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- Acknowledgement -

Efforts from many quarters have gone into the successful publication of this Inaugural Issue of the Indian Journal of Constitutional Studies. We would like to express a deep sense of gratitude towards our blind peers who thoroughly validated all articles sent to them for reviews. We would also like to thank our contributors for contributing extraordinary submissions to the issue which stood at par on the rigorous scrutiny.

CONSTITUTIONALITY OF THE NINETY-NINTH AMENDMENT ACT

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I. INTRODUCTION

The ninety ninth amendment seeks, among other things, revise Article 124 of the Constitution to modify the process of appointment of judges to the Supreme Court. If the Bill is ratified by the requisite number of state legislatures the process of consultation of the President with the judges of the Supreme Court and the High Courts in the States will stand replaced by a recommendation by a National Judicial Appointments Commission. The Judicial Appointments Commission seeks to be a vibrant mix of the executive and the judiciary, while accounting for the other representatives of India's rich legal system as well. The extent to which this bill will transform the functioning of the judiciary is one that can be answered with time. However, it is possible to speculate the effect of different stakeholders and functionaries in the process.

The independence of the judiciary is a concern that has been debated by jurists in the country but no standard for independence has ever been established. What constitutes independence has been decided on an *ad hoc* basis by the Supreme Court in several of its decisions, as will be discussed in this paper. Nevertheless the real question that is to be answered is not what degree of independence the Higher Judiciary wishes to bestow upon itself but the extent to which the Constitution of India wishes to separate the three organs of government. The endeavour to ensure that the basic structure of the Constitution is not violated can be achieved only after determining the answer to this question.

II. THE CASE FOR AN INDEPENDENT AND INDEPENDENTLY APPOINTED JUDICIARY

In the Constituent Assembly, the proposal was first moved by Sir N. Gopalaswami Ayyangar who suggested that the Constitution must read "a judge of the Supreme Court shall be appointed by the President after consulting the Chief Justice and other judges of the Supreme Court as also such judges of the High Court as may be necessary for the purpose".[1] Several of the drafters were opposed to this and suggested instead that the Chief Justice and the judges of the Supreme Court must be appointed "after a joint standing committee of both Houses of Parliament consisting of six members from the House of the People and five from the council of states".[2] It is apparent from this that what was intended by the Constitutional Framers was not a judiciary which would answer to the whims and fancies of the Houses of Parliament but one that would be independent in both its form and functioning.

The constitutionality of the ninety-ninth amendment act rests on the question whether it violates the basic structure of the constitution. In *Keshavananda Bharati*, the seven judges who resolved to limit the power of the parliament to amend the constitution were in agreement that the independence of the judiciary is part of what constituted the basic structure of the constitution. Further, Article 50, in Part IV of the Constitution, provides that the state shall take steps to separate the judiciary from the executive in the public services of India. Thus, it cannot be questioned that the judiciary envisioned by the Indian Constitution is an independent one.

Further, the judiciary being the least political organ of government has taken upon itself the burden of keeping within their limits other organs of the state.[3] The Supreme Court, through the exercise of such power, gives meaning and effect to the Rule of Law,[4] which itself is undoubtedly a part of the Basic Structure of the Constitution.[5].

An independent judiciary is also necessary to defend the constitution against excesses of the Executive[6] as there have been numerous instances where it has violated the rights of the people and has been unjust in its dealings.[7] Indeed, *per* Justice Krishna Iyer, "*Independence of the Judiciary is neither a genuflection nor is it the opposition to the Government*".[8]The independence of the Judiciary is also a necessary requirement of the power of Judicial Review under our Constitution[9]

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[1] IV Constituent Assembly Debates 887 (1947).
[2] *Id.*
[3] *S.P. Gupta* v. *President of India*, AIR 1982 SC 149. 4-23
[4] *Id.*
[5] Feroza. H. Seervai (ed), *The Seervai Legacy*, (Universal Law Publishing Co Ltd 2004) 154.
[6] Dr. R. Venkata Rao, 'Basic Structure and Human Rights'in Sanjay S. Jain (ed.), *Basic Structure Constitutionalism – Revisiting Kesavananda Bharati* (Eastern Book Company 2011).
[7] Kalpana Sharma, 'Binayak Sen: India's war on a man of peace' *The Guardian* (London 28 December 2010) < http://www.theguardian.com/commentisfree/libertycentral/2010/dec/28/binayak-sen-india-british-gandhi> accessed 16 November 2014. See Also: B. Shiva Rao, *The Framing of India's Constitution*, (Vol IV Indian Institute of Public Administration 1968) 194.
[8] *Supreme Court Advocates on Record Association v Union of India,* AIR 1994 SC 268 [194] (Panadian J).
[9] J.S. Verma, 'Judicial Independence. Is it threatened?' in Santosh Paul(ed) *Choosing Hammurabi* (Lexis Nexis 2013) 159.

There are several reasons why the involvement of the executive and the legislature in the appointment of the judiciary might in fact affect the appointments process. This is borne out by Indian constitutional history as well.

The independence of the judiciary is sought to be secured under the Constitution[10] under a multiplicity of Articles. In order to secure the Independence of the Judiciary, it must be detached from the influence of the Executive and the Legislature,[11] as was the intention of our Constitution Framers. Articles 202(3)(d) and 112(3)(i) provide that the salaries and allowances payable to the High Court Judges and the salaries, allowances and pensions payable to the Supreme Court judges shall be charged upon the Consolidated Fund of the States and of India respectively. Articles 203(1) and 113(i) state that such expenditure as charged upon the Consolidated Funds must not be subject to the vote of the Legislative Assemblies. The salaries of the Supreme Court and High Court judges as laid down in the Second Schedule are assured by Articles 221(1) and 125(1). Moreover, an assurance has been held out in Articles 221 and 125 that the salaries and allowances of the Judges shall not be varied to their disadvantage during the course of their tenure. Lastly, Article 211 immunises the judges from discussion, with respect to their conduct in the discharge of their duties, in the Parliament save in those circumstances when a motion for an impeachment is moved under Article 124(4) in respect of Supreme Court judges and Article 217(1)(b) in respect of High Court judges. All these Constitutional provisions are meant to ensure the independence of the Judiciary in the performance of their duties.[12] It is evident that the Founding Fathers of our nation wished to insulate the Judiciary from the influence of the Executive and the Legislature.[13]

The independence of the Judiciary is secured at two levels. First at the time of appointment of the judges and second is during the discharge of their duties by the judges.[14] However, experience dictates that these provisions are not sufficient by themselves to ensure the Independence of the Judiciary. The immutable rights and privileges with respect to the service conditions alone do not ensure independence of the Judiciary.[15]The independence of the Judiciary can only be guaranteed by addressing concerns regarding the methodology and process pertaining to the appointment of judges.[16] Further, an erroneous appointment of an unsuitable person as a judge may cause irreparable damage to the administration of justice and thereby dent the public confidence.[17] Hence, if the Judiciary fails to justify the trust reposed in it by the public, the Democratic Polity underlying the Judiciary itself shall fail.[18] In addition, if a person is appointed on certain ulterior considerations, they can hardly command the real and spontaneous respect of the Bar. The Judge's diligence, efficiency, tact, devotion and mastery of law being of utmost

[10] Constitution of India, 1950.
[11] Baron de Montesquieu, *The Spirit of Laws*, (Thomas Nugent tr, G. Bell & Sons Ltd 1914) 80. See Also: *The Queen v. Beauregard* (1987) LRC 180.
[12] Granville Austin, *The Indian Constitution Cornerstone of a Nation*, (2nd edn, OUP 1974) 176.
[13] *S.P. Gupta v President of India*, AIR 1982 SC 149 [704] (Desai J).
[14] *Supreme Court Advocates on Record Association v Union of India,* AIR 1994 SC 268 [188] (Pandian J).
[15] *Supreme Court Advocates on Record Association v Union of India,* AIR 1994 SC 268. [187] (Pandian J).
[16] *Id.*
[17] N. B. Rakshit, 'Judicial Appointments' [2004] 39(27) *Economic and Political Weekly* 2959.
[18] *Supreme Court Advocates on Record Association v Union of India,* AIR 1994 SC 268 [653] (Punchi J).

importance, the absence or lack of the same could result in the Court Proceedings encountering difficulties.[19]

However, despite the apparent independence that has been granted to the judiciary, prior to the creation of the collegium system, the executive involvement in the judiciary often 'packed the court' in politically coloured decisions. The Government being the biggest litigant before the Court, judges might give favourable judgements in order to secure desirable appointments. An increase in political influence could vitiate the impartiality of the judges. Impartiality being the credo of the Judiciary, any decline in the same may lead to loss of public confidence and this may result in the eventual dismantling of the entire system. Indeed, judicial appointments were adversely impacted due to political influence. Justice A.N. Ray and after him Justice Beg came to be appointed to the post of Chief Justice of India by superseding judges senior to them. Justice A.N. Ray superseded Justices Shelat and Grover because he gave a dissenting judgement in the *Kesavananda Bharti* case whereas the other two were a part of the majority ruling against the Government. Similarly, in the elevation of Justice Beg, Justice Khanna was superseded for giving the sole dissenting judgement in *A.D.M. Jabalpur* v. *Shivakant Shukla*.[20] Thus, the Collegium insulates the Judiciary from all external influences and pressures and thereby maintains the independence of the Judiciary and the Basic Structure of the Constitution. Further, as the Judiciary is responsible for appointments to itself, the need for Judicial Review will not arise in matters of appointments.

The Supreme Court has been key in ensuring that the Parliament does not exceed its limits. For instance, in the case of *Golak Nath* v. *State of Punjab* restrained the amending power of the Parliament in holding that the Fundamental Rights in Part III cannot be amended. In the case of *R.C. Cooper* v. *Union of India*,[21] the Supreme Court struck down the Bank Nationalization Act as being violative of Articles 14, 18 and 31. In several other cases as well the Supreme Court has actively intervened at times when Governmental policy sought to override the rights of citizens. A judiciary in the clutches of the executive is antithetical to this very concept of an activist Supreme Court.

It is not merely the idea of the involvement of the Executive in the process of appointments to the judiciary that is troubling but the composition of the Judicial Appointments Commission itself. As per the Constitution (Ninety-ninth) Amendment Act, 2014 the Judicial Appointments Commission is sought to be comprised of the Chief Justice of India, two senior most judges of the Supreme Court, the Minister in charge of Law and Justice and two eminent persons to be nominated by a committee consisting of the Prime Minster, the Leader of the Opposition and the Chief Justice of India. Thus, the judiciary does not even enjoy a majority on this committee. Further, one may notice that the committee that it is trusted with the task of appointing two persons of eminence to the Judicial Appointments Commission has a majority of its members from the executive. Thus, one may say with certainty that the persons of eminence who are nominated to the Commission would favour the executive in the appointments process. This

[19] Law Commission, *The Method of Appointment of Judges,* (Law Com No. 80, 1979) para 2.5.
[20] *Additional District Magistrate, Jabalpur* v. *Shivakant Shukla*, AIR 1967 SC 1207.
[21] *R.C. Cooper* v. *Union of India*, AIR 1970 SC 564.

could possibly bring the functioning of the Judicial Appointments Commission to a deadlock. Perhaps, if a majority of the members on the Judicial Appointments Commission were from the judiciary itself, one could say that the appointments process would not be hampered. However, with this new constitutional dynamic the possibility of the Parliament packing the court seems inevitable.

The arguments for insulation of the judiciary from other branches of government seem compelling. It is certainly necessary to ensure an independent judiciary in any democracy. However, what the proponents of the collegium system fail to see is the ills that the institution has propagated including nepotism, favouritism and a complete lack of transparency. Thus it is necessary to weigh these harms against the benefits that are apparent.

III. THE CASE FOR A COLLABORATIVE APPOINTMENT PROCESS

Proponents of the Judicial Appointments Commission pose a question which remains yet unanswered. The question is of how the collegium system be considered to be part of the basic structure of the constitution when the same is merely a creation of the Supreme Court and the binding opinion of the Chief Justice mere convention and not a constitutional mandate. They celebrate the constitutionality of the Commission and argue for it on three grounds. Firstly, that the Amendment Act does not infringe upon the independence of the Judiciary and thereby does not violate the basic structure of the Constitution as the appointment of judges is an Executive function. Secondly, that the Collegium system of appointing judges is ineffective and unconstitutional and thirdly, that the Judicial Appointment Panel itself is a more suited to the Indian constitutional environment.

As with the interpretation of any constitutional provision it is essential to understand where the intention of the framers of the constitution lay. The answer to this, some believe is that the framers intended the prerogative in the appointment of the higher judiciary to lie with the executive. This interpretation, though not observed in convention, is constitutionally correct. Articles 124 and 217 provide that all appointments to the Higher Judiciary must be made by the President after consultation with such judges from the Supreme Court or High Court as he may deem fit. The intention of the Framers of the Constitution was to create a consultative process where neither the President nor the Chief Justice has absolute control over the appointments.[22] In this regard, the word “consultation” was not replaced with “concurrence” as that would be result in the Chief Justice having an effective *veto* in the appointments process. Moreover, the Chief Justice too was considered to be a man with “all the failings and prejudices of a common man” and hence excessive discretionary power was not vested in him. Therefore, a mechanism was devised such that both the Executive and the Judiciary played a necessary role in the appointments process.[23]

Further, the Executive plays an essential role because it provides a perspective to appointments which the unilateral decision-making of the Chief Justice does not. In addition to the merit, legal

[22] Constituent Assembly Debates 24 May 1949 Vol VIII p. 258.
[23] *Id.*

acumen, performance, capacity and experience several other factors have to be given due consideration while making appointments to the Higher Judiciary.[24] These factors include qualities such as honesty, integrity, endurance, emotional stability, moral vigour, ethical firmness, imperviousness et al.[25]In addition to these traits, a judge's ideology, his faith towards the Constitution's ideals and his attitude towards the social goals sought to be achieved by the nation must also be given due weightage.[26] Moreover, the Supreme Court is widely regarded as the final arbiter of the Constitution[27] and the final bastion of justice.[28] The High Courts and Supreme Court have a responsibility to deliver justice across lines of caste, class, creed, religion and economic background.[29] In order for this to be realised, besides having impartial judges it is necessary that the Judiciary must have representation from diverse sections of society. Hence, judges belonging to Scheduled Castes, Scheduled Tribes, other minority groups and diverse socio-economic background and women, too, must be given representation in the higher Judiciary.[30] For a real participatory democracy, it is essential that these factors be given due consideration.[31] One of the objectives of the Judicial Appointments Commission in the United Kingdom, too, is to increase the representation of women and ethnic minorities, and also have racial diversity in the Judiciary.[32]

The Judiciary, despite its tools to adjudge the professional merits of the candidates, might not be capable of taking such extraneous factors into consideration which the Executive is adequately equipped to consider by conducting an inquiry into the background of a given candidate and thereby assess information pertaining to the aforementioned traits.[33] Hence, the involvement of the Executive ensures that process of appointing a judge is holistic in nature due to a truly equitable, reasoned and consultative approach.[34]

Also, the Court is the only avenue where Judges may be able to ascertain the performance and suitability of a given candidate. This may result in a narrow ambit for shortlisting candidates. There might be certain meritorious candidates outside the purview of the judges who the Executive feels must be a part of the Bench.[35] Thus, both the Executive and the Judiciary must participate in the appointment of judges. This is also mentioned in the Fourteenth Report of the Law Commission which states that in order for the Courts to command the confidence of the people, it is imperative that the Executive play an important role in the appointment of judges.

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[24] Raju Ramachandran, 'Judicial Supremacy and the Collegium' [2013] 642 Seminar <http://www.india-seminar.com/semsearch.htm> accessed 18 November 2014.
[25] *S.P. Gupta v President of India*, AIR 1982 SC 149[29] (Bhagwati J).
[26] V.R. Krishna Iyer, 'Needed Transparency and Accountability' *The Hindu* (19 February 2009). <http://www.hindu.com/2009/02/19/stories/2009021954661000.htm> accessed 31 December 2013.
[27] *S. R. Bommai v Union of India* AIR 1994 SC 1918 [351] (K. Ramaswamy J).
[28] *Union of India v Sankal Chand Himatlal Sheth*, AIR 1977 SC 2328 [14] (Chandrachud J).
[29] V.R.Krishna Iyer (n. 6).
[30] Parliament of India– Rajya Sabha, *Sixty fourth report: Judicial Appointments Commission 2013* (Rajya Sabha Secretariat 2013) Report no. 64, pp. 22.
[31] *Supreme Court Advocates on Record Association v Union of India,* AIR 1994 SC 268 [357] (Pandian J).
[32] 'Selection Policy' (*Judicial Appointments Commission*) <http://jac.judiciary.gov.uk/about-jac/9.htm> accessed 17 November 2014.
[33] *S.P. Gupta v President of India*, AIR 1982 SC 149 [760] (Desai J).
[34] *S.P. Gupta v President of India*, AIR 1982 SC 149 [715] (Desai J).
[35] *Supreme Court Advocates on Record Association v Union of India,* AIR 1994 SC 268 [422] (Ahmadi J).

Another factor that may be considered is the method of judicial appointments being followed in the countries from whom our Constitution was borrowed, or rather, inspired. In the United States the Department of Justice, working closely with the Office of the President of the USA, forwards nominations for appointments to the Senate. The Senate, after taking factors such as integrity, professional competence, and effective administration of justice, confirms certain of these nominations, who are finally appointed by the President.[36] In Canada, the Ministry of Justice identifies potential candidates and after consultation with members from the Judiciary suitable candidates are chosen jointly by the Prime Minister and the Minister of Justice.[37] Appointments are then made by the Governor General, after a final approval by the Federal Cabinet. In Australia and New Zealand, too, the Executive plays a pivotal role in the appointment of judges to the Higher Courts.[38] Thus, it may be inferred from the position in all the aforementioned countries that the voice of the Executive is considered to be essential in matters of Judicial Appointments.

As discussed earlier, the proponents of the Judicial Appointments Commission hold that the collegium system of appointments is one that is wholly unconstitutional. This is for the reason that the exclusion of the Executive from the Collegium System of Appointments was to insulate the Judiciary from external influences and thereby safeguard its independence in spite of the existence of other provisions that serve the function with. These include Articles 202(3)(d), 112(3)(i), Articles 203(1) and 113(i), Articles 221(1) and 125(1), Articles 221 and 125, Article 21; and Article 124(4) and 217(1)(b) as have been discussed earlier.

While the separation of the Executive from the Judiciary is considered to be the conscience of the Constitution,[39] there is nothing in the Constitutional provisions or in the Constituent Assembly Debates to suggest that it was the intention of the Framers to vest the control over appointments completely in the hand of the Judiciary. Hence, neither a contextual nor a purposive interpretation of Articles 124 and 217 provide for a collegium system.[40] This creative interpretation of the Constitution done by the Supreme Court in two landmark, where it read "consultation" to mean "concurrence" with the opinion of the collegium cases has prevailed till date.

The next question to be considered is the constitutionality of the collegium itself. Some experts assert that the constitution of the Collegium is erroneous. The Chief Justice of India and four other senior-most judges of the Supreme Court are responsible for appointment of judges. However, there is no legal justification behind such a composition as there is no correlation between the seniority of a judge and the assessment to be made by while appointing another

[36] Indira Unninayar, 'Appointments Systems followed in Different Countries' (*Campaign for Judicial Accountability & Judicial Reforms* (6 February 2010) <http://www.judicialreforms.org%2Fimages%2Fstories%2Fpdf%2FAppointment_systems_diff_countries.pdf&h=TAQHNy5ek> accessed 18 November 2014.
[37] Ibid.
[38] H.P Lee(ed), *Judiciaries in Comparative Perspectives*, (Cambridge University Press 2011).
[39] Granville Austin, *The Indian Constitution Cornerstone of a Nation*, (2nd edn, OUP 1974) 182.
[40] Fali. S. Nariman, 'A Case I Won *But which I would Prefer to have Lost*' in Santosh Paul (ed) *Choosing Hammurabi* (Lexis Nexis 2013) 35.

judge. A junior judge may be better able to perform such a function.[41] And perhaps, supersession must itself be the norm in such cases.

Secondly, they also argue that the composition of the collegium being of questionable nature, the method of appointing judges has been the matter of severe criticism. There are no objective criteria or parameters which are said to be followed by the collegium in making such appointments. It is unknown whether such appointments are made solely on the grounds of merit or if the social philosophies and background of a judge are taken into consideration while making an appointment. Justice Pendse of the Bombay High Court, who was revered in the legal fraternity, was not elevated to the Supreme Court because he incurred the displeasure of the Chief Justice of India when he initially declined to go from Bombay to Karnataka as Chief Justice. There have also been allegations of lobbying by judges from Bombay then in the Supreme Court against his elevation.[42]

Thus, there is no openness about the deliberation within the Collegium for the shortlisting of candidates who might be appointed to the higher judiciary.[43] Contrary to the situation which existed before the Collegium came into existence and as has been pointed out above, no other Constitutional functionary is included in the consultation process.[44]

This lack of transparency was evident during the nomination process of Justice Dinakaran by the Collegium for transfer to the Sikkim High Court as Chief Justice of Sikkim.[45] Thus, the pattern of events brings into question the integrity in the functioning of the collegium.

One may also wonder if the lack of transparency, inherent to the collegium, violates the principles of natural justice. By deciding upon the appointment of judges, the Judiciary is adjudicating in and furthering its own cause and thereby Justice may not seem to be done. Due to the opacity of the collegium and the lack of any criteria for shortlisting candidates, many worthy and capable candidates have been overlooked thereby perpetrating more injustice. This opacity raised questions about the integrity of the Judiciary when Justice Altamas Kabir was the head of the institution; Justice Bhattacharya of the Calcutta High Court had opposed the elevation of Mrs. Shukla Kabir Sinha, the sister of Justice Altamas Kabir, to the Bench. A few months later when vacancies arose in the Supreme Court Justice Bhattacharya was not considered for elevation.[46]

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[41] Fali. S. Nariman (n. 23) 39.
[42] Fali. S. Nariman (n. 23) 40.
[43] 'Collegium System of judges' appointment 'opaque', says Sibal *India Today*, (New Delhi 13 Mat 2013) <http://indiatoday.intoday.in/story/collegium-system-of-judges-appointment-opaque-says-sibal/1/270807.html> accessed 19 November 2014.
[44] Editorial, 'Closed Brotherhood' 44(12) *Economic and Political Weekly* (21 March 2009) 6.
[45] Prashant Bhushan, 'The Dinakaran Imbroglio: Appointments and Complaints against Judges' 44(41) *Economic and Political Weekly* (10 October 2009) 10.
[46] Saurav Dutta, 'The importance of a Judicial Appointments Commission' *DNA* (Mumbai 12 September 2013) <http://www.dnaindia.com/analysis/standpoint-the-importance-of-a-judicial-appointments-commission-1887981> accessed 31 December 2013. See Also: Appu Esthose Suresh and Maneesh Chibber, 'Lost SC Berth for opposing HC judgeship for CJI Kabir's sister: Guj CJ' *The Indian Express* (New Delhi 24 July 2013) <http://www.indianexpress.com/news/lost-sc-berth-for-opposing-hc-judgeship-for-cji-kabirs-sister-guj-cj/1140897/> accessed 19 November 2014.

Moreover, the lack of transparency is coupled with a lack of accountability on part of the collegium which appoints the judges. In the *Third Judges' Case*,[47] the Supreme Court ruled out the scope for Judicial Review of appointments made, hence eliminating the only avenue for challenging improper appointments.[48] In addition to the lack of Judicial scrutiny, as the judges are not elected directly by the people, there lacks any scope for them to be accountable to the public.

A former judge of the Delhi High Court was quoted saying, "*Keeping the system of appointment of judges within the four walls of collegium has given rise to a lot of criticism like uncle-and-son-syndrome*".[49] Factors such as loyalty and reverence have replaced merit for appointment to the Bench and the integrity of some of those who secure appointment has come to be doubted. Occasions when the best candidate was not appointed are aplenty, leading us to question the impartiality and independence of the Judiciary.[50] This is the case because erroneous appointments cause irreparable damage to the effective administration of justice thereby inflicting serious damage to public interest.[51] These phenomena demonstrate how the Supreme Court is erroneous in its attempt to adjudicate in its own cause, in terms of appointments.

Further, after the appointment of a judge to the Supreme Court there is no accountability. To date, the statistic remains that no judge of the Supreme Court has been impeached by the Parliament owing to misconduct. Even in cases where such misconduct is apparent, as in the case of Justice Ramaswamy,[52] a motion for impeachment has ultimately failed. Thus, this effective immunity that is given to judges necessitates that the screening of judges at the time of appointment must be effective as their removal is practically impossible.

In a democratic state, each organ of the state- the Executive, the Legislature as well as the Judiciary- must derive its powers externally. In a Parliamentary democracy, the people create the Legislature and the Executive emerges out of this Legislature. The Judiciary must also be integrated in this system of inter-dependence. Not only is this system of judges being solely responsible for appointments to the Judiciary unheard of in any part of the world, it also creates a culture of self-perpetuation which has the tendency of unleashing judicial authoritarianism.

The importance of the Executive's role in matters of appointments and the failure of the collegium to safeguard the integrity of the Judiciary[53] necessitate the formation of an independent authority for the purpose of making appointments to the Supreme Court and the High Courts.

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[47] *In Re Presidential Reference of 1999*, 1998 (5) SCALE 629.
[48] Anil Divan, 'Judicial Appointments and Norms' *The Hindu* (Chennai 23 September 2013) 10.
[49] Ashish Tripathi, 'Has the collegium system of judges' appointment outlived its utility' *The Deccan Herald* (New Delhi 5 July 2013) <http://www.deccanherald.com/content/155018/has-collegium-system-judges-appointment.html,> accessed 19 November 2014.
[50] *Ibid.*
[51] *S.P. Gupta v President of India*, AIR 1982 SC 149 [620] (Tulzapurkar J).
[52] *K. Veeraswamy* v. *Union of India*, 1991 SCR (3) 189.
[53] 'Unspoken no longer: RS passes amendment bill after incisive debate on judges' *The Telegraph* (6 September 2013) <http://www.telegraphindia.com/1130906/jsp/frontpage/story_17318065.jsp#.UsK9x_QW1qV> accessed 19 November 2014.

As per Section 3 of the Constitution (Ninety-ninth) Amendment Act, 2014, besides three members from the Supreme Court, the Judicial Appointments Commission also has a member from the Executive in the form of the Union Minister of Law and Justice, a representative from the legal profession and two eminent members. By including members from both the Executive and the Judiciary, the Judicial Appointments Commission lays the foundation for a collaborative process between these two wings of the State.[54] As a result, there will be a holistic consideration of factors while making appointments. The Judiciary can account for the legal expertise and professional competence of the candidate while the representative from the Executive can provide an insight into the socio-economic background, integrity, ethical firmness and general character of the candidates in question.[55] The provision for having eminent persons on the Panel ensures that there is diversity of opinion and due consideration to factors of great national importance, which may be overlooked by the Executive and the Judiciary. The presence of the "legal professional" lends a unique perspective to the appointments process, as they are able to comment on the manner in which the judges conduct the court, due to their frequent interaction with the Bench and their expertise in the legal field.[56] The reason behind providing for all of these members from different spheres of public life is to have a process which is truly collaborative, discursive, and non-partisan in its functioning. The composition of this Panel in this current form, thereby, helps achieve the ideal of a real participatory democracy.[57]

In light of the appointments to the Higher Judiciary, it must be noted that there is an alarming rate of vacancies in the High Courts across the country and also in the Supreme Court. There are around 275 seats out of 895 vacant in the High Courts across the country whereas in the Supreme Court 12 vacancies are expected to arise.[58] The collegium has been unsuccessful in filling up these vacancies and its opacity may be one of the reasons which may be attributed to the same. The Judicial Appointments Commission seeks to create an institutional response to this problem via Section 7 of the National Judicial Appointments Commission Bill, 2014. This provision seeks to create a time bound provision for the initiation of the process of appointments to the Panel thereby taking a step towards timely filling up of vacancies.

In addition to addressing the concern regarding the increasing number of vacancies, the Judicial Appointments Commission also addresses the concern regarding the lack of objective criteria or defined parameters to be considered while making appointments. The Panel may lay down the requisite procedure to be followed for making recommendations for appointments to the Higher Judiciary and also for shorting of candidates to be considered for the same. Hence, the Panel has been statutorily entitled with the authority to infest objectivity into the selection process.

In addition to the aforementioned merits, as per Section 3(e) of The Constitution (Ninety-ninth) Act 2014, the function of appointing the Chief Justice of India and of other High Courts is assigned to the Judicial Appointments Commission. This provision clearly seeks to change the convention that has been followed till date of appointing the senior-most judge in the Supreme

[54] V.R. Krishna Iyer, 'Judicial Appointments and Disappointments' *The Hindu* (Bangalore 18 August 2012).
[55] *Supreme Court Advocates on Record Association v Union of India,* AIR 1994 SC 268 [462] (Ahmadi J).
[56] *Supreme Court Advocates on Record Association v Union of India,* AIR 1994 SC 268 [47] (Verma J).
[57] *Supreme Court Advocates on Record Association v Union of India,* AIR 1994 SC 268 [54] (Verma J).
[58] J. Venkatesan, 'In 2014, Supreme Court will witness three CJIs' *The Hindu* (New Delhi 1 January 2014) 13.

Court (or the High Court as the case may be) to the office of the Chief Justice. It will thus establish merit and administrative ability to be the most important criteria in the selection of the Chief Justice.[59] This is an essential feature to arrive at, as seniority might not directly translate into the best legal acumen and administrative capability required to preside over the higher Judiciary.

It has been observed till now that the Executive as well as the Judiciary have been reluctant in moving away from the convention of appointing judges for the Supreme Court merely from the High Courts, ignoring the prospects of appointing individuals from the Bar or "eminent Jurists".[60] The Judicial Appointments Commission, through the presence of eminent persons and the representative of the legal fraternity, will have a perspective which is divorced from the long-drawn conventions which have prevented ingenious appointments to the higher Judiciary.

The need for a Commission has been recognised in South Africa as well. The Judicial Services Commission in South Africa consists of twenty three members who are drawn from are drawn from the Judiciary, the two branches of the legal profession, the national and regional Legislatures, the Executive, Civil Society and Academia as per Section 178(1) of the South African Constitution. Further, learning from the ills of the apartheid era, social, racial and cultural diversity is also given due consideration while making appointments.[61] Transparency and openness is maintained by advertising vacancies and making public the views of the screening committee and other such institutions whose views are garnered.[62] Thus, South Africa serves as a credible example of what the Indian system must strive to achieve, to ensure fairness, equity and social justice.

Thus, the Judicial Appointments Commission eliminates the problems of opacity and lack of objective criteria encountered in the Collegium System of appointments. It makes the appointment procedure more Democratic by giving a voice to the Executive and to the legal profession. In addition, by the involvement of eminent persons it seeks to achieve the goal of diversity in appointments. Moreover, the method of selection of the Chief Justice is lent greater credibility by the doing away of the seniority rule. The Commission thereby ensures that the best possible candidates shall be appointed to the Higher Judiciary.[63] As may naturally follow the impartiality and independence of the Judiciary shall be upheld due to the objectivity and openness of the selection process.

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[59] Law Commission, *Reform of Judicial Administration*, (Law Com No. 14 1958) p. 40.
[60] R. Balaji, 'How Judges are appointed and how the Rajya Sabha wants them to be appointed' *The Telegraph* (Calcutta 6 September 2013) .http://www.telegraphindia.com/1130906/jsp/nation/story_17318049.jsp#.UsG1q_QW1qV accessed 20 November 2014.
[61] Justice Yvonne Mokgoro, 'Judicial Appointments', (2010) 23(3) *Advocate* 43.
[62] Ajit Prakash Shah, 'Who should judge the judges?' *The Hindu* (Chennai 26 January 2012). <http://www.thehindu.com/opinion/op-ed/who-should-judge-the-judges/article2832090.ece> accessed 10 November 2014.
[63] *Ibid.*

IV. CONCLUSION – RECONCILING THE DEBATE

The constitutional vice of packing the court is one that the executive has often sought to indulge in. In the absence of a procedure for doing the same, the executive in the past resorted to punitive measures such as transfers. Perhaps, the most visible example of the same was the supersession of the judges in the appointment to the office of the Chief Justice of India in 1973. The independence of the judiciary is necessary in order to secure the freedom and courage that the Judiciary has shown in challenging the authority of the Parliament time and again. It is this very challenge of the judiciary in the cases during the regime of the Congress government in the 1970s that led to active executive involvement in the appointments, transfer and elevation process. Thus, the solution developed by the Supreme Court in its judgements in *Supreme Courts Advocates on Record* v. *Union of India* and *In Re Presidential Reference of 1999* insulated the judiciary completely and shrouded its functioning with constitutional protection.

However, the constitutional experience after this decision of the Supreme Court has come to show that the solution developed by the Supreme Court is perhaps worse than the problem itself. The complete independence that the apex court has granted itself has led to a culture of nepotism and favouritism, completely antithetical to any notion of meritocracy. Further, it cannot be denied that the original intention of the framers of the Constitution was to involve the executive in the process of appointments. It should also be recognized that the concern of impairing the independence of judiciary is limited to appointments and transfers as in other spheres such as salaries, emoluments and security of tenure, the judiciary is insulated from interference by the legislature and executive.

The complications faced by the judicial system are far greater than these and include a number of vacancies in several key judicial positions, further the judicial system itself has to evolve to meet the changing needs of the Indian polity by addressing problems such as the backlog of cases that exist. Thus, the Judicial Appointments Commission is a welcome change in this regard, neither denying the merit in judicial self-appointments, nor the problems faced by the collegium it seeks to address these issues while dealing with administrative aspects as well. With a changing concept of social justice, it is necessary to have a Higher Judiciary which recognises the same. The Constitution (Ninety-ninth Amendment) Act is no doubt constitutional and of course, a breath of fresh air.