



JUDICIAL APPOINTMENTS: OF COLLEGIUMS AND MORE

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Synopsis

Statement of the Problem

The process of judicial appointments has been through a multitude of changes over the years, which have affected its nature and have brought in a lot of constitutional questions into play. The judiciary has also evolved through these and has come to strongly adopt a cogent manifesto for its independence and has adopted the collegium system for appointing judges. This has created a lot of problems and has superseded not only the legal intent behind the provisions but also disregarded the involvement of the other organs. The author aims to analyze the series of developments that led to the current system and look at alternate systems for the resolution of the aforementioned conundrums.

Research Questions

1. Whether the judiciary's current system of appointment is constitutionally tenable?
2. Whether there can be an alternate model to efficiently substitute the current system of judicial appointments for the better?

Hypothesis

That the current model of judicial appointments is not founded on cogent constitutional grounds. That it lacks accountability and transparency and needs to

be amended. That its independence is not undermined due to a lack of primacy to its opinion and that the executive needs to be substantially accommodated in the process.

Introduction

The Indian Judicial System is a body politic of itself. With trials and tribulations that run the course of more than half a decade, it is an intrinsically contested functionary. There is also a perennial threat to its independent nature in the form of the ever-strengthening executive. However, there are mechanisms which it employs to protect itself from the interference of other organs of the Government. Some of these mechanisms it has been endowed with, and some of them it has developed on its own.

Today, the Indian judiciary is one of the strongest judiciaries in the world, a title that fits a judiciary that derives its power from one of the most impeccable constitutions. There are a lot of tenets of the constitution that empower the judiciary to maintain its independent nature, like on the issues of salaries, services, and removal process. There is one process, however, which allows for the role of executive. This is the process of judicial appointments. There has been a lot of debate and discussion surrounding the process and it is still quite a contested issue. This paper tries to identify and critically analyze the various themes that emerge when we look at the series of judgments, which served as the basis for the development of the same.

The paper is divided into two parts and the first part deals with three themes. The first theme to be discussed would be the debate surrounding the articulation of article 124 which included the word "consultation with



judges”. It was first held to be that “consultation” would be a mandatory process, but it won’t be of a binding nature on the executive. This was subsequently overruled in the Second Judges Case since the consultation was made mandatory. The sub-argument of accountability was mentioned with respect to executive having an upper hand over the judiciary. The author believes that the statute has been misconstrued in the garb of overreach of judicial power and in the absence of any ambiguity, a plain reading of the article does not suggest anything else than a mere consultation.

Another major argument that emanated from the idea of the consultation was that primacy is accorded to the opinion of the Chief Justice of India in the consultative process. This argument does not stand when we refer to the Constitutional Assembly Debate where primacy to the opinion of CJI was openly rejected. The idea of primacy was rejected in the First Judges Case due to plain statutory interpretation, but was overruled in the Second Judges Case where it was opined that the opinion of the Chief Justice should be a cumulative opinion of all the concerned functionaries, plus the argument of primacy stands on the fact that the CJI is the highest functionary. The author believes that this argument is in continuation to the first argument, insofar as judicial overreach has soiled its true meaning. Besides, there is ambiguity regarding the process of appointment of judges of High Courts where CJI is still accorded primacy in case of disputes.

The argument of Independence of Judiciary has been employed to support the first two

arguments, insofar as it has been considered as a part of the basic structure of the constitution. By providing a political background to the First Judges Case, the shift in paradigms of the appointment process has been highlighted. Under the gamut of doctrine of independence, executive’s role was intensely limited. The NJAC was scrapped under the same doctrine, due to the impervious role of the “eminent persons” in the Commission. The tenet of including primacy to the judiciary has also been unsuccessfully attempted to be included in the basic structure doctrine. Finally, the very idea of independence of judiciary is analyzed with respect to the role of the Bar.

The second part of the paper is primarily aimed at picking the best arguments from the ones discussed in part one so as to build upon a judiciary that is inclusive of all the opinions and truly represents the values enshrined in the constitution. This is also divided into three parts, which include provisions that might be; (i) retained, (ii) amended and (iii) introduced. In summation of the entire paper, a very basic model has been envisaged which, according to the author, encompasses the best possible perspectives and is the ideal model that can accommodate the aspiration of both the executive as well as the judiciary.

Part – I Model of Appointment

Article 124 of the constitution dictates that,

*“Every Judge of the Supreme Court shall be appointed by the President... after **consultation** with such of the Judges of the Supreme Court and of the High Courts in the*



States as the President may deem necessary... in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted”¹

The word consultation was first explained in the case of Union Of India vs Sankal Chand Himatlal Sheth² where the judges opined on its meaning to say that the consultation should be full and effective rather than being unproductive and dull. However, they were of the opinion that the executive was not bound by the opinion rendered after effective consultation.

In the First Judges Case, i.e. S. P. Gupta v Union of India³, the judges reiterated the meaning of the word “consultation” thus explained and opined that it is compulsory but final power rests with the executive. They reasoned that this does not and should not end up making the executive supreme, but should be considered as a due deliberation with functionaries who are *ex-hypothesi* acclaimed to render correct advice in terms of the candidates. The President necessarily has to give due weight to the opinions rendered by the judges, and if he departs from them, he should have cogent reasons to do so.⁴

The doctrine of judicial primacy, which accords a binding nature to the advice so rendered was also discussed in this case and an interesting argument was raised which postulated that the doctrine fails when we consider the appointment process to the office of CJI. Under article 124, the President consults any judge that he wishes to consult

and mandatorily consults the CJI while making appointments to any other post. But concerning appointment to the office of the CJI itself, the President need not mandatorily consult any judicial office and is, in effect, exclusively bound by the aid and advice of his council of ministers. Thus, if the “doctrine of judicial primacy” fails at the office of the CJI itself, then it certainly cannot be enforced upon the rest of the offices.⁵

The First Judges Case was subsequently overruled in Supreme Court Advocates-on-Record Association v Union of India⁶, also referred to as the Second Judges Case. This was the landmark case that drastically eliminated the role of the executive in the process by introducing the collegium system, which was to include the CJI and two senior-most judges of the Supreme Court (later increased to CJI plus 4 senior-most judges⁷). The majority judgment agreed with the argument that due weight needed to be given to the opinion of the judicial members, but they took the argument one step further by according it a binding nature because, since the consultation is made mandatory, it would be rendered as a futile exercise if it were not effective.⁸

Ahmadi J. dissented by pointing out that while consultation might’ve been made mandatory to put a check on the abuse of power by the executive, the article does not suggest a complete exclusion of the executive from the process of judicial appointments by making the suggestions of the judiciary binding. If the constitution-makers

¹ Article 124, Constitution of India.

² Union Of India vs Sankal Chand Himatlal Sheth AIR 1977 SC 2328.

³ S. P. Gupta v Union of India AIR 1982 SC 149.

⁴ *ibid* 3 para 328

⁵ *ibid* 3 para 1014

⁶ Supreme Court Advocates-on-Record Association v Union of India, (1993) 4 Supreme Court Cases 441.

⁷ *In re* Special Reference 1 of 1998, (1998) 7 Supreme Court Cases 739.

⁸ SCAORA I, para 164.



deliberately didn't employ the words 'concurrence' or 'consent' in the provision then the judiciary has no mandate to interpret it that way.⁹ The author agrees with this perspective as only after stretching the word "consultation" to its very limits can the enforcement factor be reasonably argued and there is no ambiguity in the provision so as to enable the judiciary to do so. Besides, a quick reference to the Constituent Assembly Debates would suggest that the constitution-makers wanted this to be a joint endeavor of both the organs so as to ensure a transparent and effective system and not a one-sided endeavor.

Also, the collegium system has no mention in neither the Constituent Assembly Debates nor the Constitution, meaning that such a system was never envisaged by the constitution-makers and is an innovation of the judiciary, by the judiciary and for the judiciary.

An argument surrounding **accountability** was also raised in this judgment, which discussed the much-pervasive view that since the executive is elected by the people, it is directly accountable to them and the judiciary, being appointed on the basis of seniority and merit, holds no apparent accountability to the people and thus, the appointment process should rest with the executive. But the judges opined, and aptly so, that the executive is rarely ever elected on the basis of its influence in the process of judicial appointments. Their election manifesto is rarely about this and it is also not

something that could be openly debated in the legislature.¹⁰ The Supreme Court, however, is imminently responsible for the management of the courts, which are inseparably connected to the people, and it is also accountable and responsible to the Bar. The author agrees with this view that the executive often uses the defense of being 'directly accountable' to the people in order to gerrymander its interests insofar as the accountability of the judiciary is considered, which is seemingly quite remote.

The majority decision is the Second Judges Case was upheld and further condoned in the NJAC case, i. e., the Supreme Court Advocated-on-Record v Union of India¹¹ which challenged the constitutionality of the National Judicial Appointment Commission Act, 2015¹² which was to establish a National Judicial Appointments Commission, which was to replace the collegium insofar as judicial appointments were concerned. It would have consisted of "the Chief Justice of India, two other senior judges of the Supreme Court, the Union Minister for Law and Justice and two eminent persons, who were to be nominated by the Prime Minister, the CJI and the Leader of the Opposition, provided that one of the eminent persons to be nominated shall belong to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women."¹³ The Commission was introduced as a bipartisan model in place of the collegium in order to counter the growing complaints of lack of transparency, accountability, and

⁹ SCAORA I, para 300.

¹⁰ SCAORA I, para 454.

¹¹ Supreme Court Advocates-on-Record Ass. v Union Of India (2015) SCC OnLine SC 388.

¹²The Constitution (Ninety-Ninth Amendment) Act, 2014.

¹³ ibid 13.



sycophancy within the closeted collegium mode.¹⁴

The majority ruled against the Act and declared it unconstitutional. They emphasized the importance of the process of consultation by opining that it is actually a process of aid and advice. Since the primary intent of the constituent assembly was to keep the judiciary asunder of any political influence, the involvement of executive is by default rejected and the process is made out to be a primarily judicial function.¹⁵

However, the author believes that the appointment process can never be a truly judicial process because it's done under the seal and warrant of the President, an executive functionary, and by the virtue of Article 74, the President is bound to act at the aid and advice of the Council of Ministers, which is binding in nature. But if we consider the function to be judicial or even quasi-judicial in nature, it would in effect mean that the President is not bound to act by any authority, which is not possible. Thus, the function constitutionally remains an executive function.¹⁶

Another argument put forth by Lokur J. was that the NJAC undermined the authority of the President in the appointment process.¹⁷ The article clearly mandated a discretionary role being provided to his/her office, however, the NJAC completely removed his/her involvement from the process, which was not in line with the legal intent behind the statute. The author agrees with this view insofar as the role of the President has been quite abruptly been limited. However, that

author believes that necessarily involving the office of the President is only important insofar as the end goal of effectively involving the executive in the process is achieved.

Finally, Chelameswar J. in his dissenting opinion stated that the nature of the collegium is such that it provides no avenue for accessibility to the public. The consensus is often achieved by unfair means, and sycophancy and lobbying play a major role in most appointments. This leads to a miscarriage of judiciary and all the values that the constitution stands for, as unworthy candidates get appointed to important posts.

The executive also makes the situation worse by practicing active silence in the matter of judicial appointments even after having avenues to question the process, if not play a role in it.¹⁸

Thus, the current model of appointments is intrinsically contested. It is borne out of views that are not really in par with the intent behind the statutes and there is a growing need for change in the same. Within the paradigm of consultation itself, there is another major argument surrounding the fact that whether primacy needs to be accorded to the opinion of the CJI.

Primacy to the opinion of the CJI

The idea of judicial appointments was often debated in the constituent assembly, with a

¹⁴ B. N. Srikrishna, 'Judicial Independence' in Sujit Choudhry, *The Oxford Handbook of the Indian Constitution*, Oxford University Press (2016).

¹⁵ NJAC Case, para 97.

¹⁶ SP Gupta, para 709.

¹⁷ NJAC Case, para 1030.

¹⁸ NJAC Case, para 1144.



special focus on safeguarding the judiciary against the executive.¹⁹ The house was effectively against providing any authority to the executive, however, it was divided on the exact method to be adopted for the same. The propositions raised included one where the President was to appoint the judges of the Supreme Court in concurrence with the views of the Chief Justice of India. Dr. B. R. Ambedkar explained how vesting veto powers in the institution of the CJI (considering how he was ultimately a being with failing and misgivings of a human) when it came to judicial appointments, would be to vest authority in him that other substantially authoritative offices, like that of the President or the Council of Ministers, were left in want of.²⁰ Thus, it is clear that the mandatory consultation might have been envisaged to be a much-needed check on the power of the executive, however, there was a clear intention of not providing any sort of veto or primacy to the office of the CJI.

The debate surrounding primacy being accorded to the opinion of the CJI arose first in First Judges Case and pertains primarily to article 217. The question was whether primacy could be accorded to the opinion of the Chief Justice of India when other constitutional functionaries were also to be consulted. The author believes that perhaps this doubt might have arisen because of the special way the articles (124 and 217) are worded. Due to the CJI, by virtue of the office, being mandatorily consulted in both the instances and also being the paterfamilias of the judiciary, a special position might be

accorded to him simply because of the constitutional gravity of his position.

However, the judges in the First Judges Case resorted to the view that since the article is completely silent about this, a hierarchy of opinions does not exist and every functionary's view is to be given equal weight. Primacy would necessarily mean that out of two authorities, one will always be preferred over another, but such is clearly not the wording of the case, and thus, cannot be the intent. In case a difference does arise, the CJI should then compile all the opinions and send them to the President for him to deliberate and decide.²¹

The Second Judges Case did accord primacy to the opinion of the CJI, but also mentioned that his/her view was to represent the view of the judiciary *per se* and was to be formed after due consideration of opinions of all the functionaries involved. It should necessarily involve the feature of plurality for it to be truly consultative and effective in nature. The justification provided for primacy being meted out to the CJI is that this process of appointment is different from the one appointed for other functionaries, and since the CJI is the highest office in the judicial system, his opinions are bound to be provided primacy, not only principally, but also constitutionally.²²

Chelameswar J. opined against this tenet of the Second Judges Case, in the NJAC case by saying that primacy to the opinion of the CJI is not what the constitution dictates, but it is

¹⁹ Constituent Assembly Debates, 24th May 1949 (Vol. VIII).

²⁰ *ibid* 20.

²¹ SP Gupta, para 719.

²² SCAORA I, para 181.



the non-investiture of arbitrary authority in neither the judiciary nor the executive.

The author agrees with this contention insofar as, it accords primacy to an office only on the basis of its virtue of being the senior-most office. In cases pertaining to the appointment of high court judges, the CJI is still accorded more weight than say, the Chief Justice of the concerned high court. The CJI may not have any primary resource to form his opinion, and the Chief Justice of the High Court may have had the first-hand experience with the candidate. This problem especially arises in the collegium system when a candidate from a particular region is to be considered and the collegium has no cogent basis to determine the merit of the candidature. Further, since the function of appointments is primarily an executive function, so it should be left to the executive to collect a multiplicity of opinions and then decide on the appointees. The executive usually does not stray from the majority view of the consultees and even if it does, due to political consideration, it can always be checked by judiciary.

Thus there is no cogent reason, neither in the Articles nor in the CAD to prove that the opinion of the CJI needs to be accorded primacy besides it being his prerogative by virtue of his office.

Independence of Judiciary vis a vis Primacy of Judiciary

The argument of Independence of Judiciary has been reiterated in a lot of instances to establish its upper hand of judiciary in various constitutional facets. In the relevant issue too, the judiciary has primarily focused on maintaining its independence in the matter, even if it was not originally meant to be eschewed to it. The basic tenets that run beneath this argument are the doctrine of separation of power and the limitation of political interference by the executive in the functioning of the judiciary.

The author believes, however, that these tenets of the judiciary have turned into a tool to constitutionally justify its nature of dogma and dogmatic evolution into a super-executive of sorts.

The idea of political influence came to light after Indira Gandhi appointed Justice A. N. Ray as the CJI, superseding 3 senior judges in line. This was against the age-old established practice of appointing CJI based on seniority. What was contended, however, was the fact that he was one of the minority judges, who had opined in favor of the Government in the Bharti Case.²³ This supposed malpractice was repeated when Justice Beg, who opined in favor of the Government in the ADM Jabalpur case²⁴, was appointed superseding Justice Khanna, who opined against the case of the Government.²⁵

These were indeed difficult political times and it is in this light that we need to consider the First Judges Case. It was delivered in the early 1980s, after the Indira Gandhi Government succeeded in coming back to

²³ Kesavananda Bharti v State of Kerala and Ors. (1973) 4 Supreme Court Cases 225.

²⁴ ADM Jabalpur v Shivkant Shukla AIR 1976 SC 1207.

²⁵ Arun Tiruvengadam, The Constitution of India: A Contextual Analysis (Bloomsbury) p 125-127



power with an astounding majority, after the debacle of the Emergency, and the judge ruled almost entirely in favor of the executive. Perhaps the ruling was affected by the prevailing political circumstances, the author is not sure of that. But the effect of these impugned decisions was that in the Second Judges Case, the dialogue shifted almost entirely in the favor of the judiciary. The system had basically shifted from one end of extreme to another, one with pervasive political interference to one that was completely asunder from any political inputs.²⁶

In the Second Judges Case, it was opined that appointment could not be left to the prerogative of the executive, not only due to fear of political interference but also because the state is the biggest litigant in the judicial system and it would not be fair to have judges of interest judging their cases.²⁷ Another factor could be that judges, in the aspiration of being promoted, could deliberately adjudicate in favor of the state. This is why, the court believed, the appointment process should include consultation of a binding nature so that the independence of the judiciary can be safeguarded.

But it could alternatively be said that out of all the functions, regarding the judiciary, that the constitution envisaged, this was perhaps the only one which allowed for political involvement. All the other processes (salaries, removal, etc.) have airtight provisions to protect the independence of the judiciary from the whims and fancies of the executive, but it was only in the case of judicial appointments that the constitution

deliberately allowed for only a mandatory consultation with the CJI and such consultation with other judges as the executive deems necessary.²⁸ This is proof enough that the legal intent was to provisionally allow for executive involvement in the process. Besides, there is no other reason to believe that it undermines the independence of the judiciary.

The introduction of the collegium system and the belittling of executive's role is thus, the judiciary acting in the garb of protecting its own interests and over-interpreting a provision that has been provided in a plain and simple language, to sequester itself from other organs, under the gamut of judicial independence, especially when such a system was never even mentioned in the constituent assembly or the constitution in the first place.²⁹

The NJAC Act challenged this system, on grounds of opacity and lack of efficiency and argued that the introduction of representatives from executive as well as the civil society would bring in the much-needed transparency while ensuring that the judiciary was adequately represented. This Act was challenged mainly on the basis of introduction of the two "eminent persons" in the commission who would, together, have the authority to veto the unanimous decision of the judiciary.³⁰ Besides, there were no criteria established for the appointment of such persons and the commission itself was also not inclusive of the representatives of the marginalized segments of the society.

²⁶ Arun T. p 132-133

²⁷ SCAORA I, para 447.

²⁸ Arun T p 112-113.

²⁹ Dr. Anurag Deep and Shambhavi Mishra, 'Judicial Appointments in India and the NJAC Judgement: Formal Victory or Real Defeat' *Jamia Law Journal*.

³⁰ NJAC Case, para 214.



Thus, again, it was a sudden shift from the prerogative of judiciary, to that of the executive, and thence, a fatal blow to its independent nature. This is perhaps one of the main reasons why the Act was challenged and struck down before it even had a chance to be implemented.

Moreover, the tenet of primacy to the opinion of the judiciary was considered to be a part of the basic structure, based on the need for independence. However, since the concept of the 'doctrine of basic structure' is in itself so ambiguous and contested, there is a dearth of enough reasons so as to prove why primacy is to be a part of the basic structure. There is a lack of normative reasoning to determine what forms part of the basic structure and what doesn't and it is something that is usually left to the discretion of the bench that adjudicates the matter. However, in this case, the problem arises when the judiciary is deciding a case that grossly affects the judiciary itself and thus has a major conflict of interest in that regard.³¹

Regardless, Justice Khehar and Justice Goel opined that primacy was part of the basic structure, but since only two out of five judges opined so, it does not qualify to be regarded as the binding *ratio* of the judgment. The only reason provided was that it is integral to securing independence of the judiciary and that this is a practice that has

been an established practice which is being followed for a long time.³²

Both of these reasons rest on unsound grounds as the mere fact that a provision helps reaffirm a practice that is a part of the basic structure, does not automatically qualify the provision *per se* to be a part of the basic structure. Besides, just because a particular practice has been long-established, it does not provide reasons enough to abide by it, especially in times as dire as those we find ourselves in.³³

Constitutional aspect apart, another perspective being shed on the independent nature of the judiciary, with respect to the executive is in the light of the Bar. For every facet that the judges affect to stay independent from the executive, they find themselves depending on the Bar to realize it. It is considered to be the best judge of the judges and the judiciary often finds itself at the disposal of the Bar for matters that are important to its own existence. In that sense, the myth of strong and independent judiciary fails when we notice that the judiciary is intrinsically dependent on political and extra-political factors to survive.³⁴

Thus, the Indian judicial system finds itself back to square one, without having successfully resolved the problems that have been plaguing the system since the last few decades. We need to remember, however, that the collegium system was adopted as a response to a system that was inherently

³¹ Deep and Mishra (n 29).

³² Arghya Sengupta, "Judicial Primacy and the Basic Structure" [2015] 50(48) EPW <<https://www.epw.in/journal/2015/48/appointments-judges/judicial-primacy-and-basic-structure.html>> accessed 24 October 2019.

³³ Ibid.

³⁴ Upendra Baxi, 'Courage, Craft and Contention: The Indian Supreme Court in the Eighties' (N. M. Tripathi, 1985) <https://www.academia.edu/8135590/Baxi_Upendra._1985._Courage_Craft_and_Contention_The_Indian_Supreme_Court_in_the_Eighties._Bombay_N.M._Tripathi> accessed 14 November 2019.



political in nature, something that posed a great threat to the values enshrined in the constitution. The collegium system did manage to eradicate the political interference, but problems only emerged because of the character of the approach as well as the judiciary itself, which vouched for complete independence from all extraneous factors.

Moreover, besides the nature and working of the collegium system, there exist a multitude of other problems, like documents related to the discussions of the collegium, the disclosure of which may lead to the breach of privacy of candidates. This issue has been substantially discussed and adjudicated recently in the case of Central Public Information Officer of SC v Subhash Chandra Agrawal³⁵, where the court adjudicated that the documents that pertained to discussion related to the appointments of judges shall be covered under the RTI Act to ensure transparency. This is a landmark judgment insofar as transparency in appointments is concerned.

However, the trends have changed as even the judges themselves have started to realize that the collegium system is anything but a solution to the earlier model of an executive-based approach. A reform process needs to be initiated, which would allow for space for expression from both the organs while eradicating any extraneous influences that might hinder the process. Currently, the judiciary and the executive are in a process to figure out amendments to the Memorandum of Procedure³⁶ which would allow for such changes to be effected.

After analyzing the aforementioned points, the position of the two functionaries and the various tussles that they've been through, the author has identified a few contentions. There are a few features that can be retained from the current system, a few that may be changed, and some additional institutional changes that might be employed to amend the system for the better.

Part – II

To Retain

The constituent assembly might have only envisaged a mere consultation with the CJI, but the gross abuse of such a provision by the executive go a long way to show that it is not safe to leave the appointment process entirely in the hands of political actors as they might use it to supersede the authority of rule of law. Thus, more weight and greater gravity need to be provided to the CJI as well as other senior-most judges (as the distinction between the two is only based on seniority and not on merit) without making them binding in character.

The main contention against the NJAC Act surrounded the “eminent persons”. The author agrees that the ill-define nature of their offices as well as veto power being accorded to them would have not only been inimical to the independent stature of the judiciary, but may have provided a way of undermining the constitution and subservience of the law by

³⁵ Central Public Information Officer Supreme Court of India v Subhash Chandra Agrawal < https://www.sci.gov.in/pdf/JUD_3.pdf > accessed 20 November 2019.

³⁶<<https://doj.gov.in/appointment-of-judges/memorandum-procedure-appointment-supreme-court-judges>> accessed 14 November 2019.



the hands of people who are neither accountable to the courts, nor the citizens.

The course of ensuring transparency which has been adopted through the recent judgment is going to go a long way in ensuring accountability to the people as well as incentivizing the concerned functionaries to develop norms and regulations relating to the appointment of judges.

To Amend

Both of the executive, as well as the judiciary, needs to be provided substantial space in the system of appointments, however, the final say needs to rest with the executive, instead of the judiciary.

The collegium was never mentioned in any of the constituent assembly debates and is an approach that is wholly created by the judiciary. It needs to be replaced by an approach that not only draws its legitimacy from the constitution but also finds a place in it.

To Introduce

The lack of accountability and complaint mechanisms can be countered by introducing a complaint mechanism that can help address the various internal complaints since the proceedings of the collegium cannot be discussed in the legislature.

Thus, there may be a system that comprises representation from both the executive as well as the judiciary. The President as well as the CJI may be ex-officio members of

the same, this will also ensure participation of the President since his role was drastically limited in the NJAC Act. There may be a majority of judicial members, perhaps 2/3rd so that the judiciary's cardinal role is not limited. The executive might appoint eminent jurists from the legal profession, with reservation for the various ill-represented categories of the body politic, especially women, since they often do not find equitable representation in the collegium.

The proceedings might be made publicly available while ensuring that the privacy of the candidates is not breached. Concomitantly developing norms for ensuring the same as well as selecting candidates might be the first step in ensuring participation of both the functionaries. Certain criteria for selecting the eminent persons, pertaining to merit or fields of interest, might be developed prior to the Act so that it can be checked as well as implemented effectively. The role of the eminent persons so elected may be either limited to consultation, or participation in the proceedings, without making their opinions binding on any of the systems so formed. This would ensure that the independent character of the judiciary is not undermined. The decisions of such a commission would be accommodative of the opinions of the executive also and since both the functionaries would be working together, political influence might be limited since the discussions would be under the direct scrutiny of the public. The judiciary, having a majority say, would not feel undermined. The final appointment would still rest with the executive, but since the recommendation of the body would be after due deliberation and discussion, the executive would be bound by its decisions. If it does choose to appoint



someone other than the recommended person, it would be answerable to the body so formed.

The introduction of the complaint mechanism could be one step forward in making the judiciary accountable to not only the judiciary but to the society at large.

Conclusion

The author has attempted to highlight the various themes that emerged when the process of judicial appointments was debated and discussed, both inside as well as outside the court, throughout the years. The model of appointment, i. e. the collegium, which primarily revolved around the word 'consultation' was analyzed through the four Judges Cases so as to understand how it has evolved, both constitutionally as well as politically. Existing problems, as well as future aspiration, were kept in mind while following the arguments, and it was found that the problem lies in the closeted nature of the collegium and so, solutions were developed while ensuring that the approach allows for the expression of interests of both the executive as well as the judiciary. The issue of primacy to be accorded to the opinion of the CJI is resolved through referring to the statute and the CAD in a plain and lucid way, which postulates that there is no cogent reason for effecting the same. The issue of independence of judiciary with respect to the basic structure doctrine was affirmed and accepted, with the addendum that primacy in judicial appointments was not a cardinal factor for ensuring independence. Considering the various sub-points and contentions raised in the aforementioned discourse, the author chose the most reasonable points from all the sources

discussed and formulated a very basic model, which might be given effect to, in order to realize the goals and aspirations of both the parties as well as the constitution.

The author believes that "in times when the political branches cannot be trusted, neither can the judiciary". It is only by accommodating and trusting each other, can the two functionaries further the goals and aspirations of the constitution.

There is no perfect approach to the process of judicial appointments. It is only after a relay of continuous contesting and amending that the process can be emulated, and even then, it's only effective insofar as it fits the current political scenario.
