

‘REFORM THAT YOU MAY PRESERVE’: RETHINKING THE JUDICIAL APPOINTMENTS CONUNDRUM

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Abstract

Appointment of judges to the constitutional courts in India has been a subject of inter-institutional discord, constitutional jurisprudence as well as public debate. This issue underlines the concern about safeguarding the institutional independence of the judiciary from the creeping march of executive power while addressing the genuine concerns about the inadequacies of the Collegium system.

While weighing in on the debates around judicial primacy as the sole route for securing independence, this paper argues that the judicial appointment process needs to be radically rethought. The paper underlines the need of rigorous public scrutiny and debate about judicial appointments process to increase objectivity and transparency thus creating accountability for the judiciary. More importantly, what is needed is the initiation of meaningful dialogue and discussion between the judiciary and other branches of government, to strike at the roots of inefficiency and the judicial-political discord.

Keywords: judicial appointments, collegium, National Judicial Appointments Commission Act, Supreme Court Advocate-on-Record Association and others v. Union of India and Others

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1. Introduction

In 2015, the Supreme Court of India reviewed the constitutionality of the Constitution (Ninety-ninth Amendment) Act, 2014, that established the National Judicial Appointments Commission (NJAC) through NJAC Act.¹ The key *formal-legal* outcome of the crucial Constitution Bench judgement has been the restoration of ultimate authority in the judiciary in matters pertaining to its selection and appointment.² This has given rise to impassioned debates about judicial independence being an inherent part of the basic structure,³ democratic mandates of the elected executive,⁴ and striking a fine balance between independence and accountability.⁵ However, in the aftermath of the judgement, a series of controversies relating to the executive's recalcitrance and delay with respect to certain judicial appointments, and the transfer of independent judges have raised a cause of concern.⁶ This issue is particularly relevant in light of the recent controversial elevations to the Supreme Court, wherein concerns were raised about the change in collegium's decisions and the supersession of numerous judges.⁷

The paper will first elaborate on the controversy around the judicial appointments process. Subsequently, the paper delves into an analysis of the Collegium system of judicial appointments and critiques the modular inadequacies of the Collegium. It specifically analyzes the Supreme Court's reasoning in the *Supreme Court Advocate-on-Record Association and others v. Union of India* (2016)⁸ case and emphasizes the importance of Justice Chelameswar's dissent.

The article concludes by highlighting the need for robust public debate on the judicial appointments process in light of the institutional experience and guidance from foreign models. Here, the article proposes a meaningful institutional dialogue between the judiciary and the

¹ Supreme Court Advocate-on-Record Association and others v. Union of India and Others, (2016) 5 SCC 1.

² G. Bhatia, *The Sole Route to an Independent Judiciary?: The Primacy of Judges in Appointment*, 138, 145 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

³ A.Sengupta, *Justice Chelameswar's Dissent*, 159, 167 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

⁴ A. Jaitley, *The Judicial Collegium: Issues, Controversies and the Road Ahead*, 45, 55 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018); Arun Jaitley on NJAC verdict: Democracy cannot be 'tyranny of the unelected', *The Indian Express* (19/10/2015), available at <https://indianexpress.com/article/india/india-news-india/njac-sc-verdict-democracy-cannot-be-tyranny-of-the-unelected-says-arun-jaitley/> last seen on 23/12/2018.

⁵ P. B. Mehta, *A Plague on Both Your Houses: NJAC and the Crisis of Trust*, 57, 70 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018); Mukul Rohatgi, *Checks and Balances Revisited: The Role of the Executive in Judicial Appointments*, 84, 95 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

⁶ Prannv Dhawan and Anmol Jain, *Strong Executive, Weak Courts: Collapsing Edifice of Judicial Independence* 57(45) *The Mainstream Weekly* (2019).

⁷ Justice Madan B Lokur, *Collegium's actions show that the NJAC which was struck down four years ago is back, with a vengeance*, *The Indian Express*, (16/10/2019), available at <https://indianexpress.com/article/opinion/columns/govt-calling-the-supreme-court-shots-narendra-modi-6070659/>, last seen on 23/12/2018; F. Mustafa, *The danger of reciprocity: on the independence of the Supreme Court*, *The Hindu*, (19/01/2019), available at <https://www.thehindu.com/opinion/op-ed/the-danger-of-reciprocity/article26030925.ece>, last seen on 23/12/2018; Rekha Sharma, *Seniority cast aside*, *The Indian Express*, (19/01/2019), available at <https://indianexpress.com/article/opinion/columns/supreme-court-judges-appointment-dinesh-maheshwari-sanjiv-khanna-seniority-cast-aside-5545527/lite/>, last seen on 23/12/2018.

⁸ *Supra* 1.

other two organs of government, so as to ensure a participative, transparent and credible constitutional mechanism for the appointment of judges.

2. From Independence to Primacy: The Deadlock Over Judicial Appointments

Judicial independence is both a highly contested and valued ideal in a democracy.⁹ A major point of contention in the debate over independence of the Indian judiciary, has been the method of appointment of judges. The Constitution in India devised a mechanism of ‘consultation’ with those judges of the Supreme and/or High Court as deemed necessary by the President.¹⁰ However, through the *interpretative gloss of Article 124*¹¹, the last word on appointments has been reserved with judiciary through a slew of cases.¹² The method prevailing currently is the Supreme Court’s collegium system, which originated from three of its own judgements known collectively as the Three Judges Case.¹³ It consists of the five senior-most judges of the Supreme Court,¹⁴ and is a method for judges themselves to appoint and transfer their subordinate counterparts, without the interference of other branches of government.

2.1. *The Judicial Collegium’s Control over Appointments Process*

The collegium system has not been mentioned either in the Constitution or in any subsequent amendments. It is notable that the role of the executive in the process of judicial appointments and transfers has been substantially mitigated,¹⁵ and the “consultation” of the CJI by the President enshrined under Articles 124(2)¹⁶ and 217(1)¹⁷ of the Constitution, has now been translated into “concurrence”.¹⁸

While attempts have been made to justify the system as one that safeguards the independence of the judiciary from the legislature and executive, it has often come under scrutiny for allegations of cronyism and nepotism. In fact, the two men who spearheaded the

⁹ F.A. Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94(3) *American Economic Review* 712 (2004); I. Kaufman, *The Essence of Judicial Independence*, 80 *Columbia Law Review* 671 (1980).

¹⁰ Art. 124(2), 217, the Constitution of India; *Independence of the Judiciary*, 264, 267 in *Courts of India: Past to Present* (2016); P. B. Mehta, *A Plague on Both Your Houses: NJAC and the Crisis of Trust*, 57, 70 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

¹¹ See *Supra* 1, Justice Chelameswar, at ¶¶ 1178, 1177, 1212, 1217, 1213.

¹² Editorial, *An Assertion of Primacy*, *The Hindu*, (17/10/2015), available at <https://www.thehindu.com/opinion/editorial/supreme-court-bench-order-on-national-judicial-appointments-commission-act-an-assertion-of-primacy/article7770892.ece>, last seen on 12/01/2019.

¹³ *S.P Gupta v. President of India And Ors.*, AIR 1982 SC 149; *Supreme Court Advocates-On-Record Association v. Union of India*, (1993) 4 SCC 441; Special Reference No. 1 of 1998 In Re Presidential Reference, AIR 1999 SC 1.

¹⁴ P. Bhushan, *The Dinakaran Imbroglio: Appointments and Complaints against Judges*, 44(41) *Economic and Political Weekly* 10, 10 (2009); A. Chandrachud, *The Insulation of India’s Constitutional Judiciary*, 45(13) *Economic and Political Weekly* 38, 40 (2010).

¹⁵ M. Shukla, *Judicial Accountability: Welfare and Globalization*, 51 (2010).

¹⁶ Art. 124(2), the Constitution of India.

¹⁷ Art. 217(1), the Constitution of India.

¹⁸ Art. 124(2), the Constitution of India.

system, Justice J.S. Verma and Fali S. Nariman, later regretted having formed it.¹⁹ This is reflected also in F.S. Nariman's book *Before Memory Fades*, where the chapter dealing with the second and third judges case is titled: "A Case I Won but Which I Prefer to Have Lost".²⁰

It was also alleged, in opposition to the collegiate system, that, "it has now become a matter of practice and convenience to recommend advocates who are the sons, daughters, relatives and juniors of former judges and Chief Justices. Nepotism and favouritism is writ large."²¹ A similar situation arose soon after, when a list of fifteen names recommended by the Collegium, had allegedly been "proposed on extraneous criteria such as caste, religion, office affiliations, political considerations and even personal interests and quid pro quo."²²

The lack of transparency in the collegiate system of appointment, provides a rather opportunistic avenue for cases of favoritism without the risk of accountability. Moreover, the fact that the process is ad hoc and lacks specific objective criteria, has caused an infiltration of politics in the judicial system, and nepotism at the hands of the higher judiciary.²³ This has led to a situation where a person without familial ties with acting or previous judges being appointed as a High Court judge, is a rare exception.²⁴ Nevertheless, the Law Commission of India in its 230th Report, has itself recognized a phenomenon known as the 'Uncle Judges Syndrome', whereby a person appointed as a High Court Judge has kith and kin practicing in the same court.²⁵ This has given rise to cases of favoritism, which eventually results in judicial nepotism.²⁶ The occurrence of self-perpetuation in this highly insulated process, where only judges select future judges, is not in line with the democratic principle of checks and balances that has been emphasized in the Constitution.²⁷ As a matter of fact, the judiciary does not enjoy the sole prerogative in relation to appointment of judges in any other major democratic country, including the United States, the United Kingdom and France.²⁸ Hence, there is an urgent need for a critical review of the opaque system of judicial appointments.²⁹

In a nutshell, this assertion of independence has led to evolution of appointment mechanism from consultation³⁰ to concurrence³¹ to collegium³² to current state of constant

¹⁹ G. Jacob, *Collegium system had flaws, says K.T. Thomas*, The Hindu, (18/10/2015), <http://www.thehindu.com/todays-paper/collegium-system-had-flaws-says-kt-thomas/article7776060.ece>, last seen on 02/02/2019.

²⁰ F. S. Nariman, *Before Memory Fades*, (Faber 2010).

²¹ N.G.R. Prasad et al., *The costly tyranny of secrecy*, The Hindu, (05/07/2013), <http://www.thehindu.com/opinion/lead/the-costly-tyranny-of-secrecy/article4881975.ece>, last seen 02/02/2019.

²² Ibid.

²³ P. Bhushan, *Judicial Accountability: Asset Disclosures and Beyond*, 44(37) Economic and Political Weekly 8, 10 (2009).

²⁴ *Writings on Human Rights, Law, and Society in India: A Combat Law Anthology*, 63 (Harsh Dobhal, 2011).

²⁵ Law Commission of India, *230th Report: Reforms In The Judiciary- Some Suggestions*, available at <http://lawcommissionofindia.nic.in/reports/report230.pdf>, last seen on 15/06/2020.

²⁶ S. Verma, *Every third HC judge is 'uncle'*, Hindustan Times (03/05/2014), available at <https://www.hindustantimes.com/punjab/every-third-hc-judge-is-uncle/story-emvLdM8SlnknyCQ4A7uLM.html>, last seen on 12/12/2019.

²⁷ Editorial, *Closed Brotherhood*, 44(12) Economic and Political Weekly 6, 6 (2009).

²⁸ Ibid.

²⁹ B.V. Rao, *Crisis in Indian Judiciary*, 5 (2001).

³⁰ S. P. Gupta v. President of India & Ors, AIR 1982 SC 149.

³¹ Supra 1..

³² Special Reference No. 1 of 1998 In Re Presidential Reference, AIR 1999 SC 1; Dept. of Justice, Ministry of Law and Justice, Govt. of India, *Memorandum Showing the Procedure for Appointment of the Chief*

conflict and confusion. Scholars view this as an aftermath of complete constitutional usurpation³³ by the judiciary that sustained its *independence* as juxtaposed to a discredited and politically fragile mandate of the executive. In the last two decades, a series of attempts to pass various versions of NJAC legislation introduced by coalition governments had failed. However, the incumbent single party majority government steadfastly disturbed the existing equilibrium through passage of the ninety-ninth Constitutional Amendment Act and the NJAC Act, 2014, giving rise to various controversies regarding the appointment of judges.³⁴ After the acts were held unconstitutional in 2015, these controversies have primarily been about the delay in confirmation of appointments, internal dissent regarding lack of transparency in collegium and finalization of the draft Memorandum of Procedure wherein concerns about excessive executive sanction on the pretext of national security have been raised.³⁵

2.2. *The NJAC Case: Contentious Case of Primacy*

An attempt to counter this uncontrolled independence was made via the Constitution 99th Amendment Act and National Judicial Appointments Commission (NJAC) Act of 2014, whereby the NJAC- a constitutional body- was set up and regulated respectively.³⁶ The NJAC was proposed to consist of six members, of which three members would be from within the judiciary and three members would be external to the judiciary.³⁷ The arguments favoring the NJAC included a “more transparent and efficient” replacement of the Collegiate system, while maintaining the independence of the judiciary through the veto power granted to the judiciary representatives.³⁸ Additionally, the inclusion of civil society representatives and political leaders would ensure greater accountability in the judicial appointments and selection process.³⁹ However, in an unprecedented judgement of the *Supreme Court Advocates-on-Record Association v. Union of India*⁴⁰, the Supreme Court held it to be unconstitutional, since it violated of the basic structure of the Constitution and ‘compromised’ the independence of the judiciary.⁴¹ The judiciary- executive contestation is best represented by the debate on *judicial primacy* in the appointments process in the light of this judgment.

The judgement assumes the requirement of judicial primacy in appointments but makes no persuasive case as to why this is so essential. After all, as established above, nepotism is as prevalent under the judiciary as political favoritism was under the executive (prior to 1993). In

Justice of India and Judges of the Supreme Court of India, available at <http://doj.gov.in/appointment-of-judges/memorandum-procedure-appointment-supreme-court-judges>, last seen on 15/06/2020.

³³ Supra 7, at 62.

³⁴ P. Bhushan, *Scuttling Inconvenient Judicial Appointments*, 49(28) Economic and Political Weekly 12, 15 (2014).

Editorial, *Judiciary in Turmoil*, The Hindu (31/12/2018), available at <https://www.thehindu.com/opinion/editorial/judiciary-in-turmoil/article22431846.ece>, last seen on 18/09/2019.

³⁶ *NJAC vs collegium: the debate decoded*, The Hindu (16/10/2015), available at <http://www.thehindu.com/specials/in-depth/njac-vs-collegium-the-debate-decoded/article10050997.ece>, last seen on 18/09/2019.

³⁷ P.S. Krishna, *NJAC vs collegium: The arguments and counter-arguments*, Business Standard (16/10/2015), available at http://www.business-standard.com/article/current-affairs/njac-vs-collegium-the-arguments-and-counter-arguments-115101601449_1.html, last seen on 18/09/2019.

³⁸ G. S. Bhatti, *Judicial Appointments In India: The Chronicle Of The Turf For Ascendancy And Superiority*, 5(2) Journal of Global Research & Analysis 76, 84 (2016).

³⁹ A. Sengupta, *Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgement*, 48 Economic & Political Weekly 27, 27 (2015).

⁴⁰ Supra 1.

⁴¹ R. Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective*, 49 The George Washington International Law Review 569, 569-570 (2017).

the majority judgement, judicial primacy is read into the heart of judicial independence.⁴² Justice Khehar alludes to the Indian democracy's imperiled state during the National Emergency of 1975 to emphasize the absolute need of judicial primacy to safeguard democratic polity.⁴³ This highlights the conception of the judiciary as the sole vanguard and interpreter of the constitution.⁴⁴ This betrays a cynical sense of self-importance which democratic institutions should ideally be careful about.⁴⁵

As is the illustrious tradition of dissent in the Supreme Court judgement, the dissenting judgement of Justice Chelameswar underlines the fidelity to the constitutional scheme of checks and balances. It accords the appropriate respect to the constitutional amendment and propounds that lack of judicial primacy as per the institutional design of NJAC Act did not 'damage or destroy' the basic structure.⁴⁶ According to Justice Khehar, the constitutional amendment has to merely affect the basic structure to be considered unconstitutional.⁴⁷ The divergence in the judicial application of basic structure doctrine by Justice Khehar and Justice Chelameswar,⁴⁸ shows the real bone of contention between the political conflict between the two institutions.⁴⁹ It is important to recognize the reasoning given by Justice Chelameswar that honestly acknowledges the flaws and opacity of the existing collegium system⁵⁰ while showing judicial respect towards the other institutions. Justice Chelameswar explains the need for clear separation of powers and checks and balances so as to ensure no institution enjoys absolute power by quoting Constituent Assembly Debates.⁵¹ He underlines the need for reform by stating that the opaque and ad-hoc system of appointment was in fact inimical to judiciary's independence and public legitimacy.⁵²

Justice Chelameswar also recounts the prophetic words of Thomas Babington Macaulay's to the House of Commons: "Reform, that you may preserve" to emphasize the urgency of judicial reforms.⁵³ He also solemnly notes that the rejection of the Executive's attempts to reform the institution has imposed greater burden on the judiciary to make the legal system more fair and efficient. Thus, he preferred to suggest improvements in the framework of the proposed NJAC so as to reach a fine balance between the interests of both the institutions.⁵⁴ Hence, the analysis shows the *crisis of trust* that is negatively affecting the executive-judiciary engagement on crucial matter of judicial reforms in general and judicial appointments in particular.⁵⁵

⁴² Supra 4; A. P. Kumar, *Justice Lokur's Concurring View: The Future of Appointment Reform, in Appointment of Judges to the Supreme Court of India*, Supra 4, at 146-154.

⁴³ Supra 1, at ¶ 316, 317, 318.

⁴⁴ Supra 7.

⁴⁵ Supra 7.

⁴⁶ Ibid, at ¶ 1178; Supra 5.

⁴⁷ Ibid, at ¶ 341, 258, 1167.

⁴⁸ Supra 5; Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of Basic Structure Doctrine* (2010).

⁴⁹ Supra 7, at 59.

⁵⁰ Supra 1, at 471, 508; Supra 5.

⁵¹ *Constitution Assembly Debates*, vol. 8, no. 3 (Lok Sabha Secretariat) 24 May 1949, 258.

⁵² Supra 64, at ¶ 533.

⁵³ T. B. Macaulay's address on 2nd March 1831 in the House of Commons on Parliamentary Reforms; Supra 64, at ¶ 534, 535; Supra 5.

⁵⁴ Supra 7.

⁵⁵ Supra 7.

3. The Way Forward: Striking a Balance between Accountability and Independence

The existing system of judicial appointments leaves much to be desired for all the stakeholders. While the duly elected Executive is denied a meaningful legal-institutional role in the appointment process, the judicial collegium's decisions regarding appointment face prolonged delays by the Executive.⁵⁶ In that context, key elements of the judicial appointments procedure need to be rethought. This includes the rather opaque functioning of the collegium, the lack of a credible evaluation criteria for candidates, and the rampant self-perpetuation and nepotism.

While an attempt was made to make the minutes of the proceedings of the collegium public, the essence of the exercise was abandoned soon thereafter.⁵⁷ This instance highlights the need to prioritize comprehensive structural and institutional transformation over piecemeal reforms.

Hence, it is important to critically consider and seek guidance from certain reforms implemented in foreign jurisdictions. The framework of judicial appointments in the United Kingdom was laid out in the Constitutional Reform Act 2005, which set up an independent Judicial Appointments Commission (JAC).⁵⁸ According to the Act, appointments must be made "solely on merit" and only once the selecting body is convinced that the candidate is "of good character".⁵⁹ The JAC follows five stipulated merit criteria when choosing candidates. These include intellectual capacity (appropriate knowledge of law and expertise in the chosen area), personal qualities (including professionalism, decisiveness, ability to work constructively with others and objectivity), an ability to understand and deal fairly (to treat everyone with respect regardless of their background, and a willingness to listen patiently), communication skills (including the ability to explain and justify decisions succinctly and maintain authority when challenged), and lastly, efficiency (involving the ability to work under pressure and to produce scrupulous judgements swiftly).⁶⁰

These criteria go a long way in ensuring that only the most deserving and meritorious candidates obtain the highest posts of the judiciary- after all, judges are the keystone of the arch of Justice.⁶¹ The adoption of such criteria by the Indian judiciary would significantly reduce corruption in the judicial system, while also reinstating the largely alienated public confidence in the system. In fact, two criteria- the ability to deal fairly, and efficiency- are particularly befitting for the Indian scenario. With regards to the former, there exists an immensely diverse

⁵⁶ Supra 9.

⁵⁷ A. P. Kumar, *Supreme Court stops uploading collegium resolutions on website: Move is major self-inflicted wound, smacks of institutional cowardice*, The Firstpost (22/10/2019) available at <https://www.firstpost.com/india/supreme-court-stops-uploading-collegium-resolutions-on-website-move-is-major-self-inflicted-wound-smacks-of-institutional-cowardice-7536991.html>, last seen on 01/01/2020.

⁵⁸ Parliament of the United Kingdom, *Judicial Appointments- Constitution Committee* (2012), available at <https://publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27204.htm#n6>, last seen on 15/06/2020.

⁵⁹ S. 63, Constitutional Reform Act 2005 (United Kingdom).

⁶⁰ Judicial Appointments Commission, Government of the United Kingdom, *Amending the JAC's merit criterion: 'an ability to understand and deal fairly'*, Judicial Appointments Commission (2011), available at https://jac.judiciary.gov.uk/sites/default/files/sync/news/jac_merit_criterion_consultation_feb_11.pdf, last seen on 15/06/2020.

⁶¹ V.R. Krishna Iyer, *Justice & Beyond*, 25 (1982).

caste and religious background in India that allegedly seeps in prejudices obstructing the rule of law and fair dispensation of justice. In relation to the latter, it is no secret that there is a huge backlog of cases in the judicial system yet to be heard and decided upon.⁶² The appointment of the most efficient candidates as judges would undoubtedly help to reduce this backlog and ensure justice to the Indian citizens- after all, justice delayed is justice denied.⁶³

Furthermore, in the United States, candidates being considered for appointment to the Supreme Court are questioned by the Senate, about not only their judicial perspectives, but also about aspects of their personal life. These proceedings are televised and open for viewing by the general public.⁶⁴ In light of the recent jurisprudence about live-streaming the court proceedings and the thrust on transparency, such a level of transparency in the Collegium proceedings should be publicized. The initiative to publish the minutes of the Collegium meetings is a creditworthy step in this regard. The argument that publicizing the reasons for rejecting a candidate could “affect their reputation”,⁶⁵ should be discarded as a trivial consideration when faced with the need for transparency and accountability- aspects to which judicial independence does not and should not extend.

3.1. The Need for Meaningful Institutional Dialogue

The “judiciary versus executive” debate has created more heat than light⁶⁶ and internal and institutional turmoil in the superior judiciary has been worrisome.⁶⁷ The case in favor of the Collegium has long been to avoid political influences from seeping into the judiciary, and thus to maintain the independence and impartial ideal of the judicial system. While it has been criticized for perpetuating judicial overreach, nepotism and appointment of corrupt judges, the issue is perhaps incorrectly attributed solely to the composition of the collegium. What is required is not necessarily a re-composition of the collegium to include external members such as in the NJAC, or even a wholly independent body altogether. If the method of appointment is regulated, then it will not matter, who appoints the judges. The solution lay in two essential steps- increasing transparency and establishing explicit criteria for appointment.

The need to remove the opaqueness in the appointment process has been suggested, but never implemented. It has been advocated as a beneficial step in furtherance of eliminating corruption, even by members of the higher judiciary, including former Chief Justice V.N. Khare.⁶⁸ Currently, there are several insinuations of groupism, nepotism, cronyism and favoritism which have prevented worthy candidates from selection to High Court and Supreme

⁶² V. Doshi, *India's long wait for justice: 27m court cases trapped in legal logjam*, The Guardian (05/05/2016), available at <https://www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam>, last seen on 15/06/2020.

⁶³ *Justice Delayed is Justice Denied*, 1(6) Journal of the American Institute of Criminal Law and Criminology 975, 975 (1911).

⁶⁴ M. Katju, *One Way to Fix the Collegium is to Televisе its Proceedings*, The Wire, Nov. 5, 2015, <https://thewire.in/law/one-way-to-fix-the-collegium-is-to-televisе-its-proceedings>.

⁶⁵ B. Panda, *Not very collegial: The Supreme Court is split wide open today due to its opaque collegium system*, The Times of India (18/01/2018), available at <https://blogs.timesofindia.indiatimes.com/toi-edit-page/not-very-collegial-the-supreme-court-is-split-wide-open-today-due-to-its-opaque-collegium-system>, last seen on 15/06/2020.

⁶⁶ V. Upadhyay, *Reclaiming the Judicial Ground*, 43(33) Economic and Political Weekly 13, 15 (2008).

⁶⁷ *Supra* 33.

⁶⁸ T. Anwar, *Collegium system not perfect, but superior to NJAC, says former CJI*, Firstpost (16/10/2015), available at <https://www.firstpost.com/india/collegium-system-not-perfect-superior-njac-says-former-cji-2242812.html>, last seen on 15/06/2020.

Court benches.⁶⁹ If the appointments are made public, along with the reasons for appointing, rejecting or transferring a particular candidate, a system of accountability for the Collegium's decisions will be created, thus ensuring fair and honest appointments to the maximum.

In such a situation, it is very important for both the institutions to engage in meaningful institutional dialogue and explore the efficacy of solutions like Judicial Councils which promise the institutional check and balances in the process.⁷⁰ While the judiciary needs to acknowledge the executive as a co-producer of the Constitution⁷¹ and not exercise judicial review without judicial restraint, the executive should consider the constructive criticisms of its proposed judicial council i.e. the NJAC.⁷²

The interim order in *Nadeem Ahmad, Advocate v. Federation of Pakistan*⁷³ by the Supreme Court of Pakistan can shed light on the importance of institutional dialogue. The order reconsidered the provisions relating to judicial appointment in the crucial Constitution (Eighteenth Amendment) Act, 2010 (18th Amendment). The interim order, where the Court ordered the Parliament to amend these provisions to safeguard judicial independence, led to the Constitution (Nineteenth Amendment) Act, 2010 (19th Amendment) which incorporated considerable modular safeguards. This portrayed a unique example on how questions of basic structure can be resolved through an institutional dialogue that respects the reasonable interests of each other in positive spirit.⁷⁴

Ultimately, there must be graceful recognition of people's faith in the higher judiciary. In other words, the absolute majority political executive in India should recognize the special place that its predecessors have ceded to the 'Supreme' court.⁷⁵ The Court should prefer *methods of prodding* to communicate the institution of its excesses and shortfall in duty over absolute invalidation or judicial execution so as to evolve harmonious dynamics of communication between the organs of polity.⁷⁶ Supreme Court's own suggestions of upholding constitutional statesmanship in case of institutional discord can be very insightful in the process of judicial reform to honour the principles of independence, transparency and accountability.⁷⁷

4. Conclusion

The need for institutional and administrative reforms in the Indian judiciary cannot be disputed. The higher judiciary finds itself at the crossroads wherein on one hand it is applauded

⁶⁹ Ibid.

⁷⁰ M. Rohatgi, *Checks and Balances Revisited: The Role of the Executive in Judicial Appointments*, in Appointment of Judges to the Supreme Court of India, Supra 4, at 84, 95.

⁷¹ Supra 7.

⁷² A. Datar, *Eight Fatal Flaws: The Failings of NJAC*, in *Appointment of Judges to the Supreme Court of India*, 122, 134 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

⁷³ [2010] PLD 1165 (Supreme Court of Pakistan).

⁷⁴ Ibid at ¶8, 10, 13; M. D. Mahmood, *The Judiciary and Politics in Pakistan: A Study* (1992); J. Khawaja, *Foreword*, in *The Politics and Jurisprudence of the Chaudhry Court 2005–2013* (M.H. Cheema & I. S. Gilani eds., 2015); S. Khosa, *Judicial Appointments in Pakistan*, 246, 254 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

⁷⁵ S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, (2nd edn., 2003).

⁷⁶ State of UP and Ors v. Jeet S Bisht and Anr, (2007) 6 SCC 586.

⁷⁷ G. Bhatia, "Working A Democratic Constitution": *The Supreme Court's Judgment In NCT Of Delhi v Union Of India*, Indian Constitutional Law and Philosophy, available at <https://indconlawphil.wordpress.com/2018/07/04/working-a-democratic-constitution-the-supreme-courts-judgment-in-nct-of-delhi-v-union-of-india/> last seen on 15/06/2020; supra 61.

for its ability to cause the arc of moral universe to tend towards justice,⁷⁸ but on the other hand it is severely criticized for its ad-hoc, inconsistent and opaque manner of functioning.⁷⁹ The direction that the institution takes will undeniably depend on what the institution considers itself to be. The recent imbroglio over judicial appointments from the NJAC case to the delay in judicially recommended appointments to the controversy over breach of seniority can also be resolved once the judiciary takes a stock of the Collegium system of appointments. This serious and hard task of engagement with the other organs of government and the public at large was evaded in the crucial NJAC case.

However, the judicial dissent by stalwarts like Justice Chelameshwar shows there is scope for serious deliberative discourse on these fundamental challenges. It would be cynical to conclude that 'judicial accountability' and 'judicial independence' are antithetical concepts. A fine balance should be aspired for where the judiciary is devoid of political influences, while maintaining utmost fidelity to its constitutional duty to enforce the fundamental right of the citizens and safeguard the forms and values of constitutional democracy.

Several reforms have been proposed to ensure that this balance is achieved, and they need to be seriously considered. The Campaign for Judicial Accountability and Reforms has proposed a more transparent mechanism for shortlisting of candidates for appointment and promotion. In addition to these, recommendations of Sr. Adv. Gopal Subramanian, Sr. Adv. Arvind Datar and ASG Pinky Anand can be good starting points in a serious institutional dialogue for the new memorandum of procedure.⁸⁰ These include a more participative and consultative selection process aided by a competent secretariat which can record and verify the credentials of all the candidates. Adherence by the courts and especially the Collegium to RTI and less ambiguous definitions of terms guiding contempt of court are also important to increase transparency.

Additionally, a serious attempt should be made to formulate objective criteria in order to ensure that only scrupulous, decisive and efficient judges are awarded high posts in the judiciary. The judicial appointment process should be open to public scrutiny. The robust and voluntary disclosure of information about the candidates, their credentials and the proceedings of the selection committees would also go a long way in portraying to the public, that the true essence of justice is being honoured with complete transparency. Ultimately, the autonomous Bar Associations and Bar Councils along with a vibrant and assertive legal academia, media and larger civil society must play an active role in the ensuring the transparency and integrity of the selection process. The opportunity to include 'eminent persons' in the selection process that the NJAC partially provided should not be forgotten and appropriate provisions for effective and meaningful civil society participation in this critical process should be seriously considered.⁸¹ This selection procedure should provide for appropriate mechanism for affirmative action for the under-represented communities and ensure that the appointments

⁷⁸ Navtej Singh Johar & Ors v. Union of India, (2018) 10 SCC 1 ¶20; G. Bhatia, *The narrow and the transformative*, The Hindu (31/07/2018), available at <https://www.thehindu.com/opinion/lead/the-narrow-and-the-transformative/article24555861.ece>, last seen on 31/07/2019.

⁷⁹ M. Moitra, *The Supreme Court of India is a Court of Rights, Not of Contempt*, The Wire (29/04/2020), available at <https://thewire.in/law/the-supreme-court-of-india-is-a-court-of-rights-not-of-contempt>, last seen on 02/05/2020.

⁸⁰ Read G. Subramaniam's 7 neo-collegium suggestions, Legally India, available at <https://www.legallyindia.com/supreme-court/read-gopal-subramaniam-s-7-neo-collegium-suggestions-read-submission-pinky-anand-arvind-datar-20151105-6842>, last seen on 15/06/2020.

⁸¹ M. Divan, *Opening up Appointments: Civil Society Participation in the NJAC*, 104-108 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

reflect the constitutional vision of diversity and inclusion.⁸² The debate must move beyond the questions of judicial primacy to adopting a truly democratic and meritorious process for judicial appointments.

⁸² *Ibid.*