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FROM 1993-2019: HAS COLLEGIUM OVER-LIVED ITS UTILITY?

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ABSTRACT

The issue of judicial appointments by the collegium system has been in the news recently. The January 2019 resolution to elevate Justice Khanna and Justice Maheshwari to the Supreme Court has left the nation perplexed about the grounds on which the resolution of December 2018, to elevate Justices Menon and Nandrajog, had been rescinded.

The Collegium System emerged as a procedure to appoint judges to the higher judiciary in the famous Second Judges' Case. In 2015, the SC struck down the 99th Constitutional Amendment which sought to amend the procedure of appointments to the higher judiciary in India. The presence of the Law Minister in the commission appointing judges was held to be an unacceptable interference of the executive with the independence of the judiciary.

The collegium system, so introduced is a product of 'judicial activism' and a process of 'self-selection.' The Supreme Court is the guardian of 'rule of law' and it has a

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responsibility to be free from self-prejudices and biases. This paper seeks to analyse the journey of the collegium system up till now and concludes with measures to be taken to improve the transparency in the appointment of judges to higher judiciary in India

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I. INTRODUCTION

With the recent controversy of elevation of Justice Khanna and Justice Maheshwari to the Supreme Court [hereinafter "**SC**"] by a collegium headed by Chief Justice Ranjan Gogoi, the enigma which surrounds the higher judicial appointments in India has resurfaced once again. The seniority convention was not followed, and the collegium did not present any justification for doing so. This is yet another example of the lack of transparency and accountability in the method of appointing judges in India.

The method of appointment of judges to higher judiciary has always been soaked with its fair share of doubts and reservations. When the SC declared National Judicial Appointments Commission [hereinafter "**NJAC**"] unconstitutional and upheld the Collegium System in 2015, it seemed like the storm shall rest now but it has only aggravated. The manner in which the collegium operates, and the present-day misadventures have ignited the debate of whether or not the collegium should exist all over again, and the country is forced to reconsider the confidence that it vests in its judiciary. The collegium system, as has been vehemently argued by the SC in a catena of judgments, protects the 'independence of the judiciary.'

The Supreme Court is regarded as the guardian of the Constitution.[1] Despite the responsibility it is entrusted with, the SC has been rather impervious to an issue which requires its urgent surveillance.

[1] A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (India).

In the last of the famous Judges cases, Justice Lokur himself enunciated the fact that steps will have to be taken to improve the working of the collegium system and to increase its transparency. The fallacies which inherently smeared this system have now started to reflect on the Indian judicial institution itself. The courts in India are entrusted with the enforcement of the rights and liberties of the citizens and are, therefore required to be above all sorts of suspicion.

This article seeks to establish that the collegium system has miserably failed the objective it originally sought to achieve. The article has been divided into three major parts. Part I deals with an analysis of how Article 124[2] has been misinterpreted repeatedly and how the principle of 'independence of the judiciary' has been molded by the SC to justify its own whimsical analogies. This part is further divided into five sub-parts, each of which individually deliberate on various rationales provided by the SC in favour of the collegium system, and it ends with explaining that the SC has actively forwarded a kind of 'judge-made legislation,' encroached on the sacrosanct principle of 'separation of powers' and over-augmented the contours of 'judicial independence.'

Part II deals with the deep-rooted problems associated with this system at length. Finally, Part III lists an ideal method to adopt for higher judicial appointments in order to maintain transparency in the system. This method is suggested with due regards given to the preservation of judicial independence. It also seeks to restrict the nepotism in judicial

[2] INDIA CONST. art. 124.

appointments and maintains a system of checks and balances, better-equipped to bring transparency and accountability in the system.

II. COLLEGIUM, CONSTITUTION, AND INDEPENDENCE OF THE JUDICIARY

The famous French philosopher Montesquieu first propounded the idea of an independent judiciary. In India, independence of judiciary has flown from the theory of separation of powers, which is a part of the basic structure of the Indian Constitution [hereinafter "**Constitution**"].[3] The Judiciary was envisioned to be independent of the other two organs of the state by the Constitution makers themselves.[4] In *Supreme Court Advocates-on-Record Assn. v. Union of India*,[5] the majority struck down the Ninety-Ninth Constitutional Amendment on the pretext of preserving this independence from any sort of executive influence and yet, the analogy with which it was done seems to lack the logical premise.

A. INDEPENDENCE OF THE JUDICIARY DOES NOT MEAN PRIMACY OF JUDICIARY IN JUDICIAL APPOINTMENTS.

Firstly, let us deliberate upon the actual interpretation of the phrase, "independence of judiciary." *Shetreet* explains judiciary as an organ of the government which is not a part of the executive or the legislature;

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[3] Kesavananda Bharti v. State of Kerala, (1973) 4 SCC 225 (India).

[4] *Constituent Assembly Debates (Proceedings) – Volume VIII (May 23, 1949)*, CENTRE FOR LAW AND POLICY RESEARCH (February 2019), *available at* https://cadindia.clpr.org.in/Constitution_assembly_debates/volume/8/1949-05-23.

[5] Supreme Court Advocates-on-Record Assn. v. Union of India, (2015) 6 SCC 408 (India).

which is not subject to personal, substantive and collective controls and which performs the primary function of adjudication.[6] It follows that no outside interference is allowed within the realm of adjudication. The function of judiciary to uphold the rule of law, therefore, should not be affected by any outside prejudices.

Justice Bhagwati has emphasized that rule of law excludes arbitrariness and unreasonableness and there should be an independent judiciary to protect the citizen against the excesses of executive and legislative power.[7] Justice Khanna observed that rule of law is the antithesis of arbitrariness, and a balance between the opposing notions of individual liberty and public order can only be attained by the existence of independent courts.[8] This is why our Constitution aims at securing an independent judiciary which is the bulwark of democracy.

The independence of judiciary, thus, has never meant to be the primacy of the Chief Justice's opinion in judicial appointments. The rationale behind merging the two entirely different concepts together has not been explained by the SC in NJAC judgment. None of the majority opinions outrightly take up this issue or even remotely deliberate on it. Instead, the judgment is full of old rhetoric and misplaced ideologies.

B. INDEPENDENCE OF THE JUDICIARY IS ENSURED BY A NUMBER OF FACTORS.

[6] SHIMON SHETREET, JUDICIAL INDEPENDENCE: NEW CONCEPTUAL DIMENSIONS AND CONTEMPORARY CHALLENGES, JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 597-598 (Shetreet, Deschenes eds. 1985).
[7] Bachan Singh v. State of Punjab, AIR 1982 SC 1325 (India).
[8] A.D.M. Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207 (India) at 1254, 1263.

We have a written Constitution and the need for a separate organ to rightly interpret it was realized by the drafters at an early stage itself. The Constitution does not mention a collegium system in its provisions.[9] However, since its advent, it has guaranteed an independent judiciary through the following provisions.

The judges have been granted the security of tenure.[10] A judge of the SC can be removed only if his removal is supported by a majority of the total membership of both the houses and by a majority of not less than two-thirds of the members present and voting.[11] The privileges, rights, and allowances of the judges cannot be altered to their disadvantage after appointment.[12] The SC and the High Courts can recruit their respective staff and frame rules.[13] The salaries and allowances of the judges are charged to the Consolidated Fund of India or of their respective states.[14] This means that their salaries cannot be put to vote in any of the legislatures.[15]

Furthermore, the judges of SC are debarred from pleading after retirement in any of the court proceedings.[16] The conduct of the judges of SC or HC in the discharge of their duties shall not be discussed in the

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[9] Amarendra Kumar Mishra, *Presidential Power to Transfer the High Court Judges: A Critique*, JOURNAL OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES 124, 135 (2001).
[10] INDIA CONST. art. 124, cl. 2; art. 217, cl. 1.
[11] INDIA CONST. art. 124, cl. 4.
[12] INDIA CONST. art. 125, cl. 2; art. 221, cl. 2.
[13] INDIA CONST. art. 145; art.146; art. 229.
[14] INDIA CONST. art. 112, cl. 3; art. 202, cl. 3.
[15] INDIA CONST. art. 113, art. 203.
[16] INDIA CONST. art. 124, cl. 7.

legislature except if it is an address of impeachment.[17] The state is obligated to keep the judiciary separate from the executive in the matters of public services.[18] In addition to all of this, our judiciary is vested with the power of judicial review, which has also been held to be a part of the basic structure and thus, cannot be taken away.

Therefore, the judiciary is made independent by pooling in a number of provisions in the Constitution, all of which ensure the self-sustaining working of the judiciary. Even if the absolute control over judicial appointments is taken away from the judges, the independence of the institution will still survive. The Universal Declaration on the Independence of Justice says that participation of executive in judicial appointments is consistent as long as the appointments are made taking into account the opinions of members of the judiciary.[19]

The judges, through the collegium system, own the entire turf of judicial appointments and there exists no mechanism with which one can question their decision. The SC has asserted on numerous occasions that all power under the Constitution is subject to judicial review. Despite this, the actions of the Chief Justice under the collegium have not been brought under the ambit of judicial review. This implies that a judge who has been overlooked for elevation without citing any satisfactory reasons for the same cannot question the authority of Chief Justice. In the quest of preserving its independence, the judiciary has become tyrannical.

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[17] INDIA CONST. art. 121.
[18] INDIA CONST. art. 50.
[19] Universal Declaration on the Independence of Justice, 1983 [Montreal Declaration], art 2.14, cl. b.

C. APPOINTMENT OF JUDGES BY JUDGES DOES NOT NECESSARILY CONSTITUTE A BASIC FEATURE OF THE CONSTITUTION.

It is pertinent here to delve into the aspect where the current method of judicial appointments has been interpreted to be a basic feature of the Constitution. Independence of the judiciary forms a part of the basic structure of the Constitution and the appointment procedure of judges is merely a component of this independence. If the power to appoint judges is absolutely vested in the executive, then the judges in order to please the deciding entity, would be inclined to pronounce judgments favoring the government. This will be a hurdle in the path of justice. However, as discussed above, there are a number of factors which ensure this independence and thus, the appointment procedure isn't the sole criterion to preserve it. The independence shall be hampered only if the power is vested 'absolutely' in the executive.

The NJAC was held to be unconstitutional because it violated the basic structure of the Constitution. This commission prescribed a six-member body which would recommend the names of judges for appointment in the higher Judiciary. The body was comprised of the Chief Justice, two senior-most judges, the Law Minister, and two eminent persons. The executive couldn't successfully recommend a name if two members from the judicial branch or one member from the judicial branch and one eminent person together oppose such a nomination. The judicial members could not successfully go through with a name unless at least one person from non-judicial block supports the nomination. This

procedure of 'collective concurrence' was held to be invalid because it did not give primacy to the opinion of Chief Justice; practically, a veto as the collegium gives.

It was said that the primacy of Chief Justice is a lynchpin to the appointment procedure as the same ensures the independence of the judiciary, which is a part of the basic structure. The nexus drawn is preposterous. The Constitution says that for any such appointment, the President has to 'consult' the Chief Justice.[20] The judiciary in the *Second Judges'* case,[21] while overruling *S. P. Gupta*,[22] held that this 'consultation' means 'concurrence.' It also introduced collegium in the same judgment and strengthened its composition in the Presidential Reference of 1998.[23] In the 2015 judgment, it reinstated the collegium and struck down the Ninety-Ninth Amendment.

However, in the whole process, it never became lucid as to when the primacy of Chief Justice's opinion became the independence of the judiciary itself. The SC is empowered to interpret the provisions of the Constitution but with this, it practically rewrote the Constitution. Due deference and regard for the other branches of the government is expected of the judiciary and this judgment explicitly fell outside its domain. Extreme judicial activism is never desirable in a country like India where the democracy is guided by the principles of separation of powers.

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[20] INDIA CONST. art. 124, cl. 2.
[21] Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441 (India).
[22] S.P. Gupta v. Union of India, (1981) Supp. SCC 87 (India).
[23] Special Reference No. 1 of 1998, In re, (1998) 7 SCC 739 (India).

Notably, our SC has been termed as one of the world's most powerful courts,[24] and is well-known for its judicial activism.

D. INDEPENDENCE OF THE JUDICIARY IS THE INDEPENDENCE OF JUDGES FROM THEIR OWN PREJUDICES.

It is noteworthy that in NJAC judgment, the Supreme Court said that our civil society is 'not evolved enough' to make any kind of meaningful contribution.[25] It was also said that both the Law Minister and the civil society might be influenced by the extraneous considerations; therefore implying that all the judges are absolutely immune from all prejudices and personal biases. It becomes necessary here to point out a statement made after *Navtej Johar*,[26] which was pronounced by Justice G. S. Singhvi, who wrote the *Suresh Koushal* judgment.[27] He said that he had seen a lot of child pornography during the deliberations on *Suresh Koushal* which led him to believe that all homosexuals are pedophiles. Thus, his judgment was affected by his personal beliefs. This proves that judges too are fallible and at times, they let their personal notions take the better of them.

There are a number of other factors such as post-retirement appointments which have proven to be a dangerous threat to the independence of the judiciary. Arun Jaitley, while he was the Leader of

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[24] S. P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (Oxford University Press 2002).
[25] Raju Ramachandran, *A Case of Self-Selection: Judicial Accountability and Appointment of Judges*, DAKSH STATE OF THE JUDICIARY REPORT 6 (2016).
[26] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India).
[27] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 (India).

Opposition in 2012, had pointed out that pre-retirement judgments are influenced by a desire for a post-retirement job.[28] However, the SC does not seem to be intimidated with this and no steps have ever been taken to protect the independence of the judiciary in this aspect.

The judges have been characterized as hermits who have no desire or aspirations of their own.[29] In the majority opinion of *K. Veeraswami v. Union of India*,[30] it was held that, "*A judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof.*" B.R. Ambedkar recognized that a conduct so ideal is not always possible when he said,

> "*With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief*

[28] Manu Sebastian, *Giving Jobs to Judges As Soon As They Retire Helps Government Influence Courts*, THE WIRE (July 13, 2019), *available at* https://thewire.in/law/giving-jobs-to-Judges-as-soon-as-they-retire-helps-government-influence-courts.
[29] High Court of Judicature of Rajasthan v. Ramesh Chand Paliwal, (1998) 3 SCC 72 (India) at 87.
[30] K. Veeraswami v. Union of India, (1991) 3 SCC 655 (India).

> *Justice which we are not prepared to vest in the President or the Government of the day.*"[31]

In regards to the collegium system, V.R. Krishna Iyer, J. has observed that, "*The Nine Judges Bench, in a mighty seizure of power wrested authority to appoint or transfer judges from the top executive to themselves by a stroke of adjudicatory self-enthronement.*"[32] The independence, impartiality, and integrity of the judiciary, amongst other things, also depend on the boundaries they seek to identify when it comes to exercising their judicial power. Power tends to corrupt and absolute power corrupts absolutely. The abuse of legislative and executive power can be curtailed by judiciary but nothing can police the judiciary when it abuses its position and this is what has led to such corruption in appointments.

E. SEVERAL COUNTRIES RECOGNIZE AN INDEPENDENT JUDICIARY WITHOUT A COLLEGIUM-LIKE-SYSTEM TO APPOINT JUDGES.

The need for an independent judiciary is recognized all over the world. It is pertinent to mention here that India stands at the 53rd position in the Judicial Independence (World Economic Forum) Index, 2018,[33] where other countries such as Finland ranks 1st, the United Kingdom

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[31] The Argumentative Indians excerpt series, *"The Chief Justice Is…": Members of Constituent Assembly Discuss Judges' Selection*, THE CARAVAN (Mar. 21 2019) *available at* https://caravanmagazine.in/vantage/Judges-selection-constituent-assembly.

[32] V. R. KRISHNA IYER, A CONSTITUTIONAL MISCELLANY 278 (2nd ed., 2003).

[33] *Judicial Independence*, World Economic Forum (July 2019), *available at* http://reports.weforum.org/pdf/gci20172018scorecard/WEF_GCI_2017_2018_Scorecard_EOSQ144.pdf.

ranks 6th, Australia ranks 8th, Canada ranks 9th and the United States ranks 25th. The method of judicial appointments in all these countries has been discussed below.

Finland is a parliamentary democratic republic and the appointment of judges is done by the President on the advice of the Minister of Justice, who acts on the recommendation of the Judicial Appointments Board.[34] The Judicial Appointments Board is comprised of judicial members, but three members come from non-judicial backgrounds. One is a public prosecutor, one is an advocate, and the third is an academic appointed by the Ministry of Justice.[35]

In the U.K., the Supreme Court is the highest court of the land. It is the final court of appeal for all criminal cases from England, Wales and Northern Island and for all civil cases. The appointments are made by the Crown on the recommendation of the Prime Minister, who only recommends those candidates whose names have been forwarded by the Lord Chancellor. The Lord Chancellor only notifies those names which have been selected by the Selection Commission comprising of the President and the Deputy President of the SC (two senior-most judges if their position is vacant/under consideration) and one member each from the judicial appointment bodies of England & Wales, Scotland and Northern Island.

[34] Act on Judicial Appointments 2000, § 6.
[35] Act on Judicial Appointments 2000, § 7.

Australia is a federal state in which the highest appellate court is the High Court of Australia. The Judges are appointed by the Governor-General in Council who acts on the advice of the federal Cabinet. The Attorney General is the responsible Cabinet member, who consults with the Attorney General of each state in case of a vacancy prior to recommending a candidate's name to the Governor-General.[36]

Canada has a Constitutional monarchy and the Supreme Court of Canada is the highest court of the Canadian federal court system. The appointments are made by the Governor-General who acts on the advice of the Cabinet.[37] The Cabinet implies the Minister of Justice in case of all the judicial appointments except that of the Chief Justice, who is appointed on the advice of the Prime Minister. The Office of the Federal Commissioner for Judicial Affairs screens applications and nominations for vacancies on statutory criteria on behalf of the Ministry of Justice.[38] Once the screening is done, it passes a list of the eligible candidates to Judicial Advisory Committees for further screening and then, the list is forwarded to the Ministry of Justice. The entire process is the object of policy documents.

The United States is a representative democracy in which the President nominates the Chief Justice and the Judges of the Supreme Court, the highest court of the land and such nominations are further

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[36] High Court of Australia Act 1979, § 6.
[37] Supreme Court Act, R.S.C. 1985, c S-26 § 4, cl. 2 (Can.) [*hereinafter* "Supreme Court Act"].
[38] *Id.* at § 5.

approved by the Senate.[39] The same procedure is followed for the appointment in (Federal) Courts of Appeal.[40]

All of the aforementioned countries have acquired a higher status as compared to India in securing an independent judiciary for themselves and yet none of them have a system where judges appoint judges, and the independence of their judiciary is certainly not adversely affected. This is because the penchant of the judges towards impartiality is the most important factor of judicial independence and as long as the judiciary has a significant (not absolute) role to play in the process of appointments, this independence is not curtailed.

III. FALLACIES IN THE COLLEGIUM SYSTEM

In 2015, instead of dwelling upon the possibility of a system such as the NJAC, the SC struck it down, bringing back its 'autonomy' over the entire procedure. The decision has been criticized badly ever since and even the Judges who pronounced the majority judgment called the collegium a non-perfect way for the selection of the Judges. H. M. Seervai, for example, wrote that "*never has a majority judgment of the Supreme Court reached a lower level of judicial incompetence.*"[41]

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[39] U.S. CONST. art II, § 2, cl. 2.
[40] U.S. CONST. art III, § 1.
[41] Prashant Bhushan, *NJAC: Independence does not mean that judges must appoint judges*, BAR & BENCH (July 11, 2019), *available at* https://barandbench.com/njac-independence-does-not-mean-that-judges-must-appoint-judges-prashant-bhushan/.

The fallacies of this system are not hidden, and they have been brought up time and again to the public domain[42] but to no avail. A lot of issues have been deliberated upon at length by the SC but this issue is still not being paid any attention. One of the senior-most advocates, who appeared in favour of the collegium system in the 1993 decision, regrets his win and explicitly mentions the same in his autobiography, calling this system a provider of an unchecked 'card or power' which is being abused by the judges today.[43] Former Attorney General Mukul Rohatgi also showed his dissatisfaction with the collegium system saying that judges appointing good judges is a myth. The continuance of a procedure with so many loopholes merely because we don't have any other alternative available will cause the disruption of the entire system.

It's high time for the legislature, who so far has just contributed as a mute spectator, to intrude in and put forth the Memorandum of Procedure which is being reviewed by the Law Minister since September 2018 in the next assembly and deliberate upon the same. Undoubtedly, the judgments should be independent, but it is the right of every citizen to be rightly informed about the merits of the judges who would be deciding their cases and playing an important role as the protectors of their life and liberty. Lord Cooke of Thorndon also criticised this judgment in an essay

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[42] DR. DEVINDER SINGH, APPOINTMENT OF JUDGES IN HIGHER JUDICIARY 284 (2017) [*hereinafter* "Singh"].
[43] FALI S. NARIMAN, BEFORE MEMORY FADES 390 (2014).

that borrowed its title from Alexander Pope's famous words, "*fools rush in where angels fear to tread.*"[44]

The following apparent inconsistencies in the present collegium system have made it urgent to change the method of judicial appointments.

A. OPACITY

The collegium system has afforded its members to work in a cabal completely enjoying their non-accountable freedom. They are not required to justify their disregard towards the seniority factor or their rejection of a name in one meeting while accepting the same in the other or their decision to arbitrarily replace the names decided earlier with a judge who is 31st in the rank of seniority. Keeping the people and their representatives completely shut out of the appointment process is one of the most critical issues with the collegium system. There are no rules to maintain even a hint of credibility and legitimacy in the collegium. Precisely, this system is a well-kept secret with no written manual for functioning, no prescribed qualifications for selection, and no publication of the records of the meetings giving an absolutely unbalanced power to its members.

B. NEPOTISM AND PERSONAL PATRONAGE

The monopoly of a few families in the judiciary is rampant, wherein the successor is decided by choices rather than merits. Since no

[44] ZIA MODI,10 JUDGEMENTS THAT CHANGED INDIA (2013).

one knows the criteria for the appointment process, the judges are blatantly abusing their discretion in the matter as a result of which the judiciary is reeking with self-selection and in-breeding. Descendants of the judges tend to be the popular choices for judicial roles. Consequently, the judges are capable of not just enjoying the privileges of their profession themselves but also of securing the same for their kith and kin.

Gaining and returning favours have become an integral part of the collegium system. Factors such as integrity, competence and work records are often neglected over the liberty of choosing whoever one wants to choose. The injustice is inevitable in a system equipped with such auspices. For example, Justice A.P. Shah was kept out of the Supreme Court because Justice S.H. Kapadia was averse to him. Justice Sanjay Kishan Kaul suffered the ignominy of not making it to the Supreme Court in time because he did not recommend the name of Justice T.S. Thakur when he was in Delhi HC and Justice T.S. Thakur returned the favour during his time.

Even the judges have raised this issue from time to time. For example, in 2010, Justice Shukla Kabir Sinha was elevated to the Calcutta HC in spite of Justice Bhaskar Bhattacharya opposing the idea. He even went on to the extent of writing a letter to the then President and the Prime Minister complaining that it was because of his strong objections during the elevation of Justice Altamas Kabir's sister that he was never appointed to the SC.[45]

[45] Singh, *supra* note 42.

C. SENIORITY

The backbone of this system is flawed when it comes to co-relating a judge's merit and competence with his/her age.[46] Majority of the issues raised in India so far with relation to the functioning of the collegium system is due to not following the seniority list. This criterion is, therefore, causing a hindrance in the selection of young judges who are meritorious and capable of bringing stability into the judicial system.[47]

Changing the personnel at a frequent pace is disadvantageous for a court which is determining and affecting the law of the land in general. This raises questions on the two most important or rather fundamental requisites, i.e., certainty in law and continuity in the approach, essential in the interest of judicial administration throughout the country. Undoubtedly, being a watchdog of the independence of the judiciary, who has the responsibility to satisfactorily administer law & justice in the country is not a job of a year or two.

D. DIVERSITY

Diversity has always been an important and integral issue in determining the credibility of the system and it needs to be infused as a norm and a practice. Gender diversity is one of those talked about issues which need a quick redress. The existing collegium system has no woman judge as its member. This puts a question mark over the merit and representation of the women in the system. Due to the sheltered process

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[46] ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION 264 (2014).
[47] Singh, *supra* note 42.

of these appointments, there is no veracity left, unlike the one present in countries like US and UK where the process of the appointment being an exposed one, the public has a chance of questioning the representation of women.[48]

E. PUBLIC CONFIDENCE IN THE SYSTEM

Abraham Lincoln says, "*Democracy is a government of the people, for the people and by the people.*"[49] As a democracy, it seems anomalous that we continue to have a judiciary whose essence is determined by a process that is evidently undemocratic**.** The reforms are urgently needed as the participation of the government in the selection process will reaffirm the faith of the people in the system. In a speech last year, Justice Gogoi said noisy judges and independent journalists were democracy's first line of defence,[50] and the judiciary seems to have shattered this defence on its own years ago when it introduced a system which lacks any form of public representation, direct or indirect, in the appointment of judges.

The influence of external factors in the selection procedure is noticeable, leading to the loss of confidence in the judiciary and making it nothing but a sham. In a country like ours where democracy is the guiding

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[48] Melody E. Valdini & Christopher Shortell, *Women's Representation in the Highest Court: A Comparative Analysis of the Appointment of Female Justices*, 69 POLITICAL RESEARCH QUARTERLY (December 2016).

[49] PRESIDENT ABRAHAM LINCOLN, IN THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN 184 (William E. Gienapp ed. 2002).

[50] C. Raj Kumar, *Future of Collegium System Transforming Judicial Appointments for Transparency*, ECONOMIC AND POLITICAL WEEKLY (2015).

factor in determining almost everything affecting people's lives, the judiciary should not be kept aloof of it.

IV. CONCLUSION

It has now become clear as to why from time to time, the bedlam to bring an amendment to the present collegium system arises. A significant number of the most dynamic judges that the Indian Judiciary has witnessed have adorned the judiciary before 1993, i.e., before collegium, for example, Justice Subba Rao, who has written the highest number of dissenting opinions; Justice Krishna Iyer, who is revered for transforming the Supreme Court into People's Court; Justice H.R. Khanna, who voiced a dissent during the zenith of Emergency and Justice P.N. Bhagwati, who pioneered the cause of Public Interest Litigation in India.

Therefore, the following recommendations are hereby suggested for enhancing accountability in the system of appointment of Judges:

A. 'SENIORITY' AS A REQUIREMENT MUST BE DONE AWAY WITH.

The explicit mention of seniority as a criterion for the selection of judges is flawed and needs to be done away with. This is because the absolute transparency that we aspire for is to be certain of the fact that the appointment of a judge of any age is bona fide. Integrity would then be the sole requisite and a deserving candidate would not be required to first grow old and have only a couple of years in his hands to bring some

notable changes.[51] Whenever a certain collegium digresses from the seniority convention, it gives way to an unnecessary furore. The uproar is more because of one's inability to ascertain the criteria with which a senior judge's name has been disregarded than because of the digression itself. The collegium hardly forwards any explanation for its actions and has not been made answerable to anyone. In such circumstances, seniority 'seems' to be the only way for people to believe that they do know, to an extent, the process with which the judges are appointed when in reality, this belief is only a facade. Therefore, this is particularly evident that the seniority convention is neither facilitating the quality of the judiciary nor paving a way for people to participate in the appointment process. The appointments, thus, should be made on the basis of merit and merit alone.

B. A COMMISSION FOR JUDICIAL APPOINTMENTS SHOULD BE BROUGHT BACK.

Before suggesting a commission to appoint judges to higher judiciary in India, it is pertinent to mention here that a long-lasting solution can only be achieved if the advisory opinion of the SC is sought by the government under Article 143[52] on how to replace the present collegium system with a new appointment panel (a commission). The SC may then adjudicate objectively upon the collegium system as it stands today and be a part of the new policy so devised for appointments. This way, there at least lies a fair chance that both the SC and the government

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[51] P.P. RAO, INDEPENDENCE OF THE JUDICIARY AND ACCOUNTABILITY OF JUDGES 19 (2014).
[52] INDIA CONST. art. 143.

may see eye to eye with respect to the issue of appointments of judges to higher judiciary. Since the opinion is not binding,[53] the opinion may be neglected if the opinion seems to be serving the biased interests of the judiciary.

Nevertheless, the terrific opportunity that the SC missed in 2015 should not be neglected anymore and a commission for appointment of judges should be reintroduced with the required changes made in its composition. The composition of the Commission should be such where the judiciary has an upper hand but its power is still checked and balanced by the presence of members from the other organs.

Therefore, a commission consisting of the Chief Justice, two senior-most Judges of the SC, Law Minister and one eminent person should be introduced. In case of HC nominations, those judges of the SC, other than the Chief Justice should be involved who either have been a part of that particular HC in the past or come from that particular state itself. The Chief Justice will be the chairperson and the ex officio member. This commission will keep a check on the pervasive nepotism in the appointments and will ensure diverse representation to a great extent.

C. THE PROCEDURE OF APPOINTMENT MUST BE DIVIDED INTO VARIOUS STAGES.

The judicial appointments should go through a proper screening process involving various stages. Whenever there is a vacancy, the Law

[53] Keshav Singh v. Speaker, Legislative Assembly, AIR 1965 SC 745 (India).

Minister must propose a list of prospective candidates to fill up the position and the members of the Commission will then deliberate on each name and select one name for elevation. For a name to pass, first, the majority must agree to it and second, at least one member from the afore-mentioned majority must be from the non-judicial block. No name can pass if only judicial members support such a nomination. This way the judicial block will not have a veto in the selection but still, it will have a necessary role to play in the appointments.

D. A FINAL REPORT MUST BE PREPARED.

After finalising one name, the Commission should then prepare a report citing all the reasons behind choosing the person for the vacancy. This may include the rationale given by each member individually or collectively. The reasons may include the landmark judgments that a judge has pronounced, his professional competence, experience & social awareness, the time a judge takes to decide a particular case, the novelty, and inclination towards people's interests, and potential impediments to his appointment, etc. The report, along with the selected name should then be forwarded to the President for his approval.

In such a set-up, the President may send back the nomination for re-consideration by giving reasons for his disapproval. However, if after 'due deliberation' the name comes again, he must accept it. This will ensure that the President also has an important say in the appointments as the Constitution originally envisaged.

E. THE ENTIRE PROCESS MUST NOT BE A SECRET FOR THE REST OF THE COUNTRY.

To ensure transparency and accountability in the process of appointments, the afore-mentioned report must be made accessible under the 'Right to Information' once a name is finalised. The citizens will then be aware of the entire process and the public confidence shall increase effectively as the public shall know what happens in the cabal and what sort of records has led to a particular elevation.

The judges, who have not been so elevated, will be aware of the merits taken into account for filling up a vacancy. Their grievances will have an explanation, unlike today when an aggrieved has no way to question the authority of the collegium. However, this does not mean that the appointment can be challenged in a court of law. This is because the merits of judges for selection or non-selection cannot be adjudicated upon and we are proposing this model in order to thwart such questions only. The judges become judges in India because they are competent to be the judges; it is the current process of elevation which is creating the entire ruckus.

F. ROLE OF THE LAW MINISTER.

The burden to divulge and bring a vacancy to the notice of the commission falls upon the Law Minister and he must do it sincerely and regularly without fail. For the position of a judge who is going to retire shortly, the proposal to fill up this vacancy must be proposed at least two

months before such retirement. This will ensure expediency in appointments. As a result, the vacancies will be timely filled, and the judiciary will have a proportionate number of judges to deal with the infamous backlog of cases in India. The burden of pendency can then be expected to debilitate to some extent. This, in the long run, will work in favour of public interest. Every other appointment aside, the Chief Justice of India shall still be the senior-most judge of the Supreme Court. This is because the Chief Justice of India is and will always be, by tradition, the 'first amongst the equals.'

The constant commotion between the judiciary and the executive is leading to the loss of confidence and faith in the collegium; a system which has obtrusively over-lived its utility. It is time for the collegium to go. It is time for the judiciary to regain its grandeur and march ahead with integrity and righteousness.