JUDICIAL ACTIVISM

VIS-A-VIS

JUDICIAL ACCOUNTABILITY WITH SPECIFIC REFERENCE TO APPOINTMENT OF JUDGES

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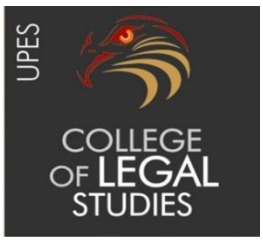
Submitted under the guidance of Dr. Ashish Verma

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



College of Legal Studies

University of Petroleum and Energy Studies

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CERTIFICATE

This is to certify that the research work entitled **"Judicial Activism vis-à-vis Judicial accountability with specific reference to Appointment of Judges"** is the work done by **Saksham Pradyot** under my guidance and supervision for the partial fulfilment of the requirement of B.B.A.-LL.B. (Hons.) Degree at the College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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DECLARATION

I declare that the dissertation entitled **"Judicial Activism vis-à-vis Judicial accountability with specific reference to Appointment of Judges"** 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 of my original work and due acknowledgement has been made in the text to all other material used.

Saksham Pradyot

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APPENDIX

TABLE OF CONTENTS

ABBREVIATIONS

TABLE OF CASES

ACKNOWLDEGMENT

1. INTRODUCTION

1.1. The Constitution of India and Independence Of Judiciary

2. DEFINITIONS

2.1. Judicial Activism as a Philosophy

2.2. Law of Appointment and Transfer of Judges

2.2.1. Appointment of Judges

2.3.Transfer of judges

3. PROCEDURE OF APPOINTMENT OF JUDGES AND FIRST, SECOND AND THIRD JUDGES CASES AND THE COLLEGIUM SYSTEM

3.1.Historical Background

3.1.1. Shift in the Authority of Appointment of Judges

3.2.Opinion of The Executive

4. JUDICIAL ACCOUNTABILITY AND JUDICIAL ACTIVISM IN INDIA

4.1.Judicial Accountability

4.1.1. Nature and Meaning

4.1.2. Need For Judicial Accountability

4.1.3. Lack of judicial Accountability in India

4.1.4. Judging The Judges (Case Laws)

4.1.5. A historic non-impeachment

4.1.6. Judicial Accountability Bill Approved

4.2.Judicial Activism

4.2.1. Meaning and implications

5. NATIONAL JUDICIAL COMMISSION v. THE COLLEGIUM SYSTEM

5.1.The Collegium System

5.1.1. The Doctrine of Separation of Powers

5.2.Independence of Judiciary

5.2.1. Appointment of Judges as a vital branch of Independence ofJudiciary

5.3.National Judicial Commission

5.4. The Arrears Committee

5.4.1.Views of arrears committee against constitution of a national judicial commission

5.4.2. Impact of The Composition of National Judicial Commission

5.4.3. Composition of the National Judicial Appointment Commission

5.4.4. Role of The National Judicial Appointment Commission

5.4.5. Reference by Central Government to the National Judicial Appointment Commission

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

5.4.7. Procedure to be followed for Appointment of A Judge for The High Court in India

6. NJAC: A BOON OR A BANE?

6.1.Contentions favouring National Judicial Appointment Commission

6.1.1. Bringing back the Constitutional scheme for appointment of judges

6.1.2. Creates a balance between judicial independence and judicial accountability

6.1.3. The Act Also Applies To The Transfer of Judges

6.2.Contentions against the National Judicial Appointment Commission

6.2.1. Feature of the act is undermining the independence of judiciary

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

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

7. CONCLUSION AND RECOMMENDATIONS

Bibliography

ABBREVIATIONS

AIR: All India Reporter

Anr. : Another

AOR: Advocate-on-Record

Art. : Article

COI: Constitution of India

DPSP: Directive Principle of State Policy

ed.: Edition

edu.: Education

Hon'ble: Honourable

SC: Supreme Court

SCC: Supreme Court Cases

U.P.: Uttar Pradesh

UOI: Union of India

v.: Versus

www: World Wide Web

TABLE OF CASES

- *Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871)*
- *Brown v. Allen, 344 US 443 (1953)*
- *H. H. Maharajadhiraja Madhav Rao v. Union of India, AIR 1971 SC 530*
- *In re Reference Case, AIR 1999 SC 1*
- *India v. Sankalchand Himatlal Sheth, AIR 1977 SC 2279: (1977) 4 SCC 98*
- *K. Ashok Reddy v. Government of India, AIR 1994 SC 107*
- *Kesavananda Bharti v. State of Kerala, (1973) 4 SCC 225*
- *Kumar Padma Prasad v. Union of India, AIR 1992 SC 1213*
- *L. Chandra Kumar v. Union of India, AIR 1997 SC 1125*
- *Marbury v. Madison, (1803) 1 Cranch 137*
- *R.C Cooper v. Union of India, AIR 1970 S.C. 564*
- *Raj Narain v. Indira Gandhi, 1975 SCR (3) 333*
- *Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549*
- *S.P. Gupta v. Union of India, AIR 1982 SC 149*
- *Shamdasani v. Central Bank of India, AIR 1852 SC 59*
- *State of Bihar v. Bal Mukund Shah, AIR 2000 SC 1296*
- *Subhash Sharma v. Union of India, AIR 1991 SC 631*
- *Supreme Court Advocates-On-Record Association and Others v. Union of India, (1993) 4 SCC 441*
- *Vidya Verma v. Shivnarain, 1956 AIR 108*

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CHAPTER- 1

INTRODUCTION

1.1 The Constitution of India And Independence Of Judiciary

The Constitution of India has provided for an independent and unprejudiced judiciary in India. Judiciary is one amongst the basic organs amongst the 3 organs of the State- viz. legislature, executive and judiciary. Judiciary is looked upon by the populace of the Country as their deliverer, the steward of fundamental rights, as hero of their trusts and desires and not care for the opposite two bodies/organs. Citizens expect an extraordinary arrangement from the Judiciary.

For ensuring independence of the judiciary, some provisions have been made which can be discussed as follows:

- **Appointment of judges:** In India, the judges of the Supreme Court and the High Courts are appointed on the basis of prescribed qualification. They are appointed by the President of India.

- **Security of tenure:** The President appoints the judges but he cannot dismiss them during their term of office without a resolution passed by the Parliament in this regard.

- **Economic Security:** The judges are paid handsomely. The salary of the judges is charged from the Consolidated Fund of the Union and the States. Their salary cannot be decreased during their term of office.

- **Privileges:** Various privileges have been given to the judges like allowances, sent free residence, etc. Adequate steps are taken for the protection of the judges.

- **Contempt of Court:** The judges cannot be criticized in public for the judgement they give while deciding cases. The Supreme Court and the High Courts can punish anyone for contempt of the Court.

Independence of judiciary is exceptionally impartment in a democracy as its main duty is to give justice to the people. In this way, provisions ought to be made so that the judiciary cannot be controlled by either the executive or the legislature and it can discharge its duty reasonably and unbiased.

In my dissertation I have firstly, concentrated on the **National Judicial Accountability Commission (NJAC) bill** which provides that *"the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation".* Decades after getting the landmark judgment in 1993 on independence of judiciary and primacy of the Chief Justice of India in judges' appointments, the Supreme Court Advocates-on-Record (AoR) Association is back in the courtroom with another petition on the subject.[1]

The growth of collegium system[2]is an example, as to how the basic word of the Constitution was formed to bring the complete control into the hands of judiciary and making the executive as mere puppet or a postman, whose responsibility was just to integrate the decision taken by the member of collegium in regards to the appointment of judges in higher judiciary. In visual difference to constitution, the judiciary by such judgment[3] has attempted to re-write the constitution, against the will of the constitution makers. The interpretation of Article 124 of the

[1]*See Judicial appointment bill challenged in Supreme Court, available at:*http://indianexpress.com/, Last accessed on 10th April, 2015.

[2] Collegium System of appointment of Judges was developed as a result of *Supreme Court 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.

[3]*Second Judges Case and Third Judges Case.*

Constitution done in the *Second Judges*[4] and *Third Judges*[5] 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 growth of body called **National Judicial Appointment Commission**; it is accountable 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"*[6] due to the hidden process and under the table appointment of the judges. The Law Commission has advocated for setting up of Judicial Commission[7], after the *S. P. Gupta Case.*[8]

My Dissertation revolves around following 5 questions:-

1. ***Whether the NJAC Bill is better than the Collegium System of Appointment of the Judges?***
2. ***Will it be beneficial in any way if Non- Judicial members are made a part of the NJA Commission?***
3. ***Does NJAC Bill curb independence of Judiciary?***

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

[5]*In Re Reference case,* AIR 1999 SC1.

[6] 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."*

[7]In its 121st Report, 1987.

[8]AIR 1982 SC 149.

4. ***How non-judicial members in the NJAC can veto a candidate irrespective of the views of three judicial members, including the Chief Justice of India?***
5. ***Has NJAC Bill removed flaws of the Collegium System?***

CHAPTER- 2

DEFINITIONS

2.1 Judicial Activism as a Philosophy:-

The common progenitor of both the U.S. furthermore, Indian judiciary is the British judiciary. Henceforth both the nations are obligated to the British legitimate framework for a considerable lot of their standards and institutions.

In England, since Parliament was supreme and there was no composed Constitution, the conventional methodology of the British Judges was just to apply the law made by Parliament to the facts of a specific case, and in this way reaches to a decision based on that law."Law is the command of the sovereign" said Austin, and since in England the sovereign was Parliament, law was what was made by Parliament, not the Judges. Thus, the British Judges were subservient to Parliament, and were not anticipated to be activist. The separation of powers theory of the French author Montesquieu said that law making was the occupation of the legislature, and taking administrative and policy decisions was the occupation of the executive. Judges were expected to be like a referee in a football match, who was only to see that the rules were followed, but was not to himself participate in the match nor guide the players how to play. The literal rule of interpretation was followed with particular emphasis in England, since to proceed from it would amount to uncomfortable the will of Parliament, which was supreme in England's unwritten Constitution.

The expression 'Judicial Activism' is often used in contrast to another expression 'Judicial Restraint'.

As an ideology of the judicial process, 'judicial activism' implies the "utilization of the court as an apparatus for intervention over the decisions of policymakers through precedent in case law."

In doing so, the Court often makes law and seeks to play a greater part in the governance of a nation through "permitting their perspectives about public policy" to help them in their decisions. The role of judges in such cases goes beyond the traditional "interpretative" role that has been allocated to them, and changes to a model by which judge tries to make law, infringing on the Separation of Powers doctrine, which forms the bedrock of the Indian and United States constitutional system. At a point when a Court strikes down a law in an "activist" manner, it puts supremacy upon its interpretation of a constitutional text, side coating the opinion of the legislature or executive.

2.2 Law of Appointment and Transfer of Judges:-

2.2.1 Appointment of Judges

Judiciary is an institution which rests the noble edifice of democracy and rule of law[9], 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[10], since it has shadowed the executives 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[11]. The Law Commission in 214th Report on the Proposal for Recommendation of Judges Case I, II and III[12] said that collegiums system was a failure and said that "*Its decisions on appointments*

[9] Harsh Gagrani, *Appointment or Disappointment: Historical Background and Present Problem in theAppointment of Judges in The Indian Judiciary*, NLIU L. Rev., 2010, 1.

[10]PhirozaAnklesaria, *Judicial Law-Making: Strength and Weakness*, XXXVIII (1&2), Ind.Bar Rev. Jan- July 2011.

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

[12]*See* Law Commission of India, 214th Report on the '*proposal for Recommendation of Judges Case I, II and III'*, 60, *available at:*http://lawcommissionofindia.nic.in/reports/report214.pdf, Last accessed on 10th April, 2015.

and transfers lack transparency and we feel courts are not getting judges on merit[13]*."*

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.

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. Sometime 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

[13] *Id.*

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.

2.3 Transfer of judges

The question of transfer of a Judge from one HC to another has raised controversies from time to time.[14] During the emergency of 1975,[15] 16 HC Judges were transferred from one HC to another. It was widely believed that the

[14] M.P. JAIN, INDIAN CONSTITUTIONAL LAW, (6th ed. 2011), 407- 410.

[15] CH-XIII, *Emergency Provisions*; MP JAIN, INDIAN CONSTITUTIONAL LAW (6th ed. 2011), 738-770.

Government did so as a punitive measure to punish those Judges who had dared to give judgments against it.[16]

Article 222(1) empowers the President to transfer a Judge from one HC to another after consulting the Chief Justice of India. Under Article 222(2) the transferred Judge is entitled to receive, in addition to his salary, such compensatory allowance as may be determined by the parliament by Law and until so determined, as the President may fix by order.

As the phraseology of Article 222(1) stands, neither the consent of the Judge is necessary to his transfer nor is the opinion the Chief Justice is binding on the Government.

A Judge of the Gujarat HC was transferred Andhra Pradesh HC without his consent. He challenged his transfer through a Writ Petition in the HC and the matter came ultimately before the SC in *India v. Sankalchand Himatlal Sheth.*[17]

The SC realised that while the Constitution promoted the democratic value of independence of the Judiciary, the Executive could use the power of transfer of HC Judges to undermine Judicial independence. As a safeguard against the misuse of power by the Executive, the majority ruled that 'Consultation' with the Chief Justice as envisaged by Article 222 has to be 'full and effective consultation' and not a mere formality. The opinion given by the Chief Justice would be entitled to the greatest weight and any departure from it would have justified by the Government under strong and logical grounds.

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[16] The Government sought to justify these transfers on the plea of National Integration and removal of narrow parochial tendencies, but this defence was found by the SC to be untrue. AIR 1977 SC 2279: (1977) 4 SCC 98.

In the words of Justice Bhagwati in S.P. Gupta v. UOI, "what was held by the Court was that transfers of HC Judges during the emergency were made not for the purpose of furthering the cause of National integration but by way of punishment."

[17] AIR 1977 SC 2279: (1977) 4 SCC 98.

Again the question of Transfer of Judges was raised in *S.P. Gupta v. Union of India,*[18]Bhagwati, J., reiterated the minority view in *Sankalchand* that a Judge could not be transferred without his consent. In any case, he said that the transfer of a Judge could be exercised only in Public Interest and that the transfer of a Judge by way of Punishment could never be in Public Interest. He emphasized that "whenever the Transfer of a Judge is affected for a reason bearing on the conduct or behaviour of the Judge it would be by way of punishment." Transfer being a serious matter, the burden of sustaining the validity of the transfer order must rest on the Government.

The question of HC Judges has been considered again by the SC in the *Supreme Court Advocates-on-Record* Case [19] . THE PROPOSITION HAS BEEN RETERIATED THAT HERE IS NO REQUIREMENT OF PRIOR CONSENT OF THE JUDGE BEFORE HIS TRANSFER U NDER ARTICLE 222 BUT THE OPINION of the Chief Justice of India has been given 'Not mere primacy' but a 'determinative character' in the transfer process. According to the majority opinion, the proposal for the transfer of the Judge/ Chief Justice should be initiated by the Chief justice of India alone. The power can be exercised only in "Public Interest". The transfer ought not to be "Punitive" in nature. "Any transfer in accordance with the recommendation from the Chief Justice of India cannot be treated as punitive or an erosion in the independence of Judiciary."[20]

Before giving his opinion the Chief Justice of India has to consult the Chief of the HC from where the Judge has to be transferred and any Supreme Court Judge whose opinion may be significant for the purpose, as well as the views of at least one other senior HC Chief Justice, or any other person whose views are considered relevant by the CJI. The question of transfer of a Judge is justiciable but only on a limited basis i.e., transfer is being without the recommendation of

[18]AIR 1982 SC 149.

[19](1993) 4 SCC 441.

[20]AIR 1994 SC, at 435.

the CJI and only the transferred Judge has *Locus Standi* to question his transfer and no one else.

In Re: Presidential Reference[21], the SC has further elucidated its ruling in *Supreme Courts Advocates* on the transfer of HC Judge. The Court has now stated that before recommending the transfer of a Judge from one HC to another as a Judge the Chief Justice of India must consult a plurality of Judges. He must take into account the views of:

i. Chief Justice of High Court from which the Judge is to be transferred;
ii. Any Judge of the Supreme Court whose opinion may have significance in the case;
iii. The Chief Justice of High Court to which transfer is to be affected.

All the views must be expressed in writing and should be considered by a Collegium consisting of Chief Justice and the Four Senior-most Puisne Judges of the SC. The Collegium should consider the response of the Judge to be transferred. These views and that of the four seniors- most Judges should be conveyed to the Government of India along with the proposal for transfer. "Unless the decision for transfer has been taken in the manner aforesaid, it is not decisive does not bind the Government of India."[22]

Because of all the safeguards mentioned above judicial review, in case of transfer of High Court Judge, according to the Court, would be limited to a case where transfer of a Judge has been made or recommended without obtaining the views and reaching the decision in the manner aforesaid.

The matter for transfer of a HC Judge was raised again before the Supreme Court in *Reddy*.[23] It was argued that judicial review being a basic feature of the constitution, exclusion of judicial review in the manner of the transfer could not

[21]AIR 1999 SC 1.

[22]AIR 1999 SC, at 21.

[23]*K. Ashok Reddy v. Government of India,* AIR 1994 SC 107.

be regarded as good law. There could be arbitrariness in transferring a HC judge. The Supreme Court rejected the contention. The court observed:[24]

"Every power vested in a public authority is to sub serve a public purpose, and must invariably be exercised to promote public interest. This guideline is inherent in every such provision, and so also in Article 222. The provision requiring exercise of this power by the president only after consultation with the Chief Justice of India, and the absence of the requirement of the consultation with any other functionary, is clearly indicative of the determinative, not mere primacy, of the Chief Justice of India's opinion in this matter."

Judicial Review is ordinarily needed as a check against possible executive excess or arbitrariness. Plurality of judges in the formation of the opinion of the Chief Justice of India is another in built check against the likelihood of arbitrariness or bias. Further, the guideline of "public interest" is sufficient guideline for the proper exercise of the power and to ensure exclusion of the possibility of any arbitrariness in the exercise of power under Article 222. Judicial Review of transfer of a Judge is not excluded but only limited. The area of justiciability is restricted to the constitutional requirement of recommendation of the Chief Justice of India for exercise of power under Article 222 by the President of India. "The power under Article 222 of the Constitution is to be exercised by the Highest Constitutional Functionaries in the country in the manner indicated which provides several inbuilt checks against the likelihood of arbitrariness or bias." The judicial review of transfer can be revoked only at the instance of the transferred judge and not at the instance of anyone else.

[24]AIR 1994 SC 107 at 1210: (1994) 2 SCC 303.

CHAPTER- 3

PROCEDURE OF APPOINTMENT OF JUDGES AND FIRST, SECOND AND THIRD JUDGES CASES AND THE COLLEGIUM SYSTEM

In this chapter I would be shedding light upon the following sub topics:

1. 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.

2. Discussion will be next taken to 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 sculpting the bare word of the Constitution of India. In this sub topic landmark ***Three Judges Cases***[25]will be discussed.

3. Lastly 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.

3.1. 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 undisputed

[25] *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.

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 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*"[26].

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 two alternative methods.[27]

- 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 Justices 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.[28]

The Constitutional Advisor, Shri Benegal Narsing Rau, recommended 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.*"

[26] G. Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford Clarendon Press, 1966, 176.

[27] B.Shiva Rao, *The Framing of India's Constitution: A Study*, IIPA, New Delhi, 590.

[28] *Id.*

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*."[29]

However, in the Constituent Assembly, there was common 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 recommended 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*

[29] B.Shiva Rao, *The Framing of India's Constitution: A Study*, IIPA, New Delhi, 600.

preposition".[30]

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 appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted.*"[31]
- *"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."*[32]

3.1.1. Shift in the Authority of Appointment of Judges

Period between 1973 to 1983 has been observed as disgraceful decade; it saw unending battles 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

[30]*See* Constituent Assembly Debate: Official Report, 258, *available at:* www.parliamentofindia.nic.in, Last accessed on 10th April, 2015.

[31]*See* Art. 124(2) of Constitution of India.

[32]*See* Art. 217(1) of Constitution of India.

transferred from Executive to the Judiciary

First Judges Case:

S.P. Gupta v. Union of India[33], is observed 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 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 immaterial thought 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 v. Union of India[34], also known as the **Second Judges case,** this case was second case related to the appointment of judges. Public Interest Litigation was filed 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 given by the majority opinion of the five judges out of the

[33]AIR 1982 SC 149.

[34]AIR 1994 SC 268.

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.*"[35]

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.*"[36]

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.*"[37]

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 of the Hon'ble Supreme Court and High Courts:-

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 strong reasons,

[35] *Supra n. 4* at 429.

[36] *Id*., at 430.

[37] *Id.*, at 434.

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*[38], 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 Judges give an adverse opinion, the CJI should not send the recommendation to the Government.*"[39]

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

[38] AIR 1999 SC 1.

[39] RaghulSudeesh, *Appointment of Supreme Court Judges*, Stripped Law, *available at:* http://strippedlaw.blogspot.in/2009/10/appointment-of-supreme-court-judges.html, Lastassessed on 10th April, 2015.

For the purpose of appointment of High Court Judges, the Chief Justice of the concerned High Court must start 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 ponder 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 familiar 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 latter 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, which is as follows:

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.

3.2.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.[40] 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.[41]
- 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.[42]
- Another example is of 2 judges of Punjab and Haryana High Court, who were involved in "Cash for Judge Scam" and "Provident Fund Case" in which 34 judges were facing allegation of misappropriation.[43]

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*"[44]. After all Judges are also humans, it is true that they are highly intellectual but they can also commit error.

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[40]*Supra n. 9.*

[41] V.Venkatesan& S.S. Chattopadhday, *Judges in the Dock*, Frontline, 32.

[42]PrashantBhushan, *Appointment and Complaints against Judges*, Economic And Political Weekly, The Dinakaran Imbroglio,10th October, 2009.

[43]*Supra n. 9.*

[44]*Brown v. Allen,* 344 US 443 (1953).

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.*"[45]By this 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 completely 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 furthermore to make a move against the corruption done misconduct involved.[46]

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 favouritism, variance in the opinion and unjust deferment, 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 Allahabad High Court having 75 vacancies out seating capacity of 160 Judges.[47] There is already high pendency of cases in India and these vacancies further delays the judicial process, which delays the justice in all.

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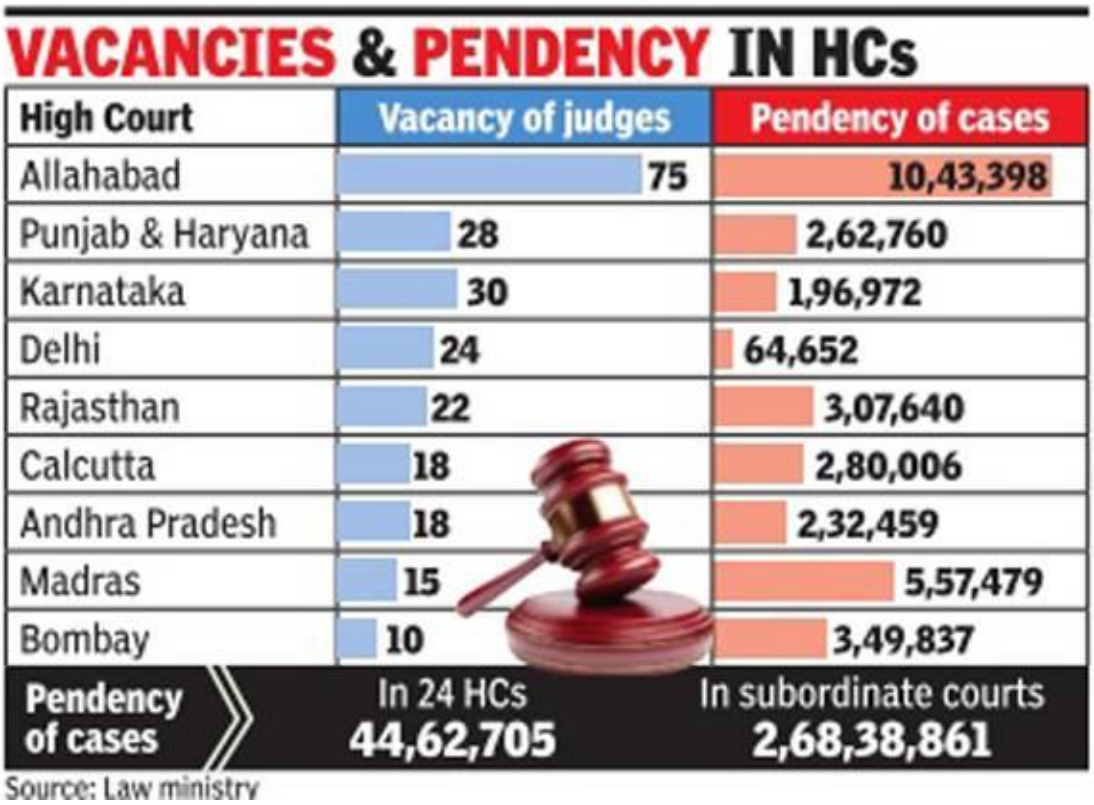
[45]ShobhithaNaithani, *The Curious Incident of Underdog's Defence*, Tehelka, 13th March, 2010.

[46]*Supra n. 12.*

- 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"

[32]*See Law minister blames collegium system for judges vacancy in high courts*, The Times of India, *available at:* http://timesofindia.indiatimes.com/india/Law-minister-blames-collegium-system-for-judges-vacancy-in-high-courts/articleshow/45279034.cms, Lastassessed on 31stMarch 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!"*[48] *Whoever is to blame, injustice due to absence of Justices and dysfunctional judicature due to diminishing judge strength are a bizarre kind of contempt of Court."*[49]

The current judiciary is already a rundown 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 harm the Independence of Judiciary. This further rises 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

[48] *Id.*, at 180.

[49] *Id.*, at 181.

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.

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.[50] However, a contrary figure is depicted by the Indian Judiciary, which is often proclaimed as the most powerful judiciary in the world[51], 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

[50]Alexander Hamilton in Federalist 78 said "The 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 orthe 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; andmust 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 everything to fear from its union with either of the other departments..." 78 The Federalist Papers 393-4 (Bantam).

[51]Santosh Pal, *Fading judicial independence,* The Hindu, Delhi, October 26, *available at:* www.thehindu.com/opinion/op-ed/fading-judicial-independence/article5272998.ece?css,Lastaccessed onNovember 4, 2013.

cases of appointment.[52] 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 body.[53] Also, when the judiciary declares an act or amendment unconstitutional, it thwarts the will of the people by which it brought.[54]

The effect of such a patently wrong action by judiciary, by creating a wall of supremacy itself infringes the doctrine of separation of power.[55] 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. [56] As rightly said, ***"power corrupts but absolute power corrupt absolutely".***[57]The achievement of absolute independence[58]by judiciary has led to much extraordinary anti-social actions, compromising the image of judiciary.

[52]*Supra n. 9*.

[53]*Id.*

[54] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH, (2nd ed. 1986), 16-17.

[55] 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 *KeshavanandaBharathi Case* and later in *State of Bihar v. BalMukund Shah*, AIR 2000 SC 1296.

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

[57]By Lord Atkin.

[58] It has been argued by ArghyaSengupta in his article that *"Absolute independence is not necessary and not desirable for judges*."

See ArghyaSengupta,"*Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry"*, 5 *Ind. J. of Const. L.* 99, 2011, 107.

CHAPTER- 4

JUDICIAL ACCOUNTABILITY AND JUDICIAL ACTIVISM IN INDIA

4.1. Judicial Accountability:

4.1.1. Nature and Meaning:-

The word 'accountable' as defined in the Oxford Dictionary means 'responsible for your own decisions or actions and expected to explain them when you are asked'. Accountability is the *sine qua non* of democracy. Transparency facilitates accountability. No public institution or public official is exempted from accountability although the manner of enforcing accountability may vary depending upon the nature of the office and the functions discharged by the office holder. The judiciary, an important wing of the State, is also accountable. Judicial accountability, however, is not on the same plane as the accountability of the executive or the legislature or any other public institution. Indian polity is under severe strain. Faith of the people in the quality, integrity and efficiency of governmental institutions stands seriously eroded[59].

They turn to the judiciary as the last bastion of hope. But of late, even here things are getting increasingly disturbing and one is unfortunately no more in a position to say that all is well with the judiciary. The independence and impartiality of the judiciary is one of the hallmarks of the democratic system of the government. Only an impartial and independent judiciary can protect the rights of the individual and can provide equal justice without fear and favor.[60]

The constitution of India provides many privileges to maintain the independence of judiciary. If the Preamble to our Constitution be regarded as the reflection of the aspirations and spirit of the people, then one thing that even a layman will note is that among the various goals that the Constitution-makers intended to secure for the citizens, "JUSTICE- Social, Economic & Political" has been mentioned before the rest." No person, however high, is above the law. No institution is exempt from accountability, including the judiciary. Accountability of the judiciary in

[59] *See Judicial Accountability in India, available at:* www.legalservicesindia.com, Last accessed on 11th April, 2015.

[60] *Id.*

respect of its judicial functions and orders is granted by provisions for appeal, reversion and review of orders. What is the mechanism for accountability for serious judicial misconduct, for disciplining errant judges? Our Constitution provides for removal of a judge of the Supreme Court or the High Court for proved misbehaviour or proved incapacity, by what is popularly called the process of impeachment, where under two thirds of the members of each House of Parliament can vote for the removal of the judge. So far, only one impeachment proceeding has been initiated against a Supreme Court judge. It failed because Congress abstained from voting and consequently two-thirds majority was not available[61].

It is now generally accepted that the present impeachment process is cumbersome, time consuming and tends to get politicized. It needs to be reformed urgently.[62]

4.1.2. Need For Judicial Accountability

"All power is a trust- that we are accountable for its exercise- that from the people and for the people, all springs and all must exist". In a 'democratic republic' power with accountability of the individual enjoying it, is essential to avert disaster for any democratic system. The accountability must be comprehensive to include not only the politicians, but also the bureaucrats, judges and everyone invested with power. Power and position in a democracy is depicted as attendant with responsibility, and every incumbent of a public office must remain constantly accountable to the people, who are the repository of political sovereignty.[63]

The judicial system deals with the administration of justice through the agency of courts. Judges are the human stuff which presides over the courts. They are not merely visible symbols of courts; they are actually their representatives in flesh and blood. The manners in which judges discharge their duties determine the image of courts and the creditability of judicial system itself. In India from time immemorial judges have been held in high esteem and revered as super humans but coming across recent incidents in Bihar (like killing of an under trial in the court itself and lynching a suspected thief to death) depicts that frustrated by the

[61] *Supra n. 59.*

[62] *Id.*

[63] *Id.*

failure to get justice, people are slowly losing faith in judiciary and are taking law into their hands. This is highly deplorable. A need definitely is there to make judiciary accountable, as derogation of values in judiciary is far more dangerous than in any other wing of the government as judiciary has to act as the guardian of our constitution. Judicial accountability and answerability of the judges is not a new concept. Several countries in their constitutions have already provided for ensuring accountability of judiciary. This to prevent concentration of power in the hands of a single organ of the state especially in countries where judicial activism interferes with and invades into the domain of other organs. But at the same time Judicial independence is a pre- requisite for every judge whose oath of office requires him to act without fear or favour, affection of ill- will and to uphold the constitution and laws of the country.[64]

4.1.3. Lack of judicial Accountability in India

The framers of the Indian Constitution would not have imagined that within 60 years of the framing of the Constitution, the Indian Judiciary would emerge as the most powerful institution of the State. The Constitution established the High Courts and the Supreme Court as watchdog institutions, independent of the executive and the legislature, to not merely dispense justice, but also to ensure that the executive and the legislature did not exceed the authority conferred upon them by the Constitution. Thus, the Judiciary was given the powers to interpret the laws and the Constitution, and also to strike down executive action which violated any law or the fundamental rights of citizens. It was also the authority to examine whether laws framed by Parliament conformed to the Constitution and declare them void if they violated it. By a creative interpretation of the provision authorizing the Parliament to amend the Constitution, the Supreme Court in 1973 also acquired the power to strike down even constitutional amendments which were held by the Court to violate the basic structure of the Constitution. Many laws and some constitutional amendments have been struck down by the Courts during this period.[65]

[64] *Supra n. 59.*

[65] *Supra n. 59.*

Through all this, the superior courts in India have emerged as perhaps the most powerful courts in the world, exercising virtually Imperial & unchecked powers. While executive action and even legislation could often be struck down by the courts, the directions of the courts, sometimes issued without even notice to the affected parties, were beyond question, and had to be obeyed by all executive officers on pain of contempt of court. Of course, often these powers were wisely exercised to correct gross executive inaction.[66]

While the Court was acquiring these powers, by an even more inventive (called purposive) interpretation of the provision regarding appointment of judges by the government, it took over the power of appointment of judges. Thus judges of the High Court and Supreme Court are now appointed by a collegium of senior judges of the Supreme Court. The judiciary has thus become like a self-perpetrating oligarchy. There is no system followed in the selection of judges and there is no transparency in the system. In particular, no regard is given to examining the record or credentials of judges in their ideological adherence to the constitutional ideals of a secular, socialist democratic republic or their understanding of or sensitivity towards the common people of the country who are poor, marginalized and unable to fight for their rights in the courts. Thus, the courts in India enjoy virtually absolute and unchecked power unrivalled by any Court in the world. In these circumstances, it is absolutely vital that judges of the superior judiciary be accountable for their performance and their conduct-whether it be for corruption or for disregard of constitutional values and the rights of citizens. Unfortunately, neither the Constitution, nor any other law has created any institution or system to examine the performance of judges or examine complaints against them. The Constitution provides that High Court and Supreme Court judges cannot be removed except by impeachment. That process requires signatures of 100 MPs of the House of People or 50 MPs of the Council of States for its initiation. If a motion containing charges of serious misconduct with the requisite signatures is submitted, and admitted by the Speaker of the House of

[66] *Id.*

People or the Chairperson of the Council of States, an Inquiry Committee of 3 judges is constituted to hold a trial of the judge.[67]

Only if he is found guilty, the motion is placed before each House of Parliament where it has to be passed by a 2/3 majority of each House. Our experience has shown that it is practically impossible to remove a Judge through impeachment even if one is somehow able to get documentary evidence of serious misconduct. This is because MPs and political parties to which they belong are very reluctant to take on a sitting Judge because virtually all of them have pending cases in courts. The judges often behave like a trade union and do not take kindly to brethren being accused of misconduct. It is, therefore, virtually impossible to get an impeachment off the ground unless the matter has become a big public scandal. Only in those cases, is it possible to get enough MPs to sign an impeachment motion. The only impeachment of a Judge to have gone far was that of Justice V. Ramaswami in the early 90's. After the motion was presented, a Judges Inquiry Committee found him guilty of several charges of misconduct when the matter went up for voting to Parliament.[68]

The ruling Congress Party directed all their MPs to abstain from voting. Thus, though the motion was unanimously passed in the Lok Sabha, it did not get the support of the majority of the total membership of the House and, therefore, failed. The Judge remained in office till he retired, but was not assigned any judicial work by the then Chief Justice. Only last month, we have seen a second motion against a Judge of the Calcutta High Court signed and submitted to the Chairman of the Council of States. Allegations and charges against a Judge even when supported by documentary evidence rarely get any coverage in the media because of the widespread fear of contempt of court. The contempt law in India allows any judge of the High Court and Supreme Court to charge any one with criminal contempt and send him to jail, on the ground that he/she has "scandalized the Court or lowered the authority of the Court". What "scandalizes or lowers" the authority of a Court is also the subjective judgment of each Judge. In Arundhati Roy's (the well-known writer) case, a bench of 2 judges of the Supreme Court

[67] *Supra n. 59.*

[68] *Id.*

charged her with contempt and sent her to jail merely because she criticized the Court in her affidavit.[69]

Earlier, the Supreme Court has declared that a person charged with "scandalizing the Court" will not be permitted to prove the truth of his allegation against a Judge. Though Parliament has recently amended the Contempt of Courts Act to expressly allow truth as a defence, nothing has been done to prevent judges against whom allegations are made from charging the person with contempt and hauling him to jail. The criminal contempt jurisdiction of the Court and the cavalier manner in which it is exercised, is another example of the enormous and unchecked power of the superior courts in India Our campaign for Judicial Accountability has since long been demanding that the courts' power to punish for "scandalizing and lowering the authority of the Court" must be taken away by legislation. Of course, this demand has been stoutly resisted by the courts who claim that deleting this provision would greatly encourage baseless allegations and abuse of judges by disgruntled litigants and would thereby erode public confidence in the courts.[70]

But then, there is the law of civil and criminal defamation to protect judges against vilification. Moreover, public confidence in the courts as in any person or institution, is generated or eroded by the actions of the courts and not by any baseless allegations by disgruntled litigants. However, with such fierce opposition by the courts, the legislature has not had the courage to delete this provision from the Contempt of Courts Act. In 1991, the Supreme Court by another ingenious judgment, involving Justice Veeraswami (the father-in-law of Ramaswami), who was Chief Justice of the Tamil Nadu High Court who was caught with assets, vastly disproportionate to his income, laid down that no judge of a superior court could be subjected to a criminal investigation without the written permission of the Chief Justice of India.[71]

This judgment has been use to prevent the investigation and prosecution of many judges against whom there was documentary evidence of corruption, fraud,

[69] *Supra n. 59.*

[70] *Id.*

[71] *Id.*

misappropriation, etc. This has also increased the impunity of judges who have now got used to the feeling that they can get away with any kind of misconduct or even criminal conduct, without any fear of any criminal action or action for removal. Armed additionally with the power of contempt, they also have little fear of public exposure. All this makes for an alarming picture of lack of accountability of the higher judiciary in India. You cannot practically take any disciplinary or criminal action against misconduct or crimes committed by judges.[72]

If you expose them publicly, you run the risk of contempt. This lack of accountability coupled with the enormous unchecked powers that the courts have acquired and are exercising make the judiciary a very dangerous institution and indeed a serious threat to Indian democracy. This lack of accountability has led to considerable corruption of the higher judiciary which is evident from the recent spate of judicial scandals which have erupted in India. The recent report of TI on corruption perception index shows that the judiciary is perceived to be the second most corrupt institution in India after the Police.

4.1.4. Judging The Judges (Case Laws)

Recently, the judiciary has been greatly in the news, but for all the wrong reasons. A string of judicial scandals have erupted in the recent past, starting with Chief Justice Sabharwal's case, and then going on to the Ghaziabad district court Provident fund scam, the 15 lakh cash-at-judges-door scam of Chandigarh, and the Justice Soumitra Sen case of Calcutta. Some of these have arisen due to the lack of transparency in the selection and appointment of judges. In many cases, persons of doubtful integrity come to be appointed and confirmed through a totally secretive, ad hoc, arbitrary and non-transparent process of selection and appointment through a Collegium of judges of the High Court and the Supreme Court. Unfortunately however, we are finding that these rotten eggs who come to be appointed, get confirmed, even when they are found by the Collegium to have been of doubtful integrity, and are not removed even when a judge's committee has found them guilty of criminal misappropriation and criminal breach of trust,

[72] *Supra n. 59.*

and even after the Chief Justice of India has recommended their impeachment selection, appointment and removal of judges.[73]

4.1.5. A historic non-impeachment

1. Case of Justice V. Ramaswami

May 11, 1993 will be remembered as a black day for Parliament and for the judiciary in this country. For on that day, 205 Lok Sabha members belonging to the Congress(I) and its allies sabotaged the impeachment motion against Justice V. Ramaswami of the Supreme Court by abdicating their constitutional duty of voting for or against and thus defeating the motion by ensuring that it did not receive the support of an absolute majority of the total membership of the House. Each one of the 196 MPs, who voted, all belonging to the Opposition parties, voted for the removal of the judge. Thus, despite the motion for removal being passed unanimously by the members who voted, it failed, bringing to a close the more-than-two-year old proceedings for the removal of Ramaswami. The result, therefore, is that despite a high-power inquiry committee of three eminent judges having come to the conclusion that Ramaswami was guilty of several acts of gross misbehaviour which warranted his removal, the judge is still entitled to discharge judicial functions from the highest court of the land. It is another matter that after the impeachment motion failed and Ramaswami was persuaded to resign by the Congress (I) which belatedly realised that it would have to pay a heavy price for being seen to have supported a corrupt judge. The failure of the motion, especially after the tortuous course it went through, raises several grave issues for the future of the administration of justice in this country and indeed for probity in public life in general[74].

2. The Case Of Justice Ashok Kumar

In the case of Justice Ashok Kumar, who was appointed an additional judge in April 2003, the Collegium of three senior judges of the Supreme Court unanimously decided not to confirm him as a permanent judge in August 2005 because of adverse reports regarding his integrity. Despite this, he was given

[73] *Supra n. 59.*

[74] *Id.*

extensions as additional judge, and finally came to be confirmed in February 2007 on the Chief Justice's recommendation, which was made without consulting other members of the Collegium of judges, in complete violation of several judgements of the Supreme Court. These had clearly laid down that in a matter of appointment of judges, the Chief Justice cannot act alone and must go along with the majority view of the Collegium of senior judges of the Supreme Court. The 9 Judge judgments also provided that an appointment made without consulting the Collegium was challengeable and could be struck down in a judicial proceeding. The memorandum of procedure lay down by the law ministry also made it abundantly clear that in such matters the Chief Justice must consult the Collegium of senior judges, as well as those other judges who have come from the same High Court in which the proposed appointment is to be made. Thus, Justice Ashok Kumar's appointment was clearly contrary to the Constitution, and the law laid down by the Supreme Court itself. Though Justice Ashok Kumar's confirmation as a permanent judge was challenged by senior advocates of the Supreme Court, unfortunately the court has upheld his confirmation on the basis of very dubious reasoning. While the Court berated the previous Chief Justices for having given extensions to Justice Ashok Kumar as additional judge for political considerations, it found nothing wrong with his confirmation, despite the fact that it was done without consulting the Collegium and after his integrity was found doubtful by the previous Collegium of judges when it had considered the matter. Moreover, nothing had changed subsequently to cast any doubt on the finding of the previous Collegium. Thus the Supreme Court, missed the opportunity to judicially correct the administrative illegality in confirming a judge whose integrity had been found to be doubtful, and that too without consulting the Collegium of senior judges of the Court. Such judicial behaviour of the Supreme Court only confirms the growing public perception that the recent crisis of credibility and integrity of the higher courts is largely a result of improper appointments due to extraneous considerations which are facilitated by the totally nontransparent manner in which judges are selected and appointed.[75]

[75] *Supra n. 59.*

3. Arundhati Roy's Case

The facts were these: After the judgment of the Supreme Court in the Narmada Dam case, there was a public protest outside the Supreme Court in which Medha Patkar (the leader of the anti-Dam movement in India) and Arundhati Roy participated. A couple of lawyers (probably on the hint of the Court itself) filed a contempt petition against Patkar, Roy and Mr. Prashant Bhushan alleging that we had raised abusive slogans against the Court. The lawyers' contempt application, apart from being in grotesque language, also contained palpably absurd allegations that Roy and Patkar (who can hardly be considered rowdies) manhandled the burly lawyers. Roy, in her reply to the court notice said: "For the Court to have issued notice on such a ridiculous petition to three persons who have been vocal in their criticism of the Court shows a disquieting inclination on the part of the Court to muzzle dissent and stifle criticism". Though he discharged the first notice, the same judge (Justice G.B. Patnaik) who had issued the first notice, issued a second contempt notice, this time to Roy alone for daring to berate the court in this manner. They eventually held her guilty of contempt and sent her to jail with Justice Patnaik sitting as a Judge in his own cause.[76]

4. The Case of Justice Soumitra Sen

Justice Sen has been recommended to be removed by impeachment by the Chief Justice of India, for the offence of misappropriating funds received by him as a court receiver and thereafter for giving false explanations to the High Court. The Chief Justice made this recommendation after a report of a committee of three Judges, who after carefully examining the facts came to the conclusion that he had committed several acts of serious misconduct. Though these acts of misconduct were the subject matter of proceedings pending against him in the Calcutta High Court, yet he came to be appointed during that time, due to the lack of transparency in the matter of appointments. Though the report of the judges committee was submitted a year ago, and the Chief Justice's recommendation for the removal by impeachment of Justice Sen was made five months ago, the government has not made any attempt to proceed with his

[76] *Supra n. 59.*

impeachment. This is despite the fact that the government has proposed a bill to amend the Judges Enquiry Act by which this very procedure for initiating impeachment proceedings is being sought to be given statutory status. The inaction of the government in Justice Sen's matter displays the complete lack of seriousness on the part of the government in enforcing judicial accountability. In these circumstances, the Campaign for Judicial Accountability and Reforms has prepared an impeachment motion against Justice Sen and is sending it to all the political parties with the request that they should have it signed by their MPs so that it could be presented to the Chairman of Rajya Sabha for proceeding with his impeachment.[77]

5. Case of Justice Ashwini Kumar Mata

The problems created by the lack of transparency in the appointment of judges is exemplified by the presently proposed appointment of Mr. Ashwini Kumar Mata who has recently been recommended for appointment as Judge to the Delhi High Court. Mr. Mata has recently purchased one floor of a house in Safdarjang Enclave from a builder who had an agreement with the owner of the plot that he would construct the building and hand over three floors to the owner. The remaining two floors would remain with him which he could sell only after handing over possession of the three floors to the owner. Despite the fact, that the builder had not completed the construction of the building and not handed over the possession of the floors belonging to the owner to him, Shri Mata entered into an agreement for purchasing one of the floors which was to go to the builder from him. Shri Mata thereafter used his agreement with the builder to seek mutation (getting his name recorded as owner) of that floor in his name. In his application, he attached a copy of his agreement with the builder, containing the forged signatures of the owner, Mr Joshi. When this was discovered by Mr. Joshi, he made a complaint to the police regarding the forgery. Eventually, at the instance of a magistrate, an FIR came to be registered and an investigation began into this forgery. The act of forgery became clearer when Mr. Mata filed a different version of the same agreement in arbitration proceedings which he had initiated. In this version of the agreement, the

[77] *Supra n. 59.*

signatures of the owner were not there. These facts were learnt only after the recommendation for the appointment of Shri Mata had already been sent to the Law Ministry by the Collegium of the High Court. Thereafter a representation was sent to the collegiums in the High Court and the Supreme Court. Mr. Mata responded to the representation and said that the criminal investigation by the police had exonerated him. The police report had been given hurriedly after the representation, without even waiting for the forensic examination of the forged signatures, and is dishonest. Thereafter another representation was sent to the Supreme Court and the High Court collegiums detailing the misconduct of Mr. Mata and pointing out why it is not possible for the signatures of the owner to have been forged without Mr. Mata's knowledge and consent. We have pointed out in our representation that even if it is not certain that Mr. Mata participated in the forgery of his agreement with the builder, it is better to err on the side of caution by not appointing him, instead of being faced with a situation as that with regard to Justice Soumitra Sen of the Calcutta High Court.

4.1.6. Judicial Accountability Bill Approved

The Judicial Standards and Accountability Bill will set judicial standards and make judges accountable for their lapses. It will also mandate that judges of the High courts and the Supreme Court declare their assets and liabilities, including those of their spouses and dependants. The Union Cabinet has approved the draft Judicial Standards and Accountability Bill, 2010 that provides for setting up a five-member oversight committee to deal with complaints against members of the higher judiciary. Official sources said judges would also be required to declare their assets and file an annual return of assets and liabilities. All these details will be put up on the websites of the Supreme Court and high courts. It will further require judges not to have close ties with any member of the Bar, especially those who practise in the same court. "The enactment of the Bill will address the growing concerns regarding the need to ensure greater accountability of the higher judiciary by bringing in more transparency, and will further strengthen the credibility and independence of the judiciary," Information and Broadcasting Minister Ambika Soni told reporters after a meeting of the Union Cabinet. The proposed oversight committee will be headed by a former chief justice of India and include the attorney general, a

Supreme Court judge, a chief justice of a high court and an eminent person nominated by the President.[78]

Oversight committee

The Bill to replace the Judges Inquiry Act retains its basic features, contemplates setting up of a national oversight committee, to be headed by a former Chief Justice of India, with which the public can lodge complaints against erring judges, including the Chief Justice of India and the Chief Justices of the High Courts. At present, there is no legal mechanism for dealing with complaints against judges, who are governed by 'Restatement of Values of Judicial Life,' adopted by the judiciary as a code of conduct without any statutory sanction.

The five-member committee to be appointed by the President will have a serving judge of the Supreme Court and a serving High Court judge, both nominated by the Chief Justice of India; the Attorney-General; and an eminent person nominated by the President.

Scrutiny panels

On receiving a complaint, the committee will forward it to a system of scrutiny panels. In the case of a complaint against a Supreme Court judge, the scrutiny panel will consist of a former Chief Justice of India and two sitting Supreme Court judges, and in the case of a complaint against a High Court judge, the panel will have a former Chief Justice of the High Court and two of its sitting judges. The members of the Supreme Court panel will be nominated by the Chief Justice of India, and that of the High Court panels by the Chief Justice of the High Court concerned. The scrutiny panels will have the powers of a civil court. For instance, they can call for witnesses and evidence. They will be required to give their report within three months to the oversight committee. In the case of a complaint against a Chief Justice, the oversight committee itself will conduct the scrutiny. On receiving the report from the scrutiny panels, the oversight committee will set up a committee to further investigate the case. Like

[78] *Supra n. 59.*

the scrutiny panels, the investigation committee will have the powers of a civil court; it will have the power to frame definite charges. If the charges are not proved, the investigation committee can dismiss the case. Otherwise, it will give a report to the oversight committee, which can issue an advisory or warning or recommend minor punishment if the charges are not too serious. If the charges are serious, the committee can request the judge concerned to resign. If the judge does not do so, the oversight committee will forward the case to the President with an advisory for his removal. The Bill mandates that judges should not have close association with individual members of the Bar and not allow any member of their immediate family to appear before them in courts. Judges should not contest any election to any office of club, society or other association, except those associated with the law or any court. Further, they should not have any bias in judicial work or judgments on the basis of religion, race, caste, sex or place of birth.

4.2. Judicial Activism

4.2.1. Meaning and implications

The judicial activism is use of judicial power to articulate and enforce what is beneficial for the society in general and people at large[79]. Supreme Court despite its constitutional limitation has come up with flying colors as achampion of justice in the true sense of the word. JUSTICE… this seven letter word is one of the most debated ones in the entire English dictionary. With the entire world population being linked to it, there is no doubt about the fact that with changing tongues the definition does change. The judicial activism has touched almost every aspect of life in India to do positive justice and in the process has gone beyond, what is prescribed by law or written in black and white. Only thing the judiciary must keep in mind is that while going overboard to do justice to common man must not overstep the limitations prescribed by sacrosanct i.e. The Constitution.[80]

[79] *See Judicial Activism: Meaning and implications, available at: www.academia.edu*, Last accessed on 10th April, 2015.

[80] *Id.*

Judicial Activism vis-à-vis Judicial accountability with specific reference to Appointment of Judges

Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law. The question of judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers.[81]

Black's Law Dictionary defines *Judicial Activism* as a "philosophy of Judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decision." Judicial activism means active role played by the judiciary in promoting justice. Judicial Activism to define broadly is the assumption of an active role on the part of the judiciary[82]. Ronald Dworkin, for example, rejects a "strict interpretation" of the constitutional text because it limits constitutional rights "to those recognised by a limited group of people at a fixed date of history."

According to Prof. Upendra Baxi, Judicial Activism is an inscriptive term. It means different things to different people. While some may exalt the term by describing it as judicial creativity, dynamism of the judges, bringing a welfare revolution in the field of human rights and social welfare through enforcement of public duties etc., others have criticized the term by describing it as judicial extremism, judicial terrorism, transgression into the domains of the other organs of the State negating the constitutional spirit etc.

Judicial activism implies going beyond the normal constraints applied to jurists a nd the Constitution, which gives jurists the right to strike down any legislation or rule against the precedent if it goes against the Constitution. Thus, ruling against majority opinion or judicial precedent is not necessarily judicial activism unless it is active. In the words of Justice J.S Verma, Judicial Activism must necessarily mean "the active process of implementation of the rule of law, essential for the preservation of a functional democracy". In a modern democratic set up, judicial activism should be looked upon as a mechanism to curb legislative adventurism and executive tyranny by enforcing

[81]Supra n. 79.

[82]ChaterjiSusanta, *"'For Public Administration' Is judicial activism really deterrent tolegislative anarchy and executive tyranny?"* , XLII, April-June 1997, 9-11.

Constitutional limits. That is, it is only when the Legislature and the Executive fail in their responsibility or try to avoid it, that judicial activism has a role to play. In other words, judicial activism is to be viewed as a "damage control" exercise, in which sense, it is only a temporary phase. Recent times have been judiciary play an intrusive roles in the areas of constitutionally reserved for the other branches of governments. Issues in judicial activism arise, when governance is apparently done by Mandamus. The Constitution of India operates in happy harmony with theinstru mentalities of the executive and the legislature. But to be truly great, the judiciary exercising democratic power must enjoy independence of a high order. But independence could become dangerous and undemocratic unless there is a constitutional discipline with rules of good conduct and accountability: without these, the robes may prove arrogant[83].

Judicial activism is the views that the Supreme Court and other judges can and should creatively (re)interpret the texts of the Constitution and the laws in order to serve the judges' own visions regarding the needs of contemporary society. Judicial activism believes that judges assume a role as independent policy makers or independent "trustees" on behalf of society that goes beyond their traditional role as interpreters of the Constitution and laws. The concept of judicial activism is the polar opposite of judicialrestraint.

Failure on part of the legislative and executive wings of the Government to provide 'good governance' makes judicial activism an imperative. Delivering justice to a population of over a billion does not sound like and never will be an easy task. It however becomes increasingly difficult in a country like India. The Executive, the Legislature and the Judiciary are the three wings of the Indian democracy.

Judicial activism, however, came into its own only in the last couple of years. In his Dr. Zakir Hussain Memorial Lecture, Former Chief Justice of India A.M. Ahmadi said, "In recent years, as the incumbents of Parliament have become less representative of the will of the people, there has been a growing sense of public frustration with the democratic process. This is the reason why the Supreme)

[83]*See* www.thehindu.com, Last accessed on 10th April, 2015.

Court had to expand its jurisdiction by, at times, issuing novel directions to the executive."

Many are critical of judicial activism as an exercise of judicial powers, which displaces existing laws or creates more legal uncertainty than is necessary, whether or not the ruling has some constitutional, historical or other basis. Judicial activism can be considered as "legislating from the bench." Some have even gone to the extent of calling it judicial tyranny. This implies that a judge is ruling on the basis personal political convictions or emotions.Declaring that the judiciary has a vital function to protect minority rights in a pluralist society, former Attorney General of India Soli J Sorabjee said "'judicial activism has contributed to the protection of fundamental human rights.

When serious issues like environmental pollution crop up and the statutory bodies take no action and the people suffer, the courts have to step in to alleviate human suffering, he added. Calling upon the judiciary to evolve a "jurisprudence of compassion"', Mr Sorabjee said the institution of publicinterest litigation (PIL) had helped to secure "fundamental rights as a living reality for some sections of society" However, the senior Supreme Court lawyer cautioned that PIL "could not be treated as a pill for every ill" and said that some had sought to use it as an instrument of blackmail and oppression. The judiciary had to be vigilant against personal, political andpublicity-oriented litigation masquerading as PIL, he added. However, theabuse of PIL was not a ground for its abolition or restriction as it had playedan important role in securing justice to suffering sections, ranging fromund er-trial prisoners to children working in hazardous occupations andworkers treated as slaves in quarries and kilns. Lauding Justice (Retd.) V R. Krishna Iyer for his judgments upholding rights of prisoners, Mr. Sorabjee saidtorture was rampant in Indian prison cells. By giving judgments againstsolita ry confinement and handcuffing of prisoners, Justice Krishna Iyer had upheld basic human dignity.

Judicial activism might sound, for a lay man, a heavy-duty term but in thesimpler manner is quite easy to comprehend. We can say in simple words that judicial activism is a practice by the judges that does not involve the balance of law,

instead it hampers it. In judicial activism, the judge places his final decision with his heart and mind, which is emotionally handled. It, at times, works in our favour to save from the wrong decision to take place but at times it also backfires on us. In other words we can easily say that judicial activism is the practice going beyond the normal law for the jury. There are some very important cases which come in the talk whenever we discussabout judicial activism in India.***Bhopal gas tragedy*** and ***Jessica Lal Murder case*** are among the top two. The latter was an open and shut case for all. Money and muscle power tried to win over the good. But lately, it was with the help of judicial activism that the case came to at least one decision.

The two most prominent figures in the Bar Council of India whose names arethe most interrelated with judicial activism are Justice Prafullachandra Natwarlal Bhagwati and Justice Vaidyanathapura Rama Krishna Iyer.

The Golak Nath case[84]is an example of judicial activism. The Supreme Court by a majority of six against five laid down that the fundamental rights as enshrined in Part-III of the Constitution are immutable and beyond the reach of the amendatory process. The power of parliament to amend any provision in Part-III of the Constitution was taken away. In ***Kesavananda Bharti*** case by a majority of seven against six, the Supreme Court held that by Article 368 of the Constitution, Parliament has amending powers.

But the mandatory power does not extend to alter the basic structure or frameworkof the Constitution. The basic features of the Constitution being:

i. Supremacy of the Constitution;
ii. Republican and Democratic form of government;
iii. Secularism;
iv. Separation of powers between the legislature, the executive and the judiciary; and
v. Federal character of the Constitution.

Supremacy and permanency of the Constitution have thus been ensured by the pronouncement of the summit court of the country with the result that the basic

[84]Dr. BhureLal, *Judicial Activism and Accountability*,ISBN,38-39.

features of the Constitution are now beyond the reach of Parliament. After making these observations certain reasons can be generalized which lead to judicial activism. The following are some of the well accepted reasons which compel a court or a judge to be active while discharging the judicial functions assigned to then either by a constitution or any otherorganic law.

i. Near Collapse of responsible government.
ii. Pressure on judiciary to step in aid.
iii. Judicial enthusiasm to participate in social reform and change.
iv. Legislative vacuum left open.
v. The constitutional scheme.
vi. Authority to make final declaration as to validity of a law.
vii. Role of Judiciary as guardian of fundamental rights.
viii. Public confidence in the judiciary etc.

In the 1980's two remarkable developments in the Indian legal system provided a strong impetus to judicial activism in India.[85]

There was a broadening of existing environmental laws in the country and judicial activitythrough public interest litigation began in earnest in India. These twodevel opments gave more scope to citizens and public interest groups to prosecute a corporation or a TNC which violates environmental norms. It is a known fact that judicial activism has given us some very good case laws and path breaking judgments, which even led to revolutionary changes in the society, To deny judicial activism to the courts is to nullify the judicial process and to negate justice. Take away judicial activism and tyranny willstep in to fill the vacant space.

It is rightly stated by former Justice Hidaytuallah that "The first principle to observe is that the wisdom of the law must be accepted. A little incursion into

[85] PranayLal and VeenaJha, *"Judicial activism and the environment in India. Implications for transnational corporations",* report as part of unctad/cbs project: Cross Border Environmental Management In Transnational Corporations.

law-making interstitially, as Holmes put it, may be permissible. For other cases the attention of Parliament and/or Government can be drawn to the flaw."[86]

In India, although the activism *versus* restraint debate existed even in the pre-Constitution period, it did not vigorously take-off till the 1970s when the Supreme Court of India itself became very active. However, the underlying philosophical issue of the relationship between means and ends has been long debated in Indian philosophy. Mahatma Gandhi who advocated that the means used for achieving a particular result must also be as acceptable as the result itself. As we shall see, the saga of judicial decision-making by the highest court in India indicates that judicial activism or the mere pursuit of ends without regard to the means, has become the dominant approach in judicial thinking.

With this background, it becomes necessary for the Judge to ask, likeHamlet, whet her it is nobler in the mind to remain impervious to the dominant discourse around, or to trim the sails of his thinking to the winds blowing around. This is a question of great moment, which must haunt any conscientious Judge. Tradition and good sense demand that, irrespective of the political debate around, the Judge maintains a neutral stance in his decision-making, being guided only by accepted legal principles and the dictates of his conscience. The Judge being human, the social ambience in which he operates is likely to affect his judgment, but the extent to which he disallows this to happen determines his mettle.

It was rightly put by legal luminary, Former Justice, Shri B.N Shrikrishna , in his article *Skinning the Cat* that undesirable consequences ensuing from Judicial activism are delay, backlog and abuse of public interest litigation,ex pediency and judicial error, credibility of institution is questioned in certain situations, diversion of institutional resources for the purposes other than constitutionally assigned and finally judicial activism is personality driven than institutionalized adjudication.

[86]Justice M. Hidayatullah, *Highways and Bye-Lanes of Justice*, (1984) 2 SCC J-1, 5.

CHAPTER- 5

NATIONAL JUDICIAL COMMISSION v. THE COLLEGIUM SYSTEM

5.1. The Collegium System

The Indian Judiciary from its Three Judges Cases[87] has made it very clear that the Independence of the Judiciary can be attained completely only after ensuring a complete control over the process of appointment of Judges. Independence of Judiciary includes Independence of Judges from the other organs of the state and that can only be ensured when there is no role of the other organs in the matter of appointment of judges, otherwise appointments might take place due to political influence.

The chastity and the sanctity of the Constitution of India will completely demolish, defiled and defaced if the other organs of the state, i.e. the legislature and the executive will be allowed to share the work of appointment and transfer of Judges with the Chief Justice of India and his other colleague's judges[88]. This will destroy the two essential basic principal of the constitution which are:

- The separation of power among the three organs of the Government. (Executive, Legislature and the Judiciary).[89]
- Independence of the Judiciary.[90]

5.1.1. The Doctrine of Separation of Powers:

Every State provides for three organs; the legislature, the executive and the judiciary, working in connection and consonance to one another and in the meantime working autonomously of one another. The doctrine of Separation of Powers propounded by Montesquieu [91] says that if any particular organ is privileged will absolute power then it will prompt a circumstance where there will

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[87] *Supra n. 31.*

[88] SamanwayaRautray, *PIL filed against National Judicial Appointments Commission which is to replace collegium system*, The Economics Time, 6th January, 2015, *available at:* http://articles.economictimes.indiatimes.com/2015-01-06/news/57747903_1_collegium-system-national-judicial-appointments-commission-bishwajit-bhattacharya, Last assessed on 31st March 2015.

[89] Art. 50 of Constitution of India.

[90] *Supra n. 17.*

[91] I P MASSEY, ADMINISTRATIVE LAW, (6th ed. 2005), 34.

be no freedom and there would be an end of everything, where the same man or the same body, whether of the nobles or of the individuals, to practice those three powers, that of demanding laws, that of executing the general population resolutions and of attempting the cause of the people. Along these lines, the principle of Separation of Powers glorifies circumstances wherein one individual or a solitary power is not wheeling the entire force.

The doctrine of Separation of Powers leads its origin in the American Constitution. The Policy makers believed that putting absolute power in the hands of any one organ may result in a situation of autocracy. The administrative force is generally vested with the Congress under Article 1, while the executive force with the President under Article II and eventually the legal force with the Supreme Court under Article III.

Besides, there are different procurements which accommodate a check and offset system. The first case in which the force of judiciary to procure administrative activities was set down was *Marbury v. Madison*[92]. While on the other hand when India which being a state that received legislative framework, is compared from the United Kingdom the latter does not support the doctrine of Separation of Powers.

The Constitution of India has not out rightly or expressly adopted the doctrines of Separation of Powers while the American Constitution and acknowledged it and provided rigid framework for the execution of the same. The Constitution of India procures the theory of Separation of Powers in Part V and Part VI of the Constitution and safeguards that the three wings i.e. executive, legislature and the judiciary are managed as independent parts and.[93]

The Directive Principles of State Policy[94]expressly lies down that the procurement which provides for separation of judiciary vehemently is not enforceable through

[92](1803) 1 Cranch 137.

[93] Delhi Laws: In Re 1951 SCR 747.

[94]*Supra n. 89.*

the doors of Court. Moreover the Constitution of India does not acknowledge the doctrine of Separation of Power in its true, strict and clear sense.

However the doctrine seems to play a pivotal role and is well valued as an essential aspect of the basic structure of the Constitution of India. This can be inferred through various judgments as procured by the highest judiciary in the country[95].

The prime agenda of the legislature must revolve around performing law making functions; while the executive should focus on actualizing such laws that are being made by the legislature, and the judiciary role on the other hand must be to keep a check on both.

The Hon'ble Supreme Court in its ruling has laid down that: "we follow a separation of functions and not powers and hence it is not rigid"[96]. In India the major focus is on separation of functions amongst the three organs rather than Separation of Power and in doing so, some of the functions may overlap or bisect each other but the essentiality lies on the fact that each of the three organs must support each other equally to garner a strong working structure.

Importance of the Doctrine

The doctrine of separation of power in its actual sense is exceptionally unbending and this is one of the reasons of why it is not acknowledged by countless around the world. The primary object according to Montesquieu in the Doctrine of separation of power is that there ought to be administration of law instead of having will and impulses of the official. Additionally another most essential highlight of the above said doctrine is that there ought to be freedom of judiciary i.e. it ought to be free from alternate organs of the state and in the event that it is so then equity would be conveyed legitimately.

The judiciary is the scale through which one can gauge the real advancement of the state and if the judiciary is not autonomous then it is the initial move towards a

[95] *KeshavanandaBharathi v. State of Kerala*, (1973) 4 SCC 225.

[96] *Ram JawayaKapur v. State of Punjab*, AIR 1955 SC 549.

domineering manifestation of government i.e. power is packed in a solitary hand and on the off chance that it is so then there is a penny percent shot of abuse of power. Consequently the Doctrine of separation of power do assumes a crucial part in the making of a reasonable government furthermore reasonable and fitting equity is administered by the judiciary as there is autonomy of judiciary. Additionally the significance of the above said doctrine can be followed back to as right on time as 1789 where the constituent Assembly of France in 1789 was of the perspective that "there would be not at all like constitution in the nation where the doctrine of separation of power is not acknowledged".

Doctrine of separation of powers in Indian perspective

The Constitution of India sets out a utilitarian separation of the organs of the State. Article 50 of the Constitution sets out that State should competent enough to make moves to differentiate/separate the judiciary from the executive or from each other's control. This is with the end goal of guaranteeing the freedom of judiciary. Article 122 and 212 gives legitimacy of procedures in Parliament and the law-making bodies can't be made subject to any Court and enjoy exclusivity. This guarantees the separation and insusceptibility of the law-making bodies from judicial intercession on the aspect of procedural inconsistency.

Moreover, while examining in the case of Judiciary the behaviour or conduct of a judge of the Supreme Court and the High Courts can't be examined or scrutinized in the Parliament and the State Legislature. This has been indicated by Article 121 and 211 of the Constitution of India.

Article 53 and 154 individually, of the Constitution of India provides that the executive power of the Union and the State should be vested with the President and the Governor and they enjoy invulnerability from civil and criminal liability.

5.2. Independence of Judiciary:

Independence of Judiciary means that there should be shield over judiciary to protect it from legislative and executive powers, i.e. there should be no influence of the other two branches on the judiciary. Judicial independence is sine qua non

in the functioning of the contemporary government machinery.[97] The judicial independence has been recognized from the very earlier period and is very important feature for the maintenance of rule of law and social security. Although judicial independence may be abstract social value, its existence depends on specific institutional elements that can be analyzed.[98] *The primary talk on the independence of the judiciary is based on the doctrine of separation of powers which holds its existence from several years. The doctrine of separation of powers talks of the independence of the judiciary as an institution from the executive and the legislature*".[99]

According to Montesquieu, "*When the legislative and executive powers are united in the same person, or in the same body or Magistrate, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the Legislative and Executive power. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be ends of everything were the same man or the same body to exercise these three powers...*"[100]

Phillips and Wade were of the opinion that doctrine of separation of powers consists following characters:[101]

- The same person should not form more than one organ of the Government.
- One organ of the Government should not exercise the function of other organs of the Government.
- One organ of the Government should not encroach with the function of the other two organs of the Government.

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[97]M. P. JAIN, INDIAN CONSTITUTIONAL LAW, (6th ed. 2010), 507.

[98]Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 Wm. & Mary Bill Rts. J. 1 (1996).

[99]Atin Kumar Das, *Independence Of Judiciary In India: A Critical Analysis*" (Mulnivasi Organizer).

[100]Montesquieu, De L' Espirit Des Lois, 1748 quoted in JUSTICE D.D. BASU: ADMINISTRATIVE LAW, 23.

[101]TejBahadur Singh,*"principle of separation of powers and concentration of authority"*, I.J.T.R., U.P., Lucknow.

Therefore, as per the concept of Separation of power it is very clear that there is a need of an independent judiciary. According to the scholars writings independence of judiciary means two things: Firstly, independence of judiciary as an institution itself and secondly, independence of the individual judges, which we can conclude that if there is no independence of the individual judges than there will be no independence of the judiciary as an institution and therefore both must go hand in hand.[102]

There are three main reasons with which we can identify that what is the need to give utmost importance to the independence of judiciary. They are as follows:

1. To check the functioning of the organ: Judiciary acts as a guardian of the Constitution and ensures the organs of the state are working in their respective areas and according to the provisions of the constitution.
2. To interpret the provisions of the Constitution: The draftsman of the Constitution were aware that in future the ambiguity will arise with the provisions of the constitution, so they ensured that the judiciary must be independent and self competent to interpret the provision of the constitution in such a way to clear the ambiguity but such an interpretation must be unbiased i.e. free from any pressure from any organs like executive. If the judiciary is not independent, the other organs may pressurize the judiciary to interpret the provision of the constitution according to them.
3. To adjudicate on disputes referred to it: A judiciary is expected to deliver judicial justice and not a committed and partial justice. By committed justice we mean to say that when a judge emphasizes on a particular aspect while giving judgement and not considering all the aspects involved in a particular situation. So if the judiciary will not be independent the other organs may restrict the judges to consider all the aspects and may stress them to consider only those aspects which are in their favor.[103]

Justice Bhagwati, in *Union of India v. Sankal Chand Himatlal Sheth*[104]asserted that independence of judiciary is the basic feature of the constitution. Also in the

[102]*Id.*

[103]*Id.*

[104](1977) 4 SCC 193.

S.P Gupta case[105]the same ratio of the previous case was followed.

5.2.1. Appointment of Judges as a vital branch of Independence of Judiciary

The appointment of the judges was primarily rested with the President, after consultation with the Chief Justice of India for the Supreme Court.[106] 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.[107]

The practice of appointment of Judges through Collegium system was developed by the Supreme Court through three cases which popularly came to be known as The Three Judge's case, 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 collegium system.

Under the collegium system, now there is no role of an executive in appointing judges for the Supreme Court or the High Court. Judges of Supreme Court are now appointed by the collegium consisting of Chief Justice of India and four senior most judges of the Supreme Court and in case of High Court judges collegium consisting of Chief justice of India and two senior most judges of the Supreme Court. There is a reason for which this shift was required; 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. Government will appoint those judges who in their opinion are favourable to them; this practise will be against the principal of Independence of Judiciary as the appointed judges will deliver judgements in the favour of the Government.

Appointment also includes appointment of judge as the Chief Justice of India; there is a possibility that Government in order to fulfil their ill motive can overlook the convention of appointment of senior most Judges as the Chief Justice of India as he is the head of the administrative functions of the Supreme Court. In the past also three attempts have been made to overlook the convention.

The first attempt can be tracked from the year 1943 when Justice Patrick Spens

[105] AIR 1982 SC 149

[106] *Supra n. 31.*

[107] *Supra n. 32.*

was appointed Chief Justice of India, neglecting Justice Srinivasa Varadachariar who was the senior most judge at that instance. It was alleged that basis for supersession was racial, as British judges and lawyers did not wanted an Indian as the Chief Justice of India.[108]Second can be tracked in the year 1973, April 25, just the day after the pronouncement of the landmark judgment of the *Kesavananda Bharti case*[109], the Indira Gandhi Government departed from the convention and appointed Justice A.N Ray as the Chief Justice of India who decided the three major cases in the favour of Government though in his minority opinion namely in the *Bank Nationalization Case*[110], the Privy Purse case[111]and in the *Kesavananda Bharti case* itself and suppressed the three senior most judges who decided the case against the Government. The former Attorney General of India, CK Daphtary caustically remarked it as, "*The boy who wrote the best essay won the first prize*."[112]

Post 1980 it was widely believed that executives were blocking the appointments of the judges nominated by the CJI and it was also believed that those judges are being appointed who executive feel that favourable judgments can be obtained for dubious considerations from complaint judges.[113]

After the collegium system the ultimate power of appointment of judges has come into the hands of judiciary, the President has to appoint a judge who is approved

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[108]Alok, *"How India Missed Getting Its First Woman Chief Justice India"* (Critical Twenties, November 26, 2010), *available at:*http://www.criticaltwenties.in/lawthejudiciary/how-india-missed-getting-its-first-woman-chief-justice-india, Last accessed on 12th April, 2015.

[109]AIR 1973 S.C. 1461.

- In this case it was said that, there are some basic feature of the Constitution of India which cannot be altered or amended by the simple majority of the parliament of the India. The apex court in April, 1973, comprising of 13 judges in a majority opinion of 7-6 gave the pronounced that:

  "*Article 368 of the Constitution does not enable Parliament to alter the basic structure orframework of the Constitution*"

[110]*R.C. Cooper v. Union of India*, AIR 1970 S.C. 564.

[111]*H.H. MaharajadhirajaMadhavRao v. Union of India,* AIR 1971 SC 530.

[112]*Supra n. 30.*

[113]Anil Divan, *"A Trojan horse at the Judiciary's door"*, The Hindu, June 14, 2013, *available at:* http://www.thehindu.com/todays-paper/tp-opinion/a-trojan-horse-at-the-judiciarys-door/article4812743.ece, Last accessed on 12th April, 2015.

by the collegiums. Now there is no actual role of the executive in the appointment of judges. Judges know the intellect of a person who appears before them and therefore person with perfect ability is appointed for judgeship. Also, in the case of appointment of the Chief Justice of India, the senior most Judge is appointed, as he is the most experienced judge and had spent maximum time then other judges. The appointment of judges through this method ensures Independence of Judiciary as there is no influence of the other two branches and impartial and unbiased judgments can be delivered by the appointed judges.

5.3. National Judicial Commission

The Constitution (67th amendment) Bill, 1990 proposed the formation of a National Judicial Commission for the appointment of Supreme Court and High Court Judges and for the exchange of Judges from the High Court. The primary aim was to prevent any discretion in appointments and. This Judicial Commission was in view of the recommendations in the 121stLaw Commission Report. It was to consist of the Chief Justice of India, two Senior Supreme Court Judges, Chief Justice and two Judges of the High Court wherein appointments were to be made. This Bill was never passed. The proposition for a National Judicial Commission has been revived by the Constitution (98th amendment) Bill, 2003 and once again contemplates the formation of a National Judicial Commission. It proposes to present another Chapter consisting of only one Article in the Constitution furthermore proposes to make consequential changes to other Article in the Constitution.

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*."[114]

5.4. The Arrears Committee

In the year 1989, the Government of India appointed, on the basis of the

[114]*See* Preamble of The National Judicial Appointment Commission Bill, 2014.

recommendation made by the Chief Justices Conference, a Committee of three Chief Justices of the High Courts to go into the question of large arrears in the High Courts and to suggest measures to reduce them.

In that connection, the Committee (Justice V.S. Malimath, C.J. Kerala, Justice P.D. Desai, C.J. Calcutta and Dr. A.S. Anand, C.J. Madras) constituted by the Government of India on the recommendation of the Chief Justices Conference, went into and examined the method of appointment of Judges. The Committee also considered the merits and demerits of the Constitution (Sixty-seventh Amendment) Bill, 1990 proposing constitution of the National Judicial Commission.

5.4.1. Views of Arrears Committee against constitution of a National Judicial Commission

The Arrears Committee also examined the Constitution (Sixty-seventh Amendment) Bill, 1990.The Committee first noticed the unanimous resolution of the Chief Justices Conference held on October 10-11, 1988 opposing the concept of a National Judicial Service Commission as recommended in the 121st Report of the Law Commission. The Resolution said that such a Commission was "neither necessary nor expedient". It then added: "The strain to which the system has been put in the recent past on account of erosion of the primacy of the judiciary in the matter of appointment to the higher judiciary is capable of being rectified by drawing suitable ways and means within the existing constitutional framework and appropriate measures in that direction being taken expeditiously."

The Committee then noticed the proposed Article 307 (in Part XIIIA) and strongly opposed the inclusion of the Chief Minister in the Commission for appointment of High Court Judges. It observed:

- "Instead of removing the vice of executive interference, which has vitiated the working of the present system, the presence of the Chief Minister on the recommendatory body actually elevates him from the status of a mere consulter to the position of an equal participant in the selection process of the recommendatory body. By making the Chief Minister as an equal party, when he is not equipped to offer any view in regard to the merit, ability, competency, integrity and suitability of the candidates for appointment, the scope of executive interference is enhanced."

The Committee recommended a different composition of the Commission. It suggested that besides the Chief Justice of India and two senior-most Judges, two more members be appointed by the President on the recommendation of the Chief Justice of India from out of the sitting Judges of the Supreme Court. The Committee set out the procedure to be followed under Article 307 (4)(proposed).

It reads:

Article 307(4) provides that the procedure to be followed in the transaction of business by the Commission shall be regulated by the law made by the Parliament and until then, in accordance with the rules made by the President, in consultation with the Chief Justice of India. The procedure to be followed in the matter of initiating recommendation for appointment of Judges and about their consideration by the Commission is matters of vital importance. A wrong and imperfect procedure without necessary safeguards may virtually nullify the object of the Constitutional provision. It is an unsatisfactory situation that till the procedure is regulated by any law made by the Parliament; the same can be prescribed by the President in consultation with the Chief Justice of India. The President would act on the advice of his Council of Ministers. He is only required to consult the Chief Justice of India and consultation is not the same as concurrence.

There is, thus, scope for the executive to prescribe by rules a procedure which may not be conducive to the attainment of the object of the proposed amendment. In the opinion of the Committee, the procedure should be prescribed along with the enactment of Article 307 and the amendment of other articles and it should be annexed as a Schedule to the Constitution. That would almost ensure that the prescribed procedure then cannot be amended by a simple majority and the possibility of tinkering with it is minimized. Such procedure should *inter alia* provide for full and formal record of the deliberations of the Commission being maintained which alone would constitute the official record of the transaction of the business of the Commission."

The Committee then analyzed the proposed article 124(2) and noticed that according to it, the recommendation of the Commission is not binding upon the

President and then referred to the several situations that may arise in that behalf. Accordingly, the Committee made the following recommendations

In the light of the foregoing discussion, the Committee recommends:

- That the reasons recorded for not accepting the recommendation of the Commission regarding appointment of a Judge of the Supreme Court shall be communicated to the Commission to enable it to reconsider the matter in the light of such recorded reasons.
- That in case the Commission on reconsideration affirms its earlier recommendation; it shall be made obligatory on the President to make the appointment in accordance with such recommendation.
- That the reasons should also be required to be recorded in case the appointment is proposed to be made by varying the order in which the names are recommended by the Commission; such reasons should be communicated to the Commission to enable it to reconsider the matter and in case the Commission, after reconsideration, reaffirms the order in which the recommendations had been made, the appointments shall be made in that order.
- A reasonable time limit shall be fixed within which the President to take a decision on the recommendation of the Commission."

With respect to the appointment of Chief Justice of India dealt with by Article 124(2), the Committee made the following recommendation:

- That the second proviso to Article 124(2) be deleted and an appropriate proviso be substituted to the effect that the senior most Judge of the Supreme Court shall ordinarily be appointed as the Chief Justice of India. However, in case he is not proposed to be appointed as Chief Justice of India, reasons therefore shall be recorded in writing and the appointment shall then to be made in consultation with the seven Judges next in order of seniority to the senior most Judge, after communicating to them the recorded reasons."

With respect to Article 217 (appointment of High Court Judges), the recommendations of the Committee, are similar to those relating to appointment of Supreme Court Judges.

5.4.2. Impact of the Composition of National Judicial Commission:

When we talk about National Judicial Commission, what is in a far-reaching way imperative is its composition. Its composition ought not be, for example, to influence specifically or by implication the autonomy of the judiciary and the force of legal review both of which have been held to be the essential highlights of our Constitution.

Our Constitutional framework involves the composed Constitution, the conventions which have been developed and are being taken after and the interpretation of the Constitution by the Supreme Court. In spite of the fact that Articles 124 and 217 discuss a Judge of the Supreme Court and of the High Court being named by the President in consultation with the Chief Justice of India and certain other indicated powers, a convention has evolved over the most recent 50 years where under the proposition for appointment is started by and exudes only from the Chief Justice of the High Court (on account of appointment to the High Court) and the Chief Justice of India (on account of appointment to the Supreme Court). The exceptions to this guideline have been very few, may be not more than a modest bunch over the last fifty one years. Even where the executive thought about a few persons for appointment, the suggestion was put to the concerned Chief Justice and if the recent concurred with it, he sent up the proposition. It can, accordingly, be said that a convention that every proposition ought to radiate and start from the Chief Justice is immovably settled in this nation.

The significance and ambit of the "consultation" contemplated under Articles 124 and 217 has been altogether wrangled about and pronounced upon by the Supreme Court. Even however a specific interpretation was put thereon in S.P. Gupta (1981), which was in reality at variance with the previously stated convention; it was over-ruled immediately by a bigger Bench in SCAORA (1993). (The proportion of the said two decisions has as of now been alluded to hereinabove)

Indeed even amid the period 1981 to 1993, the previously stated convention was taken after, may be with three or four aberrations.

What is further critical is that when the question identifying with the importance of "consultation" contemplated by the said Articles emerged for consideration again in the Presidential reference (1998), the Government of India was requested that elucidate its remain as for the decision in SCAORA. The scholarly Attorney General expressed, on instructions- an announcement which is recorded in the judgment of the court that the Government of India was not looking for a review or reconsideration of the greater part decision in SCAORA and further that the Union of India would acknowledge and regard as tying the answers of the Supreme Court on the nine questions alluded to it.

The opinion rendered on the Presidential reference has reaffirmed the interpretation of the said expression put in SCAORA with a slight improvement i.e., the collegium in the Supreme Court was to contain the Chief Justice of India and four senior judges rather than the Chief Justice of India and two senior most judges as provided by SCAORA.

It should, thusly, take after that under our constitutional framework, the proposition for appointment of a judge to the Supreme Court or to the High Court ought to radiate and begin from the Chief Justice of India (and his associates, as elucidated in SCAORA) or the Chief Justice of High Court (and his partners), as the case may be, and from no other quarter. Even if the executive has someone as a top priority, they must propose it to the Chief Justice and it is for the last to choose whether to suggest that name or not. Secondly, the consultation contemplated by the said Articles ought to be a full and effective consultation and the opinion of the Chief Justice of India is qualified for supremacy, whether the appointment is to the Supreme Court or to a High Court. The collegium and the methodology showed in the said two decisions of the Supreme Court must be perused into Articles 124 and 217 – or rather the said Articles must be seen as translated in the said two decisions. Both these perspectives are however features of the autonomy of judiciary– i.e. its fundamental component.

5.4.3. Composition of the National Judicial Appointment Commission

The National Judicial Appointment Commission comprises of Six member, the members of the commission are as follows:[115]

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

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.

5.4.4. 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.

5.4.5. Reference by Central Government to the National Judicial Appointment Commission

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.

[115] 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, Last assessed on 31stMarch, 2015.

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

5.4.6. 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:[116]

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 favour of recommending a particular person for the judgeship.

5.4.7. Procedure to be followed for Appointment of A Judge for The High Court in India[117]

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

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

[117] *Id.*

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.

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.

CHAPTER- 6

NJAC A BOON OR A BANE

6.1. Contentions favouring National Judicial Appointment Commission

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*[118], the Supreme Court suddenly became the most powerful apex judicial institution, among all other apex judicial intuitions of the world[119] 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 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

[118] *Supra n. 34.*

[119] *Supra n. 51.*

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. [120] But what constitutes judicial independence is a judge's freedom to apply his/her interpretation of the law to each case before her[121]. The principle of the independence of the judiciary seeks to ensure the freedom of judges to administer justice impartially, without any fear or favour[122]. 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 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[123]. 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[124]. Even the commission creates a balance where the appointment is made on the recommendation of all the wings of government, including the

[120] *Supra n. 50.*

[121] In *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) ("It 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, (1970), 143-45; 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).

[122] Akkas, Sarkar Ali, *Appointment of Judges: A Key Issue of Judicial Independence*, Bond L. Rev, 16, 2004.

[123] *Id.*

[124] As in USA.

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 Judges* [125] and *Third Judges* [126] case by giving representation to both executive and judiciary.[127]

6.1.1. 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 executives or judiciary in matter of appointment of judges[128]. 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[129]. 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[130]. 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.

6.1.2. Creates a 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

[125] AIR 1994 SC 268.

[126] AIR 1999 SC 1.

[127] *See* Section 3 ofHigher Judiciary (Appointment and Transfer) Act, 2013.

[128] *Supra n. 30.*

[129] *Id.*

[130] *Id.*

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[131]. 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[132]. 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.

6.1.3. The Act Also Applies To The Transfer of Judges

In the Collegium system after the *Third Judge Case*[133], 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.

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

[131] Anthony Mason, *The Appointment and Removal of Judges*,(Judicial Commission of New South Wales, December 19, 2013, *available at:*http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbmason.htm, Last accessed on 12th April, 2015.

[132] *Id.*

[133] AIR 1991 SC 1.

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.

6.2. Contentions against the National Judicial Appointment Commission

6.2.1. 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.[134]

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

[134]*Supra n. 51.*

democratic thinking.[135] 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,[136] bringing the even the influence of executive in the appointment of judges will affect the enforcement of fundamental rights.

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,[137] which, fortunately, are basic features of our Constitution.[138] 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.[139]

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 same[140] rather bringing it in the complete control of the legislature and indirectly in control of executives[141].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.

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

[136]*Shamdasani v. Central Bank of India*, AIR 1852 SC 59; Also in *VidyaVerma v. Shivnarain*, AIR 1956.

[137] 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 (2009) SCC 1.

[138]Ram Jethmalani, "*Two Bills that threaten Democracy*", The Sunday Guardian, 25th December 2013.

[139]*Id.*

[140] Anil Divan, *"Upholding Judicial Independence",* The Hindu, 7th December 2013.

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

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. Union of India*[142]. 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[143] 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 other words, this Act is a corrupt and unconstitutional method of setting aside the nine-judge bench decision of the Supreme Court[144], by throwing dust in the eyes of the people. It is evident from the mechanism provided in the Constitution [145] 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.

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[142](1993) 4 SCC 441.

[143]*Supra 23.*

[144]*Supra n. 34.*

[145] *See* Art. 368 of Constitution of India.

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[146]. This judgment establishing executive supremacy was set aside by the nine judge bench judgment[147] 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 *Kesavananda Bharti* judgment of 1973.[148]

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.[149]

6.2.2 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[150], 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

[146] *S.P. Gupta v. President of India and Ors,* AIR 1982 SC 149.

[147] *Supra n. 34.*

[148] *Supra n. 95.*

[149] *Supra n. 34.*

[150] Art. 146 of Constitution of India.

dysfunctional. In addition, the confidentiality and secrecy of the Panels 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 the Consolidated Fund of India as provided for the Supreme Court[151] and the High Court[152] (Article 146 and 229). The Panel must be financially independent of executive budgetary control.

6.2.3 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[153]. 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 Supreme Court in *L. Chandra Kumar v. Union of India*[154] held that "while 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

[151] Art. 149 of Constitution of India.

[152] Art. 229 of Constitution of India.

[153] *Supra n. 145.*

[154] AIR 1997 SC 1125; 1997 (1) BLJR 735; (1997) 1 CALLT 55 SC.

unconstitutional goal can change the whole composition, and disturb the working of the judiciary by controlling the appointment and transfer of the judges.

6.2.4 Exemption from the Right To Information (RTI):

One of the ways the Judiciary can be considered responsible is the point at which the individuals have the privilege to realize what precisely they are doing. This falls into place without any issues in a law based manifestation of government. In the popular "*Raj Narain v. Indira Gandhi*" case, the establishment for the RTI was laid by the SC. It expressed "the people of the nation have the right to know about public Act. This has basically emerged from the idea of the right to speak freely. To cover it with the veil of legacy the normal routine business is not in light of a legitimate concern for the general population." This is a prime protection against debasement. There are truth to be told, in numerous nations where open exposure of advantage is needed as a measure for good government. In the US, the Ethics in Government Act 1976 requires the yearly exposure of budgetary data by all identified with approach making obligation. This issue of advantage presentation emerged when Subhash Agarwal, asked about the data whether the judges were following the 1997 "Set of principles". The Central Information Commission had coordinated the data officer of the court to get the data from the CJI's office and give it to the candidate. This incited the SC to document a writ appeal to in the Delhi HC, guaranteeing that benefit exposure was exempted under RTI follow up on the premise that- this data was revealed by the judges to the Chief Justice under "trustee relationship." The twofold standard of the courts on RTI Act was seen when despite the fact that the courts were incorporated in the meaning of Public Authorities the greater part of the HCs did not even choose Public Information Officers (PIOs) even months after this demonstration came to constrain. Besides data in regards to the arrangement of Class 3 and 4 representatives by the High Court had been denied under the Delhi HC decides that accommodate:

Exception from the divulgence of the data indicated under area 8 of the demonstration should not be uncovered and made accessible and specifically the accompanying data might not be unveiled:

Such data which is not in consonance or does not identify with Judiciary capacities and obligations of the court and matters coincidental and subordinate thereto.

6.2.5 Judges Inquiry Act:

The legal cases that any outside body having disciplinary controls over them who trade off their freedom so they have set up an "in-house component" examining defilement. This was proposed by the Judges Inquiry Act Amendment Bill 2006 which accommodated a National Judicial Council comprising of the CJI, two senior-most judges of the SC and two CJ's of HCs as individuals to enquire assertions. The issue which emerges is that in this in-house methodology the judges view themselves as a 'nearby fellowship' and subsequently are unwilling to make any stride against them. What is offensive is Section 33, which says not to uncover any data identifying with the grumbling to any individual in any procedure aside from when coordinated by the Council. This will make it difficult to pitch the charges. Also, regardless of the fact that it discovers a judge liable of genuine wrongdoing, it can just suggest prosecution which again tries for voting in the parliament, at last coming up short as we saw in the Ramaswamy case. The main positive highlight of the bill is that it starts an enquiry into the affirmations of wrongdoing of a judge.

6.2.6 The Judicial Accountability and Standards Bill

The Bill replaces the Judges (Inquiry) Act, 1968. It tries to:

- create enforceable gauges for the conduct of judges of High Courts and the Supreme Court,
- change the current instrument for investigation into allegations of misbehavior or inadequacy of judges of High Courts and the Supreme Court,
- change the procedure of removal of judges,
- enable minor disciplinary measures to be taken against judges, and
- require the declaration of benefits of judges.

The Bill obliges judges to take after specific norms of conduct. Objections against judges can be made on grounds of non-agreeability with these benchmarks or certain activities, for example, corruption, stubborn ill-use of force or constant inability to perform obligations.

A few activities restricted under the Bill are:

a) close association with individual individuals from the Bar who rehearse in the same court,
b) allowing relatives who are individuals from the Bar to utilize the judge's home for professional work,
c) hearing or choosing matters in which an individual from the judge's family or relative or companion is concerned,
d) entering into open verbal confrontation on political matters or matters which the judge is liable to choose, and
e) engaging in exchange or business and speculation in securities.

CHAPTER- 7

CONCLUSION & RECOMMENDATIONS

- **Preamble and the Object**

The preamble of the current National Judicial Appointment Commission is ""that to accommodate the arrangement of the Judicial Appointments Commission with the end goal of suggesting persons for arrangement as Chief Justice of India and different Judges of the Supreme Court, Chief Justices and different Judges of High Courts, its capacities, technique to be trailed by it and for matters associated therewith or coincidental thereto", at present it is exceptionally insufficient, the introduction must be framed in congruity with the UN Basic Principles on the Independence of Judiciary,1985[155]. The object of the demonstration ought to be arrangement of autonomous and capable Judiciary which can guarantee the tenet of law. Arrangements made must be legitimacy base arrangement which is a piece of methodology in diverse nations too.

Demographic elements must be likewise contemplated while selecting Judges while designating judges for the most elevated court, it makes measure up to representation from all the parts of the nation and further reinforce the faith in legal.

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

One of the real disadvantages of the Act is that the arrangement of the commission has not been made piece of the alteration. It has pulled in heaps of feedback, i.e. a sythesis of the board can be changed by a straightforward larger part.

It is prescribed that the synthesis of the board must be made piece of the correction so that it can't be alter by the basic dominant part. Legal arrangement is a piece of Chapter IV Part V of the Constitution of India, and in this manner requires no less than two third larger parts of both the places of Parliament and 50% of the congregations of the state.

On the off chance that the synthesis of the board will be made piece of the

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

correction than it will guarantee the populace of the nation that the demonstration conveyed into power is just to make straightforwardness during the time spent legal arrangement and there is no evil thought process which can modify the standard of law. In the event that any further corrections will be needed than it could just be finished by no less than two third dominant part of the Parliament of India and at any rate 50% of the State Assemblies.

- **Diversity**

  Differing qualities in judiciary is spine of a nation lawful framework. Assorted qualities as far as sexual orientation, demography, rank, ethnicity, religion and so on a wide examination could be possible if there is differences in the arrangement of Judges, it further advances the trust in the populace of the nation. The current demonstration does not specify anything with respect to the differing qualities in the arrangement methodology.

  India is an extremely plural society and if the assorted qualities will be looked into for arrangement than the Indian Judiciary will be more solid and delegate and will likewise be mindful about the diverse needs of the distinctive parts of the general public.

  In South Africa differences is given all that much significance it expresses "The Commission, in performing its capacities under this Part, must have respect to the need to energize differing qualities in the scope of persons accessible for determination for arrangement". It is prescribed to ad lib a same methodology while making legal arrangements in the India.

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

  Creation of the board is exceptionally vide, for eg. Commission of South Africa has 23 individuals for making arrangements, a comparable model must be received, more individuals from the general public means meet representation from all the divisions of the general public, additionally legal arrangements are extremely essential issue, in this manner more individuals means more materialness of brain while settling on arrangement choices.

Other critical thing is that there is no representation from the layman in the commission. We have seen in distinctive nations layman is likewise an individual from a commission, this reinforces the trust of individuals in the process and makes arrangement handle more open.

- **Standard criteria for evaluating merit**

The Act says that proposal of that individual will be done who has respectability, limit and staying in court, it shows towards an authenticity based plan, yet there is no criteria itemized to survey the estimation of the likelihood for the judgeship.

In America evaluation activities are there to judge the estimation of the cheerful, it is done on the reason of respectability, character, ability to administrate, capacities, data, identity, verifiable aptitude et cetera.

South Africa have thought of an entire distinctive criteria[156], they judge competitor on the premise of trustworthiness, inspiration and vitality, specialized ability, experience, learning of the need of group, potential, and so on.

Arrangement on this premise guarantees that chose competitor is totally competent to hold the workplace as judge. Individuals of the nation feel secure as judges can think in all the accessible headings according to the needs of the general public.

In this manner, I think a comparable assessment component must be presented for assessing before making any arrangements to the higher courts.

- **Clarity on power of President**

According to Section 4 of the National Judicial Appointment Commission Act, it is the obligation of the commission to prescribe name of an individual to be named as a judge to the President, it implies that the Judicial Appointment Commission is not the last arrangement body and simply a suggesting body.

It is not pass that climate the proposal made to the President is last, or the President

[156]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

has the ability to set aside the arrangement.

As I would like to think, so as to bring more clarity, force of the President of India, must likewise be determined.

At long last, as I would see it is an extremely novel step taken to constitute a commission with the end goal of arrangement and move of judges in higher Judiciary. In the majority of the nations a comparative sort of model has been embraced.

In such models there is no encroachment of the detachment of force and they even guarantee guideline of law. Arrangements made are extremely open and straightforward.

In setting of India, certain progressions and illumination must be made, so that the official and the legal, while working in their power and with no conflicts, settle on choice in regards to the arrangement and exchange of Judges. It will carry straightforwardness and responsibility and judges with trustworthiness, great character, and experience will be designated. It will further upgrade the trust of the individuals in legal and maintain the enthusiasm of the country.

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