[38]

Another major argument which is given by the executives is that, there is high number of vacancies in the courts due to various reasons such as regional favoritism, difference in the opinion and unjust procrastination, etc. Recently, Law Minister of India criticized the collegium system for the vacancies. There are 24 High Courts in the country having post for almost 948 judges out which around 348 seats are vacant with highest vacancy in the Allahbad High Court having 75 vacancies out seating capacity of 160 Judges.[39] There is already high pendency of cases in India and these vacancies further delays the judicial process, which delays the justice in all.

[38] Law Commission of India, 214th Report on the proposal for Recommendation of Judges Case I, II and III, p. 60 < http://lawcommissionofindia.nic.in/reports/report214.pdf > accessed on 24th December, 2013

- The report has shown deep concern for the working of the collegium. It says that the Supreme Court of India has virtually rewritten article 124(2) and 217(1), and have stated that the collegiums has failed to deliver the desired result.
- It further recommends that "Two alternatives are available to the government at the day. One is to seek a reconsideration of the three judgments aforesaid before the Hon'ble Supreme Court. Otherwise a law may be passed restoring the primacy of the Chief Justice of India and the power of executive to make the appointment"

[39] Law minister blames collegium system for judges vacancy in high courts, The Times of India, < http://timesofindia.indiatimes.com/india/Law-minister-blames-collegium-system-for-judges-vacancy-in-high-courts/articleshow/45279034.cms> assessed on 31st March 2015

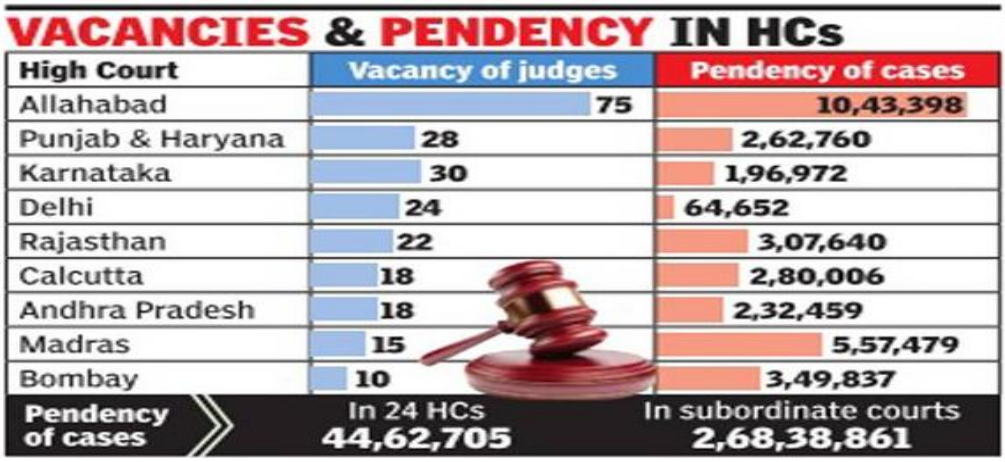

Image Courtesy: Law minister blames collegium system for judges vacancy in high courts, The Times of India, < http://timesofindia.indiatimes.com/india/Law-minister-blames-collegium-system-for-judges-vacancy-in-high-courts/articleshow/45279034.cms> assessed on 31st March 2015

Hon'ble Mr. Justice Krishna Iyer once remarked "*Maybe, the high functionaries shouldering the burden of processing judge's fitness for office are faithful to their anfractuous protocol, mediate to resolve differences and remain in a wise and masterly inactivity! How else do we else the pathetic delay in finalizing the suitable candidate- a few from each High Court once in a blue moon!"*[40] *Whoever is to blame, injustice due to absence of Justices and dysfunctional judicature due to diminishing judge strength are a bizarre kind of contempt o Court."*[41]

The current judiciary is already a dilapidated Judiciary and over that it has an exemption from the Right to Information Act(2005), i.e. any information which is in the opinion of Chief Justice can hamper the Independence of Judiciary. This further increases the chances of undue influence by the member of the collegium in the process of appointment of judge and lowering the faith of the people of the country in the Judicial System of the country

Secondly, the supreme court by way of judicial review and doctrine of basic feature created a wall to protect its supremacy over the legislative and executives

[40] Ibid, at 180

[41] Ibid, at 181

Judiciary has been considered by some jurist, as least dangerous organ to the government and compared to the weakest organ of the government in terms infringement of each-others powers[42]. However, a contrary figure is portrayed by the Indian Judiciary, which is often proclaimed as the most powerful judiciary in the world[43], has taken such stand after the Second Judges Case and by virtue of Judicial Independence as basic feature of constitution, that it has now substantially affected the working of executives and the legislature in the name of judicial review. The interpretation of Art. 124 and Art. 217 in the Second Judges and the Third Judges case have given an unlawful privilege to the judiciary in the cases of appointment[44] . It can be argued that the working of the executives and legislature is substantially affected by the role, judiciary has taken. Hamilton also argued that the power to make law should not be given to an unelected

[42] Alexander Hamilton in Federalist 78 said "[T]he judiciary, from the nature of its functions, *will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.* The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. *The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever*. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power*; that it can never attack with success either of the other two*; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive.... liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments..." 78 The Federalist Papers 393-4 (Bantam)

[43] Santosh Pal, Fading judicial independence, The Hindu (Delhi, October 26) www.thehindu.com/opinion/op-ed/fading-judicial-independence/article5272998.ece?css accessed on November 4, 2013

[44] Harsh Gagrani, Appointment or Disappointment: Historical Background and Present Problem in the Appointment of judges in Indian Judiciary,(1 NLIU Law. Rev., 2010) p. 54

body.[45] Also, when the judiciary declares an act or amendment unconstitutional, it thwarts the will of the people by which it brought[46].

The effect of such a patently wrong action by judiciary, by creating a wall of supremacy itself encroaches the doctrine of separation of power[47]. The judiciary has got itself an authority to indulge with the working of the executive and the legislature, and with that has exhausted all means to check its act by the legislature and executive as in propagation of the doctrine of check and balance[48]. As rightly said, "*power corrupts but absolute power corrupt absolutely*[49]*".* The achievement of absolute independence[50] by judiciary has led to much unprecedented anti-social actions, compromising the image of judiciary.

[45] Ibid

[46] Alexander M. Bickel, The Least Dangerous Branch 16-17 (2d Ed. 1986)

[47] Importance of the separation of powers on our system of governance was recognized by this Court in Special Reference No.1 of 1964 [(1965) 1 SCR 413]. Also in it was recognized as basic feature of Constitution in Kesavanada Bharti Case and later in State of Bihar v. Bal Mukund Shah, AIR 2000 SC 1296

[48] As Independence of Judiciary has been brought under the doctrine of basic structure.

[49] Lord Atkin

[50] It has been argued by Arghya Sengupta in his article that Absolute independence is not necessary and not desirable for a judges. Arghya Sengupta**,** Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry" 5 *Indian J. of Const. L.* 99 (2011) p. 107

CHAPTER:II

DEFECTS IN THE PROCESS OF APPOINTMENT OF JUDGES BY JUDICIARY

Judiciary is an institution which rests the noble edifice of democracy and rule of law[51], thus bringing judicial appointment in complete control of judiciary is not in interest of the nation.

The Collegium system was developed by the judiciary can be considers as a beneficial exercise of judicial review[52], since it has shadowed the executive's participation on the name of judicial review. Charges of misappropriation of funds and improper conduct have sprawled heated debates pertaining to the system of appointment of judges[53]. The Law Commission in 214th Report on the Proposal for Recommendation of Judges Case I, II and III[54] said that collegiums system was a failure and said that "*Its decisions on appointments and transfers lack transparency and we feel courts are not getting judges on merit*[55]*.*"

The problem with the collegiums system and the defects created by it are as following:

1. Exclusive control of judiciary:

   Through collegiums system the Indian Judiciary has taken the power of appointments of High Court Judges and Supreme Court Judges completely in its hand. It leaves no space for the executive to interfere in the process of appointment of judges. In a democratic country like ours all the wings of the country, i.e. executive, legislature and judiciary must have a say and equal representation.

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[51] Supra 32

[52] Phiroza Anklesaria, Judicial Law-Making: Strength and Weakness, Indian Bar Review, Vol XXXVIII (1&2) Jan- July 2011

[53] Judicial Accountablity Vis-à-vis Judicial Independence in the Light of the Right to Information Act, (2005, RMLNLU L. Rev.) 48

[54] Law Commission of India, 214th Report on the proposal for Recommendation of Judges Case I, II and III, p. 60 < http://lawcommissionofindia.nic.in/reports/report214.pdf > accessed on 24th December, 2013

[55] ibid

2. No transparency and Accountability:

   In the collegium system, Judges appoint Judges, now there is no identified method for the appointment of Judges, there can be many candidates of equal potential, but they can choose anyone amongst them whom the collegium thinks perfect for the post. Also, the fundamental right, right to information is also no applicable to question the appointment of a particular Judge for the judgeship.

3. No identified method for the transfer of Judges:

   Process of transfer of judges is also initiated by the members of the Collegium, now there is no specified rule regarding the transfer taking place. Some time transfers also take place due to political pressure, for eg. A judge hearing an important political case might be transferred to some other High Court in order to delay the process of hearing.

4. Individual independence of High Court at peril:

   The High Courts are sovereign and have to decide matter in any manner which they deem fit. All the High Court Judges wants to be elevated to the Supreme Court, in order to do say sometime they try to flatter the member of Collegium, by referring to the interpretation done by them, any judgment passed by them or by citing their views over a particular subject, etc. In this manner they do not act independently.

5. Nepotism:

   Nepotism is another major issue of concern when we talk about the appointment of Judges. Many times we have seen relatives of Judges becoming judges, even though they are capable then other candidate. Collegium system works on the basis of recommendation by the judges and therefore, there is high possibility of judges recommending their relatives for the Judgeship.

6. Intention of the constitution and constitution framers was completely reversed by development of collegium system:

   A thorough study of the Constituent Assembly Debates makes it very clear that the members of the Assembly never wanted to give power of appointment of judges in hands of only one wing and therefore, they formulated a method in

which both executive and judiciary have say. Through the collegiums system Judiciary has taken over the power of appointment of judges in its control, which is against the intention of the constitutional framers.

Exclusive Control of the Judiciary

Judicial independence was based on the concept of public policy, and the concept of public policy is dynamic in nature[56]. Similarly, where the advent of executive or legislature was earlier considered to be an annoying and disturbing the judicial independence in past, now the exclusive control of the judiciary over the appointment of judges have created such results, that is has been many a times considered as an dangerous phenomena. There have been instances where such exclusive power has been used dishonestly and for improper use, creating a question on the integrity of the judicial system. The judiciary, which had taken the powers from the hand of the executive in *Second Judges Case*[57] and *Third Judges Case*[58] had created a more complex system, which resulted in increasing of the problem associated with the appointment of judges.

The concept of judicial independence is as wrongly held by the Indian Judiciary, does not require judges to have control over their own selection[59]. The selection can be done by legislature or in consultation with executive or by an independent panel consisting of judges, person from bar, executives and other eminent fraternity from the legal field.

The exclusive control of the judiciary over the appointment of judges has been proved to be very dangerous and aided in diminishing the merit based appointment[60]. Also, such

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[56] Judicial Accountablity vis-à-vis Judicial Independence in the Light of the Right to Information Act, 2005 pg. 53

[57] SC Advocates on Record Association v. Union of India, AIR 1994 SC 268

[58] In re Reference. AIR 1999 SC1

[59] Note of Seminar in University College London (Judicial Independence And Judicial Appointments, 22nd February, 2012) < http://www.ucl.ac.uk/constitution-unit/research/judicial-independence/Seminar_Note_-_Judicial_Independence_and_Judicial_Appointments.pdf> Accessed on 27th December, 2013

[60] Many instance have come before the people where the essence and integrity of the judiciary has been disturbed as in propagation of the exclusive independence of the Judiciary like

- Chief Justice of Karnataka was recommended for elevation to the Supreme Court by the Collegium, who have been earlier accused of acquiring more than 450 acres of land meant for

appointments which are very opaque in process are extremely susceptible to misappropriation. Taking the role of appointment of judges the judiciary had aggravated the problem as compared to that existed previously[61]. The practical aspect of judicial independence was thus missing.

Lack of Transparency And Accountability

The procedure of the collegiums system was dependent on the wish of the judiciary for the appointment of judges. The appointment lacks the concept of transparency as the whole system is done inside the purview of Collegium and after all process the decision is assimilated to by way of President, since the word consultation has been made dead by constructing it as mere concurrence. The element of accountability and independence forms essential elements to the existence of the judicial institutions[62]. The freedom of information has been recognized universally as a "*fundamental human right and touch stone of all freedoms*[63]". As discussed earlier also, the members of the bench were also not satisfied by such system of appointment of judges and referred it "*the best kept secret*"[64]. The lack of legislation and substantive procedure regarding appointment of judges has led to an ineffective control over the judicial autonomy, which in turn has tarnished the sanctity of entire institution. Also, the biggest irony is that the judiciary has excluded itself substantially from the Right to Information Act, 2005[65], which has itself

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distribution to landless dalit family.(Prashant Bhushan, The Dinkaran Imbrogio: Appointment and Compliant Against Judges, Economic and Politically Weekly, October 10, 2009)

- In Provident Fund case and Cash-for-judges Scam, involving two judges of Punjab and Haryana High Court also underlines the arbitrary and totally unsatisfactory manner of selection of judges to the higher judiciary.

[61] Appointment or Disappointment: Historical Background and Present Problem in the Appointment of Judges in The Indian Judiciary

[62] Judicial Accountablity vis-à-vis Judicial Independence in the Light of the Right to Information Act, 2005 pg. 46

[63] Resolution 59 (I), United Nation General Assembly

[64] Justice Ruma Pal

[65] As Right to Information Act, 2005 does not apply on the appointment of judges.

propagated and introduced this concept in India[66]. In case of *Inderpreet Singh Kahlon v. State of Punjab*[67] , the Supreme Court reacted vigorously to the corruption prevailing in the state judiciary appointment though state public service commission, however the same Apex Court is completely ignorant to irregularities and issues arising in the appointment due to the opacity of the process of the appointment of the judges in the higher judiciary. The requirement of independence hence seeks to ensure the exclusion of improper influences on particular decisions, thereby making the judge a detached and impartial arbiter of the dispute[68].

No Identified Method for the Transfer of Judges

Similar to the process of appointment, there are no solid grounds or procedure on which the transfer of the judges is conducted. The transfers of the judges are highly susceptible to the political pressure or the internal politics since it lack any ground rules and again depends on the will of collegiums. The process for the transfer is essential composition in protecting the independence and the undue influence in discharge of justice by the High Court. Also, the rationale behind such transfers is not made available, creating a whole suspicion as to on what grounds the transfer was made.

Individual Independence of High Courts At Peril

When we are talking about independence in judiciary, it includes independence at every level, including the High Courts. Since judicial independence also include independence of the individual judge from superiors in the judicial hierarchy, so that a judge can decide each case on his or her own best view of what the law requires[69]. High Courts are

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[66] The Right to Information was upheld by Supreme Court in Bennett Coleman v. Union of India ([1973] 2 SCR 757), S. P. Gupta v. Union of India ([1982] 2 SCR 365), Association of Democratic Reforms v. Union of India ([2000] 57 DRJ 82, and People's Union for Civil Liberty v. Union of India ([2004] 2 SCC 476)

[67] AIR2006SC2571

[68] **Arghya Sengupta,** Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry" 5 *Indian J. of Const. L.* 99 (2011)

[69] Judicial Appointment and Judicial Independence, January 2009, United States Institute of Peace <https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.usip.org%2Fsites%2Fdefault%2Ffiles%2FJudicial-Appointments-EN.pdf&ei=1WHVUtP5IYar

sovereign and have their own right in deciding matter which come to them, deciding over the cases and jurisdiction which comes within their purview. Each High Court is independent and right to entertain extra-ordinary petition under Article 226 of the Constitution and decide in any manner without any influence from the Supreme Court. In the respective subject matter, they should not be subjected to influence in any manner by the Supreme Court[70]. Furthermore, individual judges of the high court have a great incentive to conform, and are under an indirect influence of the Supreme Court. The system prevalent before the amendment that Judges of High Court look for pleasing the Judges of Supreme Court for their elevation to the Supreme Court. Where, the appointment is directly vested in the hands of the judges of Supreme Court, they enjoy an influence over the Judges of the high court and thus creating a negative friction in the working of High Court Judges and influence their decision and judgments.

Issue of Nepotism

The issue which concerns everyone deeply is the manner in which relatives of Judges are practising in High Court. In the present time there is a widespread dissatisfaction from the working of the Collegiums system. There has been marked deterioration in the standard of the High Court judges mainly due to the method of selection which is often influenced by political and other extraneous consideration[71]. *The Punjab and Haryana High Court Bar Association recently passed a resolution supported by over 1,000 lawyers in which it is stated that "it has now become a matter of practice and convenience to recommend the names of those advocates who are the sons, daughters, relatives and juniors of former judges and Chief Justices" without reference to their merit. The resolution alleges that nepotism and favouritism is writ large. The*

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geOpYHICA&usg=AFQjCNG_4xOjCgwxDfwCLQ_eC_zZbKkojw&sig2=4g15p0bJimF0hRUoYUuaYA&bvm=bv.59378465,d.bmk> Accessed on 29th December, 2013

[70] J. Hidayatullah, in Viswanathan v. Abdul Wajib, (AIR 1963 SC 1) held that "*A Judgment which is a result of bais or want of impartiality on the part of judge will be regarded as nullity and the trail* ***coram non judix"***

[71] G. Austin, Working a Democratic Constitution: The Indian Experience (Oxford University Press, 1999) p. 130

statements in the resolution about names recommended by previous Chief Justices of Punjab & Haryana High Court may not be correct. The resolution, however, manifests the general dissatisfaction with the working of the present system and highlights the necessity and urgency of enactment of a statute comprehensively dealing with the subject of judicial appointments.[72] The present Act and Amendment system which has been passed is capable of removing this dissatisfaction arising out the issue of nepotism as in Judicial Appointment Panel there will be multiple brains and collective efforts will be made in the process of appointment from both executive and Judiciary side, and it will be more in consonance with an old Roman saying "*Whatever touches us all, must be decided by all*".[73]

Intention of the Constitution And Constitution Framers Was Completely Reversed By Development of Collegium System

The Judiciary has in name of judicial activism, has completely reversed the words and spirit of Art. 124. The intention of the constitution framers was to devise a method where there exist a balance between the executive and judiciary, as to role of appointment of judges. The Constitution Frames held it to be very dangerous to devise a complete control of the executives or judiciary in matter of appointment of judges74. To counter such anticipation, they devised in constitution a mechanism where the proper say was given to judiciary and power of scrutiny was provided to executive75. The aim of the constitution frames is clear. They were not in the notion to give a complete autonomy to executive or judiciary, thus absolute authority was not granted to any of the organs and a middle path was chosen76. The existing collegiums system has disturbed the balance that was sought by the Constitution. Thus, the appointment of judges should be on balanced formula,

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[72] **Soli J Sorabjee, 'It's time judges stopped appointing themselves and shed nepotism' *The New Indian Express* (26th May 2013)**

[73] Harsh Gagrani, "Appointment Or Disappointment: Historical Background And Present Problem In The Appointment Of Judges Of Indian Judiciary", (2010) 1 NLIU Law Rev.,57

[74] Constituent Assembly Debates: Official Report, p.258

[75] Article 124 of Constitution

[76] *ibid* Constituent Assembly Debates

backed by proper words of law and giving representation to executive branch of the government.

CHAPTER: III

THE NATIONAL JUDICIAL APPOINTMENT COMMISSION BILL, 2014

The Law Minister of India, of the current BJP Government, Mr. Ravi Shankar Prasad, on 11th August, 2014, introduced The National Appointment Commission Bill, 2014 in the Lower House of the Parliament of India.

This bill was introduced in connection 121st Constitutional Amendment which establishes The National Judicial Appointment Commission. The ultimate objective of the bill is provide with the procedure which is to be followed by the National Judicial Appointment Commission for the purpose of recommending person for the appointment as the Chief Justice of India, the Judge of the Supreme Court of India, Judge of the High Court in India and for the transfer of Judges.[77]

The preamble of the National Judicial Appointment Act, 2014 states "*to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto*."[78]

In this chapter, I will discuss the following issues:-

- Composition of the National Judicial Appointment Commission
- Role of the National Judicial Appointment Commission
- Reference made by the Central Government to the Commission

[77] The National Judicial Appointment Commission Bill, 2014, PRS Legislative research, http://www.prsindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014-3359/ assessed on 1st April, 2015

[78] The National Judicial Appointment Commission Bill, 2014, Preamble

- Procedure to be followed for appointment of a judge for the Supreme Court of India
- Procedure to be followed for appointment of a judge for the High Court in India

Composition of the National Judicial Appointment Commission

The National Judicial Appointment Commission comprises of Six member, the members of the commission are as follows:[79]

1. The Chief Justice of India, he is the ex-officio Chairperson of the commission.
2. Other two senior most judges (next to the Chief Justice of India) of the Supreme Court of India.
3. The Cabinet Minister of Law and Justice of the Union of India
4. The other two eminent person nominated and appointed by a committee consisting of the Chief Justice of India, the Leader of Opposition in the Lower house of the Parliament and the Prime Minister of India. Out of the two eminent person appointed, at least one of them must belong to a community of Schedule Tribe, Schedule Caste or to OBC or other minor community. There tenure of appointment is for 3 years and are not eligible for the re-appointment.

Role of The National Judicial Appointment Commission

The National Judicial Appointment Commission will have the following roles to perform.

1. To recommend and appoint, the Chief Justice of India.
2. To recommend and appoint, the judge for the Supreme Court of India.
3. To recommend and appoint, the judge for the High Courts in India.
4. To take decisions related to the transfer of High Court Judges.

Reference by Central Government to the National Judicial Appointment Commission

The role of the National Judicial Appointment is as follows:-[80]

[79] National Judicial Appointment Commission: Pros and Cons, Jagran Josh, 8th September, 2014, < http://www.jagranjosh.com/current-affairs/national-judicial-appointment-commission-pros-and-cons-1410171662-1>, assessed on 1st March, 2015

1. The Central Government will make a reference to the Commission, whenever a vacancy arises in the Supreme Court of India or in any High Court of India for the nomination and appointment of Judges for the court.
2. Reference by the Central Government will be made in Six month advance, if the vacancy is about to be created due to the completion of the term of any Judge.
3. Reference by the Central Government to the commission will be made within 30 days of occurring vacancy, if it is created due to death or due to resignation.

Procedure to be Followed for Appointment of A Judge for The Supreme Court of India

Below mentioned procedure is to be followed for the appointment of Judge for the Supreme Court of India:[81]

1. For the Chief Justice of India, name of the senior most judge of the Supreme Court will be recommended by the Commission. Name of the senior most judge will not be recommended for the post of Chief justice of India if in the opinion of the commission he/she is not fit to hold the office.
2. Name of the person will be recommended by the commission for the judge of the Supreme Court of India on the basis of his/her ability, qualification, merit and on other specified regulations.
3. No name of a person will be recommended if any 2 person of the commission are not in favor of recommending a particular person for the judgeship.

Procedure to be followed for Appointment of A Judge for The High Court in India[82]

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[80]The National Judicial Appointment Commission Bill, 2014, PRS Legislative research, http://www.prsindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014-3359/ assessed on 1st April, 2015

[81] ibid

1. For the post of the Chief Justice of High Court, name of the senior most judge of the particular High Court will be recommended by the National Judicial Appointment Commission. Ability, experience, merit are some other criteria's which are also to be taken in to consideration while recommending a name.
2. For the appointment of other High Court Judges, the commission for the purpose of appointment shall recommend names to Chief Justice of the concerned high court.
3. The Chief Justice of the concerned High Court to whom the names have been recommended will consult with other 2 senior judges of the particular High Court.
4. Before making any recommendations, the National Judicial Appointment Commission shall take into consideration the views of the Chief Minister and the Governor of the concerned state where the High Court is located.
5. A name a person will not be recommended for the judgeship if any 2 members of the commission do not agree on a particular name of the candidate.
6. This is to be noted that, that the power of National Judicial Appointment Commission, is limited to refer a name for the appointment of Judge. The power of appointment is still vested in the hands of the President of India.

[82] ibid

CHAPTER: IV

ARGUMENTS IN FAVOR AND AGAINST THE NATIONAL JUDICIAL APPOINTMENT COMMISSION

This chapter I will discuss the arguments in favor and against the National Judicial Appointment Commission. As a coin has two sides, similarly whatever comes to an existences have some pros and cons. I will try to analyze the bill completely in this chapter by pointing out the benefits and the ill effects of the bill.

Arguments in Favor of the National Judicial Appointment Commission

Some arguments in favor of the National Judicial Appointment Commission are as follows:

a. That the independence of judiciary has not been disturbed by the introduction of the panel

The Panel which has been introduced for the appointment of judges has not disturbed the independence of the judiciary. It has created a balanced platform, where the representation is from both executive, judiciary and as well as legal fraternity. The composition of the panel has been created in such a manner that both executive and judiciary have equal say. The Act and Amendment has in no manner encroached upon the independence of the judiciary.

b. Judiciary doesn't have exclusive power for appointment of judges

After the decision in the *Second Judges Case*[83], the Supreme Court suddenly became the most powerful apex judicial institution, among all other apex judicial intuitions of the world[84] after taking an absolute role in appointment of its own judges. In most of legal systems around the world, the judges are appointed collectively by representation of all three organs of the government. Indian judiciary became the exception as to where the exclusive role of judiciary was

[83] Supreme Court Advocate on Record Association and Others v. Union Of India, (1993) 4 SCC 441

[84] Santosh Pal, Fading judicial independence, The Hindu (January 9, Delhi)

recognized by way of judicial review, for the appointment of judges in the higher judiciary.

c. The Judicial Appointment Panel will include representative from executive and judiciary

The proposed Judicial Appointment Panel will be consisting of a total of Six members out of which three members will directly representing judiciary while only one member will be directly represented by the executive. The other member will be other stakeholder i.e. representative from the legal profession and eminent person. The appointment of the eminent person will be based on the view of collegium consisting of Prime-Minister, the Chief Justice of India and the Leader of Opposition. Again, while electing the eminent person a balance has been sought reflecting the opinion of all the wings of the government. The effectiveness of the commission system depends on the composition of the commission and the system used by it.

d. **The essential of Judicial Independence is not encroached upon**

Political systems that aspire to the rule of law consider judicial independence indispensable[85]. But what constitutes judicial independence is a judge's freedom to apply his /her interpretation of the law to each case before her[86]. The principle of the independence of the judiciary seeks to ensure the freedom of judges to administer justice impartially, without any fear or favor[87]. The elements of independence of judiciary include the essentials which enable to maintain a judge's freedom to decide a case in accordance with the judge's view of the law. The fixed tenure that offers

[85] Alexander Hamilton, Federalist No. 78, 1788

[86] In Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871) ("[lIt is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."); *see also* THEODORE L. BECKER, COMPARATIVE **JUDICIAL POLITICS** 143-45 (1970); James Zagel &Adam Winkler, *The Independence of Judges,* 46 MERCER L. REV. 795 (1995) (exploring the extent of and the constraints on this freedom from the perspective of judges).

[87] Akkas, Sarkar Ali, Appointment of Judges: A Key Issue of Judicial Independence, (2004 Bond L. Rev: Vol. 16)

protection from arbitrary removal and that is subject only to narrowly tailored provisions allowing discipline or removal of judges for misconduct or incapacity, fixed and adequate compensation independent from the executives and legislature, minimum qualifications and limited civil immunity for judicial decisions[88]. The essential of independence of judiciary claims a complete freedom in the working of judiciary in delivering justice; however administration of judiciary including appointment of judges can be delegated to other organs of the government to give effect to accountability and doctrine of check and balance. In most of the nation, judicial appointment is has been a part of executive function or to the legislature[89]. Even the commission creates a balance where the appointment is made on the recommendation of all the wings of government, including the representative from public and therefore the Amendment and the Act, does not disturbs the independence of judiciary. Also, the Act and Amendment settled a model which brings it closer to the aspiration of the Constitution Framers, as disturbed in the *Second Judge[90]s* and *Third Judges[91]* case by giving representation to both executive and judiciary.[92].

e. The Commission system for appointment consummates the deficiency of the collegiums system and has brought positive changes in the Appointment of judges

The Judicial Appointment commission has been made after the failure of the collegium system. The commission has been specifically designed to counter all the issues and deficiencies that existed with the collegiums system. An independent commission has been widely recognized as the most effective mechanism for the appointment of judges[93]. The ***Beijing Statement of Principles***

[88] *ibid*

[89] As in USA

[90] AIR 1994 SC 268

[91] AIR 1999 SC 1

[92] Higher Judiciary (Appointment and Transfer) Act, 2013, s. 3

[93] American Judicature Society (AJS) reported in April 2002 that Judicial Nominating Commission is used for all terms of appointment to all courts of Alaska, Colorado, Connecticut, Delware, District of Columbia, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, New Mexico, Rhode Island, Utah,

***of the Independence of the Judiciary in the LAWASIA Region* [*Beijing Statement*] 1995** states that "*In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Service Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose. Where a Judicial Service Commission is adopted, it should include representatives of the higher judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained*[94]*."*

f. Role of Executive in appointment of judges promotes doctrine of check and balance

The doctrine of the "separation of powers" has traditionally proposed that the state is divided into the separate and distinct arms of Executive, Legislature and Judiciary, whereby each arm acts as a "check and balance" on the others. However, the division has not been made as a water tight compartment, and allow for interdependence between the organs as they can check and balance each other[95]. Mutual check and balance was necessary to be incorporated with the doctrine of separation of power to promote moderate government by conditioning the autonomy of each organ and promoting accountability *inter se.*

Particularly, where the judiciary has got the exclusive power for checking the action of executive and legislature by way of judicial review, there need to be a mutual check and balance where the power of impeachment shall be given to the legislature[96] and appointment shall be made by representation of executive[97]. Thus,

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Vermont and Wyoming. It is also used for midterm vacancies on some or all levels of court in Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, North Dakota andWisconsin. For details of the Report, see *Judicial Selection Methods in the States* <http://www.ajs.org/select11.html>

[94] Beijing Statement 1995, Art 15. The 6th Conference of Chief Justices of Asia and the Pacific unanimously adopted the Beijing Statement on 19 August 1995.

[95] **Arghya Sengupta,** Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry"(5 *Indian J. of Const. L.* 99, 2011) p. 107

[96] Constitution of India, Article 124 (4)

[97] ibid

this system has restored the doctrine of check and balance and has again enhanced the effectiveness of the judiciary[98].

Since our judges were used to not elected and appointed, are virtually irremovable[99]. Surely, the system of checks and balances must apply to the process of judicial appointments. This must necessarily involve the legislature and the executive. The panel system created by the Act and the Amendment has presented a method of check and balance providing the representation to the executives in the appointment of the judges[100].

g. Bringing back the Constitutional scheme for appointment of judges

The Judiciary has in name of judicial activism, has completely reversed the words and spirit of Art. 124. The intention of the constitution framers was to devise a method where there exist a balance between the executive and judiciary, as to role of appointment of judges. The Constitution Frames held it to be very dangerous to devise a complete control of the executive's or judiciary in matter of appointment of judges[101]. To counter such anticipation, they devised in constitution a mechanism where the proper say was given to judiciary and power of scrutiny was provided to executive[102]. The aim of the constitution frames is clear. They were not in the notion to give a complete autonomy to executive or judiciary, thus absolute authority was not granted to any of the organs and a middle path was chosen[103]. The existing collegiums system has disturbed the balance that was sought by the Constitution. Thus, the appointment of judges should be on balanced formula, backed by proper words of law and giving representation to executive branch of the government.

h. Creates a balance between judicial independence and judicial accountability

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[98] Doctrine of check and balance enhances the effectiveness of the judiciary. Nibaldo H. Galleguillos, Checks and Balances in New Democracies: The Role of the Judiciary in the Chilean and Mexican Transitions: A Comparative Analysis, (1997 meeting of the Latin American Studies Association, 1997), < http://biblioteca.clacso.edu.ar/ar/libros/lasa97/galleguillos.pdf > accessed on January 4, 2014.

[99] Raju Ramachandran, Judicial supremacy and the collegium

[100] Higher Judiciary (Appointment and Transfer) Act 2013 Sec. 3

[101] Constituent Assembly Debates: Official Report, p.258

[102]. ibid

[103] ibid

In past the arena of judicial appointment was heavily influenced and attracted by the concept of judicial independence, while the concept of judicial accountability was completely ignore. Judicial independence continues to be central to the modern debate because concern has been expressed about accountability and transparency in the process of appointment of judges. There has been critical attention of the interest groups on the on the composition of the judiciary and the procedures for the appointment of judges. There was a lack of identified criteria for judicial appointment and the procedures for appointment, which has been rectified by the present system. The system not only ensures independence of judiciary by also brings accountability in process of appointment, since checked by the executive.

Those procedures were neither public nor open and they do not involve public participation. Such issues would not have been addressed, would have been affected the quality of judges[104]. A failure to strike the right balance between judicial independence and judicial accountability will result in either an unacceptable weakening of judicial independence or inadequate accountability[105]. Absence of mechanisms for accountability and lack of judicial performance standards lend greater weight to claims for more open procedures and public participation in the judicial appointment process. Thus, the present system for the appointment has created the concept of judicial accountability without disturbing the judicial independence, by introducing transparency and a defined system for procedure and criteria for appointment of Judges.

i. The Act Also Applies To The Transfer Of Judges.

In the Collegium system after the *Third Judge Case*[106], the Chief Justice of India along with other Collegium members had a right to transfer High Court Judges from one High Court to another High Court, appoint a Chief Justice from among the High Court Judges and also had a power to transfer Chief Justice from one High Court to another High Court.

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[104] Anthony Mason, The Appointment and Removal of Judges,(Judicial Commission of New South Wales , December 19, 2013), < http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm> accessed on 3rd March, 2015

[105] Ibid

[106] AIR 1991 SC 1

So, in other words which Judge is to be transferred to another High Court, which has nothing to be done with the judicial function of the court and which is purely an executive function is also exercised by Collegium members. The concept of the Independence of Judiciary also means the independence of Judiciary at High Court level, now the Collegium system disturbed the very delicate constitutional balance which allows the High Court Judges to act independently. The High Court Judges were not independent anymore and they are under a continuous threat of transfer if any of their opinion is contrary to the opinion of the Collegium members which resulted in that High Court Judges are looking towards the members of the Collegium and what are their views on the subject.

The Collegium system had disturbed the two very important basic features of the constitution which is in the heart of the constitution; they are the Independence of Judiciary and the Separation of Power. The practise developed in the name of the so called Collegiums system has completely taken the power of appointment from the executive and vested it in the hands of judiciary. If there is any lacuna in a function by the executive than judiciary has a full right to give directions to the executive but stepping into the shoes of an executive and performing executive function is a clear violation of the separation of power.

Arguments against the national judicial appointment commission

Some arguments against the National Judicial Commission are as follows:

a. **Feature of the act is undermining the independence of judiciary**

The Constitution 121st amendment and the Judicial Appointment Commission Act, 2014 are just the weapons used by the executive to suppress the judiciary in order to have supremacy of the executive over the judiciary.

The composition of the so called Judicial Appointment Panel introduced by the amendment is not a part of the constitution in itself. In other word we can say that, the composition of the Panel can be altered or modified with a simple majority by a ruling party in Parliament. A body with such immense powers of appointing members of the higher judiciary (enjoined constitutionally to be separate and independent) being

determined and constituted by a simple majority in Parliament, does not display constitutional wisdom[107].

Also, the Amendment and the Act will affect the enforcement of fundamental right by the judiciary. The concept of Fundamental right represents a trend in modern democratic thinking[108]. Also judiciary in every country has an obligation and a Constitutional role to protect Fundamental Rights of citizens. Since most of the Fundamental Right are claimed against the state and its instrumentalities[109], bringing the even the influence of executive in the appointment of judges will affect the enforcement of fundamental rights.

b. **Creation of illusion by laying down the structure and composition of the Judicial Appointments Panel under the act and not under the constitutional amendment**.

The above mentioned Amendment and Act together, as well as individually, are a serious threat to our democratic system and the independence of the judiciary[110], which, fortunately, are basic features of our Constitution.[111] Experience from past shows that it is only when the executive gets sunk in corruption and such other flaws, that it resorts to stifling other branches of government unconstitutionally through executive supremacy.[112]

In *Federalist 78,* Alexander Hamilton argued that judiciary is weakest organ of the government, since it has neither the control over the public purse, as vested with the legislature and not the power of as effective as an executive have.

The composition and working of the panel responsible for making recommendations for appointment of judges is provided under the Act and not under the sanctifying constitutional amendment. This shows the real intention of establishing supremacy of the executive in judicial appointments and not reforming or improving the mechanism for the

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[107] Santosh Paul, 'Fading judicial independence' The Hindu (26 October 2012)

[108] The concept of fundamental rights are prevalent among all the nation. Like in Europe the Europe Convention for the Protection of Human Rights and Fundamental Freedom was adopted on Nov 4, 1950.

[109] Shamdasani v. Central Bank of India, AIR 1852 SC 59; Also in Vidya Verma v. Shivnarain AIR 1956 108

[110] Independence of Judiciary has been regarded as a basic feature of constitution. Kumar Padma Prasad v. Union of India, AIR 1992 SC 1213. Also in N. Kannadasam v. Ajoy Khose (2009) SCC 1

[111] Ram Jethmalani, 'Two Bills that threaten Democracy' The Sunday Guardian (25th December 2013)

[112] ibid

same[113] rather bringing it in the complete control of the legislature and indirectly in control of executives[114].It can be construed with the parallel reading of both the amendment and act that an illusion is being created, as mischievously, though doubtless cleverly, the structure and shape of the panel are defined in Section 3 of the act, and not in the Constitutional Amendment. The Act and Amendment in no manner is trying to improve the system of appointment of judge one hand and on another hand such faulty system will bring the independence of the judiciary in peril.

The above mentioned mechanism is both improper and unfair and in no manner would result in the improvement of the previously used Collegium system which existed from 1993 as a result of the Nine Judge Bench decision of the Supreme Court in the Famous case of Supreme Court Advocates-On-Record Association and Others v/s Union of India[115]. The alleged astute cleverness actually exists in creating an illusion that even while the structure of the panel prescribed by Section 3 will remain a permanent statutory provision, the constitutional amendment, sanctifies the panel by the amendment of Article 124 in the Constitution. This not only makes the panel enjoy the longevity of any ordinary Constitutional provision, but also ensures that its actual composition and working shall be regulated by Parliament by a simple majority in both Houses thus envisaging the supremacy of the executive.

In another way it can be construed that any government in power enjoying the majority of even one vote in both Houses can alter its shape and make it utterly useless if not impotent. We can further understand this with an illustration.

In its present form the panel the configuration of members is not constitutionally entrenched[116] and being a simple Act passed by the Central Legislature, even all this can be scrapped and the Union Minister of Law and Justice be made the sole appointing authority with or without some consultation with some judge of the Supreme Court. In

[113] Anil Divan, 'Upholding Judicial Independence' The Hindu (7th December 2013)

[114] Since in India Executives are responsible in Legislature.

[115] (1993) 4 SCC 441

[116] Anil Divan, 'Upholding Judicial Independence' The Hindu (7th December 2013)

other words, this Act is a corrupt and unconstitutional method of setting aside the nine-judge bench decision of the Supreme Court[117], by throwing dust in the eyes of the people.

It is evident from the mechanism provided in the Constitution[118] that the amendment of constitutional provisions is much more stringent as compared to other statutes which can be amended by the simple majority in both houses. The structure of the panel if would had been included in the constitution, would have provided the entire scheme of the Judicial appointments a stable and trustworthy approach different from the current wage and deceiving one as envisaged by the government.

The combined effect of the new amendment and the act is to restore the pre 1993 position, which had been sanctified by the S.P. Gupta judgment of 1981[119]. This judgment establishing executive supremacy was set aside by the nine judge bench judgment[120] fortunately putting an end to this disruptive practice in the matter of higher judiciary appointment.

The nine judge bench accepted the arguments made by various distinguished counsels that Article 50 of the Constitution is a basic feature of the Constitution within the meaning of the concept enunciated by the thirteen-judge Keshavananda Bharati judgment of 1973[121].

Article 50 of our Constitution is an extremely simple Article consisting of only one sentence. "The State shall take steps to separate the judiciary from the executive in the public services of the State."

The Supreme Court rightly construed this Article to mean that the government, which is the cause of more than half the litigation in our courts, cannot be permitted to have any control over the appointment of judges, who must deal with every litigant including the government, on the merits of their case. A frequent litigant cannot be permitted by any civilized society to be the appointing authority of judges of his liking or choice[122].

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[117] Supreme Court Advocate on Record Association and Others v. Union Of India, (1993) 4 SCC 441

[118] Constitution of India, Art. 368

[119] S.P. Gupta vs. President of India and Ors., AIR 1982 SC 149

[120] Supreme Court Advocate on Record Association and Others v. Union Of India, (1993) 4 SCC 441

[121] (1973) 4 SCC 225

[122] Supreme Court Advocate on Record Association and Others v. Union Of India, (1993) 4 SCC 441

c. **The convention of appointment of the senior most judges has not been recognized completely**

The appointment of senior-most judges of the Supreme Court as the Chief Justice of India has been followed from a very long period and can be traced from the era of pre-independence. Such convention is also followed in the other nation, while appointment of chief justices, senior-most judges is appointed in their courts[123]. Also, presence of such a system prevent will prevent lobbying and will preserve collegiality in the apex court[124]. in the present amendment and the Act, provision is given that Senior most Judge will not be appointed as Chief Justice if he is not fit to hold the office. This will directly or indirectly attract lobbying and favoritism.

The practice has been developed after looking into the prospective of the judiciary and presents a risk as every eligible senior judge will now face a direct threat to being superseded from being appointed as Chief Justice[125].

d. The mode of appointment of the other functionaries of the Panel is outside the purview of Article 146

Thirdly, the Act and the Amendment provides that the Central government will appoint the officers and employees of the Commission, making its secretariat a government department. This is the most dangerous provision. The officials and personnel of the Commission should be appointed in the same manner as those of the Supreme Court[126], by the CJI or such other judge or officer of the court as he may direct. If the secretariat or officers and servants of the JAC are treated as government departments, there are a hundred ways of making the Panel dysfunctional. In addition, the confidentiality and secrecy of the Panel's deliberations cannot be maintained. The importance of an independent secretariat is a *sine qua non* for an independent and politically neutral Panel. Also, all expenses including salaries, allowances and pensions should be charged upon

[123] As in Ireland and Pakistan

[124] Anil Divan, The Hindu < www.thehindu.com/opinion/lead/upholding-judicial-independence/article5430672.ece 2/3> Accessed on January 14, 2014

[125] Santosh Pal, Fading Judicial Independence, The Hindu (New Delhi, October 26, 2013)

[126] Constitution of India, Art. 146

the Consolidated Fund of India as provided for the Supreme Court[127] and the High Court[128] (Article 146 and 229). The Panel must be financially independent of executive budgetary control.

e. The Act and the Amendment is anti-thesis to the notion of welfare state

India being a welfare state rests the duty to the government to secure the welfare of the people[129]. The Act and the Amendment is serious concern as to affecting the judiciary, which is an important pillar supporting the welfare of the people[130]. As to bring the effect in India, the Directive Principle of State Policy was added to the Constitution[131]and purpose of the Directive Principle is to achieve a welfare state[132]. The Directive Principle of State Policy also describes the separation of judiciary from executives[133] as an essential element for the attainment of welfare state. It is based on the principle of independence of Judiciary[134]. The attainment of separation of the judiciary from the executive is regarded as very essential element of Independence of Judiciary[135].

f. That the power for composition of panel has been given to legislature and can be changed with simple majority

The Constitution has made the provision as to check the illegal trace over the amendment of any provision related to judiciary[136]. The procedure for the amendment of the provisions related to the judiciary has been made complicated and tough as to provide a check over the power of the legislature to disturb the independence of the judiciary. Also

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[127] Constituion of Indian, Art. 149

[128] Constitution of india, Art. 229

[129] Paschim Banga Khet Mazdoor Samity v. State of West Bengal AIR 1996 SC 2426

[130] Mark Tushnet, State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations, (2002) 3 Chi. J. Intl. L, 433

[131] Part V of the Constitution of India.

[132] M. P. Jain, Indian Constitutional Law, (Lexis Nexis Butterworths Wadhwa Nagpur, Sixth Edition)1486

[133] Constitution of India, Art. 50.

[134] Baldev Raj v. Punjab and Haryana High Court, AIR 2007 SC 1087

[135] M P Jain, Indian Constitutional Law, (Lexis Nexis Butterworths Wadhwa Nagpur, Sixth Edition) 1518

[136] Constitution of India, Art 368

Supreme Court in *L. Chandra Kumar v. Union of India*[137], held that "[w]hale the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions."

This configuration of members is not part of the Constitution and is not constitutionally entrenched and very open for the amendment. The Act and the Amendment has devised such a mechanism that it will be very easy for the legislature to play with the composition of the panel. The compositions of the panel can be changed with a simple majority, and thus the disturbance can be created as to even a political party who forms the power at centre, aiming to secure an unconstitutional goal can change the whole composition, and disturb the working of the judiciary by controlling the appointment and transfer of the judges.

[137] AIR 1997 SC 1125, 1997 (1) BLJR 735, (1997) 1 CALLT 55 SC

CHAPTER: V

PROCEDURE FOR APPOINTMENT JUDGES IN SOME DIFFERENT COUNTRIES

In this chapter, we will discuss the procedure of appointment of judges in some other countries, having commission system. We will discuss about the procedure follows in constituent nations of the United Kingdom, Australia, North America, European Countries, South Africa and Israel.

Procedure in the United Kingdom

In the year 2003, a series of reforms were introduced in the selection procedure by the Government of Britain, a new Supreme Court was included and the Judicial Appointment Commission was established by the Constitutional Reform Act, 2005.

Judicial Appointment Commission for England and Wales[138]

A separate Judicial Appointment Commission is established for the England and Wales by the Constitutional Reform Act. There are around 15 members in the commission from the legal profession, judiciary and from lay community. The members are appointed by the Queen and the composition of the commission is as follows:-

- Five members from the judiciary appointed in consultation with the Council of Judges.
- Two members from the legal profession, who are a solicitor or a barrister from the England and Wales. There appointment can only be made after confirming it from the Law Society and the General Council of the Bar.
- Six Lay members who have never been a practicing lawyer or a judicial authority, the must be a resident of United Kingdom.
- One member who is appointed by the Minister.
- One Lay Justice[139]

[138] This discussion draws from the Explanatory Notes to the [UK] Constitutional Reform Bill.

[139] One Lay Justice and the other Six Lay Members will be appointed only after consultation with the advisory panel. Advisory Panel will be consisted of the following members:

The Queen of England appoints one of the lay member as the Chairperson of the commission, the Queen do so after the consultation with the Minister. The term of office of the Commissioners of the commission is of five years, and the maximum duration is of 10 years.

The composition of the commission can be reduced or increased by the order passed by the Minister, but it cannot be less than 15 members. The Lord Chief Justice has to be consulted by the Minister before passing any order.

The Judicial Appointment Commission selects candidates on the basis of their merits and character. Minister may also specify some considerations after consulting the Lord Chief Justice on which the merits of the candidate are assessed.

After taking into account all the aspects the Commission recommends a name of a candidate to the minister to be appointed as Judge.

The minister either appoints the recommended candidate or refuses to appoint the candidate advice commission to reconsider the name once again. The commission may resubmit the name of the selected candidate.

Judicial Appointment Commission for Scotland

Within the United Kingdom the Scotland has entire separate legal system for the appointment of Judges.[140] To bring transparency and openness in the judicial appointments a Judicial Appointment Board was established in June, 2002.

There are around ten members in the board. A proper advertising is done and finally the members are selected from the applicants by the ministers of Scotland. The board I divided in 2 parts which is lay members and the judicial members. The Chairperson is always a lay member.

- One member who has never been a judge, lawyer, barrister, a civil servant or commissioner. He will be the chairperson.
- The Lord Chief Justice of England and Wales
- The Chairperson on the Commission.

[140] Ministry of Justice- Tahu o te Ture, Appointing Judges: A Judicial appointment commission for New Zealand?, Appendix Two: Judicial Appointment Practice in Selected Overseas Countries, <http://www.justice.govt.nz/publications/publications-archived/2004/appointing-judges-a-judicial-appointments-commission-for-new-zealand-a-public-consultation-paper-april-2004/appendix-two-judicial-appointments-practice-in-selected-overseas-countries> , accessed on 2nd April, 2015

The board on the basis of merit and character of a candidate recommends a name to the minister for the appointment as Judge. There is no involvement of the board in appointing the two most senior Judges of the Scotland[141] and the judges to be appointed in House of Lords from the Scotland.

Whenever, a vacancy is created it is advertized so that candidates with potential can apply. The board conducts the interview of the applied candidates and finally makes recommendations to the First Minister who finally recommends the name to the queen for the appointment. The First Minister also have power to reject the name recommended to him/her by the board, with reason recorded.

Judicial Appointment Commission for Northern Ireland

Currently, the Lord Chancellor is the only person who has the power to advice the Queen regarding the judicial appointment. But there is a Justice (Northern Ireland) Act, 2005, establishes a Judicial Appointment Commission. The act is not in force yet. The strength of the Commission is of 12 members which are as follows:

- 5 members from the Judiciary who will be nominated by the Lord Chief Justice.
- 2 members from the legal fraternity
- 5 lay members, they will represent the community

The duty of the panel is to interview the shortlisted candidates, once the interview take place, the commission will recommend the names to the First minister and the Deputy First Minister.. The Judicial Appointment Commission selects candidates on the basis of their merits and good character.

Procedure in the Australia[142]

In Australia there is no direct commission system, but we can say a semi-commission system is followed in the process of appointment of Judges. The Attorney-General, who

[141] The Lord Justice Clerk and the Lord President of the Court of Session

[142] Australian Government, Attorney-General's Department, Judicial Appointments, Ensuring a Strong and independent judiciary through a transparent process, < http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/FedJudicialAppointmentsPolicy_May2010.pdf> , accessed on 2nd April,2015

is the first law is ultimately responsible for the Judicial Appointments. He recommends name to the Governor-General and to the Cabinet.

An Advisory Panel is formed to assist the Attorney General or the purpose of recommending name of candidates for the Judgeship. The members of the Advisory Panel are as follows:

- Heads of the concerned Court
- Retired Justices
- Some other senior officials from the office of Attorney General

Whenever vacancy arises, the Attorney General requests the Panel to assist him/her in recommending names of the suitable candidates for the post of Judge. The panel advertises and conducts interviews of the candidate and finally, presents a list of suitable candidates to the Attorney-General.

The Attorney General forward the list, of the suitable candidates provided to him by the Panel to the Prime Minister or to the cabinet for its approval, if cabinet approves the list than recommendations are made to the Governor General for the appointment of Judges.

Procedure in United States of America[143]

For the purpose of appointment of Judges at federal level, appointments are made by the President of the United States of America. An association called" American Bar Association" assesses the suitable candidates followed by a review by the Judiciary Committee of the Senate, finally, voting take place in the Senate House.

For the purpose of appointment at the State level, appointment commission is responsible for the appointment. The commission strength varies from five to twenty four members, they are either lawyer member or the lay member.

[143] Ministry of Justice- Tahu o te Ture, Appointing Judges: A Judicial appointment commission for New Zealand?, Appendix Two: Judicial Appointment Practice in Selected Overseas Countries, <http://www.justice.govt.nz/publications/publications-archived/2004/appointing-judges-a-judicial-appointments-commission-for-new-zealand-a-public-consultation-paper-april-2004/appendix-two-judicial-appointments-practice-in-selected-overseas-countries> , accessed on 2nd April, 2015

Whenever there is any judicial vacancy it is advertised and the responsibility of the members is to screen, investigate and recruit the most suitable judicial candidates.

Procedure in Canada

For the Federal Court of Canada, there is an appointment committee of seven members, the term of office of each member is of 2 years and they are eligible for the re-appointment. The Minister of Law is responsible for the appointment of Committee members. The composition of the commission is as follows:

- 1 Judge
- 2 lay members
- 3 lawyers

The committee plays an advisory role and do not appoint candidates as Judge directly.

At Provincial Level, there are different models of appointment committees; the ultimate decision is taken by the Provincial Cabinet, currently I am using the example of Ontario Judicial Appointments Advisory Committee.[144]

In Ontario Judicial Appointment Advisory Committee comprises of 13 members who are as follows:

- Two Judges who are appointed by the Chief Justice of Province
- Judicial Council member
- Seven lay people, appointed by the Attorney General of Province
- Three Lawyers

The tenure of the members is for 3 years and are eligible for the re-appointment. The duty of the committee is to review and recruit suitable candidates. For the purpose of appointment committee reviews candidates on certain criteria's such as merit, character, excellence, demographic characteristics, and awareness about the community.

[144] Ontario Courts, < http://www.ontariocourts.on.ca/judicial_appointments/index.htm>, accessed on 2nd April, 2015

Procedure in Israel

A nine member committee known as the Judges' Nomination Committee is responsible for nominating names to the President for the appointment of Judges. The members of the committee are as follows:

- 2 members from the Parliament of Israel
- 3 Judges[145]
- 2 Ministers, one of whom is the Minister of Justice and also the Chairperson of the committee
- 2 representatives from the Bar Association of Israel

If the vacancy arises, it is advertised, candidates who apply are interviewed by the sub-committee and it presents it report to the Nominations Committee. Finally the committee decides regarding the appointment of judges by voting through ballot system.

Procedure in South Africa[146]

The Judicial Service Commission is responsible to advice the President of South Africa for the appointment of Judges in the higher Courts. There are around 23 members in the commission who are as follows:

- The Chief Justice of South Africa who is the Chairperson aswell
- Two representatives of the Presidents of the other Courts
- Two practicing barristers nominated by the profession
- Two practicing solicitors nominated by the profession
- One academic lawyer
- Six members of the National Assembly, at least three of whom are members of the Opposition
- Four delegates from the National Council of Provinces
- Minister of Justice or delegate

[145] One Judge is President of Israel Supreme Court and Two other Supreme Court Judges

[146] The South African Judiciary, < http://www.judiciary.org.za/>, accessed on 4th April, 2015

- Four persons designated by the National President after consulting other party leaders.

"*The highest court in South Africa is the Constitutional Court, which consists of the President, Deputy President and nine other Judges. The President and Deputy President are appointed by the President of the National Assembly after consultation with the Commission and leaders of other political parties. The Commission's recommendations to these positions are not binding on the President, unlike its recommendations to other courts and for the other judges of the Constitutional Court. Legislation provides more detailed procedures for appointing the other judges of the Constitutional Court. The Commission prepares a list of nominees containing three more name than the number of appointments to be made. The President then consults with the President of the Court and political party leaders. The President must advise the Commission with reasons if any of the nominees are unacceptable and any appointments remain to be made. The Commission must then supplement the original list and the President must make the remaining appointments from that supplemented list.*"[147] South Africa's process of appointment of Judges is very open and transparent.

PROCEDURE IN EUROPEAN COUNTRIES

The below mentioned table tells about the commission in different European Countries for the purpose of appointment of Judges.

[147] Ministry of Justice- Tahu o te Ture, Appointing Judges: A Judicial appointment commission for New Zealand?, Appendix Two: Judicial Appointment Practice in Selected Overseas Countries, <http://www.justice.govt.nz/publications/publications-archived/2004/appointing-judges-a-judicial-appointments-commission-for-new-zealand-a-public-consultation-paper-april-2004/appendix-two-judicial-appointments-practice-in-selected-overseas-countries> , accessed on 2nd April, 2015

European Country	No. of Members	Method of selection
FRANCE *Conseil Superieur de laMagistrature* (CSM)	12	5 elected by judges 1 public prosecutor 1 councillor of state chosen by his/her peers 3 individuals nominated one each by President of the Republic, the Senate and National Assembly *Ex officio Members:* President of Republic and Minister of Justice
ITALY *Consiglio superiore dellamagistratura* (Csm)	33	20 judges elected directly by the judiciary 10 lawyers or university law professors nominated by Parliament *Ex officio Members:* President of the Court of CassationProsecutor general of CassationPresident of the Republic
SPAIN *Consejo General del PoderJudicial*	21	12 judges 8 lawyers with more than 15 years experience. All appointed by Parliament, with six each nominated by the Congress of Deputies and the Senate by a 3/5 majority. *Ex officio Members:* President of the Supreme Court
PORTUGAL Conselho Superior da Magistradura (CSM)	17	7 judges elected directly by judiciary 1 judge nominated by President of Republic 7 non-judges nominated by parliament 1 non-judge nominated by President of Republic *Ex Officio Members:* President of the Supreme Court
THE NETHERLANDS Judicial Selection Committee	5	3 members of the judiciary 1 outsider (university professor, journalist, member of the bar) 1 member of the Justice Department
GERMANY Lander Appointment Boards Federal Selection Committee	various 32	members of the judiciary members of the Land Parliament members of the bar--- nominees for appointment to judiciary recommended by Land Minister of Justice 16 representatives of regional Ministries of Justice 16 elected by the federal Parliament

Table Source: Dr Cheryl Thomas, Judicial Appointments in Continental Europe, (1997) a discussion paper prepared for the Lord Chancellor's Department.

CHAPTER: VI

CONCLUSION AND RECOMMENDATIONS

As per the scheme of the Constitution, the power of appointment of Judges was rested with the President of India, the Indian Judiciary by delivering the land mark judgments[148] , took the power of appointment in its hand. In the opinion of Indian judiciary, a judiciary can work independently only when the executive or the legislature has no role to play in the process of appointment of Judges, otherwise it might lead to corruption, government favoring judiciary, or to the political appointments of Judges, etc.

The Government of India recently has passed two bills one is the Constitutional 121st amendment and the National Judicial Appointment Commission Act, 2014. The constitutional amendment inserted a new Article 124A[149]which establishes the National Judicial Appointment Commission for the appointment and transfer of Judges in Higher Judiciary.

Most of the democracies in the world, as we have discussed in Chapter V, has moved on to a new model for appointment of judges, which is Judicial Appointment Commission. In this method representation is made from all the beneficiaries. Normally, Judicial Commission consists of Judges, Lawyers, Ministers and lay people. Judicial appointments are very crucial decisions and therefore it is necessary that many minds must work before a judicial appointment is made.

Judiciary complains that if the appointment of judges are made by the executives than it will lead to political appointments and government favoring judges will be appointed by the government at the day, whereas, executives says that the appointment of judges by judiciary is not transparent and is leading to corruption. In this situation Judicial Appointment Commission is best way to resolve the dispute between the two organs of the state. "*Power tends to corrupt, and absolute power*

[148] Three Judges Case

[149] "*There shall be a Commission to be known as the National Judicial Appointments Commission*"

corrupts absolutely."[150] Therefore, giving the power of appointment of Judges will certainly lead to corruption.

The UN Basic Principles on the Independence of Judiciary says ""*selected for judicial office shall be individuals of integrity and ability with appropriate training or qualification in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social original, property, birth or status...*"[151]. As per this article also, commission system is the best method for the appointment of Judges.

In context of India, as per my opinion there are certain benefits of the commission system for the appointment of judges, which are as follows:

- **That the constitution is an organic document and need to be changed as per contemporary needs to revive trust in the Judiciary**

  The Constitution of India is a living document which is reason behind the working of the government machinery[152]. The idea of a written constitution is to define the structure of the government and enumerating rights of the people as a limitation to the power of the government[153]. By government, it is to be under stood as all three form of government. The flexibility of the Constitution lies in its amendment[154]. The amendment by the legislature is the procedure for the development of the Constitution, which represent the democratic needs of the

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[150] Lord Acton, Letter to Archbishop Mandell Creighton, Apr. 5, 1887, < http://history.hanover.edu/courses/excerpts/165acton.html> accessed on 3rd April, 2015

[151] UN Basic Principle on Independence of Judiciary, Art. 10

[152] As per the Secretary of Law Ministry, Government of India in Preface part of the updated Constitution till 1st September, 2007. < http://lawmin.nic.in/coi/coiason29july08.pdf> Accessed on January 6, 2014

[153] Paul G. Kauper, The State Constitution: Its nature and purpose, (Citizens Research Council of Michigan, October 1961) < http://www.crcmich.org/PUBLICAT/1960s/1961/memo202.pdf> accessed on January 4, 2014

[154] *ibid* Secretary of Law Ministry

nation[155]. Even the significant feature, which forms the base of the Constitution need a revised as to the changing need of the nation. The most adequate means to fulfill such need is amendment to the constitution, which is backed by the will of the people[156]. A stringent Constitution will not be able to deliver the rule of law and its protection to stakeholders. Thus, the wall created by the basic structure doctrine is not in interest of the development of the constitution and the expression in the doctrine need to be revised. The growth of the constitution to bring it with par with the demands of the contemporary needs could not be neglected as to give effect to the doctrine of basic feature.

The Constitution has given the power to the legislature for making amendments in the Constitution[157]; the Judiciary has encroached upon this power by anarchic use of the judicial review. The Judiciary has in-fact have been amending the constitution without any written authority in Constitution in the name of judicial review[158] , and has also compromised the power of the legislature for amendment of the constitution provided in the Constitution[159]. There can be no reason for rights to be better protected by the practice of the judicial review by the court than by the legislation that are drafted by the democratic way[160] and following the procedure established by law. Currently, there is needs a transparent Judiciary to revive trust in it which can only be done if it is made transparent. By amendment a commission has been set up which will make the process of appointment very transparent.

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[155] Vivien Hart, Democratic Constitution Making, (Special Report of United States Institute of Peace, July 2003) < http://www.usip.org/sites/default/files/sr107.pdf> Accessed on January 5, 2014

[156] Sebastian M. Saiegh, Active Players or Rubber-Stamps?: An Evaluation of the Policy-Making Role of Latin American Legislatures, (Division of Social Science) < http://dss.ucsd.edu/~ssaiegh/legislatures.pdf> Accessed on January 4, 2014

[157] Constitution of India, Art. 368

[158] Concept of Judicial Review was also added by the Judiciary as the basic feature in S. R, Bommai v. Union of India, AIR 1994 SC 1918, Second Judges Case, Minerava Mills Case, S. P Sampath Kumar v. Union of India, IR 1987 SC 386

[159] In *Kesavananda Bharati vs. The State of Kerala*, (AIR 1973 S.C. 1461) by defining the basic structure doctrine.

[160] JJeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346

- **Balance between Judicial Independence and Judicial Accountability**

  In past the arena of judicial appointment was heavily influenced and attracted by the concept of judicial independence, while the concept of judicial accountability was completely ignore. Judicial independence continues to be central to the modern debate because concern has been expressed about accountability and transparency in the process of appointment of judges. There has been critical attention of the interest groups on the on the composition of the judiciary and the procedures for the appointment of judges. There was a lack of identified criteria for judicial appointment and the procedures for appointment, which has been rectified by the present system. The system not only ensures independence of judiciary by also brings accountability in process of appointment, since checked by the executive.

  Those procedures were neither public nor open and they do not involve public participation. Such issues would not have been addressed, would have been affected the quality of judges[161]. A failure to strike the right balance between judicial independence and judicial accountability will result in either an unacceptable weakening of judicial independence or inadequate accountability[162]. Absence of mechanisms for accountability and lack of judicial performance standards lend greater weight to claims for more open procedures and public participation in the judicial appointment process. Thus, the present system for the appointment has created the concept of judicial accountability without disturbing the judicial independence, by introducing transparency and a defined system for procedure and criteria for appointment of Judges.

- **Doctrine of Check and Balance will be recognized**

  The doctrine of the "separation of powers" has traditionally proposed that the state is divided into the separate and distinct arms of Executive, Legislature and Judiciary, whereby each arm acts as a "check and balance" on the others.

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[161] Anthony Mason, The Appointment and Removal of Judges,(Judicial Commission of New South Wales , December 19, 2013), < http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm> accessed on 3rd April, 2015

[162] Ibid

However, the division has not been made as a water tight compartment, and allow for interdependence between the organs as they can check and balance each other[163]. Mutual check and balance was necessary to be incorporated with the doctrine of separation of power to promote moderate government by conditioning the autonomy of each organ and promoting accountability *inter se.*

Particularly, where the judiciary has got the exclusive power for checking the action of executive and legislature by way of judicial review, there need to be a mutual check and balance where the power of impeachment shall be given to the legislature[164] and appointment shall be made by representation of executive[165]. Thus, this system has restored the doctrine of check and balance and has again enhanced the effectiveness of the judiciary[166].

Since our judges were used to not elected and appointed, are virtually irremovable[167]. Surely, the system of checks and balances must apply to the process of judicial appointments. This must necessarily involve the legislature and the executive. The panel system created by the Act and the Amendment has presented a method of check and balance providing the representation to the executives in the appointment of the judges[168].

- **The Amendment and the Act is passed with majority in both the Houses representing the voice of people**

  Legislature is a large deliberative body, accustomed to dealing with difficult issues, including important issues of justice and social policy. The legislators deliberate and vote on public issues, and the procedures for lawmaking are

[163] **Arghya Sengupta,** Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry"(5 *Indian J. of Const. L.* 99, 2011) p. 107

[164] Constitution of India, Article 124 (4)

[165] ibid

[166] Doctrine of check and balance enhances the effectiveness of the judiciary. Nibaldo H. Galleguillos, Checks and Balances in New Democracies: The Role of the Judiciary in the Chilean and Mexican Transitions: A Comparative Analysis, (1997 meeting of the Latin American Studies Association, 1997), < http://biblioteca.clacso.edu.ar/ar/libros/lasa97/galleguillos.pdf > accessed on January 4, 2014.

[167] Raju Ramachandran, Judicial supremacy and the collegium

[168] Higher Judiciary (Appointment and Transfer) Act 2013 Sec. 3

elaborate and responsible[169], and incorporate various safeguards, such as bicameralism[170], robust committee scrutiny, and multiple levels of consideration, debate, and voting. Also, the amendment procedure mentioned under the Constitution has been made so strict that it can be passed when there has been a national consensus supporting the same[171]. So we can conclude from the above statements that the legislation is representation of the will of nation, and in cases of amendment to Constitution of India, special precautions has been taken as to make the process different from the normal legislation. Already precaution has been taken at each and every step[172] for the Amendment of Constitution, that only the genuine consensus of the nation could make an amendment to the constitution. Here in the instant matter, the Amendment and the Act has been passed after be tested on each and every anvil for the test of amendment and has been passed thereafter[173].

It has been argued by the Jeremy Bentham, that public good should be object of the legislator and general utility ought to be the foundation of the reasoning behind the legislation[174]. As per him, the utility of the legislation must be ascertained. In our system an action is judged to be good or bad not because it is comfortable or contrary, to the interest of those whom it affect, but because it pleases or displeases the person who judges such act. Similarly, the independence

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[169] Jeremy Waldron, *Legislating with Integrity*, 72 FORDHAM L. REV. 373 (2003)

[170] In Indian as per Art. 79 of the Constitution, "*There shall be a Parliament of the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of People*."

The people of the country are directly represented by their representatives in House of People and to check the decision of House of People, the Council of States (also popularly known as the Upper House) consists of indirectly elected members from House of Peoples, nominated members and elected members from the legislature of different states of India and Union territories.

[171] M P Jain, Indian Constitutional Law, (6th Edition, LexisNexis Butterworths Wadhwa Nagpur, 2011) 1178

[172] For instance Article 368 itself for special provision mentioned under Article 368 (2)need to passed by special majority in both the Housed, and also by the legislature of half of the states.

[173] Problem File Para 1

[174] Upendra Baxi, 'Jeremy Bentham, Theory of Legislation', (LexisNexis Butterworths, 1st Edn.), P.1

of judiciary has been included in the basic feature to effect not as to give the benefit to the people, but to protect the autonomy of the judiciary over the other two organs. So, the positive aspects brought by the Act and the Amendment must be seen, rather than considering if for an constitutional test, developed in vain to protect the autonomy of the legislature. The object, purpose and changes brought by the legislation must be tested on the principle of utility rather than testing it on the undefined and vague principle of basic feature doctrine.

- **Proper appointment at proper time**

  As we discussed in the above chapters that there are high vacancy of judges and due to which many cases are pending. A particular appointment procedure will ensure that all the vacancies are filled, which will directly decrease the pendency of cases as well.

There are certain ***recommendations*** as well which are as follows:

- **Preamble and the Object**

  The preamble of the current National Judicial Appointment Commission is ""*that to provide for the composition of the Judicial Appointments Commission for the purpose of recommending persons for appointment as Chief Justice of India and other Judges of the Supreme Court, Chief Justices and other Judges of High Courts, its functions, procedure to be followed by it and for matters connected therewith or incidental thereto*", currently it is very inadequate, the preamble must be formed in conformity with the UN Basic Principles on the Independence of Judiciary,1985.[175] The object of the act should be appointment of independent and competent Judiciary which can ensure the rule of law. Appointments made must be merit base appointment which is part of procedure in different countries as well.

  Demographic factors must be also taken into consideration while appointing Judges while appointing judges for the highest court, it makes equal representation from all the parts of the country and further strengthen the belief in judiciary.

[175] Basic Principles on the Independence of judiciary, General Assembly Resolution

- **Composition of the Commission must be included into the Amendment**

  One of the major drawbacks of the Act is that the composition of the commission has not been made part of the amendment. It has attracted lots of criticism, i.e. a composition of the panel can be changed by a simple majority.

  It is recommended that the composition of the panel must be made part of the amendment so that it cannot be amend by the simple majority. Judicial appointment is a part of Chapter IV Part V of the Constitution of India, and therefore requires at least two third majorities of both the houses of Parliament and half of the assemblies of the state.

  If the composition of the panel will be made part of the amendment than it will ensure the people of the country that the act brought into force is just to create transparency in the process of judicial appointment and there is no ill motive which can alter the rule of law. If any further amendments will be required than it could only be done by at least two third majority of the Parliament of India and at least half of the State Assemblies.

- **Diversity**

  Diversity in judiciary is back bone of a country legal system. Diversity in terms of gender, demography, caste, ethnicity, religion etc. a wide discussion can be done if there is diversity in the appointment of Judges, it further promotes the confidence in the people of the country. The current act does not mention anything regarding the diversity in the appointment procedure.

  India is a very plural society and if the diversity will be taken into consideration for appointment than the Indian Judiciary will be more strong and representative and will also be aware about the different needs of the different parts of the society.

  In South Africa diversity is given very much importance it states "*The Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointment".* It is recommended to improvise a same approach while making judicial appointments in the India.

- **Composition of the commission must be increased**

  Under Chapter V, we discussed about the judicial commissions in the different countries, we noticed than in almost all the countries the composition of the panel is very vide, for eg. Commission of South Africa has 23 members for making appointments, a similar model must be adopted, more members from the society means equal representation from all the sectors of the society, also judicial appointments are very crucial issue, therefore more people means more applicability of mind while making appointment decisions.

  Other important thing is that there is no representation from the lay man in the commission. We have seen in different countries lay man is also a member of a commission, this strengthens the trust of people in the process and makes appointment process more open.

- **Standard criteria for evaluating merit**

  The act says that recommendation of that person will be done who has integrity, ability and standing in court, it indicates towards a merit based appointment, but there is no criteria formulated to evaluate the merit of the candidate for the judgeship.

  In America evaluation programmes are there to judge the merit of the candidate, it is done on the basis of integrity, character, ability to administrate, skills, knowledge, temperament, professionalism etc.

  South Africa have come up with a whole different criteria[176], they judge candidate on the basis of integrity, motivation and energy, technical competence, experience, knowledge of the need of community, potential, etc.

  Appointment on this basis ensures that selected candidate is completely capable to hold the office as judge. People of the country feel secure as judges can think in all the available directions as per the needs of the society.

  Therefore, I think a similar evaluation mechanism must be introduced for evaluating before making any appointments to the higher courts.

[176] Republic of South Africa , Summary of the Criteria Used by the Judicial Services Commission when Considering Candidates for Judicial Appointments, < www.justice.gov.za/saiawj/saiawj-jsc-criteria.pdf >, accessed on 3rd April, 2015

- **Clarity on power of President**

  As per Section 4 of the National Judicial Appointment Commission Act, it is the duty of the commission to recommend name of a person to be appointed as a judge to the President, it means that the Judicial Appointment Commission is not the final appointment body and just a recommending body.

  It is not clear that weather the recommendation made to the President is final, or the President has the power to set aside the appointment.

  In my opinion, in order to bring more clarity, power of the President of India, must also be specified.

Finally, in my opinion it is a very novel step taken to constitute a commission for the purpose of appointment and transfer of judges in higher Judiciary. In most of the countries a similar kind of model has been adopted.

In such models there is no infringement of the separation of power and they even ensure rule of law. Appointments made are very open and transparent.

In context of India, certain changes and clarification must be made, so that the executive and the judiciary, while working in their authority and without any clashes, make decision regarding the appointment and transfer of Judges. It will bring transparency and accountability and judges with integrity, good character, and experience will be appointed. It will further enhance the trust of the people in judiciary and uphold the interest of the nation.

" Satyamev Jayate"

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