International Journal of Law
www.lawjournals.org
ISSN: 2455-2194
Received: 28-08-2022, Accepted: 13-09-2022, Published: 29-09-2022
Volume 8, Issue 5, 2022, Page No. 79-87

Appointment of judges in high courts and supreme court: An analysis

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Abstract
Sovereign power of the State is distributed into Executive, Judiciary and Legislature. Each component acts as countervailing forces against the other, to prevent accumulation of Sovereign power in one entity, 'Separation of Power' of Montesquieu lends credence to this system. We, with rich heritage of this philosophy from the British, engrafted in our Constitution, this remarkable barrier of governance or, more precisely the field of play of three pillars of governance. The 'basic structure theory' churned out by the Constitutional Court has given judiciary an insulated status by coining 'Independence of Judiciary' as one of the several attributes of 'Basic Structure of Constitution'.

Keywords: high courts, supreme court, Independence of Judiciary, basic structure of constitution

Introduction

Civilised democracies elect by voting their Legislators to sit in the Legislature. The Legislators, in turn, choose the Executive (Council of Ministers). The Executive, with consultations of Members of Judiciary, selects the Judiciary. In the entire exercise being carried out in this way, the will of the People is reflected in the crowning process of the three limbs of Sovereign. Consciously, this paramountcy of Will of the People is given recognition in the Indian Constitution [1].

Keeping in mind the separation of powers between the judiciary and the executive, the framers of the Constitution came up with threeimportant provisions to provide the procedure of appointment of judges working in different courts, that is, the Supreme Court, the High Court and the District Courts.

For the Appointment of the judges of the Supreme Court, there is a provision under Article 124 of the Constitution of India which lays down:

1. There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

2. 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:

Provided further that—

a. a Judge may, by writing under his hand addressed to the President, resign his office;
b. a Judge may be removed from his office in the manner provided in clause (4).

(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.

3. A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—

a. has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
b. has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
c. is, in the opinion of the President, a distinguished jurist.

Explanation I.—In this clause "High Court means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

Explanation II.—In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocate shall be included.

4. A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than twothirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

5. Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

6. Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and

subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

7. No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.

Article 217 of the Constitution of India speaks about the Appointment of Judges of the High Courts:

1. 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 years.

Provided that-

a. a Judge may, by writing under his hand addressed to the President, resign his office;
b. a Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court;
c. the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

2. A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and-

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

Explanation.- For the purposes of this clause-

a. in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an Advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;

b. in computing the period during which a person has held judicial office in the territory of India or been an advocate of High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.

3. If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

Additional Judgesand Acting Judges for High Courts are appointed under Articles 224 and224A. The transfer of High Court Judges and Chief Justices, of one HighCourt to another, is made under Article 222.

Supreme Court Judge was conceived to be appointed by the President (Executive Head) in consultation with such Judges of the Supreme Court and of the High Courts as the President may deem necessary. But in the case of appointment of Supreme Court Judge, there must be mandatory consultation with Chief Justice of India. Likewise, in the appointment of Judges of various High Courts, the President shall consult the Chief Justice of India, the Chief Justice of the concerned High Court and the Governor of the State. With the commencement of the Constitution, this will of the People worked efficaciously through appointment procedure moulded by the Memorandum of Procedure. The Executive, through the Ministry of Home Affairs, often initiated the process of appointment by nomination and elicited the views of the Chief Justice of India in the matter of appointment of Supreme Court Judges [2].

The role of judges is indispensible in the delivery of justice. The judiciary seeks to ensure that all the organs of the state are within its powers, thereby ensuring rule of law. Besides this, the judiciary assists in progression and protection of the society by preventing injustice in addition to bring about social change for the betterment of the citizens and democracy of India. It acts as an interpreter and guardian of the Constitution of India.

The quality of the judiciary depends upon the individual judges. Thus, the proper selection of judges is of paramount importance. The significance of every single appointment to the Supreme Court or a High Court was emphasized in the majority opinion, in the case of *K. Veeraswami v. Union of India* [3]. It said:

A single dishonest judge not only dishonors himself and disgraces his office but jeopardizes the integrity of the entire judicial system…a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and tohave the public confidence thereof [4].

In view of the above, it becomes extremely essential to ensure that the right persons sit in the prestigious position of judges. By the beginning of this decade, there emerged unanimity and broad consensus among political parties for contriving a mechanism, where there is greater or equal say for Executive in the matter of appointment of Judges of Constitutional Courts.

99th Constitutional Amendment Act, 2014

Towards the end of the UPA regime, the government sought to tame judges by demolishing the collegium. It brought in a constitutional amendment to provide for the National Judicial Appointments Commission (NJAC) — an independent commission with three senior judges, two eminent outsiders and the Law Minister. The UPA's inept parliamentary handling led to a failure of the bill [5].

A commanding NDA victory in 2014 saw the Modi government revive the proposal and Parliament amended the

Constitution, brought about the 99th Amendment to provide for the National Judicial Appointment Commission.

This wasn't the first time when the NDA government tried to alter the collegium system. When Atal Bihari Vajpayee was at the helm, the NDA government set up the Justice M.N. Ventakachaliah commission to study if the current system of appointment of judges needed any changes. The Commission recommended the formation of National Judicial Appointment Commission which was almost similar to the current form of NJAC, but it couldn't materialize then [6].

The Constitution (121st Amendment) Bill, 2014 was introduced by Minister of law and Justice Mr. Ravi Shankar Prasad in Lok Sabha on 11thAugust 2014. The Bill seeks to enable equal participation of Judiciary and Executive, ensure that the appointments to the higher judiciary are more participatory, transparent and objective.

The National Judicial Appointment Commission was established by amending the Constitution [Constitution (Ninety-Ninth Amendment) Act, 2014] passed by the Lok Sabha on 13thAugust2014 and by the Rajya Sabha on 14thAugust 2014. Alongside, the Parliament also passed the National Judicial Appointments Commission Act, 2014, to regulate the NJAC's functions. Both Bills were ratified by 16 of the State legislatures and the President gave his assent on December 31, 2014. The National Judicial Appointment Commission Act and the Constitutional Amendment Act came into force from April 13, 2015 [7].

The National Judicial Appointments Commissionis a constitutional body proposed to replace the Collegium system of appointing judges, thus enabling the Legislature and Executive to have a say. The NJAC propose a transparent and broad-based process of selection of judges & the transfer of judges of the Supreme Court and High courts. They were to be selected by the commission whose members were be drawn from the judiciary, legislature and civil society.

It is pertinent to mention that with the Constitution (99th Amendment) Act, 2014, Articles 124 and 217 were inter alia amended, and Articles 124A, 124B and 124C were inserted in the Constitution, through the Constitution (99th Amendment) Act, by following the procedure contemplated under Article 368(2), more particularly, the proviso thereunder.

Articles 124A and 124B define the NJAC, its members and their duties, while Article 124C empowers Parliament to make laws in the future to regulate the procedure for the appointment of judges.

Composition of NJAC: -Article 124A states that a Commission known as National Judicial Appointments Commission is formed consisting of:

- Chief Justice of India as Chairperson
- Senior SC Judge next to CJI – ex officio
- Second Senior SC Judge next to CJI – ex officio
- Union Minister of Law & Justice – ex officio
- Eminent Person in field of Law 1
- Eminent Person in field of Law 2

Selection of Eminent People on the Commission: They will be nominated by a committee consisting of the Chief Justice of India, Prime Minister of India, and Leader of Opposition in the LokSabha. One person would be from the Scheduled Castes or Scheduled Tribes or OBC or minority communities or a woman. The eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination. Any 2 people on the Commission can veto a nomination.

The Ninety-Ninth Amendment Act did not get rid of the 'Collegium' or the view of the Chief Justice having overwhelming weight, however it likewise made the Head of the Executive who additionally was the Head of the Legislative party and additionally the Leader of the Opposition as two critical persons in the choice of 'selectors' of judges [8].

Functions of the NJAC: -Article 124B, provides for the functions of the NJAC which include:

- Recommending persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;
- Recommending transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and
- Ensuring that the persons recommended are of ability and integrity.

Article 124C, enables Parliament to pass a law to:

1. regulate the procedure of appointments, and
2. empowers to lay down the procedure for its functioning, and manner of selection of persons for appointment, through regulations.

National Judicial Appointment Commission Act

Pursuant to the mandate of Article 124C, Parliamentmade the National Judicial Appointment Commission Act, 2014. The salient features of the Act are:

Section 4: Reference to NJAC for filling up the vacancies

1. The Central Government shall, within a period of thirty days from the date of coming into force of this Act, intimate the vacancies existing in the posts of Judges in the Supreme Court and in a High Court to the Commission for making its recommendations to fill up such vacancies.
2. The Central Government shall, six months prior to the date of occurrence of any vacancy by reason of completion of the term of a Judge of the Supreme Court or of a High Court, make a reference to the Commission for making its recommendation to fill up such vacancy.
3. The Central Government shall, within a period of thirty days from the date of occurrence of any vacancy by reason of death or resignation of a Judge of the Supreme Court or of a High Court, make a reference to the Commission for making its recommendations to fill up such vacancy.

Positives of the NJAC Act

1. Transparency: The NJAC ensures transparency because of an organised procedure for the appointments by means of consultations from among all organs of the government. This was not possible with collegium system where appointments are more of back-door operations and no specific mechanism or criteria for selection of candidates [9].
2. Accountability: Since the NJAC contains Chief Justice of India, Law minister and Opposition leader has a say there is no scope or less scope of political influence

towards any appointment and the NJAC is answerable to every appointment. This is, was not the case where there are alleged political influence in appointments as made public recently by some ex-judicial members [10].

3. Faster Appointments: Gone are the days where an appointments are delayed because NJAC will be estimating the potential vacancies in the near future and 6 months before the vacancy can happen which makes it easy for a fresh appointment immediately. This further adds to the speedy justice delivery too [11].

The petitions challenging the new legislation were filed by the Supreme Court Advocates on Record Association (SCAORA) and others contending that the new law on the selection and appointment of judges was unconstitutional and aimed at hurting the independence of judiciary. Noted jurists like Fali Nariman, Anil Divan and Ram Jethmalani were among prominent senior advocates who had argued against the NJAC replacing the collegium system [12].

Bishwajit Bhattacharyya, a former Additional Solicitor General of India, filed a PIL in the Supreme Court in January this year, terming the NJAC as 'direct attack on the independence of judiciary'. In his petition, the former ASG contended:

The NJAC Act and amendment of the Constitution are unconstitutional and violate the basic structure of India's Constitution, as various clauses stipulated therein make a frontal attack on the independence of the judiciary as also on the doctrine of separation of powers [13].

In a historic ruling that the primacy of the judiciary in Judges' appointments was embedded in the basic structure of the Constitution, the Supreme Court declared unconstitutional an amendment to validate the National Judicial Appointments Commission (NJAC) Act, which had contemplated a significant role for the executive in appointing judges in the higher judiciary. Effectively sealing the fate of the proposed system, which was unanimously passed by both Houses of parliament, a five-judge Constitution Bench ruled with a 4:1 majority that judges' appointments shall continue to be made by the Collegium system in which the Chief Justice of India will have "the last word" [14].

Declaring that the judiciary cannot risk being caught in a "web of indebtedness" towards the government [15]. When the final decision for *Supreme Court Advocates-On-Record Association and ANR. V. Union of India* [16] came out in a document containing 1,042 pages, delivered on October 15, 2015, it was a decisive blow.

It was a setback to the Narendra Modi government, which had acted with remarkable alacrity, taking up the NJAC bill as soon as it came to power and passing it in Parliament. It also marks a royal snub to the political class, which had shown near-unanimity in passing the NJAC bill, as also the 99th Constitutional Amendment Bill that enabled it [17]. The judgment read:

The political-executive should not be involved in selection of judges. The judiciary should be kept away from the spoils system that has come to prevail in Indian politics [18].

Senior counsel Arvind Datar, representing Madras High Court-based Service Bar Association assailed Section 6(1) and Section 6(3) of the NJAC Act coupled with their requirement of 'ability, merit and any other criteria of suitability'. Mr. Datar termed the NJAC as ill-conceived. He contended that the new law "destroys" the independence of judiciary as it defies the principle of separation of powers by bringing it under parliamentary control. "From the constitutional control, the 99th amendment makes the judiciary under Parliamentary control," he added. He argued:

The power of appointment of Supreme Court and High Court Judges was always intended to be in the Constitution itself. The framers of the Constitution never intended that the appointment could be subjected to ordinary laws or delegated legislation [19].

The exact point on which the NJAC was struck down was that it dealt a blow to the primacy of the judiciary in selection of judges—an attack on the independence of the judiciary [20].

T.R. Andhyarujina, counsel for Maharashtra, said the independence of the judiciary depended on the personal character of a judge and not in the manner in which he was appointed [21].

The Joint Secretary, Department of Justice has filed a counter affidavit on behalf of the Union of India (UOI), defending the Amendment and the Act. UOI's case is that independence of judiciary is only post appointment. Appointment is an executive act and the judiciary's independence has no relevance with the executive act of appointment. UOI submits that judicial independence is to be coupled with checks and balances and that a contextual reading of Articles 124(2) and 217(1) with the Constituent Assembly Debates (CAD) makes it evident that there is no primacy of the CJI in appointment of judges. Consultation with the CJI was only by way of a check on executive, which had the final say in the matter.

Hotly contested Attorney-General MukulRohatgi's opening argument was that there was not a word about judicial primacy in the original Constitution drafted by the founding fathers. Mr. Rohatgi submitted that independence of the judiciary did not mean that the CJI and his collegium had the final say or primacy in appointment and transfer of judges. "Independence of judiciary was not an insulated concept," He blamed the 1993 judgment in the Second Judges Case by a nine-judge Bench for ushering in the collegium system of judicial appointments [22].

According to the petitioners the primacy of judiciary in appointment of judges and absence of interference by the Executive therein is by itself a part of basic feature of the Constitution being integral part of independence of judiciary and separation of judiciary from the Executive. According to the respondents primacy of judiciary in appointment of judges is not part of independence of judiciary. Even when appointments are made by Executive, independence of judiciary is not affected. Alternatively in the amended scheme, primacy of judiciary is retained and independence of judiciary is strengthened. The amendment promotes transparency and accountability and is a part of needed reform without affecting the basic structure of the Constitution. To determine the question one has to look at the concept of basic feature evolved in Kesavananda Bharti case. The basic structure or framework was not exhaustively defined but some of the features of the Constitution were held to be the illustrations of the basic structure [23].

The scope of amending power was again considered by this Court in the course of challenge to Thirty-Ninth Amendment. Chandrachud, J. (later the Chief Justice) observed that:

It is not that only certain named features of the Constitution are part of its basic structure….Having regard to its place in the scheme of the Constitution, its object and purpose and the consequences of its denial on the integrity of the Constitution, a feature of the Constitution could be held to be a basic feature [24].

A five-judge Constitution Bench headed by Justice J S Kheharobserved during the course of arguments on the constitutional validity of the National Judicial Appointments Commission Act (NJAC):

Don't put the new law as good or bad. If it meets the parameters of the basic structure, work it out [25].

Justice Khehar said that even if the chief justice and two senior-most judges in the six-member NJAC, which has now been struck down, consider a nominee to be worthy for appointment, his way be blocked by the exercise of veto by any two members including two eminent people. Describing such a possibility as "out-rightly obnoxious", Justice Khehar said:

The reason to describe it as being obnoxious is this – according to the learned attorney general, 'eminent persons' had to be lay persons having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualification, such lay persons would have the collective authority, to override the collective wisdom of the chief justice of India and two judges of the Supreme Court of India.

K. Parasaran, representing Rajasthan, submitted:

The NJAC, comprising the Chief Justice of India, two senior-most judges, the Law Minister and two eminent persons, is an ideal mix. Now a person [one of the eminent persons] from the Scheduled Castes and Scheduled Tribes and minority communities and women are at least in the selection process. It is better to use trial and error than error and trial [26].

Senior advocate Rajeev Dhawan had said opposing the NJAC Act:

The 99th amendment is a thoughtless piece. Constitutional amendments are not made for trial. It is too serious an issue and cannot be left to hit and trial. It cannot be put on experimental basis….We cannot experiment with the Constitution. Why are we eager that there must be a reform. Everything is not vulnerable to change. What is the compulsion for the change. I agree, at the maximum, there might be a body to look into the performance of the judges. But, not beyond this. The collegium system was working perfectly. Appointment of judges is not a thing to be played in the hands of the Parliament. What is the basis of making this change [27].

Mr. Datar also rebutted the Centre's argument that eminent persons are necessary to ensure participation of the general public. He said:

When there is no participation of general public through eminent persons in the appointment of any other constitutional functionary such as CAG, Chief Election Commissioner etc there is no reason why there should be such participation only for judges [28].

Union of India submitted that the presence of two eminent persons is a check and balance on the functioning of other members. Diversity of members will ensure greater accountability of each member to the other. The presence of Law Minister as a member of the NJAC ensures accountability to public.

Justice Kehar's judgment concluded that the NJAC did "not provide an adequate representation, to the judicial component" and that "clauses (a) and (b) of Article 124A(1) are insufficient to preserve the primacy of the judiciary in the matter of selection and appointment of Judges" It further held that "Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an ex officio Member of the NJAC." The clause it was held, impinged upon the principles of "independence of the judiciary", as well as, "separation of powers" [29].

The clause which provided for the inclusion of two "eminent persons" as Members of the NJAC was held ultravires the provisions of the Constitution, for a variety of reasons. Such as for having not laid down "qualifications of eligibility" and "having left the same vague and undefined".

The rule of 'purposive interpretation' can be applied to this provision. By application of this rule, the Court can interpret eminent persons to mean only 'persons trained in law' or 'eminent jurists' [30].

The primacy of the judiciary in making judicial appointments has been reasserted; judicial independence has been safeguarded and the political executive's attempt to legislate into being a new system to constitute the superior judiciary has been scuppered [31].

The fact remains that when one of the major litigants of the country is the executive and if the latter only chooses the judiciary, it might lead to a conflict of interest [32].

The Supreme Court is vehement that the collegium is not the Imperium in imperio – an empire in an empire – that the Constituent Assembly specifically did not want to set up. It says it has set aside the NJAC because, in its words, "wrongful selections" of judges "may well lead the nation into a chaos of sorts". Only judges, it seems, can ward off the apocalypse [33].

The Apex court said that the grant of veto power to eminent persons under the NJAC Act amounted to conferring them with "monarchical power" as they could then "stymie" the decision of the President as well as the Chief Justice of India on the appointment of judges.

The second proviso under Section 5(2) and Section 6(6) of the NJAC (National Judicial Appointments Commission) Act clearly mandates that a person nominated to be considered for appointment as a judge of the Supreme Court, and persons being considered for appointment as chief justices and judges of high courts, cannot be appointed, if any two members of the NJAC do not agree to the proposal.

The two eminent persons would also have the absolute authority to reject all names unanimously approved by the remaining four members of the NJAC. That would obviously include the power to reject the unanimous recommendation of the entire judicial component of the NJAC. The vesting of such authority in the "eminent persons", is clearly unsustainable.

The court said the veto provision would mean the law minister, together with any one of the two eminent persons, could shoot down a proposal made by the judicial members, thus taking away the primacy of the judiciary from the process. One judge even remarked that the law minister would never allow a gay person to be appointed as judge [34].

Justice M.B. Lokur said eminent persons could be consulted but empowering them to veto the decisions of the Chief Justice of India or the President was "unthinkable":

The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the other organs of governance," Justice J.S. Khehar, the presiding judge on the five-judge Constitution Bench, explained in his individual judgment [35].

The 'veto' provision, therefore, is clearly antithetical to the concept of 'primacy'.

Mr. Rohatgi said the 1993 judgment needs to be first "re-considered" by a larger Bench on the question of interpretation of Articles 124 and 217 of the Constitution, which deal with judicial appointments [36].

Justice Khehar said his Bench was sitting to decide the validity of the NJAC law "and here it is not enough to prove that the 1993 judgment about the CJI's primacy is wrong."

Justice Khehar observed:

The citizen of the country is not worried about the salary of a judge or the house in which he lives or who the CJI is. He is only worried about whether a judge is impartial. For this, the government, the largest stakeholder, should not participate in selection of judges [37].

The petition also submits that Article 124C inserted in the Constitution gives the Parliament unbridled power to regulate judicial appointments through ordinary law without any safeguards and the same cannot be challenged by using the Basic Structure doctrine [38].

When Mr. Datar presented a detailed study on the method of judges' appointment in 182 member countries of the United Nations, the bench made it clear that NJAC could not be justified or junked by comparing it with the best practices being followed in various countries for the appointment of judges to the higher judiciary.

The Supreme Court's judgment on the National Judicial Appointments Commission is a landmark verdict. In terms of importance, it ranks second only to the famed Kesavananda Bharati versus State of Kerala - a case that has been cited to declare that the NJAC is unconstitutional [39].

Justice Chellameshwar's dissenting judgment, has, with strong logic, beautifully worded, upheld the constitutional amendment which scrapped the collegium. Like all dissents, his judgment is an appeal to the future and the powerful brooding spirit of the law. He ended his dissent quoting Macaulay's dictum, "Reform that you may preserve." [40]

Here are the top five things he said in his note: [41]

1. "As Bentham has observed, 'In the darkness of secrecy sinister interest, and evil in every shape, have full swing'. Transparency is a vital factor in constitutional governance....Transparency is an aspect of rationality. The need for transparency is more in the case of appointment process. Proceedings of the collegium were absolutely opaque and inaccessible both to public and history, barring occasional leaks.
2. Assumption that "primacy of the judiciary" in the appointment of judges is a basic feature of Constitution "is empirically flawed."
3. There were cases where the apex court collegium "retraced its steps" after rejecting recommendations of a particular name suggested by the High Court collegium giving scope for a great deal of "speculation".

There is no accountability in this regard. The records are absolutely beyond the reach of any person including the judges of this Court who are not lucky enough to become the Chief Justice of India. Such a state of affairs does not either enhance the credibility of the institution or good for the people of this country.

4. To hold that it (government) should be totally excluded from the process of appointing judges would be wholly illogical and inconsistent with the foundations of the theory of democracy and a doctrinal heresy; he said, adding Attorney General Mukul Rohatgi was right in his submission that exclusion of the executive branch is destructive of the basic feature of checks and balances - a fundamental principle in Constitutional theory.
5. For all the above mentioned reasons, I would uphold the Amendment. However, in view of the majority decision, I do not see any useful purpose in examining the constitutionality of the Act, the judge said.

System of Appointment in other countries

In 8 countries (France, Israel, Italy, Kenya, Nigeria, Pakistan, South Africa and UK) with bodies for judicial appointments, independent members have a mandated role in the selection process through representation on the said bodies.

In 4 countries where independent members do not play a formal role in the appointment process (Canada, USA, Australia and New Zealand), the appointing authority (body or person) consults independent members at various stages of the appointment process for their feedback on the selection or recommendation of a prospective candidate.

In 3 countries (Bangladesh, Germany and Sri Lanka) no documented process of consultation with independent members is provided for.

The British model, which is regarded as one among the finest in the modern constitutional democracies, is essentially based on the doctrine of equality of opportunity. There is clear vacancy notification that is followed by receipt of applications and nominations. This ensures publicity in the process, which is 'the soul of justice', as Jeremy Bentham put it. Also there is a series of interviews, consultations and verifications of the track records and antecedents of individual candidates. The process is not vitiated by secrecy. By way of a lengthy and comprehensive process, the system is equipped to choose the best [42].

In America. the State judges are elected. When they are not elected, their appointment is subject to legislative concurrence. In the Supreme Court it is the President who nominates the Judges but the nomination has to be confirmed by the Senate.

InAustralia.it is the executive that appoints judges.

In Canada. the Governor General makes the appointment of judges.

In New Zealand the Chief Justice is appointed on the recommendations of the Prime Minister by the President. The Prime Minister in turn consults the Attorney General; the A.G. informally consults the President of Court of Appeal and other judges [43].

Suggestions and Conclusion

Both the Supreme Court and the government have a different position on National Judicial Appointments Commission (NJAC) and collegium system, making it a bone of contention between the two pillars of Indian democracy. Where the CJI's opinion has some weight in Collegium system, its power is divided as per Article 124 A

of the 99th Amendment Act, clearly being in violation to the 2nd and 3rd Judges case which demanded CJI's primacy.
The three faults pointed out by Justice Lodha in the collegium system are: [44]

1. the lack of transparency
2. lack of an expert body like the standing committee and
3. executive's indifferent role in the participatory process.

Further, the collegium system was criticized for giving exclusive power to the judiciary in addition to the 2009 judgment given by the Supreme Court of India in the Veeraswami Case, in which it was held that no judge of the Supreme Court or the High Courts can be subjected to investigation for any offence of corruption, unless there is a prior permission of CJI. This has prevented any investigation from being carried out against any sitting judge.
The biggest criticism put across by the government against collegium system is that it's creating imperium within imperia in the Supreme Court. The system is also blamed for being a 'give and take' arrangement building a gap between the "haves" and the "have-nots", which according to them is also the reason for the delay in justice delivered by them [45].
Though the collegium system seems far from perfect, SC's concerns over involvement of politicians in the appointment of judges are completely justified. The appointment of Justice AN Ray as the Chief Justice of India, superseding 3 senior judges, at the behest of Indira Gandhi is still considered as one of the darkest chapters in the history of Indian Judicial system.

A former Delhi High Court Judge said:
Keeping the system of appointment of judges within the four walls of collegium has given rise to a lot of criticism like uncle-and-son-syndrome [46].
One consistently raised counter to the Collegium system is that there is no country in the world where Judges appoint Judges [47].
Ram Jethmalani went one step further in his defence of the collegium system and asserted in his (written) response to the written submissions of the Attorney General that he has not seen a single judge who can be compared with the worst judges produced by the earlier system. He was appearing for intervener Advocate Ashish Dixit. Mr. Jethmalani said:
The AG with his private knowledge about bad judges is entitled to have his own opinion but speaking for me, I have not seen a single judge who can be compared with the worst judges produced by the earlier system. The personal assertion of the AG is not supported by any admissible evidence and cannot influence the decision of this case [48].

Attorney General Mukul Rohatgi submitted:
We have been so bogged down by seniority that every judge who came from the High Court (to the Supreme Court) was a chief justice of a particular high court [49].
While quashing the NJAC, the apex court had fixed marathon hearings for November 18 and 19. The court had also invited suggestions from the Centre, states, the Bar Council of India, the Supreme Court Advocates on Records Associations and various Bar association and individuals for improving the collegium system, often criticised for its opaque functioning.

The constitution bench headed by Justice Jagdish Singh Khehar took up for hearing a 20 page report filed by Additional Solicitor General Pinky Anand and senior advocate Arvind P Datar who submitted suggestions on four aspects — how to improve transparency in judges selection process, what changes to make to the eligibility criteria, on formation of an office of the collegium in the Supreme Court which will be called the secretariat and on how to deal with any complaints or adverse reports about a candidate for judgeship.

1. A unique suggestions under eligibility criteria said "there should be a written examination for elevation to the supreme court. Regarding transparency, the suggestions note said
2. There must be well-defined criteria that should be established by the Supreme Court for appointments to the High Courts and to the Supreme Court. The criteria must refer to age, merit, seniority, integrity, income criteria, academic qualification, etc.
3. The criteria should be made available on the website of the Supreme Court as well as of the High Courts. In some suggestions, it was requested that these vacancies should be notified 6 months in advance and applications should be permitted for appointment apart from the names being recommended by judges/collegiums [50].

Supreme Court was told that law ministry received 3500 representations to improve the existing collegium system:

1. Some other suggestions were that the terms of appointment should include a clause where if it is found out that a candidate gave wrong information about the asked things, he or she should be removed without the process of impeachment.
2. The decision making in the appointment of the judges should be under the scanner of RTI so that it brings transparency and the common man also is informed about it [51].

After the National Judicial Appointments Commission (NJAC) was struck down, the revived collegium, headed by Chief Justice HL Dattu, cleared the names of 24 additional judges in six high courts for appointment as permanent judges, while the Centre played ball by flying the files to Kolkata to get the President's assent, reports The Times of India

It was my moral duty to see that these 24 additional judges did not suffer uncertainty because the Supreme Court is on Dussehrabreak [52].
– CJI to TOI

The President of India Pranab Mukherjee has appointed Justice T.S. Thakur as the Chief Justice of India (CJI) as per provisions laid down in Article 124 of the Indian Constitution. The appointment of Justice T.S. Thakur as the CJI indicates that seniority reigns supreme in the Supreme Court following the revival of the Collegium system of Judicial appointment. Justice Thakur, who is the senior most judge after the Chief Justice, will take over after Chief Justice retires on December 2, 2015. Had the NJAC law been upheld in whole by the Bench, it would have been the six-member Commission, and not the CJI, who would have recommended the next Chief Justice of India [53].

Justice Thakur said, while speaking at the farewell function for outgoing Chief Justice H.L. Dattuthat there were 400 vacancies to be filled up and it was difficult to find suitable candidate for appointment as judges-

People today feel that judiciary has claimed itself to appoint the judges, then let them live up to the expectations," he said while describing it as a "major challenge [54].

Also addressing a suggestion by the Attorney General Mukul Rohatgi that the Supreme Court bar had a reservoir of talented lawyers and some of them could be picked up from it for appointment as judges, Justice Thakur said:

I assure that whenever any candidate who can be picked up from Supreme Court bar itself for elevation will be considered.

In both, there is no notification or opportunity to apply. An eligible and fit person cannot aspire for a fair opportunity by way of an equally fair procedure, in both the systems. Nor there is an objective method of assessment of merit in either situation [55].

Thus, both the NJAC in its present form and the collegium system ought to be scrapped. The government should take legal luminaries and the Supreme Court into confidence before coming up with a new NJAC. The Supreme Court and Parliament should engage with each other to make the appointment of judges fool proof. Justice Chelameswar's dissent will then provide the only silver lining.

To conclude in the words of Justice Thakur:

What I feel is that judges are very valuable human resources, so long as the resources are available to the country for service to cause of justice, it will be a great loss to let such resource go waste.

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