APPOINTMENT OR DISAPPOINTMENT: PROBLEM AND PERSPECTIVE TO THE APPOINTMENT OF JUDGES IN THE INDIAN JUDICIARY

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I. INTRODUCTION

The judiciary is one of the institutions on which rests the noble edifice of Democracy and Rule of Law. It is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of power conferred upon it by the Constitution and the laws, thereby making the Rule of Law effective and meaningful. Besides ensuring Rule of Law and realization of human rights, it also ensures prosperity and stability of a society. According to Justice H.R. Khanna, the role of the judiciary has passed from one of "*settling disputes between private citizens*" to acting "*as the arbiter of disputes between the state and the citizens*." Since persons who are to decide such disputes should not be susceptible to the pressures of the citizens and of the state, the independence of judges has come to be accepted as an essential trait of a democratic society.[1]

Independence of judiciary includes independence from other organs of the state viz. the executive and the legislature, as well as independence of individual judges, so that they can decide a dispute, uninfluenced by any other factor. A judge should fulfill his duties in the true spirit, and must hold his scales even in the interpretation of laws and administration of justice. This brings into light one of the

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[1]H.R. KHANNA, JUDICIARY IN INDIA AND JUDICIAL PRACTICE 16, (Ajoy Law House, S.C.Sarkar and Sons Pvt. Ltd., Calcutta, 1985).

underlying objectives of an independent judiciary i.e. to secure appointment of men of requisite qualities.
However, in India, the judicial institutions by tradition have surrendered to political commitments due to a final veto power of the executive in judicial appointments. Thus, assurance of a non-political judiciary has always been contentious. This resulted in a nine-judge bench evolving the self-serving concept of "collegium" whereby the Chief Justice of India and a collegium of four senior most judges of the Supreme Court shall have the final say in appointments to the Supreme Court. Unfortunately, even this process has been found to be flawed with a plethora of arbitrary and controversial appointments, and no system for keeping a check on the same. The founding fathers of our Constitution apparently foresaw this struggle for supremacy, and therefore they brought into play a collective process, involving both the executive and the judiciary in appointing the judges of the Supreme Court and the High Courts. However, controversies regarding judicial appointments soon arose.

II. BACKGROUND- THE CONSTITUTIONAL ASSEMBLY DEBATES

The procedure of appointment of the Supreme Court and the High Court judges was one of the most debatable themes before the Drafting Committee. Under the Government of India Act, 1919 and the subsequent Government of India Act, 1935, it was the prerogative of the crown to appoint the High Court judges, with no specific provision for consulting the Chief Justice in the process. But the Drafting Committee was against an unquestioned discretion to rest with the executive. The Sapru Committee in 1945 recommended in its Constitutional Proposal that "*the justices of the Supreme Court and High Courts should be appointed by the head of the state in consultation with the Chief Justice of the Supreme Court and in case*

of High Court Judges, in consultation additionally with the High Court Chief Justice and the head of the unit concerned."[2] Even the Ad Hoc Committee of the Union Constitution, in the beginning of 1947 reported that it did not think it "*expedient to leave the power of appointing judges…to the unfettered discretion of the President*" and recommended two alternative methods. One of the methods authorized the President to nominate a person for the appointment to the Apex Court, with the consultation of the Chief Justice. This nomination will then require confirmation by a panel of seven to eleven members comprising Chief Justices of High Courts, Members of Parliament and Law officers of the Union. The other method required a recommendation of three persons to come from the above panel, one of whom has to be appointed by the President in consultation with the Chief Justice of India. The same procedure was to be followed for the appointment of the Chief Justice of India, except that the Chief Justice was not to be consulted.[3]

Sri B.N.Rau, the Constitutional Advisor in the Memorandum of Union Constitution submitted a few days later, suggested that the Judges should be appointed by the President with the approval of at least twothird of the Council of States, in which the Chief Justice of India was an ex-officio member.[4] Even the Union Constitution Committee differed from the recommendation of the Ad Hoc Committee and proposed that "*a Judge of Supreme Court shall be appointed by the President after consulting the Chief Justice and such other judges of the Supreme Court as also such judges of the High Courts as may be necessary for the purpose."*[5]

In the Assembly, a unanimous opinion was that the President should have the primary authority in the appointment of judges. However,

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[2]G. AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 176 (Oxford Clarendon Press, 1966).

[3]B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION: A STUDY 590 (IIPA, New Delhi).

[4]B.N. RAU, INDIA'S CONSTITUTION IN THE MAKING 72, 86 (Allied Publishers, 1960).

[5]Shiva Rao, *supra* note 3, at 600.

there were debates regarding who should advise and recommend him for the same. Some members suggested concurrence of Chief Justice, whereas other members proposed an approval of the Parliament or the Council of States. Dr. B.R. Ambedkar referred to the process of appointment in England and U.S.A. In England, the judges are appointed on the sole discretion of the executive, whereas in U.S.A, approval of the Senate is also required. He considered it dangerous to leave the appointment of judges to the exclusive discretion of the President. With this reference, he concluded:

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

"With regard to the question of the concurrence of Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous preposition."[6]

The Assembly, therefore, adopted a middle path, and neither gave the executive nor the judiciary an absolute authority in matters of appointments. The executive is required to consult persons who are *ex hypothesis* well-qualified to give proper advice on this matter. The

[6]Constituent Assembly Debates Official Report, 258, www.parliamentofindia.nic.in.

following two provisions were laid down by the Assembly for the appointment of the judges of the Supreme Court and the High Courts:

1. 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.[7]
2. 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.[8]

III. THE FOURTEENTH LAW COMMISSION REPORT

The Law Commission, chaired by Attorney General M.C. Setalvad was established in August 1955 in response to widespread demands for the reform of the legal system. It produced thirteen reports by autumn 1958. The Commission's famous Fourteenth Report, which was submitted in September 1958 included in its terms of reference ‘recruitment to the Judiciary.’

The Commission sent questionnaires to ascertain the views of judges, lawyers and political leaders and discovered harsh criticisms of the selection process. It reported that it had heard 'bitter and revealing' condemnation of the recent appointments to the higher judiciary from Supreme Court, High Court, retired judges, lawyers and law school

[7] INDIA CONST. art. 124(2).
[8] INDIA CONST. art. 217(1).

faculty. Former Chief Justice M.P. Sastri said that there had been a marked deterioration in the standards (in High Courts) mainly due to methods of selection which is often influenced by political and other extraneous consideration.[9] K.M.Munshi, former Governor of U.P, in reply to the questionnaire said that he believed that the High Court Judiciary has deteriorated in the recent years owing to the faulty selection process. He pointed out the following three reasons for such deterioration:

1. The Chief Minister acts as a 'source of patronage' under the selection system of Art.217.
2. The judges promoted to the High Courts from the District Courts are individuals who have little physical and judicial vigor left.
3. The methods of selection are often influenced by political and other extraneous considerations.[10]

Later, few letters were exchanged between M.C.Setalvad and Home Minister G.B.Pant, in which the former criticized the selection process and concluded that "*some High Court appointments are being made on political expedience or communal sentiment*".[11] In light of the research done and views obtained, the Law Commission drafted the final recommendations on judicial appointments. Some of the recommendations were:

1. The appointment to the Supreme Court must be on merit alone, without reference to communal or regional considerations.

[9]G. AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 130 (Oxford University Press, 1999).
[10]MUNSHI 'REPLIES' TO LAW COMMISSION QUESTIONNAIRE, K M MUNSHI PAPERS, Microfilm Box 67, File 183, NMML.
[11]For a detailed discussion on these letters, see G. AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE, 131-136, (Oxford University Press, 1999).

2. The Chief Justice of India should be chosen not merely on the basis of seniority but should be the most suitable person, whether taken from the Supreme Court, the Bar or the High Courts.[12]
3. Appointment to the High Courts should be made solely on the basis of 'merit' and 'only' on recommendations of the Chief Justice of the concerned High Court and with the concurrence of the Chief Justice of India.[13]

The recommendations, thus emphasized on making the selection process more inclined in favor of meritorious judges. However, these recommendations were, for a long time, kept in cold storage, and as will be seen further, invoking one of them twice over the next two decades created huge national hue and cry.

IV. EXECUTIVE V. JUDICIARY - A REGRETTABLE DECADE

The period from 1973 to 1983 has always been regarded as a deplorable decade, marked by unending tussles between the ruling party and the judiciary. The decade saw two supersessions of competent, experienced and senior judges for the post of Chief Justice of India, mass transfers of High Court Judges and later, the Supreme Court giving a self-inflicting blow affecting the independence of judiciary.

A. Supersession of Judges

Appointment of the Chief Justice of Supreme Court or High Courts was seldom controversial as long as the central government observed the convention of promotion by seniority. This convention was broken for the first time in 1973, when after the retirement of Sikri

[12] 14th Law Commission Report, *Reform of the Judicial Administration: Classified Recommendations* 2, (1958) (India) https://lawcommissionofindia.nic.in/1-50/report14vol1.pdf.
[13] *Id.* at 2, 20.

CJ.; Justice A.N. Ray was appointed as the Chief Justice, superseding Shelet J., Grover J., and Hegde J., in order of seniority. The three by-passed judges resigned from the Court in protest. This led to a national uproar and the Government was accused of tampering with the independence of the judiciary. However, to justify this step, the Government invoked the 14th Law Commission Report which emphasizes on 'merit' and not 'seniority' for appointing the Chief Justice of India.

The appointment of the Chief Justice was even challenged in the Delhi High Court through a petition for quo warranto under Art.226 on the following grounds: -

a) it was mala fide,
b) it was against the rule of seniority inherent in Art. 124(2), and
c) the mandatory consultative process envisaged in Art. 124(2) had not been resorted to.[14]

Without giving any definitive opinion on points (b) and (c), the High Court dismissed the petition, holding that in a quo warranto proceeding, the motive of the appointing authority is irrelevant. The Court held that even if these contentions are correct, any writ issued will be futile as Ray J., is now the seniormost judge (as the other senior judges have resigned) and can immediately be reappointed.

The convention of appointing the seniormost judge was broken successively for the second time in 1976, when after the retirement of Ray CJ., Beg J. was appointed the Chief Justice superseding Khanna J., who was senior to him. Consequently, Khanna J. resigned in protest. "*Mrs. Gandhi had struck a 'grievous blow' to the independence of the judiciary*" remarked Justice Khanna.[15] Indeed, the independence of judiciary had been interfered with. Apparently, the supersession of the three judges in 1973 was a result of anti-government judgments in the famous *Kesavananda Bharti case*[16] and

[14]P.L.Lakhanpal v. A.N.Ray, A.I.R. 1975 Del. 66(India).
[15]Khanna, *supra* note 1, at 22.
[16]A.I.R. 1973 SC 1461(India).

they were 'awarded' with supersession on the very next day after they pronounced their judgments.[17] Moreover, Ray J. had ruled for the government in the *Bank Nationalization case*[18] and was one of the two dissenters in the *Privy Purse case*.[19] Khanna J., who was superseded in 1978, paid this price for an anti-government, but a brave dissenting opinion in the *Habeas Corpus case*.[20]

B. The first judges case

The controversies regarding the procedure of appointment of judges came for determination before the Apex Court in the *First Judges case*.[21] Different judges expressed their views on various issues, which also included transfer and appointment of judges.

On the issue of appointment of judges, the Court gave primacy to executive actions. The Court held with regards to appointment of High Court Judges, that there must be "full and effective consultation" between each of the constitutional functionary viz., the Chief Justice of the High Court concerned, the Governor of the state, the Chief Justice of India and the President. During such consultation, in case of any difference of opinion amongst these authorities, the opinion of the President will have an overriding effect and will thus prevail over other opinions. The majority held that the decision of the President cannot be challenged in the Court either on *mala fide* intentions or on the ground that it was based on irrelevant considerations. This case, therefore, virtually gave the President a power of veto over the appointments.

[17]Austin, *supra* note 2, at 278.
[18]R.C.Cooper v. Union of India, A.I.R. 1970 SC 564(India).
[19]Madhav Rao Jivaji Rao Scindia v.Union of India, A.I.R. 1971 SC 530(India).
[20]A.D.M., Jabalpur v. Shivkant Shukla, A.I.R. 1976 SC 1207(India).
[21]S.P.Gupta v. Union of India, A.I.R. 1982 SC 149(India).

V. POSITION AFTER 1994

In 1991, in the judgment of *Subhash Sharma v. Union of India*[22], a three-judge Bench expressed the view with regards the word 'consultation' in Art.124 (2) that "*the Constitutional phraseology would require to be read and expounded in the context of constitutional philosophy of separation of powers to the extent recognized and adumbrated and the cherished values of judicial independence*."[23] The Bench suggested that this question be considered by a larger Bench.

A. The second judges case

Subsequent to *Subhash Sharma case*, the process of appointment of judges came to be considered by a nine-judge Bench of the Supreme Court in the landmark case of *S.C.Advocates on Record Association v. Union of India,*[24] also known as the *Second Judges Case*. The case arose out of a public interest writ petition filed in the Supreme Court by the Lawyers Association questioning several critical issues concerning the judges of the Supreme Court and the High Courts. The majority opinion was given by J.S.Verma J., and four other judges.

The Court, referring to the 'consultative' process envisaged in Art 124(2) emphasized that the executive does not enjoy 'primacy' or 'absolute discretion' in the matter of appointment of Supreme Court judges.[25] The Court also indicated that it was not considered desirable to vest absolute discretion on the Chief Justice on the matter of appointments, and the executive should act as a check, whenever necessary. The Court observed: [26]

"The indication is that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the

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[22]A.I.R. 1991 SC 631, 641(India).
[23]*Id.* at 640.
[24]A.I.R. 1994 SC 268(India).
[25]*Id.* at 429.
[26]*Id.* at 430.

greatest weight. The selection should be made as a result of a participative consultative process in which the executive should have the power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose."

Further clarifying 'the primacy of the opinion of the Chief Justice of India', the Court said that it is not merely his individual opinion but *'the collective opinion formed after taking into account the views of some other judges who are traditionally associated with this function.'*[27] The process for appointment of the Supreme Court and High Court judges as laid down by the nine-judge bench can be summarized into the following points:-

1. The proposal for appointment of a Supreme Court judge should be initiated by the Chief Justice of India.
2. All the appointments of the judges of the Supreme Court should be in conformity of the Chief Justice of India and the consulted judges.
3. The appointment recommended by the Chief Justice may not be made only in exceptional cases, only after stating cogent reasons. However, if these reasons are not accepted by the Chief Justice and other consulted judges; the appointment should be made as a healthy convention.
4. Everyone involved in the consultative process, including the consulted judges should give their opinion in writing as it acts as an inbuilt check on the exercise of power.
5. The senior-most judge fit to hold the office should be appointed as the Chief Justice of India. In case there are any doubts regarding his fitness to hold the office, it should be clearly stated, which alone may permit a departure from the long standing convention.
6. Unless there is a strong cogent reason to justify departure, seniority should be the basis for making appointment from amongst the High Court judges to the Supreme Court.

[27] *Id.* at 434.

The Court thus, by the way of this judgment, minimized political influence on the part of the executive and individual discretion on the part of all the constitutional functionaries involved in the process of appointment of Supreme Court judges.

B. The third judges case

In 1999, the Supreme Court further clarified certain points arising out of the above judgment in an advisory opinion on a reference made by the President under Art.143, also known as the *Third Judges case*.[28] A nine-judge Bench unanimously held with regards to appointment of judges that the Chief Justice of India shall consult "*a collegium of four senior-most judges of the Supreme Court*" thereby widening the scope of consultation process. Before this opinion was delivered, this collegium consisted of the Chief Justice of India and two senior-most judges of the Supreme Court. The Court specifically stated that an opinion formed by the Chief Justice of India in any other manner has no primacy in the appointments to the Supreme Court and the Government is not obliged to act thereon.[29]

Further, the Court held that if majority of the collegium is against the appointment of a particular person, that person shall not be appointed. The Court even went to say that if two of the judges forming the collegium express strong views for good reasons, that are adverse to the appointment of a particular person, the Chief Justice shall not press such appointment.

The process of appointment of the judges of the High Courts should be initiated by the Chief Justice of the High Court concerned, who must form his opinion after ascertaining the views of at least two senior-most judges of the High Court. Before making its opinion, the collegium of the Supreme Court judges shall consider the recommendations of the Chief Justice of the High Court and consult other High Court judges and judges from the Supreme Court who

[28]*In re,* Presidential Reference, A.I.R. 1999 SC 1(India).

[29]*Id.* at 16.

may be conversant with that High Court. In case of disagreement between the President of India and the Chief Justice, the opinion of the latter will prevail.

Regarding the rule of seniority among the High Court judges for appointment to the Supreme Court, the Court listed the following two points: -

1. Regardless of his standing in the seniority list, a High Court judge can be appointed as a Supreme Court judge *if* he has outstanding merit.
2. From amongst several High Court judges of equal merit, a judge may be appointed as a Supreme Court judge for "good reasons", as for example, the particular region of the country in which his parent High Court is based is not represented in the Supreme Court Bench.

By the way of this opinion, the Court tried to diminish any scope of arbitrariness, even on the part of the judiciary, as the size of the collegium was increased from two to four senior-most judges other than the Chief Justice of India and due consideration has to be given to the opinion of each of the judge of the collegium. But even with all the good intentions and honest attempts on the part of the Supreme Court judges to make the selection process transparent and less arbitrary, we will find that the collegium has completely failed to fulfill its purpose.

VI. EXECUTIVE FAVORITISM REPLACED BY THE JUDICIAL SUBSTITUTE?

The formation of the collegium and vesting the final say on the appointment to the Supreme Court judges was conceived of as a noble step. However, a careful perusal of the existing system shows that it has been no less than a failure. This can perhaps be aptly demonstrated by a few recent controversial appointments to the Supreme Court and various High Courts. In a case involving a judge

of Calcutta High Court, he was appointed to the High Court when he was already facing proceedings of misappropriation in the same court.[30] Very recently, the Chief Justice of Karnataka also joined the list, when he was recommended for elevation to the Supreme Court by the collegium. Amongst other allegations, he has been accused of acquiring more than 450 acres of land meant for distribution to landless dalit families, and other immovable property including a commercial complex.[31] Apart from these, few other examples like '*Provident Fund case*' (where 34 judges were involved in misappropriation) and the 'Cash-for-judge scam' (involving two judges of Punjab & Haryana High Court) also underlines the arbitrary and totally unsatisfactory manner of selecting and appointing judges to the higher judiciary.

The interpretation of Article 124 and Article 217 as given in the *Second* and the *Third Judges cases* move towards giving an unlawful privilege to the judiciary in case of appointments. It separates the judiciary and more specifically the collegium of judges from the executive in appointment of judges but does not provide for a supervising authority which will act as a watchdog over the judicial appointments. This brings into light another chief problem in the present system i.e. lack of accountability of the judges of the collegium.

Justice Jackson of the US Supreme Court once remarked *"We are not final because we are infallible; we are infallible because we are final."*[32] Judges are humans, and humans are prone to errors, intentional or otherwise. They cannot shield their doings and misdoings from the public in the name of judicial independence. "*What's questionable about the current system is that it is carried out in secret"* remarked a recently retired Chief Justice of the Delhi High

[30]V. Venkatesan & S.S. Chattopadhyay, *Judges in the Dock*, 25 FRONTLINE, Sept. 25- Oct. 10 at 32, 2008.

[31]Prashant Bhushan, *The Dinakaran Imbroglio: Appointments and Complaints against Judges*, ECONOMIC AND POLITICAL WEEKLY, Oct. 10, 2009.

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

Court.[33] There is no criterion laid down for selection of judges. The present system also opens door for corruption at the highest level as the collegium has wholly unchecked powers of appointment of judges. However, neither the judiciary nor the executive has seriously bothered to place an independent and transparent system of appointments and taking actions against those involved in misconduct, and it seems that the judiciary has effectively become a law in itself.[34]

The Indian Courts are further characterized by vacancies, unjust procrastination in the appointments, difference of opinions and regional favoritism. We have around six hundred sanctioned judges' posts in the country, but about 150 of them lie vacant since no appointments have been made for long spans. Justice Krishna Iyer remarked on the present state of affairs of the judiciary that *"Maybe, the high functionaries shouldering the burden of processing judge's fitness for office are faithful to their anfractuous protocol, meditate to resolve differences and remain in a wise and masterly inactivity! How else do we explain the pathetic (or bathetic) delay in finalizing the suitable candidates- a few from each High Court once in a blue moon!"[35] Whoever is to blame, injustice due to absence of Justices and dysfunctional judicature due to diminishing judge strength are a bizarre kind of contempt of court."*[36]

[33]Shobhitha Naithani, *The Curious Incident of Underdog's Defence*, TEHELKA, Mar. 13, 2010.

[34]Even the Law Commission in its 214th Report has shown deep concern for the working of the collegium. It concluded in this report that the Supreme Court has virtually rewritten Articles 124(2) and 217(1), and stated that the collegium has failed to deliver the desired results. It recommended that "Two alternatives are available to the Government of the day. One is to seek a reconsideration of the three judgments aforesaid before the Hon'ble Supreme Court. Otherwise a law may be passed restoring the primacy of the Chief Justice of India and the power of the executive to make the appointments". See Law Commission of India, 214th Report on the proposal for reconsideration of *Judges cases I, II, III*, at p 60, (Date??) http://lawcommissionofindia.nic.in/reports/report214.pdf.

[35]*Id.* at 180.

[36]*Id.* at 181.

The media, popularly known as the Fourth Estate of the country, has a major role to play in absence of accountability on the part of the higher judiciary. They have powerful weapons of investigative journalism and sting operations which can be used to uncover the hidden truth. However, even the media persons and other authorities are deterred from expressing their views freely on appointments as the judiciary has often used the sword of 'Contempt of Court' for any comment which may doubt their integrity. Further, the Supreme Court also sought exemption from the Right to Information Act, 2005 for any information which, in the opinion of Chief Justice of India or his nominee, may adversely affect or tends to interfere with the independence of judiciary, which thankfully has been rejected by the Chief Information Commissioner (CIC). Such actions in the name of judicial independence will contribute more and more towards undue discretion on the part of the judges of the collegium in case of appointments and will do more harm than good by lowering down the faith of the people in the already dilapidating judiciary.

VII. PROPOSAL FOR SETTING UP A NATIONAL JUDICIAL COMMISSION

In the *First Judges Case*, Bhagwati J., suggested the appointment of a judicial committee on the lines of the Australian Judicial Commission, for recommending names of persons for the appointment of judges. Later, in its 121st Report issued in 1987, even the Law Commission advocated the setting up of a National Judicial Commission ("**NJC**"). Since the *First Judges case*, the Law Commission had feared arbitrariness on the part of the executive as it had overriding powers in the matter of selection and appointment of judges, and thus wanted to remove some powers from the executive's clutches. Though the Law Commission did not work out its composition, it tentatively suggested the following composition: Chief Justice of India ("**Chairman**"), three senior most judges of the

Supreme Court, retiring Chief Justice of India, three Chief Justices of the High Courts in the order of seniority, Minister of Law and Justice, Government of India, Attorney General of India, and an outstanding law academic.

The then Law Minister in 1990 accepted these recommendations of the Law Commission and introduced the 67th Constitutional (Amendment) Bill with substantial changes. However, the Bill lapsed as a result of the dissolution of the Lok Sabha.

Another Bill which sought to amend Article 124 and 217 and establish NJC was introduced in the Rajya Sabha on December 18, 1998. This Bill proposed the Prime Minister as the Chairman of the NJC which was primarily to dilute judicial power in the appointment of judges. However, much like the fate of the earlier Bill, even this Bill remained only a paper tiger and lapsed with the dissolution of Rajya Sabha. Later, the proposal to introduce NJC was resurrected by the 98th Constitutional (Amendment) Bill, 2003, but yet again the Bill never saw light of the day and was never passed.

VIII. CONCLUSION AND RECOMMENDATIONS

If appointment of judges by the executive created problems, taking up of the task in its own hands by the judiciary has further aggravated such problems. The Indian Judiciary has been through both the system of appointments viz. one in which the executive has the final say, and the one in which the judiciary does. Unfortunately, it is still marred by vacancies, corruption, lack of accountability etc, owing to politicized appointments in the former and delayed appointments in the latter.

Perhaps, the non-establishment of the NJC has also exaggerated the problems surrounding the appointment of judges. Though its establishment has been unsuccessfully mooted thrice in the Parliament, its composition has always been debated. Recently the sitting Chief Justice Balakrishnan CJ., said that the judges constitute a

"*self-respecting*" class of the society and will not tolerate any non-judge member in the NJC.[37] This means that such commission, if ever it comes into being, will practically be the same body which the Supreme Court Collegium is and will increase the chances of arbitrary appointments as the same will now take place under a more formalized and institutionalized method.

The present state of affairs of judicial appointments demands for a concretized action towards the establishment of the NJC. This body should comprise of the retiring Chief Justice of India as its Chairman, the President of India, three senior-most judges of the Supreme Court, three senior-most Chief Justices of the High Courts, the Law Minister of India and an outstanding law academic, selected by the President of India. Such a composition will ensure multiple brains and collective efforts in the process of appointments, and will be more in consonance with an old Roman saying *"Whatever touches us all, should be decided by all."* There is no harm in giving the judiciary the final say in appointments, but they should be accountable for their actions to the public. The names of the judges proposed to be appointed should be in public domain, and appointments should only be made through an open, accountable and a participatory procedure. The functioning of the NJC should not be outside the purview of the Right to Information Act, 2005 or any such legislation questioning their answerability. This will further ensure transparent functioning and more accountability. Further, the laws preventing the media from probing into judicial matters should also be loosened and relaxed. After all, media seems to be working more with democratic accountability than any other organ of the government. The two pillars of democracy could not fulfill their responsibilities in the way in which it was expected of them, and therefore, the only recourse left now is a formation of an independent body. Only such measures can

[37] PROF. N.S. POONIA, *Judicial Independence is not Constitutional Provision but merely Declaratory Law- Judges Inquiry Bill for NJC getting sabotaged*, AIR, 154-158 (2007).

work towards restoring the faith of the people in the slowly degrading judiciary.