INTERNATIONAL JOURNAL OF INTEGRATED LAW REVIEW

Volume 1 | Issue 1

2020

Separation of Powers is a Myth: In reference to National Judicial Appointment Commission or NJAC

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ABSTRACT

This research paper makes an analysis of the principles of separation of powers in the light of judicial independence in India. It covers all the aspects about the appointment of judges, the three judges' case, the formation of National Judicial Appointment Commission, its subsequent striking down and the revival of the collegium system. The relation between the executive and judiciary has been analyzed in detail. Certain insightful recommendations have been made hereby which shall actually form the correct balance between the executive and judiciary.

Keywords: Separation of Powers, judiciary, NJAC, unconstitutional, CJI, appointments, Constitution, independence, amendment

I. INTRODUCTION

Research Methodology

The author of the research paper has resorted to doctrinal method of research as the topic of research relates to analysis of a prevalent law or legal issue. The author made use of several books, Law Commission Reports, case manuals, etc for the purpose of reaching a comprehensive and logical end to the research problem.

Research Questions

The research paper deals with the following questions:

(1) Whether the principles of separation of powers are applicable or relevant in Indian legal system in light of the independence of the judiciary and,

(2) To what extent is the executive's role in the matter of judicial appointments permissible in light of principles of separation of powers.

Objectives of the Study

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The objective of the research is to put forth such observations which might be instrumental in understanding the scuffle between the executive and judiciary with respect to judicial appointments in light of the separation of powers. The author aimed to put all the aspects on the separation of powers and judicial independence in a crystal clear manner hereby.

Hypothesis

It has been assumed hereby that the judiciary in India is independent in nature and bereft of any influence from executive and from external factors like political conditions, personal bias and ideologies, etc.

Limitations of the Research Paper

This research paper does not discuss in detail the contents of the various reports presented by different committees.

II. SEPARATION OF POWERS: INTRODUCTION

The principle of Separation of Powers is about the intricate relationship between the Governmental organs namely the executive, legislature and judiciary. As implied by the names, the legislature does the work of law making, the executive is assigned the duty of implementing the law in the country and the judiciary has to look into the fact that the law is being duly made and being implemented in accordance with the Constitution of India, 1950. For the very first time, it was Aristotle who divided the functions of a governing unit into three parts which were - continuous executive power, discontinuous legislature power and federative power.[2] French jurist Montesquieu authored a book, L. Esprit Des Lois, that is the Spirit of Laws whereby he elaborated on this doctrine.[3] The crux of his explanation was that no single person shall be carrying out all the functions of the government which are the legislature, executive and judiciary. This also means that one organ of the government is not entitled to encroach upon the functions and sphere of the other organ's function. Montesquieu's concept of separation of powers however did not lead to the existence of any barriers or borders but rather lead to the evolution of the principle of checks and balances. This implied that the organs must deal only with their own sphere of issues however to limit whereby it is possible to do so. Hence if such a limitation is duly adhered to, it is next to impossible that the situation of eclipse of liberty as elaborated by Montesquieu and Locke shall arise.[4] In *His Holiness Sri Keshvananda Bharti Sripadgalvaru* v *State of Kerala*[5], the

[2] Tej Bahadur Singh, *PRINCIPLE OF SEPARATION OF POWERS AND CONCENTRATION OF AUTHORITY*, 4 *JTRI* 1 (1996).
[3] Justice D.D. Basu: Administrative Law, Edn. 199, p. 23.
[4] Carleton K. Alien: Law and Orders, Edn. 1965, p. 10,19.

then Honourable Chief Justice of India J. Sikri laid down that the principle of separation of powers is a part of the basic structure of the Constitution which cannot be amended by any law brought by the Parliament. In *Ram Jawaya* v *State of Punjab*[6] and *re Delhi Law case*[7], the Supreme Court recognized though no explicit provision mentions of the principles of separation of powers, the defining of the separate function in the Constitution is more than enough to depict the applicability of the doctrine in the Indian context.

In India, separation of powers has not been mentioned explicitly but provisions in the Constitution make it very much clear that it has to be adhered to. In *Ram Krishna Dalmia* v *Justice Tendolkar*[8], it was recognized that the separation of powers is implicit to the Constitution. The same was also laid down in *Jayanti Lal Amrit Lal* v *S. M. Ram.*[9] The different organs of the government along with their respective functions have been mentioned in the Constitution. In the constitutional debates, Professor K.T. Shah laid stress on the insertion of a separate provision of Article 40A with regards to separation of powers. The Article read as follows - "There shall be complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial."[10] Dr B.R. Ambedkar, the Chairman of the Drafting Committee of the Constitution Assemble disagreed to Professor K.T. Shah and remarked that the American model of strict separation of powers should not be followed in India after the much evident dissatisfaction of the Americans towards their system. He said that the doctrine of separation of powers no doubt shall be a feature of the Constitution but it should not be mentioned explicitly and rather should remain evident from the other provisions itself.[11] Shri K Hanumanthiya, a Constituent Assembly member remarked that for the best governance, it was better to have a harmonious governmental structure.[12]Thereby, the proposed provision of Article 40A did not become a part of the final draft of the Constitution.

Article 53(1) of the Constitution of India, 1950 lays down that the executive powers of the union shall be vested in the President. Article 154(1) of the Constitution of India, 1950 lays down that the executive powers of the state vest with its Governor. However, no article in the constitution specifically mentions of the granting of the legislative and judicial powers and functions to any person or organ. However, on carefully reading the articles, it becomes clear

[5] AIR 1973 SC 1462.
[6] AIR 1955 SC 549.
[7] 1951 AIR 332.
[8] 1958 AIR 538.
[9] 1964 AIR 648.
[10] Constituent Assembly Debates Book No.2, Vol. No. VII Second Print 1989, p. 959.
[11] Id. p 967.968
[12] Id. 962

that the legislative functions are to be carried out by the Parliament and State Legislatures respectively, and judicial functions are to be carried out by the Courts. However, there are certain provisions where one organ is seen carrying out the functions which are technically of the other organ. Article 123(1)[13] empowers the President who is the head of the executive to enact ordinances which in simple terms is a law enacted by the executive for a period of six moths which can later become an Act when tabled and passed in the Parliament. Under Article 357 of the Constitution of India, 1950 the President has the legislative power to make a new law during the period of emergency. In Article 103(1)[14], the President exercises a judicial function regarding the matter of qualifications of a member of the Parliament.

It is also essential to note that the Article 50 of the Constitution of India, 1950 lays down that all steps must be taken to separate the executive from the judiciary. However, Article 124(2) of the Constitution of India, 1950 gives the power to the President to make the appointment of the judges to the Supreme Court. Under Article 61[15], the parliament performs a judicial function of the removal of the President which is better known as impeachment. The judiciary's role in the country is primarily limited to the interpretation of the law, however they also have the power to legislative under certain forms and circumstances. Whenever the Constitutional Courts that is the HC and the SC upon interpreting a piece of law come to the conclusion that a law is unconstitutional, it shall declare that piece of legislation as being null and void and lay down such principles which will have the binding force of a law till the Parliament enacts a law on the same. The power of these Courts to lay down principles on the grey areas of laws is also a function of legislative nature. In *Chandra Mohan* v *State of Uttar Pradesh*[16], the SC lays down that though the Constitution separately does not mentions of separation of powers, but it provides for judiciary which is free from the influences of the executive and judiciary. If the executive is allowed to encroach upon the area of duty of the judiciary, it would be no less than the mockery of the judiciary of our country.[17]

III. INDEPENDENCE OF JUDICIARY

The term independence of judiciary largely means that the judiciary is to be bereft of any influence of the executive and other external factors like politics. An independent judiciary is a must feature of a free and democratic society. It has to ensure that the rule of law is maintained in the society, human rights is a much relevant concept hereby and that the

[13] The Constitution of India, 1950
[14] Ibid.
[15] The Constitution of India, 1950
[16] AIR 1969 ALL 230.
[17] Ibid.

society continues to flourish in prosperity and thus experience stabilization. It is a wide and comprehensive term which means that a judge is not only meant to be free from the influence of the government but also independent from his personal views, moral beliefs, political biases and religious ideologies. For Judicial independence to exist, it is necessary that the constitution of the country is held in high spirits and is given supremacy above factors like personal benefit and politics. It is generally by way of the constitution that the judicial independence is maintained. It is the starting point of the evolution of judicial independence in any country. However, it is also through conventions, customs, legislations and other legal practices that the independence of judiciary becomes much evident. Whatever the case might be, it is through the existence of a plethora of factors that combined together make the judiciary independent.

It is essential to understand that for the independent judiciary to exist, adherence to the principles of separation of powers is a must. But these principles are not the only basis of an independent judiciary as separation of powers provides for independence from the executive and judiciary but not from personal bias, religious views, etc. For judiciary to be known as independent, it is supposed to become an autonomous body unlike the legislature and judiciary. The ultimate purpose of an independent judiciary is that the judge in any case put before him or her is able to pass such judgments which are in accordance with law and in consonance with the principles of natural justice.

If the status of the Indian judiciary is analyzed in the light of the aforesaid explanation, it can be inferred that the concept of judicial independence in India is either disputed or largely misunderstood by the majority. The concept of judicial independence in Indian legal system as evident from the 2nd Judges case was largely that of an autonomous body performing its functions. As evident from the 1st judges case, it is the executive which is to be given precedence over the judicial independence as India is a democratic country. The 3rd judges case gave a rather balanced approach to the same issue.

IV. THE THREE JUDGES CASE: THEIR HISTORY AND ANALYSIS

An independent judiciary is a sine qua non for the democracy and rule of law is to be sustainable in a country.[18] For a federal form of governance like in India, it becomes even more necessary for the judiciary to remain independent. From time to time, the debate whether the Indian judiciary is independent in the true sense or not has arisen specifically in

[18] Dr Anurag Deep and Shambavi Mishra, *Judicial Appointments In India And The NJAC Judgment: Formal Victory Or Real Defeat*, 3 JLJ 50 (2018).

relation to the appointments in the Higher Judiciary. Article 124(2) and Article 217 of the Constitution of India, 1950 provides for the appointment of the judges to the SC and HC by the President who is the head of the executive. Article 124(2) of the Constitution of India, 1950 lays down that the judges to the SC of India shall be appointed by the President in consultation with such judges of the High Court and the Supreme Court which may be deemed to be necessary by the President. Article 217 of the Constitution of India, 1950 provides for the appointment of Judges to the High Court on the same lines. The role of the President in the matter of appointment of judges to the Constitutional Courts has always been questioned and considered by most from the judiciary as being violative of its independence as it provides for unnecessary inference on the part of the executive in the judiciary. The issue of appointment of the CJI has been undoubtedly the most controversial issue regarding the independence of the judiciary. A long range of history, judicial pronouncements and constitutional amendments exists with regards to this matter.

During the first twenty-three years of the independence of India from the British rule, the appointment of the judges was made strictly in accordance with Article 124 of the Constitution of India, 1950 whereby the opinion of the CJI was hardly ever held in low spirits and the Chief Justice was appointed on the basis of the seniority rule which means that the senior most judge of the Supreme Court after the Chief Justice shall become the next CJI. Seniority in the SC and HC is based upon the date on which the appointment of a judge is made or the date on which the oath is administered by them. The earlier a specific judge was appointed to the Court, the more senior he or she is with. If it so happens that a few judges are appointed on the same day, then the seniority is determined on the basis of order in which the oath was administered by them on that very day. However, in 1973, this convention of appointment of the CJI on the basis of the seniority rule was not adhered to and India thus witnessed its first case of supersession of judges. In 1973, the landmark judgment of *His Holiness Sri Keshvananda Bharti Sripadgalvaru* v *State of Kerala*[19] was pronounced by a 13 judges bench in the ratio of 7:6 whereby the basic structure doctrine was elaborated upon by the majority. This judgment was not well received by the executive as they considered that the judgment hampered their powers as the executive. It so happened that soon after this judgment was pronounced, the appointment to the post of CJI was to be made. Thereby taking lieu from the M. C. Setalwad Committee Report which opposed the blind adherence to the seniority rule, the then President appointed Justice A. N. Ray who was the fourth in seniority level as the CJI by superseding the three senior most judges namely Justice Sheelat,

[19] *Supra* note 4, pg 2.

Justice Hegde and Justice Grover, who had given the majority judgement in the aforesaid case which was disliked by the government. These three judges resigned from their posts as a sign of protest to this mala fide supersession. Thereafter, a write of mandamus was filed in the Delhi High Court regarding the legality of Justice AN Ray's appointment. The Delhi High Court refrained itself from commenting on the legality of the appointment and laid down that there was no malice in part of the President while making the appointment and that after the resignation of the three senior most judges of the Apex Court, even if the appointment in question is found to be illegal it was Justice A. N. Ray who was now the senior most judge of the Supreme Court and was thus entitled to be appointed as the CJI.

This particular incident in the judiciary gave rise to the concept of 'committed judge theory'[20] which meant that the judges may give such judgments which please the whims and fancies of the executive so as to save their jobs or secure good paying and prestigious jobs for themselves after their retirement.

A similar situation like the one in 1973 came forth in the year 1977. In 1975, the validity of the election of the then Prime Minister of India, Mrs Indira Nehru Gandhi was challenged by Mr Raj Narain in the Allahabad HC on the grounds of use of illicit practices during the general elections. Thereby, the Allahabad HC in *Raj Narain* v *Indira Nehru Gandhi*[21] declared her election as a Member of Parliament being null and void. When her appeal reached the Supreme Court, Justice V. R. Krishna Iyer in *Indira Nehru Gandhi* v *Raj Narain*[22] partly allowed her appeal and allowed her to attend the proceedings of the Parliament but without the right to vote till the matter was finally decided by a larger bench after the vacation of the Court was over. Meanwhile, the government imposed emergency under Article 352 of the Constitution of India, 1950 on the grounds of internal disturbance. Once emergency was imposed, a mass scale violation of the fundamental rights of the citizens took place which lead to the filing of several writs. However regarding the validity of the writ petition of Habeas Corpus filed under Article 32 and Article 226[23], the matter reached the Supreme Court in the case of *A. D. M. Jabalpur & Ors* v *Shivakant Shukla*[24]. The 5 judge bench in the ratio of 4:1 pronounced the judgment and laid down that even the fundamental rights under Article 20 and 21 of the Constitution of India, 1950 shall remain suspended and no rule of shall shall exist during a national emergency. The lone dissenting

[20] *Supra* note 17, pg 3.
[21] 1972 AIR 1302.
[22] 1975 AIR 2299.
[23] The Constitution of India,1950
[24] (1976) 2 SCC 521.

judgment in this case was pronounced by Justice H. R. Khanna which was yet again not well received by the then government. Similarly, soon the time came of the appointment of the CJI. Justice H. R. Khanna who was the senior most judge was superseded and Justice M. H. Beg was made the CJI. This was the second case of supersession of judges which brought in a whole lot of bad name for the executive. The debate regarding the role fulfilled by the judiciary in matters of appointment of judges gained further momentum.

Until now, the SC had never decided upon this fact in issue earlier. It was in *S. P. Gupta* v *Union of India*[25] which is much famous as the First Judges Case that this matter for the very first time was brought before the SC. Hereby the SC laid down that the CJI's role in matters of judicial appointments is solely of consultative nature as laid down in Article 124(2) of the Constitution of India, 1950. Relying upon the judgment laid down in *Sakal Chand Seth case*[26], the term consultative means that the President shall only consult the CJI but is not bound to follow the consult made by him. It was also laid down that the appointments to the post of Chief Justice shall not be made blindly on the basis of seniority but a due weight-age is also to be given to the merits of the judge. Thus hereby, the Supreme Court established the supremacy of the President or in larger sense the executive in the matters of appointment of judges.

The judgment in this case did not lead to a detailed explanation on the same. In 1991, this question was yet again raised in the case of *Subhash Sharma* v *Union of India*[27]. Though this case is not a three judges case, but the obiter dicta by the Supreme Court hereby is of important nature. It was held that it was ideal to have a separate non judicial and non political body which makes the appointments of the judges in the HC and SC as it would be a step forward towards the fulfillment of the idea laid down under Article 50 of the Constitution of India, 1950. Yet again 1993, the matter of judicial appointments again came up before the Apex Court in the Second Judges case also known as the *Supreme Court Advocates on Record Association* v *Union of India.*[28]The Supreme Court hereby overruled the ratio decidendi laid down in the first judges case and converted executive supremacy to the judicial supremacy. The SC hereby laid down the following guidelines for the judicial appointments:

(1) No appointment of the judges can be made unless the appointment made by the executive is on the lines of the consultation given by the CJI. The term consultation as mentioned in the

[25] 1982 2 SCR 365.
[26] *Sankalchand Seth* v *Union of India*,1976 17 GLR 1017.
[27] 1991 AIR 631.
[28] 1993 (4) SCC 441.

Article 124(2) of the Constitution of India, 1950 is to be read as being concurrence implying the supremacy of the opinion made by the CJI.

(2) The judgment developed the concept of 'Collegium' and laid down that the CJI in the process shall be assisted by at least two senior most judges of the SC on the lines on which the President is assisted by the Council of Ministers.

(3) Hereby it was made mandatory that the consultation process has to be recorded in writing and the Council of Ministers shall advise the President as per the suggestion made by the CJI.

(4) The appointments to the post of CJI shall be made on the basis of seniority rule.

The Second Judges case did transfer the ball back to the garden of the judiciary by introducing the concept of collegium but it did not mention the details of it. A brief idea or a passing reference was made to the idea of 'Collegium' was made but the same was elaborated in the Third Judges case.

In the year 1999, the then President of India, Mr K. R. Narayanan invoked the Article 143[29] that is the Advisory jurisdiction of the SC to seek the advise of the Court on the matter of judicial appointments. This was the 11th Presidential Reference made and is famous as the *Third Judges case.*[30] This case was decided on by a nine judge bench and the following were the essential observations made:

(1) While making the recommendations for the appointment, the CJI has to do consultation with the four senior most puisne judges of the Supreme Court, Thus it is evident that the strength of the Collegium as specified in the Second Judges case was increased from 1 + 2 to 1 + 4 whereby one denotes the CJI and 2 or 4 depicts the other senior most judges of the SC.

(2) The opinion the members of the collegium shall be in written. If majority of the collegium is against the appointment of a particular candidate, then that person should not be appointed as a judge. Even if two senior most judges of the SC are against the appointment of a certain candidate, then he or she should not be appointed.

(3) The consultative process carried out within the collegium and with the executive is to be covered in writing.

(4) In case of appointment of judges, the CJI shall consult the senior most judges and convey their opinion in written form. In case of a High Court, the seniority rule shall not be followed

[29] The Constitution of India,1950.
[30] AIR 1999 SC 1.

strictly and a High Court judge having outstanding merit regardless of his seniority can be appointed as a judge in the SC.

(5) In the matter of appointment of CJI, the seniority rule has to be followed with due diligence and with no exceptions being made whatsoever the case might be.

The third judges case tried to balance the tense situation around the matter of the power with respect to judicial appointments between the executive and judiciary. This judgement was much in consonance with the doctrine of separation of powers as it made no single person as the master in the current situation but rather gave due importance to the opinions of both the parties.

V. SETTING UP OF A JUDICIAL COMMISSION: THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION OR THE NJAC

The Three Judges case dealt with the question of appointment of judges but even after the judgments pronounced in these cases, the situation remained largely unsettled and the idea of a separate commission for the appointment purposes remained to exist. The Collegium system was criticized for not being transparent and hence constant questions continued to be raised on its credibility. Way back in the year 1987, the 121st Law Commission Report supported the setting up of a judicial commission for making judicial appointments. Suggestions were made that such a commission should consist of the CJI as its chairman along with the three senior most judges of the SC. It should also include the Law Minister, the Attorney General, CJ of three HC and a law academician of outstanding merit. This idea was however not considered then seriously and thus left in the oblivion.

After the third judges case in the year 2002, the national commission which was appointed to review the working of the constitution also proposed for the establishment of a judicial commission but yeat again the idea was not implemented. The concept yet again began to be brought up around the year 2013 when the Rajya Sabha passed the 120th Amendment bill for the establishment of the NJAC that is the National Judicial Appointment Commission. In the year 2014, the Lok Sabha passed the National Judicial Appointments Commission Bill which scrapped the collegium. On 31st December of 2014, the President gave his assent to the bill which then become the 99th Constitutional Amendment Act. Article 124 A, Article 124B and Article 124C of the Constitution of India, 1950 were inserted hereby which further explained and elaborated on the functions of the NJAC. Article 124A of the Constitution is a declaratory provision providing for the establishment of the NJAC along with its composition which consists of -

(1) The CJI as its ex officio chairman

(2) Two senior most judges of the SC

(3) The Union Minister of Law and Justice

(4) Any two eminent persons who shall be nominated by the committee which shall consist of the PM, the CJI, the leader of opposition or the Lok Sabha or in case a leader of opposition is not there then the leader of the single largest opposition party in the house of people of the Lok Sabha.

It is mandatory that a person from the community of Schedule Castes, Schedule tribes, Other Backward Classes, Minorities and Women with the condition that such a person shall be nominated for a period of three years and would ineligible for any renomination to take place. Article 124A[31] also lays down that no proceeding of the NJAC shall be declared as being invalid on the grounds that the composition of the NJAC is not as mentioned in the Constitution that is any vacancy or defect in the composition shall not effect the work done by the NJAC.

Article 124B of the Constitution of India, 1950 lays down the functions that shall be performed by the NJAC. The NJAC shall:

(1) Recommend persons for appointment as the CJI, Judges of the SC and CJ of the HC of the states and its other judges

(2) Recommend the transfer of the judges whether the CJ of a HC or any other judge from one HC to the other HC.

(3) Make sure that the person being recommended by them shall be of a dignified posture and shall possess ability and integrity.

Article 124C[32]empowers the parliament to make any law to regulate the appointment procedure in the judiciary if it considers that it is necessary to do so in light of maintaining the efficiency of the process. It was only under the power granted in Article 124C of the Constitution of India, 1950 that the National Judicial Appointments Commissions Act, 2014 for issuing a much clearer law on the issue.

VI. STRIKING DOWN OF THE 99TH CONSTITUTIONAL AMENDMENT, 2014

On the day of 16th October, 2015, the Supreme Court in *Supreme Court Advocates on Record*

The Constitution of India, 1950

[32] Ibid

Association v. *Union of India*[33] (4th Judges case) strike down the 99th Constitutional Amendment of 2014 which provided for the establishment of the National Judicial Appointment Commission or NJAC and the Collegium system as enumerated under the 2nd Judges case and the 3rd Judges case was restored. The National Judicial Appointments Commission in this case was declared as being ultra vires the Constitution of India, 1950 as it was an open attack on the independence of the Judiciary as it provided for direct influence of the executive in the appointment process. This move was celebrated by people who were constantly advocating for the independence of the judiciary but was criticized by those who favoured the view point that the people of the country or their representatives should always be involved in the processes which affect their rights or lives. The 99th Constitutional Amendment, 2014 was declared unconstitutional by a five judges constitutional bench in the ration of 4:1 whereby Honourable Justice J Chelameshawar gave his judgment in favour of the NJAC. Although the judgment does maneuvers a way to uphold the constitutionality of the collegium structure for the purposes of the independence of judiciary which is a basic structure of the Constitution, but it raises few questions which are ought to be considered. One view is that this particular verdict is selfish in nature as it pays no heed to the larger sentiments of the people in the sense of the democratic nature of the country whereby the people shall be involved in one way or the other in all essential processes of public importance.[34]This judgment is celebrated on the grounds that it upholds the judicial independence which is a part of the basic features of the Constitution but it is also known that the basic structure doctrine in itself remains on a flimsy ground.[35] It is within the powers of the Constitutional Courts to increase and decrease the ambit of the basic structure doctrine and hence, it cannot be said that the Parliament is being completely unjustified in acting in the way it has been doing so on the matter of judicial appointments or on the larger picture the independence of judiciary in India.

The majority judgment hereby majorly relied on the two cases of *Samsher Singh* v. *State of Punjab*[36] and *Sankalchand Sheth* v. *Union of India*[37]. In the former case, the SC had held that while making the appointments to the HC or the SC under Article 124 and Article 217 of the Constitution of India, 1950 respectively, the President or the head of the executive had to

[33] Writ Petition Civil No. 13 of 2015.
[34] Shambhavi Sharan and Gunjan Chhabra, "The National Judicial Appointment Commission - A Critique,Rajani, Singhania and Partners (September 29, 2020, 02:00 pm) https://www.manupatrafast.in/NewsletterArchives/listing/ILU%20RSP/2015/Aug/The%20National%20Judicial%20Appointment%20Commission%20-.pdf
[35] Ibid.
[36] 1974 AIR 2192.
[37] *Supra* note 23, pg 6.

compulsorily depend on the advice given by the CJI. This stand of the SC was also reiterated in the Sankalchand's case but was not relied upon in the first judge's case. The SC in this decision upheld the primacy of the CJI in the matters of judicial appointments. The SC has relied upon the debates of the Constituent Assembly and has considered the interpretations granted to them in the 2nd Judges case and the 3rd Judges case.[38]

Though Justice Chelameshawar gave the dissenting judgment in the present case, he maintained the ground that the independence of the judicial arm of the government is protected by the basic structure doctrine. He raised a rather interesting question in the judgment about the fact whether there existed any difference between the basic structure and basic feature of the Constitution. He reached to the conclusion that the two are indeed different and it is the basic features which are covered within the ambit of basic structure and hence any amendment in such an Article which deals with the basic structure of the Constitution of India, 1950 may not necessarily be violating the basic structure doctrine.[39]

This judgment gave voice to the much justified apprehension around the judiciary's power to form laws or declare them as being unconstitutional at their own will or rather in an arbitrary manner. With judiciary being granted the role of the interpreter and guardian of the supreme law of the India, the lack of any ' checks and balance ' over judiciary puts forth certain instrumental questions on the democratic nature of our country and the separation of powers which is also a part of the basic structure of the Constitution. On the issue of judicial appointments, the majority also put forth its serious concern on the ills of the collegium system and the SC did leave its forum open for any such suggestion which may be instrumental and helpful in rooting out all the ills from the collegium system.

VII. NATIONAL JUDICIAL APPOINTMENTS COMMISSION OR NJAC: A CRITICAL ANALYSIS

Even after the National Judicial Appointments Commission or NJAC has been declared unconstitutional by the SC in 2014, it is necessary to analyse the two procedures of the appointment of judges with respect to each other. It remains essential to answer the question that even if the National Judicial Appointments Commission or NJAC was violative of the independent nature of the judiciary, was it a much better mannerism of appointing the judges given and considering all the other factors.

The NJAC consisted of the CJI along with three senior most judges from the SC from the

[38] *Supra* note 17, pg 4.
[39] *Supra* note 17, pg 4.

side of judiciary and the Union Minister of Law and Justice, along with the involvement of several other people from the executive branch of the government. The recommendation made hereby would finally be made to the President who is the head of the Executive. Hence, no doubt exists to the fact that the NJAC gives much more primacy to the executive, rather than the judiciary in the matters of appointment of judges. Secondly, to a certain extent it can also be said that the problem of judicial accountability in its administrative functions may also have been solved as the judiciary would under the NJAC be accountable to the executive in the matter of its appointments.[40] However, apart from this reason, it doesn't serve much purpose or any major advantage over the collegium system. It in no manners cures the lack of transparency in a collegium as the NJAC itself is not transparent in nature. The considerations and procedure of appointment would still be a topic of mystery for the masses. Along with the criteria of appointment of judges specifically provided for in the NJAC Act, the words "any other suitable criteria" will surely act as a way of introducing the angke of arbitrariness yet again in the matters of appointments.[41]

The provisions of the National Judicial Appointments Act, 2014 lays down that from the six members of the NJAC, a minimum majority of five persons has to agree with the recommendation being made before it is conveyed to the President, in absence of which the recommendation cannot be made to President or the executive head. This majority specified hereby is undoubtedly unjustifiable given that it is more than a simple majority of 50 % but also more than the special majority of 67% as laid down in the Constitution for the purpose of passing of money bills in the Parliament.[42] Also, the long and strenuous procedure of the long debates and discussions which ideally take place before the passing of a legislation or law in the country has also not been adhered to hereby. The passing of the legislation in such a hurried and sudden manner has also been looked by many with suspicious eyes and the lack of any jurisprudential basis for the same.

The National Judicial Appointments Commission Act, 2014 and the 99th Constitutional Amendment of 2014 left the power of judicial appointments in the hands of the executive almost entirely. The matter of judicial appointments have always been linked with the idea of the independence of judiciary, which has from time and again been recognized to be part of the basic structure of the Constitution. To give such major primacy to the executive as under the NJAC Act, 2014 in the process of appointment of judges dilutes the independence of the judiciary and can also be said to be opposed to the basic structure of the constitution. A major

[40] *Supra* note 33, pg 9.
[41] *Supra* note 33, pg 9.
[42] *Supra* note 33, pg 9.

gap in the NJAC, 2014 which has been instrumental in leveling down the credibility of the NJAC is the inclusion of the term eminent person without specifying such yardsticks which may be in the nature of guidelines for the Committee to consider a judicial person as an eminent person. In other acts, such as the Consumer Protection Act, 1986 the yardsticks of "eminent persons" has been laid down as having some special knowledge, background and standing. In the absence of such a criteria being laid down in the NJAC Act, 2014 the committee consisting of the Prime Minister, the Leader of Opposition and the Chief Justice shall be free to appoint persons of their own choice as without any heed to the merits of the person and other factors which will in practical terms lead to major abuse of the provision. This vagueness will only promote the theory of "Committed Judge" as the provision leaves an ample scope for the evils of politics, nepotism and favoritism to creep into the Higher Judiciary and thus destroy this respected stature in the society. It remained an unanswered question that whether the Right to Information Act, 2005 shall be applicable to the appointments being made by the National Judicial Appointments Commission or NJAC.

Thus the issues which had hit the Collegium system were unlikely to be solved by the National Judicial Appointments Commission in the form it existed under the NJAC Act, 2014 and the 99th Constitutional Amendment, 2014 given the analysis made earlier.

VIII. Suggestions and Recommendations

It is a much evident fact that neither the Collegium system nor the National Judicial Appointments Commission or NJAC is perfect for the task of making the judicial appointments in the Constitutional Courts. Certain changes should be made in the Collegium system so as to satisfy the requirements of the law and the practicality of the issue being faced. The proceedings of the Collegium should be conducted in the presence of the Attorney General of India or the AG. as he knows the best of both the sides of the coin. This would also not hamper the principles of separation of powers and the independence of judiciary. The inputs made by the Attorney General shall also be recorded in writing. The Chief Justice of India or the CJI is a person of high regards and authority who possess the highest possible degree of knowledge in law. Thus his opinion should have an edge given that he is the most competent person to assess the requirements of an ideal judge.

The National Judicial Appointments Commission might be a step ahead the collegium system in terms of judicial accountability but the fact persists that there is an almost non - existent line between judicial accountability and dilution of the Independence of the Judiciary. No doubt that the matters of appointment of judges is not left entirely on the judiciary in other

countries, but is also cannot be conceived that the judiciary in such countries is not independent. The NJAC might be a step ahead the collegium system in terms of judicial accountability but the fact persists that there is an almost non - existent line between judicial accountability and dilution of the Independence of the Judiciary. No doubt that the matters of appointment of judges is not left entirely on the judiciary in other countries, but is also cannot be conceived that the judiciary in such countries is not independent.

In France, a constitutional body ' Conseil Superieur de la Magistrature ' does the task of making recommendations to the President based on which the judicial appointments are finalized. It comprises of the President, Minister of Justice, and other sixteen members, of which only four are supposed to be prominent public figures. Of the remaining twelve, half of them dealt with recommendations of the sitting judges and the other half dealt with recommendations made by the public prosecutors. The first half comprises of 5 sitting judges and one public prosecutor. Thus, the prominent role of judiciary in the procedure of appointment can be clearly perceived. Similar was the scenario in the the United Kingdom whereby, for the appointments to their SC, the Lord Chancellor has to convene a commission which consults the judges and the heads of the jurisdiction. Based on the recommendations of this commission, the Lord Chancellor notifies the selection to the Prime Minister. In Australia, the judicial commissions invite the "expression of interest" from the members of the Bar (lawyers) by the way of public advertisements so as to enable the appointment of judges in a crystal clear manner. In the U.S.A, the President's nominees have to go through hearings of confirmatory in the Senate and are subjected to public's opinion in relation to their professional lives and political view points. These methods promote transparency in the procedure for judicial appointments.[43] It would be appreciable if some similar practice which is relevant to the Indian context is devised so that the decades long scuffle comes to a logical end.

IX. CONCLUSION

Undoubtedly in context of India, the principles of separation of powers are not absolute as extremism has always lead to the forming of a plethora of issues. Various legal scholars like Montesquieu and Klarke have given great commentaries on the doctrine and the Indian legal system by way of a series of judgments has deemed the doctrine to be a part of the basic structure of the constitution. Given that, the organs in the government have been allocated their spheres so that none is able to encroach upon the other's field. However, given the

[43] *Supra* note 33, pg 9.

impossible nature of strict adherence to the doctrine, all the organs under certain circumstances do perform such functions which are in essence of any other organ. The matter of independence of judiciary in light of the doctrine of separation of powers has still not reached a conclusive end which is evident by recurring judicial pronouncements on the same issue. The three judges case are instrumental in understanding the urge of the judiciary in maintaining its independence. This urge exists probably because of the fact that the judiciary does not want itself being influenced by external factors like political disturbances.When the National Judicial Appointments Commission became a reality in 2014, the judiciary became extremely critical of its constitutionality for obvious reasons. The introduction of National Judicial Appointments Commission or NJAC and the overruling of the concerned amendment restored back the situation which existed after the Third Judges case that is the Collegium system.

It would be a wrong statement to make that the separation of powers is a myth in context of the judiciary's independence. The independence of judiciary does not mean that judiciary is an autonomous body. The concept has been largely misunderstood as most of the people including many from the legal fraternity have this particular notion of the judicial independence. No matter up to what degree the executive is trying to encroach upon the judicial independence, it would not be hampered if the judges no matter what the circumstances are continuing to follow the rule of law and principles of natural justice. Given that judicial independence is a part of the basic structure, it shall always be protected even if in the future, the idea of a judicial commission comes up again. Also, it is not a hard and fast rule that the establishment of a judicial commission will infringe the independence of the judiciary. No doubt that the National Judicial Appointments Commission was a way of letting in the influence of the executive on the Courts, it could rather have been a great alternative to the Collegium if it had been formed on the grounds of judicial commissions constituted in several other countries. For now it may seem to all that the debate has died, but rather it will yet again gain prominence and that too in the near future.

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