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# Transparency and Accountability in The Indian Judicial System: A Renewed Debate on Collegium System

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## ABSTRACT

Accountability is the sine qua non of democracy. Transparency facilitates accountability. In a democratic state, every wing of state needs to be accountable and should have transparency in working to establish trust among people. Judiciary is the most important institution of the democratic state. Constitutional framers turned judiciary into the last bastion of hope. So judiciary should compulsorily have the features of transparency and accountability in its regime. The research paper progresses on the same premise. The judges of the higher courts in India, their salary and assets, their promotion, transfer all have been questioned in the recent times. A judicial construction of basic structure doctrine and collegium system for the higher judiciary finds no place in the actual text of the Constitution. There is serious clout over working of this judicially created phenomenon. For example in recent times, the promotion of few judges of the High Court to the Supreme Court was not confirmed by the Central Government despite reiteration by the Collegium. What makes the issue more serious is that the Collegium made other recommendations leaving those judges to retire. What was the rational applied? What was the opinion of the Collegium? This all is not known to anyone leaving to the serious doubt regarding the transparency of the institutions. The research paper investigates into the same issue, discusses the related case laws, and presents a solution and recommendation.

***Keywords:*** Indian Judiciary, Appointment, Transfer, Accountability, Transparency.

## INTRODUCTION

The seat of the Justice is the seat of the God.[1] Eminent writer GranVille Austin chooses this statement of Mahavir Tyagi to start the chapter related to judiciary. This is the best statement that can be mentioned to understand the importance and relevance of the judicial system in the state.

Independence and impartiality are two basic attributes essential for a proper discharge of judicial functions. Independence of Judiciary is not an idle wish or a slogan. It was a felt necessity when the Constitution of India was being framed by the Constituent Assembly. The views of Mahatma Gandhi and the bearing of the last words of Lokmanya Bal Gangadgar Tilak at Bombay High Court[2] engraved in stone depicts the dream of the freedom fighters and constitutional makers about the concept free, fair and independent judicial system.

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[1] Indian Constitution, Corner of a nation by Granville Austin, Oxford University Press, Reprint 1985, Pg 164
[2] "*IN SPITE OF THE VERDICT OF THE JURY I MAINTAIN THAT I AM INNIOCENT. THER ARE HIGHER POWERS THAT RULE THE DESTINY OF MEN AND NATIONS AND IT MAY THE WILL OF THE*

The first ingredient of judicial independence is that a judge should be free to arrive at his judicial decision objectively, and without any[3] interference, pressure or influence, from any outside agency. It is a corresponding right of every litigant that his judge must be independent and impartial. This is not only confined to any single state, but is recognized as basic human right all over the globe.[4] The essence is found in great Magna Carta[5], which provides that "…to none will we sell, to none will we deny, to none will we delay right or injustice." The remark of Cf. Denning gives us another aspect of judicial independence. He asserts that independence of judiciary does not postulate merely an absence of interference from any external agency, but a subjective feeling by a judge that he is there to administer the law, including the fundamental law, and "not the will of the Executive"[6].

Indian judiciary has enjoyed the most honored place in the governance because of its independence and authoritative services. While describing the position of Supreme Court under the constitution D. D. Basu has mentioned that it has been rightly said that the jurisdiction and powers of our Supreme Court are in their nature and extent wider than those exercised by the highest court of any other country. Knowing about such a pivotal role in democratic society Indian Constitution confers wide powers to judiciary like power to judicial review[7], issue writs for enforcement of Fundamental Rights[8], no legislative discussions about judiciary's work[9], appointment, removal and transfer of its members[10], power to punish for contempt and be a court of record[11], original and appellate jurisdiction[12], special leave petition[13], binding nature of its decision in India[14], power to do anything to do complete justice (curative petition)[15] and advisory jurisdiction[16].

Nothing rankles more in the human heart than a brooding sense of injustice. Any feeling or consciousness of the incapability of the lawful agencies to afford relief for the wrongs and injustice, supposed and real, takes people's thought to dangerous channels and drives them to seek recourse to methods which are other than legal and smack of a state of jungle or the rule of tooth and claw. It is, therefore, essential to ensure that nothing is done to detract from the image of the courts and the broad confidence of the people in the courts by wrong and undesirable appointment of judges.[17]

The judicial independence is of the central value inherent in the Constitution. The judiciary plays a creative role in so far as it keeps government organs in limits and protects the citizens

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*PROVIDENCE THAT THE CAUSE WHICH I REPRESRENT MAY PROSPER MORE BY MY SUFFERING THAN BY MY REMAINING FREE."*

[3] *R. v. Beauregard*, (1987) LRC (Const) 180 (188 ff) Can (SC)

[4] Article 10 of *Universal Declaration of Human Rights* emphasizes the right of everyone to fair and public hearing by an 'independent and impartial tribunal'.

[5] Magna Carta, 1215, cl. 40

[6] Cf. Denning, *The Road to Justice,* 1955, p.11.

[7] Art. 13

[8] Art. 32 & 226

[9] Art. 121 & 211

[10] ART. 125 & 221

[11] Art. 129 & 215

[12] Art. 130 & 135

[13] Art. 136

[14] Art. 141

[15] ART. 142

[16] Art. 143

[17] Law Commission Report 80, p. 5, pt 2.3

against abuse of power by them and so it is essential that the judiciary be free from government pressure.[18]

**Background behind Transparency and Accountability in Justice Administration System**:

For the first time in 1925, a committee was formed under the leadership of Pandit Motilal Nehru which drafted the Dominion Bill. The Bill contained the provision for a Supreme Court free from the British influence. The subjects that loomed largest in the minds of Assembly members when framing the Judicial provisions were the independence of courts and two closely related issues, the powers of the Supreme Court and judicial review.[19] The Assembly went on to great lengths to ensure that the courts would be independent, devoting more hours of the debate to this subject than to almost any other aspect of the provision.[20] If the beacon of the judiciary was to remain bright, the courts must be above reproach, free from coercion and from political influence.[21]

Even the *ad hoc* committee of Constituent Assembly declare that “It would not be expedient to leave the appointment of Supreme Court Judges to the unfettered discretion of the President of India”[22] It offered alternate suggestion. According to one, the President shall nominate puisne judges with the concurrence of the Chief Justice and this nomination would thus be subject to confirmation by a panel composed of High Court Chief Justices, ‘some members’ of both houses of central legislature and the law officers of the Union. At second, it provided that the panel should submit three names to the President who would choose one of them with the concurrence of Chief Justice.[23]

For Ambedkar, One Single Integrated Judiciary added with Uniformity of Law was ‘essential to maintain the unity of the country.’[24] For the structure of appointment of judges, the constituent assembly had many schemes. Dr. Ambedkar dealt with two suggestions. The first suggestion was that the appointment of judges of the Supreme Court should be with the concurrence of Chief Justice. The second suggestion was that the approval of Parliament or, alternatively, of the Council of States, would be necessary to these appointments.[25] All attempts reflect towards achieving the goal of judicial independence.

**Constitutional Provisions**:

Presently the appointment of judges is made in accordance with the Article 124(2) and 217 of the Constitution of India. Article 124(2) provides that the judge of Supreme Court shall be appointed by the President after consultation with the judges of the Supreme Court. Article 217 provides that judges of the High Court shall be appointed by the President after consultation with the Chief Justice of India and Governor of that state, and Chief Justice of High Court in case of appointment of judges other than the Chief Justice. Article 222 of th4e Constitution provides that the President may transfer judges of High Court after consultation with the Chief Justice of India.

[18] S. P. Gupta vs Union of India, AIR 1982 SC 149
[19] Indian Constitution, Corner of a nation by Granville Austin, Oxford University Press, Reprint 1985, Pg 164
[20] Ibid.
[21] Ibid at pg 165
[22] Ad Hoc Committee Report, para 15-16: Reports, First Series, p.66
[23] Ibid., para 14, p.65
[24] Constitution Assembly Debates, part VII, vol. I, p. 37
[25] Dr. Ambedkar in the C. A. Debates, Volume 8, pages 257-260 at p. 258 (24th May, 1948)

On the method of Appointment till 1973, there have been diverse views. The International Commission of Jurists said that although the appointment of justices in India is potentially political[26]. But ads further that in fact no case has yet occurred where any appointment has been made without the concurrence of the Chief Justice of India. Political patronage in High Court appointments has been very rare.[27] But the concerns of various thinkers came true in year 1973. The Indian Law Commission criticized the manner of Appointment to Supreme Court and held, 'It is undoubtedly true that the best talent … has not always found its way to the Supreme Court.'[28] In regards to High Courts judges, the Commission reported the large volume of responsible criticism that selection has been inferior, that there had been undue Executive influence, and the expediency and communal considerations had influenced the appointment of judges appeared 'well founded'.[29]

Due to selfish motives and aspirations of the peoples placed at some authority and are having power the basic philosophy of the justice is getting defeated. In a democratic setup where judiciary is to be the protector of all needs protection for itself. Every kind of evil has crept into it. Now is the hour to establish transparency and accountability in judicial administration. The Judicial administration need to be responsible to save the democratic setup of the government.

The important areas which need reforms are the appointment of judges to higher judiciary, independence of judiciary, blockade of pending cases, speedy trial and corruption etc.

**Appointment of Chief Justice of India**

In Indian Constitution there is no provision regarding appointment of Chief justice of India but there is only a provision to appoint the judge of Supreme Court under Article 124(2). From the commencement of the Constitution of India, 26 January 1950, there has been convention that the senior most judge of the Supreme Court will hold the office of Chief Justice of India.

The convention was well executed and respected but in 1973, during Emergency in India, the convention of appointing the senior most judge of the Supreme Court as the Chief Justice of India was broken and Justice A. N. ray was appointed as the Chief Justice of India superseding three judges Justice I. M. Shelet, Justice K. S. Hedge and Justice A. N. Grover, who in protest resigned from the court in protest.

"*In appointing a persona s Chief Justice, I think we have to take into consideration his basic outlook, his attitude to life, and his policies. We, as a government, have a duty to take the philosophy and outlook of a judge into account in coming to the conclusion whether he should or should not lead the Supreme Court at this time. This is our prerogative which the Constitution has entrusted to us*" This was Mohan Kumaramangalam Thesis and defense of the superseding of three judges of the Supreme Court, Justice I. M. Shelet, Justice K. S. Hedge and Justice A. N. Grover by Jusitce A. N. Ray.

On considering this appointment critically, what comes out is that it was an executive assault on the independence of the judiciary. To be noted is that the three superseded judges were the part of the majority opinion of the historic Kesavanada Bharti Case[30] which curtailed the

[26] International Commission of Jurists, *Rule of Law in free society,* p. 285
[27] Ibid.
[28] Law Commission Report 14, page 34
[29] Ibid, p. 69-70.
[30] (1973) 4 SCC 225

power of the parliament as not to amend the Basic Structure of the Constitution of India. And Justice A. N. Ray supported the parliamentary supremacy over the constitution. Justice O. N. Vohra who sentenced Sanjay Gandhi in the "Kissa Kursi ka"[31] case was not reappointed as Additional Judge.[32]

Again in 1976, the government appointed the Justice Beg as Chief Justice of India bypassing Justice Khanna who was senior at that time. Consequently, he resigned in protest. However after the retirement of Justice Beg, the senior most judges, Justice Chandrachud was appointed as the Chief Justice of India. Since then again the rule of Seniority has been followed and this practice is follows even nowadays. Thus it can be concluded that in absence of specific provisions regarding to the appointment of Chief Justice of India the executive manipulates this and it is a threat to the independence of judiciary. Judiciary itself has followed 'senior most rule' as sacrosanct till date to avoid political intervention.

But whether the 'senior most rule' has been able to fulfill the real purpose that was thought to be fulfilled by the constitutional makers? There are a number of atrocities related to this rule. The Law Commission criticized the practice of appointing of appointing senior most judge of the Supreme Court as the Chief Justice of India on the ground that a Chief Justice shall not only be able and experienced judge but also a competent administrator and, therefore, succession to the office should not be regulated by mere seniority.[33]

Justice Reddy questioned the propriety of appointment of Chief Justice for a shorter period like ten days, one month or two months on the basis of seniority.[34] On speaking about the qualities of the Chief Justice of India he says that we cannot have abstract qualities in mind. "What should be the qualities of a Chief Justice? The conductor of a choir must, by force of personality, induce his team to swing in harmony, subdue the raucous, encourage the timid, conspire with young, and flatter the old"[35] Till 2022, no chief justice will get a tenure of more than a year; the present Chief Justice gets only four-five months. When a sitting judge who has only a short period to retire from service is appointed to a post, he shall express his willingness to relinquish the remaining tenure as a judge and then only his service shall be made available for such post.

In fact the hard reality is that except few most of the Chief Justice of India could not maintain the dignity of this highest office of judiciary. Thus there is a need to question the 'senior most rule' and fins its alternative as it has not been able to maintain the very spirit of the highest post in Indian Judiciary. The alternative can be that the 'senior most rule' shall be abolished and the Chief Justice shall be appointed on the merit of his performance and qualities as recommended by the Law Commission. Also the suggestions of Justice Reddy should be given emphasis. Is should be ensured that the appointed Chief Justice must has a tenure of minimum 3 to 4 years. The term of judges as the Chief Justice may also be fixed like 3 yrs or 4 yrs. This will ensure the regularity in the office of the Chief Justice and also improve the quality of works done by Chief Justice.

**Appointment of judges**

[31] 1978 AIR 961, 1978 SCR (3) 950.
[32] H. M. Seervai, *ConstitutionalLaw of India*, vol 2 p. 2400
[33] Law Commission Report 14, vol I, page 39-40
[34] Justice O. Chinnappa Reddy, *The Court and Constitution of India; Summit and Shallows* (Oxford University Press, New Delhi, 2012) p. 308
[35] Ibid, p. 309

Regarding the appointment of the judges, there have been judicial pronouncements which need to be studied thoroughly to understand the true aspects of the manner of appointment of the judges. The important of them are *S. P. Gupta v. Union of India* (I Judges case), *Supreme Court Advocates on Record Association Vs Union of India* (II Judges case) and *Re-Presidential Reference case* (III Judges case). In recent times the constitutionality of *National Judicial Appointment Commission* has added fuel to the fire.

***S. P. Gupta v. Union of India*, AIR 1982 SC 149**

In this case the question of appointment of judges of higher court came before the court. The term 'Consultation' used in the appointment clauses require the interpretation by the apex court. Court held that the purpose of 'consultation' is to safeguard the independence of judiciary and to ensure selection of proper person. Court held that "Consultation should have sinews to achieve the constitutional purpose and should not be rendered sterile by a literal interpretation."[36] With regard to Article 217, Justice P. N. BHAGWATI held that

"*If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept his opinion. But it is only consultation and not concurrence of the Chief Justice of India that is provided in Cl. (1) of Article. 217*."[37]

Justice BHAGWATI devised the concept of "COLLEGIUM" and asserted that the collegiums should make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge.[38] Who is able to decide the qualities of lawyers proposed to be elevated to the bench more than the judges of the Superior Courts before whom they practice?[39] This made it clear that the consultation should be a healthy process and views of the Court needed to be considered. The appointment no more remained a executive action.

***Supreme Court Advocates on Record Association Vs Union of India*, (1993) 4 SCC 441**

A nine-judge bench was constituted to deliver the judgment. Justice VERMA, speaking for majority, made a clear picture of the appointment of judges. He held that the process of appointment of Judges to the Supreme Court and the High Court is an integrated 'participatory consultative process'[40] for selecting the best and most suitable persons available for appointment. He added that Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court by the Chief Justice of that High Court and for transfer of a Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India.

He held that the opinion of the judiciary symbolized by the view of the Chief Justice of India, and formed in the manner indicated, has primacy and no appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India[41]. Only in exceptional cases the recommendations of Chief Justice shall not be respected but on reiteration of the recommendation by the Chief Justice of India,

[36] S.P.Gupta Vs Union of India, AIR 1982 SC 149 (para 44)
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] Supreme Court Advocates on Record Association Vs Union of India, (1993) 4 SCC 441 (para 40)
[41] *Id.*

the appointment should be made as a healthy convention.[42] This all made it clear that the opinion of the Chief Justice has not mere primacy but is determinative.

It was held that the opinion of the Chief Justice of India was a collective opinion formed after taking into account the views of the two senior most judges[43]. This provided the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive.[44] But noted jurist H. M. SEERVAI condemns this judgment and calls it null and void.[45]

Justice Verma responding to an interview to the Frontline Magazine published in its issue of October 10, 2008 asserted that "My judgment says the appointment process of High Court and Supreme Court Judges is basically a joint or participatory exercise between the executive and the judiciary, both taking part in it. Broadly, there are two distinct areas. One is the area of legal acumen of the candidates to adjudge their suitability and the other is their antecedents. It is the judiciary, that is, the Chief Justice of India and his colleagues or, in the case of the High Courts, the Chief Justice of the High Court and his colleagues (who) are the best persons to adjudge the legal acumen. Their voice should be predominant. So far as the antecedents are concerned, the executive is better placed than the judiciary to know the antecedents of candidates. Therefore, my judgment said that in the area of legal acumen the judiciary's opinion should be dominant and in the area of antecedents the executive's opinion should be dominant. Together, the two should function to find out the most suitable (candidates) available for appointment."

### ***Re-Presidential Reference*, AIR 1999 SC 1:1998 (7) SCC 739**

In this case, the President of India required clarification regarding the appointment of judges, thus made a reference to the Supreme Court under article 143 of the Constitution. The outcome established the collegiums system in the same way as it is in present before us. The court held that the appointments of judges to the higher court shall be made by the collegiums system and collegiums should make the decision in consensus and unless opinion of the collegiums is in conformity with that of the Chief Justice of India should not give recommendations to the government. The judgment increased the number of judges in the collegiums from two to four.[46]

### ***Supreme Court Advocates-on-Record-Association and another v. Union of India*, 2015 (11) SCALE 1 [NJAC]**

Parliament passed The Constitution (Ninety-Ninth Amendment) Act, 2014, with a view to establish National Judicial Appointments Commission (NJAC) to deal with judicial appointments in the higher judiciary. The amended article 124 of the Constitution provides that the judges of the Supreme Court shall be appointed by the President on recommendation of the National Judicial Appointments Commission. The composition of the National Judicial Appointments Commission was provided by inserting a new article 124 A. The commission consists of the following persons:

a) The Chief Justice of India, Chairperson, *ex officio*;

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[42] *Id.*
[43] *Id.*
[44] Supreme Court Advocates on Record Association Vs Union of India, (1993) 4 SCC 441 (para 58)
[45] H M SEERVAI, *Constitutional Law of* India, volume 3, 4th edition, p. 2936
[46] Re-Presidential Reference, AIR 1999 SC 1:1998 (7) SCC 739 (para 44)

b) Two other senior Judges of the Supreme Court next to the Chief Justice of India — Members, *ex officio*;

c) The Union Minister in charge of Law and Justice—Member, *ex officio*;

d) Two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the leader of opposition in the House of the People or where there is no such leader of opposition, then, the Leader of single largest opposition party in the House of the People.

Provided that one of the eminent people shall be nominated from amongst the persons belonging to the scheduled castes, the scheduled tribes, other backward classes, minorities or women. An eminent person so appointed shall hold the office for a period of three years and he/she is not eligible for reappointment.

This Act was passed to regulate the procedure to be followed by the commission while recommending persons for appointment as Chief Justice of India and high court, other judges of the Supreme Court and high courts and other matters such as transfers. Section 4 of the Act imposes an obligation on Central Government to intimate any vacancy in judges' post in Supreme Court or of a high court, and such intimation shall be made six months prior to the occurrence of the vacancy. If any vacancy occurs due to resignation or death of a judge, the Central Government shall make reference to commission within a period of thirty days to fill up such vacancy.

Section 5 imposes a mandatory obligation on the commission to recommend the senior-most judge of the Supreme Court as the Chief Justice of India. Only condition for deviation of rule is that the senior most judge is not fit to hold the office. With regard to other judges, the commission is expected to recommend the names based on the ability and merit. In case of appointment of high court judge, apart from seniority, the ability and merit of such judge shall be considered. However, commission shall not recommend a person for appointment if any two members of the commission do not agree for such recommendation. In appointing the judges of high court, the commission is required to seek nomination from the chief justice of the concerned high court.

In appointing the judges, the President is bound by the recommendations made by the commission. However, section 7 provides that, President may request the commission for reconsideration of the recommendation made by the commission. But, it is mandatory to the President to accept recommendation made by the commission after reconsideration. Introducing the National Judicial Appointments Commission is a big step towards the right direction. But the practicality haunts us to think over it again. It was observed by T.R. Andhyarujina that except in United Kingdom the working of such commissions were not satisfactory. He particularly referred to the judicial appointments in South Africa and other countries in Africa.[47] Further, he is apprehensive about the working of NJAC as it has to make recommendations for appointments of 31 judges to the Supreme Court and over 800 judges to the 24 high courts. This apprehension seems reasonable by looking at the fact that the Chief Justice of India and two seniors most judges of the Supreme Court being the members of the NJAC, would they be able to discharge their primary duty of hearing and adjudication of cases. He is particularly critical by saying that, "The collegiums system has not worked, but we should not have a situation where we jump from the frying pan of the collegiums to the burning fire of a chaotic National Judicial Commission."[48] Also who is able to decide the qualities of lawyers proposed to be elevated to the bench more than the judges

[47] Indian Law Institute, Annual Survey of Indian Law 2014, Constitutional Law II, volume L, p. 375.

[48] Ibid.

of the Superior Courts before whom they practice?[49] Thus executive shall be given no saying in the appointment of the judges of the Higher Courts.

It is true that NJAC would successfully prevent the political appointment of judges and also judges appointing their own colleagues. Such an attempt seems reasonable and more constitutional than the collegiums system; however, it has its own pitfalls.[50]

1. The commitment of Central Government in selection of members of various national commissions is dismal and the same may happen with NJAC.[51]
2. The absence of any criteria to decide 'eminent person'.
3. If there is any difference among the appointing committee in the appointment of members of the NJAC, there is no provision to resolve the difference of opinion like section 5 (2) of the National Judicial Appointments Commission Act, 2014 wherein the commission cannot recommend a person for appointment if any two members of the commission do not agree for such recommendation.
4. Appointing Chief Justice of India as the ex officio chairman of the commission creates conflict of interest. Such a conflict could be anticipated when he/she is required to judge the validity of the appointment of the "eminent persons" and also appointment of judges as he/she would be deciding on appointment and transfers of the judges.

Over 20 years the collegiums system successfully kept the political influence in abeyance but according to many, it failed in infusing the merit and preserving the independence in appointments. Fali S. Nariman attributes various reasons for its failure like lack of transparency in selection process, favoritism of members of collegiums, discarding the merit and blindly following seniority in ranking the judges of the High Courts, no official setup.[52] Justice A P Shah described the collegiums system as an undemocratic institution with no check and balances and opined that even bringing more transparency would not improve the system.[53]

Independent judiciary is the back bone of a vibrant democracy. The influence of executive over judicial appointments always causes strains and cast shadow on such independence.[54] The post of the judges has importance under our constitution and the incumbent is supposed to be not only fair, impartial and independent, but also intelligent and diligent.[55] But the appointments[56] mentioned has led to the conclusion that the appointment issue cannot be left

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[49] S.P.Gupta Vs Union of India, AIR 1982 SC 149 (para 44)

[50] Suhas Chakma, *Four Problems (India: National Judicial Appointment Commission Bill- The cure is worse than the disease)*, available at: http://www.achrweb.org/Review/2014/242-14.html.

[51] There are two instances of such appointments. First the Government of India appointed Mr P J Thomas as Chairman of the Central Vigilance Commission, who was charged with various allegations and the leader of opposition did not approve the name, and later Supreme Court set aside the appointment. Second the Government went ahead of appointment of Cyriac Joseph J and Mr Sarat Chnadra Sinha as members of the National Humana Rights Commission despite the objections raised by the leaders of opposition in Lok Sabha and Rajya Sabha

[52] Fali N. Nariman, *Needed: Dialogue, statesmanship*, available at: http://indianexpress.com/article/opinion/columns/needed-dialogue-statesmanship.

[53] AP Shah J, *If the judiciary is either equal or in a minority, I fear this bill will be(legally) vulnerable*, available at http://indianexpress.com/article/india/india-others/if-the-judiciary-is-either-equal-or-in-minority-i-fear-this-bill-will-be-legally-vulnberable/

[54] The Indian Law Institute, Annual Survey of Indian Law 2014, Constitutional Law II, pg 373

[55] Law Commission report, 230, p. 9

[56] Para 15 &18 of research paper

at the hands of the executive. It will be a judicial murder if Executive is given any role in appointment of judges.

The views of the Parliamentary Standing Committee on Law and Justice which has recommended scrapping of the present procedure for appointments and transfers of Supreme Court and High Court Judges are of great relevance in this context. The Hindustan Times of October 20, 2008 reported: 'The Law Ministry has agreed to review the 15-year-old system after the Parliamentary Standing Committee on Law and Justice recommended doing away with the committee of judges (collegiums). Presently, the collegiums decide the appointments and transfer of judges. Interestingly, the recommendations come close on the heels of recent cases of corruption against judges of the top courts in the country. Law Minister H. R. Bhardwaj told Hindustan Times that the House Committee's recommendation had been accepted, and an action-taken report prepared by the Ministry would now be placed before Parliament.

"*Collegiums system has failed. Its decisions on appointments and transfers lack transparency and we feel courts are not getting judges on merit. The government cannot be a silent spectator on such a serious issue*", Bhardwaj said. The House Committee had said: "*Through a Supreme Court judgment in 1993, the judiciary wrested the control of judges' appointments and transfers. The collegiums system has been a disaster and needs to be done away with*".[57] H. R. Bhardwaj, Minister for Law and Justice, said "It is the right time to review this important matter". "*There was no problem till 1993 when the judiciary tried to rewrite the Article of the Constitution dealing with appointments. They created a new law of collegiums which was wrong. In a democracy, the primacy of Parliament cannot be challenged*", he said.[58]

Sometimes it appears that this high office is patronized. A person, whose near relation or well-wisher is or had been a judge in the higher courts or is a senior advocate or is a political high-up, stands a better chance of elevation.[59] It is not necessary that such a person must be competent because sometimes even less competent persons are inducted. There is no dearth of such examples. Such persons should not be appointed and at least in the same High Court. If they are posted in other High Courts, it will test their caliber and eminence in the legal field.

Executive shall have no role in appointment of judges. The Chief Justice of Australia, Sir Garfield Barwick gave his opinion very early in 1977. He asserted that

"*The time has arrived in the development of the community and of its institution when the privilege of the Executive Government in this area (appointment of judges) should at least be curtailed ... I make bold suggestion ... there should be some commission ... a body saddled with the responsibility of advising the Executive Government of the names of the persons, who by reason of their training, knowledge, experience, character and disposition, are suitable for appointment. Such a body should have amongst its personnel judges, practicing lawyers, academic lawyers ...*"

Wrong appointments of the judges have affected the image of the court. They have also undermined the confidence of the people in the country.[60] Initially the appointment was

[57] Law Commission Report 230, p.33 12-13, pt. 1.78
[58] *Id.*
[59] *Id.*
[60] Law Commission Report 80, p. 3, pt. 2.3

solely done by the executive and now it is completely under the influence of the judiciary. But in democracy no one can be absolute. Also all three organs of the democratic government should work in cooperative manner for better results, thus there is a need to create a balance between the two organs in appointment of the judges.

Also Indian Constitution recognizes the principle of separation of judiciary from executive. Article 50 of the Constitution provides that the state shall take steps to separate the judiciary from executive from public services of the state. It has been said too constitutes the 'Conscience of the Constitution'[61]. It is based on the bedrock of the principle of independence of judiciary.[62]

In American Constitution, there is strict Separation of Power. None organ can interfere in the affairs of the other. Under Article III, the judicial work has been assigned to the Judiciary. In *United States v. Nixon*[63], it was held that the judicial power of the United States vested in the Federal Courts by Article III Section I of the constitution can no more be shared with the executive branch.

Thus, the present system shall prevail and executive shall be given no saying. Selecting several judges for appointment to higher judiciary by following rational and fair manner is an arduous task and such a task cannot be fulfilled by an ex-officio body of sitting judges and the ministers. Hence there is a need for an independent body in the lines of Judicial Appointments Commission (JAC) of the United Kingdom for the purpose of scrutinizing the applications and nominations of the candidates as per the criteria that could be developed by the commission.[64] Also the personal qualifications, experience, expertise and the ground on which the appointment is being made should be conveyed to public. This will improve impartiality and transparency in appointment and also lead to improve in quality of judges being appointed.

**Uncle Practice (Kith and Kin)**

The problem coming is that a person who has worked as a District Judge or has practiced in the High Court is appointed as the judge of the same state. If a person has practiced in the High Court, say, for 20-25 years and is appointed a judge in the same court, overnight change is not possible. He has his colleague advocates- both senior and junior- as well as his kith and kin, who had been practicing with him. Even wards of the judges are practicing in the same court. There are occasions, when advocate judges wither settle their score with the advocates, who have practiced with them or have soft corner for them. In either case, this affects their impartiality and always justice is at the losing side.

As has been stated by the Hindustan Times[65] "At least 16(34%) of the 47 judges in the Punjab and Haryana High Court have their kith and kin practicing in the same place." Either these relatives have private practice or the Punjab and Haryana governments have accommodated them in respective advocate general offices.

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[61] Union of India v. Sankalchand, AIR 1977 SC 2328: (1978) 1 SCR 423: (1977) 4 SCC 193 (para 52)

[62] Baldev Raj v. Punjab and Haryana High Court, AIR 1976 SC 2490 : (1976) 4 SCC 201; Supreme Court Advocates-on-record Association v. Union of India, AIR 1994 SC 268 : (1993) 4 SCC 441.

[63] 418 US 683: 41 L Ed 2nd 1039 (1974).

[64] Prashant Bhushan, *Lay Down Standards of Transparency*. Indian Express, available at: http://indianexpress.com/article/opinion/columns/lays-down-standars-of-tranparency/.

[65] Hindustan Times, Chandigarh, Sanjeev Verma, dated 3rd May

The then Chief Justice of India Rajindra Mal Lodha said there is nothing the judges can do about it and it is for the bar council to take active action. The Bar Council of India as well as the Bar Councils of states such as Rajasthan and Bihar had passed resolution to shift uncle judges to High Courts outside.

For improving the impartiality in justice administration system, the recommendation of M. C. Setalvad shall be implemented. He recommended that at least 1/3 of the judges of every High Court shall be appointed from outside the state.[66] The Law Commission regarding this problem, in its report no 230[67] recommended that in any case, the Judges, whose kith and kin are practicing in a High Court, should not be posted in the same High Court. This will eliminate Uncle Judges. The effect of the recommendation was that the then Chief Justice of the Punjab and Haryana High Court, Mukul Mudgal had forwarded a list of 16 "Uncle Judges" to the Union Ministry of Law and Justice.

In 1967, when U.S. President Lyndon B. Johnson appointed the son of U.S. Supreme Court Judge Tom C. Clark as the Attorney General, Clark promptly resigned from his post. This was because an Attorney General will have to make frequent appearance in the court in which his father will be one of the judges adorning the bench and in that Supreme Court all the nine judges sit together. But in India that has not been the case. Right now the matter regarding the appropriateness of a lawyer appearing in a court in which his near relative is a judge has gained significance in the context of Fali S. Nariman, a leading senior advocate of the Supreme Court, continuing to appear in cases before the Supreme Court in which his son Rohinton F. Nariman has become a Judge since July 2014. While some criticism was aired regarding this in public, Mr. Nariman dismissed complaints maintaining that there is no legal bar for such appearance and said that everyone is equal before the law.

This is more a moral obligation too. Both the Bar and Bench have an equal responsibility to maintain the trust and impartiality in Courts. In India itself, there are a number of examples which need to be appreciated and followed. When Justice P. Balakrishna Iyer became a judge of the Madras High Court, his son advocate P. B. Krishnamoorthy shifted his practice to another State. When Justice V. R. Krishna Iyer became a Supreme Court judge, his son who was a lawyer as well, chose not to practice in any court in India opting for private employment. Justice V. Sivaraman Nair of the Kerala High Court had worked as a junior of Justice Krishna Iyer. But as soon as his daughter and daughter-in-law started practicing in the Kerala High Court, he requested the President of India to transfer him to another State.

"*The Advocates Act, 1961 empowered the Bar Council of India to frame rules so that no lawyer can practice in a court where any of his relatives' functions as a judge*." Until 1961, in India, there were instances in which lawyers appeared in the same court over which their relatives were presiding. But after the Advocates Act, 1961 empowered the Bar Council of India to frame rules on the matter, such incidences have become rare. Under Rule 6 of the norms established by the Bar Council, no lawyer can practice in a court where any of his relatives' functions as a judge. The list of such relatives included his/her father, grandfather, son, grandson, uncle, brother, nephew, stepbrother, husband, wife, daughter, sister, aunt, niece, father-in-law, brother-in-law or sister-in-law.

Markandeya Katju, in his judgment sounded a warning on the ills of kith and kin being allowed to practice in the same court as their relatives. He said: "Some Judges have their kith and kin practicing in the same court, and within a few years of starting practice the sons or

[66] Law Commission Report 14, volume 1, p. 100, para 74
[67] Law Commission of India 230, p. 12-13, para 1.3

relations of the Judge become multimillionaires, have huge bank balances, luxurious cars, and huge houses and are enjoying a luxurious life. This is a far cry from the days when the sons and other relatives of Judges could derive no benefit from their relationship and had to struggle at the bar like any other lawyer."

Lawyers must not resort to strike under any circumstances and must follow the decision of the Constitution Bench of the Supreme Court in the case of Harish Uppal (Ex-Capt.) v. Union of India.[68] There is a Bar Council that has to look after ethics of lawyers, but it has rarely taken action against tainted lawyers. Everything becomes customary and loses meaning. In every part of the country, lawyers are now no more social activists. They have emerged out to be the biggest obstacle in judicial administration system. Public interest has to be its motto and service in the cause of justice its creed. Mahatma Gandhi was a barrister who practiced law without compromising truth.[69]

In order to maintain judicial independence, Supreme Court deprecated the practice of advocates or litigants to brow beat the Court or malign the presiding judge with a view to get a favorable order. It was held that "Lawyers and litigants cannot be allowed to "terrorise or intimidate" judges with a view to secure orders which they want. This is basic and fundamental and no civilized system of administration of justice can permit it."[70]

Several other methods need to be adopted for insuring the transparency and accountability in judicial administration. The Judiciary is under great pressure. Indian legal system has the largest backlog of pending cases in the world – as many as 30 million pending cases. Of them, over five million are High Court cases and 65000 Supreme Court cases. It clearly reveals the inadequacy of the legal system. We have about 10-11 judges per million population right now. The Supreme Court has recently directed that we should have 5 times the number of judges we currently have.[71]

Speedy justice may have fast track court; the government has already taken several initiatives on the path of judicial reforms. 1562 Fast Track Courts have been set up which have disposed of more than 18 lakh cases transferred to them. 190 Family Courts, established in various parts of the country, have speedily settled matrimonial disputes through reconciliation.

In almost every High Court, there is huge pendency of cases and the present strength of the judges can hardly be said to be sufficient to cope with the alarming situation. Therefore, the establishment of new Benches is necessary. It is also in the interest of the litigants. The Benches should be so established that a litigant is not required to travel long.[72]

There is huge pendency of cases in the apex court also. Now the time has come when not only the strength of the Hon'ble Judges in the Supreme Court should be increased and recommendations are made to fill up the vacancies soon but new Benches be also established in southern and eastern regions.[73] For making an appeal to the apex court, the applicants from southern states have to travel a lot and it amounts to lot of expenditure. Thus bench of the apex court should be established in southern regions so that everyone has the same suitability in getting justice.

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[68] (2003) 2 SCC 45
[69] Law Commission Report 230, p. 23, pt. 1.46
[70] Chetak Construction Ltd. V. Om Prakash, AIR 1998 SC 1855: (1998) 4 SCC 577
[71] *All India Judges' Association v. Union of India*, (2002) 4 SCC 247
[72] Law Commission Report 230, p. 10-11, pt. 1.7, 1.8
[73] *Id.*

Several judicial reforms have helped a lot in bringing the transparency and accountability in judicial setup of our country. The Judge's Enquiry Act, 1968 and Judicial Standard & Accountability Bill, 2012 are very important in this regard.

**The Judge's Inquiry Act, 1968**

The act was passed under article 124 for providing procedure for the investigation and proof of 'misbehavior' and 'incapacity' of judges of Supreme Court (including the Chief Justice of India), the Chief Justice and Judges of the High Courts.

**Judicial Standard & Accountability Bill, 2012**

This bill proposes the member of judiciary to disclose their assets before a scrutiny panel and shall have to maintain a judicial life by avoiding personal and official biases, remaining apolitical, discouraging uncle practice, not maintain collision with bar, avoiding personal use of official perquisites, etc. the bill intends to lay down judicial standards and provide for accountability of judges. The effect of it has been that numbers of judges have declared their assets; this has added to the transparency and accountability in judiciary.

## CONCLUSION / SUGGESTION

The rule is the justice shall not only be done but should also appear to have been done. It is very necessary that the judiciary of any country should be an integral part of the society and its interactions with the society must be made regular and relevant. Thus transparency and accountability in the judicial setup needs strengthening to safeguarding the interest of the people at large. The recommendation of the Law Commission needs to be implemented. All organs of the government need not interfere in the arena of the other and shall respect the doctrine of separation of power, which is a basic structure of our Indian Constitution.

Also, attitude need to be changed. Anything does not happen at the thinking and act of one person or idea of one person. It takes a collective effort of all to bring change. Right from the beginning, at the study level, the efforts have to be made. The teachers need to infuse into the mind of the law scholars that the philosophy and the rationale behind the law is important. They need to develop some basic principle before getting professional in the field. They need to get acquainted with the need of the law and the very purpose which was sought to be achieved at the time of enacting the law. The Constituent Assembly Debates (CAD) need to be included in the syllabus of all law studies.

It is very alarming that the impartiality and conduct of judicial organ is in question. The judiciary is vested with responsibility of safeguarding the interest of all other, thus it needs to be above any suspicion. Through various means the trust in judiciary should be established. But this all can happen only by responsible attitude of all with some moral instinct and hope for better judiciary. Mere legislation cannot do well. Thus, we should all consider it as our duty to safeguard the independence of judiciary and try to strengthen the trust and faith of public in it because this is only the way by which democracy is safeguarded.

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