# NEED FOR A NATIONAL JUDICIAL COMMISSION: THE STRUGGLE FOR PRIMACY AND UNCONSTITUTIONALITY OF THE COLLEGIUM SYSTEM

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**ABSTRACT**

*The authors try to put forth a suggestion of establishment of a National Judicial Commission which would deal with the appointments and transfers of judges of the higher judiciary. There is a detailed examination of the judicial principles laid down in the three Judges' cases. In critically analyzing the judgments, it is the authors' submission that the judgments laid down are not in alignment with the letter and spirit of the Constitution and that an institution like the National Judicial Commission would go a long way towards maintaining the system of checks and balances. Such an institution has also been shown by the authors to have a growing international prevalence. The article goes on to suggest the composition of such an institution in order to meet the two major*

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*concerns of today i.e. the independence of the Judiciary and the faith of the people.*

## I. INTRODUCTION

*"I have prepared my judgment, which is going to cost me the Chief-Justice Ship of India"*[1]

*"…I cannot pretend that I am not hurt, but it's a closed chapter for me…"*[2]

The above two quotes are of monumental importance, for they mark the nadirs of the appointment procedure highlighting the dichotomy between the Executive and the Judiciary. Often in the working of a democracy, processes, experiments and procedures fail to deliver due to vested motives and a lust for power. In the process of delivering three controversial judgments, the Supreme Court, instead of trying to maintain the delicate balance of power between the Executive and Judiciary has swung the pendulum of primacy between them.

This paper examines the unconstitutionality of the process that the Court held in the three Judges' Cases by critically analyzing the rationale employed by the judges in light of established canons of judicial thought.

[1]H.R. Khanna's words to his sister before delivering the dissent in Additional District Magistrate of Jabalpur v. Shivkant Shukla 1976 SCC (2) 521, true to his apprehensions, he was superseded and the Judge junior to him Beg J. got promoted to the position of CJI. Anil B. Divan, *Cry Freedom*, INDIAN EXPRESS, March 15, 2004.

[2]These are the words of A.P. Shah, Chief Justice of Delhi High Court, when asked to comment on the Collegium's decision not to elevate him to the Supreme Court. Shekhar Gupta, *Walk the Talk*, NDTV 24x7, February 16, 2010.

Part I examines the intention of the Constituent Assembly, as its relevance as an extrinsic aid to construction takes centre stage in all three judgments. Part II examines the evolution of the 'consultation' process, its scope, definition and purpose. Part III critically analyzes the *Second Judges' Case* or the *Collegium* judgment and shows on five grounds, its absurdity and hence unconstitutionality of the system of appointment born out of that judgment. Part IV documents and collates data regarding the failure of the Collegium. Part V lists the grounds and historical proposals for a national judicial commission as a viable alternative to the "consultation" process. Part VI states the international practices regarding appointment by such a commission in order to highlight its practicality in handling such an important matter. Part VII proposes the actual composition for a National Judicial Commission and the reasons for the same. The authors conclude their observations in Part VIII.

## II. APPOINTMENT OF JUDGES AND THE INTENTION OF THE FOUNDING FATHERS OF OUR CONSTITUTION

In order to evaluate the constitutionality of the collegium system of appointment, it is of critical importance that the intention of our founding fathers be kept in mind. The possibility of an overbearing Executive and the concern for an independent Judiciary were both placed on a high pedestal by the Constituent Assembly. In the Words of B.R. Ambedkar himself "there can be no difference of opinion that our judiciary must be both independent of the executive and also be competent within in itself".[3]

[3]CONSTITUENT ASSEMBLY DEBATES, VOL. 8, 258 (Reprinted by Lok Sabha Secretariat, 1966).

Keeping this in mind, a motion for an Article 102 A by Professor KT Shah was moved, which provided that the Judiciary in India be completely separate and wholly independent of the Executive or Legislature.[4]

The mechanism for appointment of judges was contained in Draft Article 103 for the Supreme Court and Draft Article 193 for the High Court. The primacy given to the CJI's opinion was discussed when B. Pocker Sahib suggested that the appointment be made by the President "after consultation with the concurrence"[5] of the CJI. The rationale behind this was that the judges' appointment should not be affected by political influences.

On December 26, 1946, Prof. K.T. Shah had sent his "General Directives"[6] suggesting that the "Judges of the Supreme Court shall be appointed from among practicing lawyers of prescribed standing, judges of High Court and other Judicial officers of the Union… provided that the Union Legislature may by a majority of two-thirds of the members present and voting…"

The report of the Ad Hoc Committee on Supreme Court[7] was not satisfied with the idea of appointment of judges in the Executive and it had suggested two alternative methods of appointment. The main theme of the opinions expressed was that the Executive had to exercise its discretion only on the recommendation of a body of representatives;[8] these could be either the people's representatives as

[4]*Id.*, at 218.
[5]*Id.*, at 232.
[6]B. SHIVA RAO, The FRAMING OF INDIA'S CONSTITUTION – SELECT DOCUMENTS455 (Universal Law Publishing Co., New Delhi) (1967).
[7]K.M Munshi, *Indian Constitutional Documents*, MUNSHI PAPERS, 260-65 (1967).
[8]K. R. Mythili, *Appointment of Judges: Norms of Consultation and Concurrence*, 21 CULR (Sep – Dec)291 – 322 (1997).

suggested by K. Santhanam[9] or judicial members as suggested by him on the subsequent day.[10]

The view of the Assembly in the words of Anantha Sayanam Ayyangar which warrant repetition "…with respect to appointment I find that there is almost unanimous opinion regarding the power to appoint judges being vested in the President – not in his discretion but in consultation …"

The draft Article was finally accepted as we know it today, in the form of Article 124, and the rationale for not accepting any amendment as given by Hon'ble Dr. B.R. Ambedkar is critical in understanding the intention of the Constituent Assembly:

"*The draft Article, therefore steers a middle course. It does not make the President supreme and absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the Article is that there should be consultation of persons who are ex hypothesis.*

*With regard to the question of concurrence of Chief Justice, it seems to me that those who advocate the 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 a dangerous proposition*"[11]

Hence briefly summarizing, the true design as envisaged by the Founding fathers of the consultative process can be best understood as

[9]*Supra* note 3, at 887.
[10]*Id.*, at 891.
[11]*Supra* note 3, at 258.

a combination of the following characteristics - (i) The independence of the Judiciary is a matter central to the scheme of the Constitution (ii) the appointment must be made by the Executive in consultation with other representatives and lastly (iv) the appointment process does not involve the concurrence of the CJI,[12] and primacy must be given to the opinion of the Executive in its discretion.

## III. JUDICIAL DECISIONS AND THE MEANING OF "CONSULTATION" EVOLVED

The Constitution prescribes the appointment of Judges to the Supreme Court in Article 124(2), High Court Judges in Article 217(1) and the appointment of Additional and Acting judges in Article 224(1). The general scheme provided in the Constitution is the appointment "by the President by warrant under his hand and seal after consultation with such of the judges …"[13]

The word "consultation" has been extensively defined, interpreted and evolved through a wide array of judgments concerning the power of the recommendation given by the Executive in deciding appointments. The word consultation maybe generally defined as "to discuss something together, or to deliberate"[14]. Its purpose thereof is to enable judges to make their respective points of view known to

[12] The Constituent Assembly in rejecting B. Pocker Sahib's motion and the summarizing by Anantha Ayyangar clearly show us that primacy was to be placed on the executive discretionary opinion.
[13] Constitution of India, Art.124(2).
[14] *16A*, CORPUS JURIS SECUNDUM 1242 (1956).

each other and discuss and examine the relative merit of their views.[15] It should be meaningful, effective and conscious.[16]

The Apex Court in 1969 defined consultation with respect to appointment of District Judges as "not an empty formality, not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views".[17] The consultation had to be "full and effective"[18] to make a valid appointment.

In order to fully understand the jurisprudence of the appointment system, we shall consider some landmark judgments in brief now.

The Apex Court in the *Sankalchand's Case*[19] was confronted with the question, inter alia, whether on a true construction of Article 222(1) the transfer of a High Court Judge could only be made with his consent after consultation with the Chief Justice[20]. H.M. Seervai, argued that in order to uphold the independence of the Judiciary, which is the basic feature of the Constitution, the Court had the plain duty to read into Article 222 (1), a limitation which is not to be found on the face of it[21]. The court held that the provision were clear and expressive. It could not be reduced to a nullity by reading into it a meaning which it did not carry.[22] Hence it was not necessary to obtain the consent of the judge who was being transferred from one High Court to another.[23] There were however two conditions for a transfer

[15]High Court of Judicature for Rajasthan v. PP Singh, (2003) 4 SCC 239.
[16]Per Lahoti J. in, Gauhati High Court v. Kuladhar Phukan, (2002) SCC 524 at para 14.
[17]Per Mitter J. in, Chandramouleshwar Prasad v. Patna High Court &Ors.,1970 SCC (3) at para 9.
[18]Per Sen J. in, State of Kerala v. Lakshmikutty, 1986 SCC (4) 632 at para 22.
[19]Sankalchand Himatlal Sheth v. Union of India(1977) 4 SCC.
[20]*Id.*, Chandrachud J. at 210.
[21]*Id.*, at 212.
[22]*Id.*, at 215.
[23]*Id.*, at 220 .

to be valid, one that it must be a transfer in public interest and two, that it must be after a full and effective consultation.

This judgment, to a certain extent, settled the law on the meaning of "consultation" in Article 217(1), which was found to have the same meaning as under Article 222(1) meaning full and effective consultation after placing full and identical material before such functionaries and did not mean concurrence. However, they might have discussed, but they disagreed; might have conferred but not concurred.[24]

About 4 years later, on 18 March, 1981, the Union Law minister issued a circular letter to all the Chief Justices of the High Courts, except North – Eastern States, requesting them, among other things, to "obtain from all the Additional Judges working in the High Court of the State their consent to be appointed as permanent judges in any other High Court of the country…"[25] This led to the filing of writ petitions questioning the transfer of judges, the constitutionality of the Circular and of course, the ever prevalent question on the attack of the Executive on the Judiciary in High Courts of Delhi, Bombay, Madras and Patna.

Since they were regarding the same questions of law, nine Writ Petitions were combined and adjudged by a Seven Judge bench[26] in what is today known as *S.P. Gupta* v. *President of India*[27], the 956 page judgment surpassing the Fundamental Rights Case, and becoming the longest recorded judgment of the Supreme Court.[28]

[24]Krishna Iyer J. and Faizal Ali J.at 267.
[25]Circular No. D.O. No. 66/10/81 -Jus.
[26]P. N. Bhagwati, A.C. Gupta, S. Murtaza Fazal Ali, V.D. Tulzapurkar, D.A. Desai, R. S. Pathak and E. S. Venkataramiah, JJ.
[27](1981) Supp S.C.C. 87.
[28]H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 2707 (Universal Law Publishing Co., New Delhi,1988) (2005).

The following issues were raised: (i) Whether the Circular issued is unconstitutional and any consent so obtained unconstitutional?[29] (ii) Whether the CJI's opinion should have primacy in determining appointments during the consultative process?[30] (iii) Whether the tenure of the Additional Judge can be non- continued after his term of two years ends and if so does he have a right to reappointment?[31] (iv)Whether the Union can claim Crown Privilege and Public Interest Immunity under Article 74(2) and protect the documents of consultation from public eye?[32] (v) Whether persons who had not suffered legal injury could approach the Court through legal recourse, in other words, do persons other than the Judges transferred have *locus standi*?[33]

To keep the discussion within reasonable limits, only issue (ii) will be considered at length in relation to the safeguards to judges during transfers.

The majority judgment unequivocally held that "the position of the CJI under Article 217(1) is not that of an appellate authority or that of the highest administrative authority having the power to overrule the opinion of any other authority".[34] The reasons given by each judge differ substantially but can be briefly summarized as follows (i) Doctrine of Literal Interpretation: it was held that "on a plain reading of these two Articles, that the CJI, the Chief Justice of the High Court … are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Central Government[35] (ii) Intention of the Constituent Assembly:

[29]*Id*., note 27, Bhagwati J., para 3.
[30]Bhagwati J. para 29, at 226.
[31]*Id*., para 32, at 233.
[32]*Id*., para 59, at 266.
[33]*Id*., para 13, at 203.
[34]Venkataramiah J., Para 1019, at 785.
[35]*Id*., note 29.

Bhagwati J. cited the rejection of B. Pocker Sahib's motion[36] which recommended the inclusion of the word "concurrence" and Ambedkar's concluding speech[37] on draft Articles 103 and 193.(iii) The Constitution has used different words signifying varying degrees of compulsive or binding character of the opinion of one constitutional dignitary under the Constitution when necessary.[38]

These questions of judicial independence were poised in the context of transfer of Singh J. from the Patna High Court[39] also. A brief perusal of facts of the particular case will show why the *First Judges' Case* and its conclusion are untenable and absurd in law.

Bhagwati J. concurring with Desai J., in his minority opinion has set out ample reasons stating that the consultation in the case of KBN Singh is neither full nor effective.[40] They can be briefly summarized as (i)The CJI on 7th December, 1980 unilaterally proposed the judges' transfer to Rajasthan High Court without any consultation.(ii) The reason for the judges' inability to go were never communicated to the Central Govt. (iii) The two letters dated the 7th and 20th of December did not give any reason for his transfer (iv) there are no records whatsoever of the "oral interviews" conducted by the CJI[41].(v) The only statements which were available on that point were the ones made by the CJI in his counter-affidavit, namely, that "every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer."This statement, even if it be accepted as wholly correct, was not sufficient

[36]*Id*., note 5.
[37]*Id.*, note 11.
[38]Venkataramiah J., para 1018 citing Articles: 'according to such opinion' (Article 103 and Article 192), 'consent' (Article 127(1), Article 128, Article 224A and Article 348(2)). 'advice' (Article 74 and Article 150), 'concurrence1 (Article 370(1)(b)(ii)), 'approval' (Article 130, Article 148(2) Article 229(2)). 'recommended by' (Article 233(2)).
[39]D.N. Pandey v. Union of India, Transferred Case no. 24 of 1981.
[40]Bhagwati J.,para112, at 337.
[41]Bhagwati J.,para113, at 337.

to discharge the burden which lies upon the Government to show that there was full and effective consultation.[42]

There is also clear evidence that in the correspondence, the reason for the transfer was that people were "exploiting their proximity to the judge."[43] These charges were however not proved conclusively. Pathak J. with the rest of the majority suggests a theory i.e. "administration of public office relies on its vitality on public confidence". Therefore, Judges who are transferred because there is "*grave and bona fide fear in the minds of honest citizens that the fountain of justice may be polluted… endangering the purity of the entire administration of justice*"[44] should be deemed to have been transferred in public interest.

It is true that justice should not be done, but also seem to be done.[45] But such a test should be considered in the context of the fact that a judge who has a record of proven dishonesty and corruption cannot be transferred punitively as that will amount to punishment.

So, according to the majority,[46] a dishonest judge may continue his career of inequity till death, or the age of retirement, but if a Judge in fact does real justice, but people feel that justice is not done – then "pubic interest" requires him to be transferred.[47]

Hence, in effect – floating rumors, unconfirmed suspicions and fears of the public were a ground for transfer in "public interest"

It is the authors' submission, that as a result of the formulation of the absurd and untenable proposition and the glaring ignorance of the

[42]Bhagwati J., para 114, at 340.
[43]*Id.*, para117, at 343.
[44]Pathak J.,para 933, at 745.
[45]Lord Chief Justice Hewart, R v. Sussex Justices, Ex Parte McCharthy, 1924 (Vol. 1) K.B. P. 256.
[46]Tulzapurkar, Pathak, Venkataramiah and Gupta JJ.
[47]*Supra*. note 28, at 2794.

Majority to a lack of "consultation" in Singh J's case, the two most important safeguards of judges against an exploitative Executive; the requirement of full and effective consultation and "public interest"[48] have been diluted and rendered meaningless.

In 1990, a Supreme Court Advocate, Subhash Sharma filed a Writ Petition asking for an issuance of mandamus to the Union of India to fill the vacancies of Judges in the Supreme Court and the several High Courts of the country and ancillary orders or directions in regard to the relief of filling up of vacancies[49].The Court in reviewing the position of the CJI held that the view taken by the Court in *First Judges' case* needs to be revised and directed the matter to a larger bench.

Pursuant to Writ petitions in the nature of PIL filed by the Supreme Court Advocates-on-Record, a Nine Judge Bench was constituted to review the *S.P. Gupta* judgment and determine the fixation of the strength of the judges and their justiciability.

## IV. THE SECOND JUDGES' CASE: UNCONSTITUTIONAL, NULL AND VOID

The *Supreme Court Advocates on Record* v. *Union of India*[50]case aka *Second Judges' Case* or more appropriately the *Collegium* judgment was a judgment that would be grudgingly acknowledged by the CJI seventeen years later, while admitting the flaws of the system and welcoming a Constitutional Amendment.[51]

[48]*Supra* note 44.
[49]Subhash Sharma v. Union of India, 1991 Supp (1) SCC 574.
[50](1993) 4 S.C.C. 441.
[51]'CJI K.G. Balakrishnan says it will not be possible to change the collegium system of appointment of judges without reviewing two Supreme Court judgments' in J

Pandhian J. in his "conclusions on the issue of appointments",[52] held –in substance that the system of appointment was an "integrated participatory consultative process" where in case of a conflict of opinion between the Constitutional Functionaries and the judiciary, the opinion of the latter "symbolized by the view of the CJI" would have primacy and hence an unequivocal veto power. The norms indicated did not confer any justiciable right to anyone and hence in effect overruled the *First Judges' Case*[53].

This has led to the Collegium system of appointment, a system that would come under heavy criticism and fire. In VR Krishna Iyer's own words, "There is no ground, no principle, no jurisprudence authorizing the creation of a bizarre or bedlam institution called collegiums."[54] The Nine Judge Bench had reached a "bizarre" end by using equally shocking means. The main propositions that were relied on are mentioned along with their refutation with well- settled principles of procedure, statutory interpretation and Constitutional Law:

(i) Neglecting the "Golden Rule" of Statutory Interpretation and bypass of the Doctrine of Literal Construction: The views of Pandhian J. on the objective of the court are to "make the Constitution quite understandable by stripping away the mystique and enigma that permeates and surrounds it"[55] He also says that "the word consultation is powerful and eloquent with meaning, loaded with undefined intonation."[56] It is the author's submission that the Constitution, more so, Article 124 and 217 are clear and

Venkatesan, *Judgment Review Needed to change Collegium*, THE HINDU, New Delhi, May 9,2010.
[52]Pandhian J., para 486.
[53]*Supra* note 27.
[54]V.R. Krishna Iyer, *Time for Change*, FRONTLINE, Vol 28. Issue 5 Feb26 – March 11, 2011.
[55]Pandhian J., para 16, 17 and 27.
[56]Pandhian J., para 112.

on a plain reading the primacy of the Executive can be concluded.[57] In AhmadiJ.'s clear, precise and succinct dissent, he very rightfully opines that the literal construction of the provisions do not convey concurrence,[58] "giving the widest connotation to the word "consultation", stretching it almost to the breaking point; it is not possible in the Constitutional context with the scheme, to attribute to it the meaning of 'concurrence'.[59] It is now a well settled canon of construction that "the law will not allow alteration of a Statute by construction when the words may be capable of proper operation without it."[60]Where the words or the language used in a statute is clear and cloudless, plain, simple, there is absolutely no room for deriving support from external aids".[61] The Apex Court recognized that while the Constitution might require a special approach, "it does not mean that the Court under the guise of judicial power, can nullify, defeat or distort the reasonably clear meaning of any Part of the Constitution …where there may be a gap in law, the court cannot fill it..."[62] Hence the majority judgment in bypassing the literal meaning of the provisions, has gone against well settled and sound legal principles and hence the judgment cannot be held to be good in law.

(ii) Misrepresentation of the Intention of the Constituent Assembly: Kuldip J. in Para 406 of his judgment had purposefully omitted relevant parts of B.R. Ambedkar's speech in order to draw a conclusion which was diametrically opposite to the actual intendment of the Assembly. While he quoted the paragraph saying "It does not make the President supreme and absolute authority in the matter of making appointments" but omitted the

[57]*Id.*, note 33.
[58]Ahmadi J.,para 291 and 293.
[59]Ahmadi J.,para 300.
[60]Kutner v. Philips, (18910 2 QB 267:60 LJ QB 505:64 LT 628.
[61]*Id.*, note 28, Bhagawati J., para 197.
[62]Per Beg CJ in, State of Karnataka v. Union of India, (1977) 4 SCC 608 at para 85.

paragraph which states "that 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 a dangerous proposition".[63] He hence arrived at the conclusion that the framers of the Constitution did not want the power of appointment in the Executive's hands. Although a perusal of B. Pocker Sahib's motion would clearly show as to how the Assembly rejected the requirement for the CJI's concurrence.[64]

(iii) Limiting Judicial Review: conclusion no.8[65] limits judicial review to only an inquiry into whether a full and effective consultation had taken place. Such a view is untenable in law, as Judicial Review is part of the Basic Structure[66]. The rationale behind the doctrine is that "one cannot legally use the Constitution to destroy itself."[67] Hence the attempt on the part of the Majority is unconstitutional.

(iv) The Constitution has used different expressions to meet different situations; used to convey different meanings. For example, the word "consultation" is used in Articles 124(2), 217(1) and (3) and 233(1), the word "recommended" in Article 232(2) and "approval" in Article 145 and 229(2).[68] Where the opinion of the Chief Justice is to be absolutely binding, the words "as he may direct" are used in Article 229(1). Hence where it was required, the framers made the primacy of the CJI clear and *prima facie* evident.

[63]Both the paragraphs in conjunction are provided in this Article on Page 2. for further reference.
[64]*Supra* note 3.
[65]Verma, Dayal, Ray, Anand and Bharucha JJ.
[66]Kesavandana Bharati v. State of Kerala AIR 1973 SC 1461; Bommai S.R. v. Union of India (1994) 3 SCC 1.
[67]D.D. BASU, SHORTER CONSITUTION OF INDIA, 2235 (2011).
[68]Ahmadi J., para 293.

(v) Contravention of Article 145(5): The judgment of Verma J. for himself and 4 of his brother Judges was dated 14 June, 199. The judgments of Ahmadi J., Kuldip Singh J. and Punnchi J. were dared 24 August, 7 Sept. and 9 September 1993. Article 145(5) says that "No Judgment shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case …" Judgments should only be delivered after all the judgments have been read by the Judges.[69]. As has already been pointed out, the majority judgments were signed before delivering of the minority opinion and the judgment is hence in contravention to 145(5).

Therefore for the five reasons stated above, the given judgment and the consequential formation of the Collegium system of appointment is bad in law and null and void.

On 23 July, 1998 the President made a reference to the Supreme Court under Article 143 related to three aspects (i) consultation between CJI and his brother Judges in the matters of Supreme Court and High Court Judges and transfer of the latter (ii) judicial review of transfer of judges (iii) the relevance of seniority in making appointments to the Supreme Court.[70] This led to the constitution of a Nine Judge Bench in the matter of *In Re Presidential Reference 1999*[71] which did not reconsider the view taken in the *Collegium case.* Hence a further study of such a case would not be of any benefit to us as it relies on a judgment proven to be unconstitutional by the authors above.

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[69]*Id.*, note 28 at 2936.
[70]Bharucha J., Para 1.
[71]1998 (7) SCC 739; *Id.*, note 26 at 2936.

The impact of the 2nd and 3rd Judges Transfer cases has been such that judicial appointments are exclusively in the hands of the Judiciary. Where the Constitution envisaged a scheme of appointments involving the Executive, the Supreme Court had deemed the tandem requirement to be not applicable in appointments (and transfers) of judges of the higher Judiciary.

The Supreme Court, thus effectively negated the Constitutional machinery that was in place and anointed itself with the burden and responsibility of the appointment and transfer of judges. However this mode has come under heavy fire for giving the collegiums powers which is not envisaged by the Constitution.

The fact that the Chief Justice of the Delhi High Court, Justice A.P. Shah was not elevated to the Supreme Court is a glaring example of how arbitrary the current system can be.[72] The delay in Justice A.K. Patnaik's appointment to the Supreme Court for reasons unknown is another instance. Similarly, Justice Gyan Sudha Misra was not considered until the President, Pratibha Patil intervened on behalf of the former. Another instance, in 1996, is that of the then Chief Justice of the Karnataka High Court, Justice ML Pendse, who was not considered for the Supreme Court. This decision came under heavy fire, especially from Senior Advocate, Fali S. Nariman, the then President of the Bar Association of India.[73]

[72]In a television interview, Justice Shah averred that, "The problem with the present system is there is complete lack of transparency. There is too much secrecy and no reasons are recorded for rejection of a candidate to SC… at least a candidate must know why he was rejected. Reasons must be recorded. Right now it seems there are no parameters for selection of judges." *A sensitive govt can help reduce litigation: Justice A P Shah*, THE TIMES OF INDIA, February 12, 2010.

[73]PP Rao, *Judicial Accountability*, INDIAN ADVOCATE,27 (1998): The "non-appointment has put in doubt the continuance of a system by which secrecy governs the entire selection process. Steven Lubet, *Judicial Discipline and Judicial Independence*, 61, SUM LAW & CONTEMP. PROBS. 59.

As for the collegium's policy on transfer of High Court judges, the decisions have often been viewed as cantankerous. Former CJI, Justice O. Chinappa Reddy commented, "The poisonous seed sown at the time of the initial transfer of judges seems to have taken root and the disastrous policy of transfer of judges is continued. The Executive itself could not have done more to shake the confidence of the people in the Judiciary than the present policy of wholesale transfer of judges pursued by the Supreme Court… By one stroke of the pen, the position of High Court judges appears to have been reduced to that of subordinate civil servants."[74] One of the casualties of this was the Bombay High Court judge, Justice RS Mohite, who resigned in protest on learning of his transfer to the Patna High Court.[75]

## V. NATIONAL JUDICIAL APPOINTMENTS COMMISSION: ITS RAISON D'ETRE AND HISTORICAL PROPOSALS IN INDIA

### *A. Report on the Reform of Judicial Administration*

The *14th Report on the Reform of Judicial Administration* submitted in 1958 says:

"*[T]he Constitution of the (Supreme) Court must command the confidence not only of the people… What perhaps is still more to be regretted is the Executive influence exerted from the highest quarters, has been responsible for some appointments to the Bench*." It goes on to comment similarly on the appointment of High Court judges. The Report grudgingly accepts not only that "the best talent among the judges of the High Courts has not always found its way to the

[74]Justice O. Chinappa Reddy, *The Indian Constitution: 1950 to 1994*, 1 LAW & JUS 54 (1994).

[75]Nagendar Sharma, *Bombay HC judge quits to protest transfer*, THE HINDUSTAN TIMES, September 20, 2010; He cited "personal reasons" for the resignation.

Supreme Court", but also that there exists a "*well founded and acute public dissatisfaction at these appointments*."[76]

At this juncture, it must be noted that these views were expressed before the travails faced by the Judiciary of the three Judges cases. The Report highlights the fact that the mode of appointments i.e. of giving primacy to the Executive regarding the appointment of judges has not worked and is not within the constitutional scheme.

Former Supreme Court judge, Justice VR Krishna Iyer, in a critical appraisal of judicial appointment these days wrote, "*A national commission for the appointment of judges with transparency, similar to the one now in England, is also urgently needed.*"[77]

The Committee on Judicial Accountability, highlighting the need for a national judicial appointments commission, in a statement regarding the proposed elevation of Justice CK Prasad noted, "*The Committee strongly feels that responsible members of the bar of the concerned High Courts should be consulted before the collegium makes any recommendation to the Government*."[78]

### *B. The 121st Report on a New Forum for Judicial Appointments*

The Report suggests the establishment of a body called the National Judicial Service Commission, "*A participatory model has a greater*

[76]*First Law Commission, under the Chairmanship of MC Setalvad*, 14th Report, Vol. 1.
[77]VR Krishna Iyer, *Time For Change, 2011*, available at http://www.flonnet.com/fl2805/stories/20110311280510600.htm (last visited July 13, 2011).
[78]*Judicial Reforms, Committee on Judicial Accountability*, Statement, 2010, available at http://www.judicialreforms.org/files/COJA_statement_on_appointments.pdf (last visited July 13, 2011).

*chance of acceptability because deliberation among participants to some extent provides a shield against arbitrary action*."[79]

Regarding its constitution, the Law Commission suggested it to be made up of the CJI, 3 senior-most judges of the Supreme Court, the most recently retired CJI, 3 Chief Justices of High Courts based on their seniority, the Minister of Law, the Attorney General of India and an outstanding legal academician.[80]

### *C. The Constitution (67th) Amendment Bill*

This Amendment to the Constitution[81], provided for the setting up of a high powered body known as the National Judicial Commission regarding the appointment of Supreme Court and High Court judges as well as the transfer of High Court judges. For appointments to the Supreme Court, the Commission was to consist of the CJI along with 2 senior-most judges of the Supreme Court. With regards to the appointments in the High Courts, the Commission was to consist of the CJI, the Chief Minister (or the Governor in case there exists a proclamation under Article 356), the Chief Justice of that High Court and one senior-most judge of the Supreme Court and that of a High Court.

Although it is permeated that the Bill addressed the criticism of arbitrariness on the part of the Executive[82], the fact that there were separate bodies for each Court made the whole system more difficult to supervise.[83] The role played by the Executive was completely done away with. There was no scope for the members of the Bar and

[79]Eleventh Law Commission under Chairman D.A. Desai, 121st Report, Para 7.4, at 41.
[80]*Id.*, para 7.10, at 42.
[81]Moved by the then Union Law Minister, Dinesh Goswamy on May 18th, 1990.
[82]*Id.*, Statement of Objects and Reasons of the Bill.
[83]Prem Kumar and Raj Bhatia, *Independence of Judiciary and The Appointment of Judges*,45 INDIAN JOURNAL OF PUB. ADMIN,364-398.

learned academicians from the public to contribute to the mechanism.[84]

The Bill, however, lapsed. But placing complete onus on the Judiciary was not within the scheme of the Constitution either.

### *D. National Commission Review of the Working of the Constitution 2002*

As per Volume 1, Chapter 7 of the Report, the institutional framework proposed by the 67th Amendment was recommended.

*"(i)t appears that latterly there is a movement throughout the world to move this function away from the exclusive fiat of the executive and involving some institutional frame work where under consultation with the judiciary at some level is provided for before making such appointments. The system of consultation in some form is already available in Japan, Israel and the UK.*[85]*"* The Report, however, adds a caveat to this suggestion and makes it clear that both the Judiciary and the Executive have to indulge in a 'participatory mode'.[86]

### *E. Constitution (98th Amendment) Bill, 2003*

This Bill sought to create a National Judicial Commission which would make recommendations for the appointment of judges belonging to the higher judicial organs. Such an institutionalized mechanism would minimize any possibility of discord between the

[84]*Supra* note 8, at 320.
[85]It must be noted that the Associate Judges of the Supreme Court of Japan are appointed by the Cabinet. In the United Kingdom, the Constitution Reform Act, 2005 has modified the way judges of the Supreme Court are appointed. The process is dealt with in greater detail separately in this Article. In the United States, the appointments to the Supreme Court by Presidential Nomination followed by Senate Confirmation.
[86]*National Commission to Review the Working of the Constitution*, Vol. 1, Para 7.3.7.

Judiciary and the Executive. Introduced by the then Union Law Minister, Arun Jaitley,[87] it also provided for the drawing up of a code of ethics.

The National Judicial Commission would be constituted as per the recommendations of the NCRWC Report.[88] This would be done by including Chapter IVA in Part V of the Constitution.

This Bill suffered several lacunae in the sense that the recommendations made by the Commission after inquiry proceedings on the conduct of a judge were not binding on the CJI. The appointment procedure was still opaque. There was hardly any mention as to the process of assessing the quality of judges.

### *F. Standing Committee Report on Judicial Standards and Accountability Bill 2010*

The Standing Committee Report, while deliberating on the Judicial Standards and Accountability Bill, 2010 also discussed the need for a separate institution which oversaw appointments and transfers within the higher Judiciary. Judicial accountability can be achieved only by an exhaustive legislation or a comprehensive legislation giving powers to an independent National Judicial Commission for recruitment of Judges, disciplinary action, promotion, *etc.* All these matters will have to be dealt with by an independent agency.[89]

Justice Malimath, during his deposition before the Committee had stated as under: - "*the quality of appointment of judges in my opinion has suffered after the 1993 judgment of the Supreme Court which has*

[87]Although the NDA Government introduced the bill, there was consensus all around. Most of the parties had promised the setting up of such a Commission in their manifestos prior to the 1999 Lok Sabha Election.
[88]*Supra* note 87.
[89] Standing Committee, *21st Report on the Judges (Inquiry) Bill*, para 21.0 (2006).

*abrogated the exclusive power of virtually recommending the judges, virtually neutralizing the judges.*[90]

*Former CJI, Justice P.N. Bhagawati stated "we have actually got to have a comprehensive law wherein with the appointment of judges we have to look into the manner in which you are going to deal with them and then how to deal with them…"*

## VI. JUDICIAL APPOINTMENT COMMISSIONS: AN INTERNATIONAL COMPARATIVE PERSPECTIVE

### *A. International Covenants*

The United Nations General Assembly, in 1985, adopted a resolution on the Basic Principles on the Independence of the Judiciary.[91] The operative clauses are in the form of twenty principles, the first of which makes it clear that, "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."[92] Further, it also states that, "Any method of judicial selection shall safeguard against judicial appointments for improper motives."[93]

There has to be an effort on the part of every country's political establishment to find its own "golden Aristotelian mean" which in the words of Senior Advocate A.M. Singhvi, has to be "between the two extremes of the British unfettered Executive discretion shrouded in

[90] *Id,*para 21.3.
[91] A/Res/40/32, November 29, 1985. Although they deal with the fundamental elements of an independent and impartial judiciary, they also elucidate and stress upon the significance of appointing judges .
[92] *Id,* Principle 1.
[93] *Id,* Principle 10.

secrecy and the equally unacceptable American model involving the striping naked of a potential appointee under harsh media lights.[94]

The independence of the Judiciary is of paramount importance in today's world. If the beacon of the Judiciary has to remain bright, the Court must be above reproach, free from coercion and political influence.[95]

### *B. Appointment systems in UK, France, Nepal, Malaysia, Spain, Portugal and Israel*

The constitution of any national judicial appointment commission varies internationally. It may be five (as in the United Kingdom Supreme Court) to twenty seven (in Italy's Consiglio superior dellamagistratura)[96].

In the United Kingdom, appointments to the Supreme Court are covered under the ambit of the Constitutional Reform Act 2005. [97] They are made by a body composed of the President and Deputy President of the Supreme Court, a member of the Judicial Appointments Commission of England and Wales, the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission.[98]

The French body for judicial appointments, Conseil Superieur de la Magistrature, consists of twelve members. Apart from the President and the Minister of Justice being ex officio members, the permanent

[94]*Supra* note 87; See Also AM Singhvi, *Special Rapporteur, UN Study, On the Independence and Impartiality of the Judiciary, Judges and Assessors and the Independence of Lawyers*, (31.7.85; E/CN.4/Sub2/1985/18).
[95]GRANVILLE AUSTIN, THE CONSTITUTION: THE CORNERSTONE OF A NATION 164-165 (Oxford-Clarendon Press, 1964).
[96]Constitution of Italy, Article 104.
[97]Constitutional Reform Act§§26-31 (2005) elucidates the process.
[98]Constitutional Reform Act§61 (2005) read with Schedule 12 provides for the Judicial Appointments Commission.

body is composed of five elected judges, one public prosecutor, one counsillor of State and three jurists.[99]

The Interim Constitution of Nepal provides for the setting up of a Judicial Council which consists of the Chief Justice, the Minister of Justice, a senior advocate, a jurist and the senior-most judge of the Supreme Court.[100]

In Malaysia, the appointment of the superior court judges is by the King, acting on the advice of the Prime Minister and the Conference of Rulers. It must be noted that the Prime Minister has to consult the Chief Justice before tendering his recommendation.[101]

The body discharging these functions in Spain is Consejo General delPoder Judicial.[102] It consists of twenty onemembers, twelve judges and eight highly experienced lawyers. As for Portugal, the body is the Conselho Superior da Magistradura (CSM), which is composed of seventeen members. They include seven judges, seven non-judges whose names are recommended by the Parliament, onejudge and one non-judge nominated by the President with the President of the Supreme Court as the ex-officio member.[103]

In Israel, all the judges are appointed by the President, upon the nomination by the 'Judges' Nomination Committee'. This body is composed of nine members, including two judges of the Supreme Court, the President of the Supreme Court, two ministers of the Government, one of whom is the Minister of Justice who chairs the

[99]Constitution of the Fifth French Republic, Article 64.
[100]Interim Constitution of Nepal, Article113.
[101]Federal Constitution of Malaysia, Article 122B.
[102]Spanish Constitution 1978, Article 122.
[103]Portuguese Constitution, Article220 (1976).

committee, two members of the Knesset and two lawyers from the Israeli Bar Association.[104]

## VII. A NATIONAL JUDICIAL COMMISSION

The establishment of a National Judicial Commission in India would necessitate a Constitutional Amendment. Not only would there be an insertion of a new Article in itself, it would also involve the modification of Articles 124(2), 217(1), 221(1) and 231(2)(a).

The authors' submit that the Commission be composed of the following members

(a) President of India (Chairperson)
(b) CJI (Vice-Chairperson)
(c) Two senior-most puisne judges of the Supreme Court
(d) Attorney General of India
(e) Eminent legal jurist nominated by the Prime Minister of India
(f) Eminent legal jurist nominated by the Leader of Opposition

Such a body would bring about a fine balance between the Executive and the Judiciary, the Bar and the Bench and the Government and the Opposition. There should be procedures affixed separately for the appointment of a Supreme Court judge, High Court judge and the transfer of a High Court judge. The Commission may record the statements of the constitutional functionaries and members of the Bar who they deem necessary to measure the calibre of the candidates. The Commission should strive to make all the decisions on the basis of mutual consensus. However, decisions may be taken on a majority voting basis when a unanimous decision is not deemed possible. It must be noted that all communication shall be recorded. However, all

[104] *Basic Law: the Judiciary [Israel]*, March 8, 1984, available at http://www.unhcr.org/refworld/docid/3ae6b51d24.html (last visited June 15, 2011).

the members who support or oppose a motion should give in writing adequate reasons for their decision, which would be available to the general public.

At this point, the authors stress on the need for protection of the National Judicial Commission from judicial review. The National Judicial Commission as an appointing authority cannot seek to satisfy each of the candidates. On adjudging the eligibility of judges, the decision of the National Judicial Commission must have finality. The National Judicial Commission's aim and objective is to balance two interests that were at loggerheads after the three Judges' cases. These were the independence of the Judiciary and the confidence of the polity in the judicial system. In providing adequate reasons, the public has full access as to whom and why a member made their decision. This would minimize, to a large extent, nepotistic, corrupt and communal tendencies. The independence of the judiciary will not be compromised as the judges will not have to consider the ramifications of decisions against the mandate of the Executive. It is also to bear in mind that if a writ petition challenging the decision of the National Judicial Commission is admitted in the Supreme Court, it would lead the same matter being reconsidered by a part of the National Judicial Commission itself. Moreover, to grant the power of judicial review would tip the delicate balance of power again towards the judiciary, as had happened post the Second Judges' case. The authors feel that this would amount to going back to the age of judges judging judges.

The current mechanism which requires the CJI and four brother judges next to him in seniority, responsible for the appointment and transfer of judges belonging to the higher judiciary is flawed in many aspects. "Judges do not have an easy job. They repeatedly do what the rest of us seek to avoid i.e. make decision."[105]Expecting the five most powerful judges in the nation, to single handedly bear the weight of

[105]DAVID PANNICK, JUDGES (Oxford University Press) (1987).

the people's expectations from the Judiciary is a "travail comme Atlas". There is a lot of work that goes into processing the files of over seven hundred and fifty High Court judges. Apart from that, there are vacancies at the Supreme Court that have to be filled and transfer of High Court judges to be made. Having administrative and logistical support in the form of an institutional framework would make the task easier. More importantly, it would not preclude, in any manner whatsoever, the original task of the judiciary i.e. to deliver justice and be the bastion of people's rights.

## VIII. CONCLUSION

It has been the authors' sincere attempt to show the readers how the Supreme Court went terribly wrong in adjudging the role of the CJI in the consultative process. Rarely does there come a time when one judgment overrules another and yet, to the legal mind sound in canons of construction, both the judgments put forth absurd and untenable propositions of law. The Hon'ble Court has in the process, overlooked and misconstrued the intention of the founding fathers, expanded and tried to read into the Constitutions – norms and rules; something that might have been more functional as an amendment and irreversibly shaken the faith of the people in the Judiciary. And at the end of it all, this purported system failed to deliver, resulting in what is in the authors' opinion: failed means, failed ends and a failed judiciary. The setting up of a national judicial commission would ensure transparency in the appointment system. It would bring about a degree of accountability to their acts. The communication would be recorded, but would not be available to the general public. Independence of the Judiciary would still be maintained, but the Executive and the Bar would have a say in the appointment and transfer process. It should be noted that by independence of the Judiciary, the authors do not mean a rigid separation. The concept of

accountability is not synonymous to judicial subordination. Accountability has to be viewed as a demarcation between rights and wrongs of the ethical considerations as well as a system of checks and balances. Thus, the two concepts are distinct, but seek to steer towards the proverbial middle course, so that they nurture, sustain and balance each other.