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INDEPENDENCE OF JUDICIARY AS PART OF BASIC STRUCTURE – A PERSPECTIVE

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Abstract: *The independence of the judiciary is not a new concept but its meaning is still imprecise. The starting and the central point of the concept is apparently the doctrine of the separation of powers[1]. Therefore, primarily it means the independence of the judiciary from the executive and the legislature. But that amounts to only the independence of the judiciary as an institution from the other two institutions of the state or the collective independence without regard to the independence of judges in the exercise of their functions as judges. In that case it does not achieve much. The independence of the judiciary does not mean just the creation of an autonomous institution free from the control and influence of the executive and the legislature. The underlying purpose of the independence of the judiciary is that judges must be able to decide a dispute before them according to law, uninfluenced by any other factor. For that reason, the independence of the judiciary is the independence of each and every judge. Independence of the individual judge consists of the judge's substantive and personal independence. The former means subjection of the judge to no authority other than the law in the making of judicial decisions and exercising other official duties, while the latter means adequate security of the judicial terms of office and tenure. The independence of individual judges also includes independence from their judicial superiors and colleagues. Without the former the latter cannot be secured and without the latter the former does not serve much purpose. Therefore, the two, even if separable, must be pursued together. A system which ignores one or the other cannot make much progress towards, much less achieve, the independence of the judiciary.*

Key Words: *Independence of Judiciary, Basic Structure, Appointment of Judges, Collegium, Constitutionalism, Constitutional Morality and Legitimacy.*

Importance of independence of the judiciary is a very important facet of democracy, like our country. Independence of the judiciary can be achieved by prohibiting interference from the Government (*i.e.,* legislature and executive). In a democratic set up only an impartial and independent judiciary can protect the rights of person and can provide justice without fear or favour. Therefore, it is important that all the judicial system (*i.e.,* Supreme Court, High Court and District Court/ Lower Court) should be allowed to perform its function without any pressure. In a democratic country like India, the judiciary is

[1] While the doctrine of separation of powers ensures liberty by preventing concentration of powers in one person or body and thereby puts a restraint on the executive and legislative, it also ensures the exercise of judicial power that is unhindered by the other two branches.

custodian of the rights of citizens. Therefore, the framers of the Indian Constitution at the time of framing of our constitution were concerned about the kind of judiciary our country should have. This concern of the members of the constituent assembly was responded to by Dr. B.R. Ambedkar in the following words:

> *"There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in it. And the question is how these two objects can be secured"*[2].

The Indian Constitution is a radiant vibrant organism and under the banner of *Sovereign, Socialist, Secular, Democratic Republic*, steadily grows spreading the fragrance of its glorious objectives of securing to all citizens: *Justice, Social Economic and Political*[3]. For securing the above cherished objectives equally to all citizens irrespective of their religion, race, caste, sex, place of birth and the socio-economic chronic inequalities and disadvantages, the Constitution having very high expectations from the Judiciary, has placed great and tremendous responsibility, assigned a very important role and conferred jurisdiction of the widest amplitude on the Supreme Court and the High Courts, and for ensuring the principle of the 'Rule of Law' which in the words of Justice Bhagwati, *"runs through the entire fabric of the Constitution"* and realization of human rights and also the prosperity and stability of a society. To say, differently, it is the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society like ours and a constitutional democracy. The concept of Independence is the livewire of our judicial system and if that wire is snapped, the "dooms day" of the judiciary will not be far off. Justice Bhagwati also supported the idea of independence of the judiciary in **S.P. Gupta v Union of India**[4] in his words as follows: -

"The concept of independence of judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law and thereby making the rule of law meaningful and effective. But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep, independence from many other pressures and prejudices. Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says, "Be you ever so high, the law is above you". This is the

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[2] Dr. B.R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly and later Law Minister of India Reply to the debate on the draft provisions of the Constitution on the Supreme Court (May 24, 1949), in CONSTITUENT ASSEMBLY DEBATES, Vol. VIII, p. 258.

[3] S.C. Advocates-on-Record Association v Union of India AIR 1994 SC 268 at pp. 44

[4] S.P. Gupta v Union of India AIR 1982 SC 149 at pp. 25 and 26.

principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution."

The most important aspect in the independence of the judiciary is its constitutional position. Just as the Constitution provides for the composition and powers of the executive and the legislature, it should also provide for the judiciary. The second important aspect of the independence of the judiciary is that judicial tenure and appointment must be beyond the control of the executive. Thirdly, impartiality and freedom from irrelevant pressures must be ensured to the judges in all aspects of adjudication.

THE UNION JUDICIARY - SUPREME COURT

Chapter IV under Part V of the constitution (Union) deals with The Union Judiciary. The constitution and jurisdiction of the Supreme Court is stated in detail from articles 124-147. Unlike the other two branches, executive and legislature, in India Judiciary is integrated. This means that even though there may be High Courts in states, the law declared by the Supreme Court shall be binding on all courts within the territory of India (Article 141). Now let's look into the details of each article dealing with the Union Judiciary.

Establishment and Constitution of the Supreme Court: Article 124

(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a judge may be removed from his office in the manner provided in clause (2A) the age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and–

(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or

(b) Has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or

(c) Is, in the opinion of the President, a distinguished jurist.

APPOINTMENT OF JUDGES IN INDIA

"The bedrock of our Democracy is the rule of law and that means we have to have an independent judiciary, judges, who can make decisions independent of the political winds that are blowing" –CAROLINE KENNEDY

"If we desire respect for the law, we must first make the law respectable"[5]

Judiciary is one of the three wings of the State. The judiciary in India has performed exceedingly well over the last six decades and has contributed significantly to the advancement of public good and good governance and in the administration of justice. Though under the Constitution the polity is dual, the judiciary is integrated and unified which can interpret and apply the laws and adjudicate upon both the Central and State laws and upon controversies between one citizen and another and between a citizen and the State. It is the function of the courts to maintain rule of law in the country and to assure that the government runs according to law. Courts also have the function of safeguarding the supremacy of the Constitution and the laws without fear or favour, without being biased by political ideology or economic theory[6] by interpreting and applying its provisions and keeping all authorities within the constitutional framework. The Judiciary has another Justice Untwalia has compared the Judiciary to *"a watching tower above all the big structures of the other limbs of the state" from which it keeps a watch like a sentinel on the functions of the other limbs of the state as to whether they are working in accordance with the law and the Constitution, the Constitution being supreme"*[7].

The structure of the judiciary in the country is paramedical in nature with the Supreme Court standing at the apex. There are High Courts below the Supreme Court in India's judicial hierarchy; under each High Court there exists a system of subordinate courts. The High Court is at the apex of the State judicial system. At present, each State in India has a High Court[8]. Parliament may, however, establish by law a common High Court for two or more States[9]. The Supreme Court thus enjoys the topmost position in the judicial hierarchy of the country. It is the supreme interpreter of the Constitution and the guardian of the people's Fundamental Rights guaranteed to them by the Constitution. It is the ultimate court of appeal in all civil and criminal matters and the final interpreter of the law of the land and thus helps in maintaining a uniformity of law throughout the country.

Appointment of Judges of the Supreme Court

Appointment of Judges of the Supreme Court is governed by Article 124(2) of the Indian Constitution. It reads: -

Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose.

Provided that in the case of appointment of a Judge other than the Chief justice, the Chief Justice of India shall always be consulted.

According to Article 124(2) of the Indian Constitution, the Judges of the Supreme Court are appointed by the President. While appointing the Chief Justice, the President has to consult with such of the Judges of the Supreme Court and the High Court's as he may deem necessary. In case of appointment of other Judges, the

[5] Louis d. Brandeis

[6] *People's Union for Civil Liberties (PUCL) v Union of India* (2003) 4 SCC 399

[7] *Union of India v Sankalchand Himatlal Sheth* AIR 1977 SC 2328

[8] Article 214 of the Indian Constitution

[9] Article 231(1) of the Indian Constitution

President is required to consult the Chief Justice of India though he may also consult such other Judges of the Supreme Court and the High Court's as he may deem necessary[10].

Appointment of Judges of the High Court

Appointment of Judges of the High Court is governed by Article 217(1) of the Indian Constitution. It states as follows: -

Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.

The High Court judges are appointed by the President after consulting the Chief Justice of India, the Governor of the State concerned[11] and in case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court to which the appointment is to be made[12].

As mentioned above, the constitutional provision [Article 217(1)] says that the President appoints these Judges after consulting the Chief Justice of India, the State Governor and the Chief Justice of the High Court concerned. The Central Executive and the State Executive provide the political input in the process of selection of the Judges.

Since the inauguration of the Constitution, the question has been considered by some authorities: how to ensure that the Judges are selected on non-political considerations? It is thought that it is necessary for securing the independence and objectivity of the Judiciary that Judges be selected on merit and not on political considerations. Such an objective can be achieved only if the role of the political elements is reduced in the process of selection of the Judges of the High Courts.

The matter was considered by the Law Commission headed by M.C. Setalvad as early as 1958. In its XIV Report on "*Reform of Judicial Administration*", the Commission opined that the High Court Judges were not always appointed on merit because of the influence of the State Executive. Accordingly, the Commission suggested that the Chief Justice of the High Court should have a bigger role to play in the matter of appointment of the Judges; that it should be only on his recommendation that a Judge be appointed and also that concurrence and not only consultation of the Chief Justice of India be needed for this purpose[13].

The Government did not accept this recommendation. On the other hand, it stated that, as a matter of course, the High Court Judges had been appointed with the concurrence of the Chief Justice of India[14].

Again, the Study Team of the Administrative Reforms Commission on Centre-State Relationship endorsed the Law Commission's view that influence of the State Executive be reduced in appointing the High Court Judges. The team suggested that the State Executive should have the right only of making comments on the names proposed by the

[10] *Proviso to Article 124(2) of the Indian Constitution.*

[11] *In case of a common High Court for two or more States, the Governors of all the States concerned are consulted*; *Article 231(2) of the Indian Constitution.*

[12] Article 217(1) of the Indian Constitution.

[13] *XIV Report of the Law Commission of India at pp. 71-75*

[14] *Rajya Sabha* Nov. 24,1959

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High Court's Chief Justice but not to propose a nominee of its own. The team hoped that this would reduce political influence exerted at the State level in appointing High Court Judges and improve professional competence[15].

However, the Administrative Reforms Commission did not endorse the suggestion made by its Study Team. The Commission took the view that the proposal would drastically reduce the role of the State Governments in the selection of the High Court Judges. In its view, the existing procedure balanced the right of the Centre and of the States. It harmonized "the initiative and autonomy of the State on the one hand and safeguards against the question of undue influence by the State on the other[16].

Discrepancies in the Appointment of Judges Before 1993

Before the year 1993, the President's power to appoint the Supreme Court Judges was purely of a formal nature, for, he would act in this manner, as in other matters, on the advice of the concerned Minister, viz., the law minister. The final power to appoint Supreme Court Judges rested with the Executive and the views expressed by the Chief Justice were not regarded as binding on the Executive.

Since the Indian Constitution is silent regarding the criteria for appointing the CJI, the convention in India had been to appoint the senior-most Judge of the Supreme Court as the Chief Justice whenever a vacancy occurred in that office. In 1958, the Law Commission criticised this practice on the ground that a Chief Justice should not only be an able and experienced Judge but also a competent administrator and therefore succession to the office should not be regulated by mere seniority[17]. The Government did not act upon this recommendation for long. It continued to appoint the senior-most Judge as the Chief Justice as it was afraid that it might be accused of tampering with judicial independence.

This norm of appointing the senior most Judge as the CJI of India remained unspoiled until April 26th 1973 when the then Congress Government led by Indira Gandhi suddenly departed from the seniority rule for the appointment of Chief Justice and appointed as Chief Justice a Judge [Justice A. N. Ray] who was fourth in the order of seniority. Thus, three senior Judges were by-passed who then resigned from the court in protest. The main reason behind this supersession is that the superseded judges (Justices J.M. Shelat, K.S. Hegde and A.N. Grover) had decided that the basic structure of the Constitution is unamendable in ***Kesavananda Bharati v State of Kerala***[18]. It was a dictatorial decision taken by Mrs. Gandhi to ensure that the judiciary favours the actions of the government, which she did when emergency was imposed. This raised a hue and cry in the country and the Government was accused of tampering with the independence of the Judiciary. The government invoked the Law commission's recommendation [14th Law Commission] which criticized the practice of appointing the senior most judges as the Chief Justice of the Supreme Court on a ground that a Chief Justice should not an able and experienced judge but also a

[15] Report I, at pp. 181-88 (1967)

[16] Report on Centre-State Relationship at pp. 40

[17] Law Commission XIV Report, I, at pp. 39- 40 (1958)

[18] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461

competent administrator and, therefore, succession of the office should not be regulated by mere seniority. Many termed this supersession as the 'Black Day' of the Indian Judiciary[19].

The second supersession again came in 1976, when the Government appointed Justice Beg as the Chief Justice by-passing Justice Khanna who was senior to him at the time on the ground that Khanna's tenure would have been too short. Consequently, Justice Khanna resigned in protest. This suppression was widely perceived as an outcome of the dissenting judgment of Justice H.R Khanna in the infamous ***ADM, Jabalpur v Shivkant Shukla***[20]case where it was held that a citizen does not have fundamental rights during the proclamation of an emergency. Prof. Baxi recalling the incident writes, *'that after the supersession, there were clear indications that the brother justices did not accept the leadership of CJ Beg. The Court almost ceased to be an institution and became an assembly of individual judges.*

On both occasions apparently the superseded judges had given judgements inconvenient to the executive while the superseding judges had given judgements palatable to the executive. This established a clear nexus between the independence of the judges and their appointment.

It is believed that the architect behind all these sessions was not the law minister but the Minister of Steel, Kumarmangalam, who was the key advisor to Mrs. Gandhi. Scholars have coined the term 'Kumarmangalam doctrine' to explain this ideology of the government to populate the court with judges who were believed to be supportive of government policies.

However, interestingly as against the popular opinion, the above was not the first attempt of supersession by the Central government. Prof. Godbois, a leading scholar on the legal history of the Indian Supreme Court in his book *'The Judges of the Supreme Court'* discusses that after independence there was a tussle going on between Pt. Nehru and the Apex Court. While Nehru tried to bring in social welfare legislation, the Court used to strike them down for violation of fundamental rights. It was in this background that Nehru uttered the famous words that *'the judges sitting in the ivory palaces are not aware about the real needs and problems of the country'*.

India would, in fact, have seen its first supersession in the form of Justice Patanjali Shastri, who Nehru wanted to supersede. Prof. Godbois recalls that Nehru preferred M.C. Chagla or Justice BN Mukherjee. However, this attempt failed as all the other six associate judges of the Court threatened to resign, if such a plan was executed. Another attempt came against Justice JC Shah, who was to succeed CJI Hidayatullah. It was believed by many that Mrs. Gandhi wanted to bring an outsider into the Court to supersede Justice Shah. However, it was a determined Hidayatullah who threatened to resign with all the other judges (except Ray) if this was carried out. Interestingly, Justice Hidayatullah, also threatened Mrs. Gandhi that India was soon hosting an international convention of lawyers and if Justice Shah was superseded the

[19] Swapnil Tripathi, "April 26-Revisiting the Black Day of Indian Judiciary", available at http://www.livelaw.in/april-26-revisiting-black-day-indian-judiciary (April 26, 2018) (Time – 09:00 PM).

[20] ADM, Jabalpur v Shivkant Shukla 1976 AIR 1207

whole world would know what happened[21].

Before the appointment of the next Chief Justice in 1978, in 1977 the Union Government changed. It referred the matter of appointment of the Chief Justice to the Law Commission of India. The Law Commission in its 80th Report recommended that in the matter of appointment of the Chief Justice the convention of appointing the senior most judge should be followed. Accordingly, after the retirement of Chief Justice Beg, the senior-most puisne Judge, Justice Chandrachud was appointed as the next Chief Justice. Since then, the practice of seniority is being followed without any exception in the matter of appointment of the Chief Justice of India. The Commission also thoroughly examined the constitutional provisions, procedure and practice for the appointment of Judges in the Supreme Court and the High Courts. While it found the constitutional scheme for the appointment of judges "basically sound", it admitted several flaws in its operation and made several recommendations for ensuring the best and most expeditious appointments with more effective consultative process and elimination of political influence. In other words, the Commission recommended a decisive role to the judiciary in the matter of appointments and transfers of judges through a collegial decision-making process.

Judicial Interpretation

The question of selection and appointment of the Judges is crucial to the maintenance of independence of the judiciary. If the final power in this respect is left with the executive, then it is possible for the executive to subvert the independence of the judiciary by appointing pliable judges.

The Constitution does not lay down a very definitive procedure for the purpose as it merely says that the President is to appoint Supreme Court Judges in consultation with the Chief Justice and "such" other Judges of the Supreme Court and of the High Court's as "the President may deem necessary" [Article 124(2)]. Similarly, Article 217(1) says that the President is to appoint the High Court Judges in consultation with the Chief Justice of India, the Governor of the State, and the Chief Justice of the High Court concerned. It was not clear from this provision as to whose opinion was finally to prevail in case of difference of opinion among the concerned persons. This important question has been considered by the Supreme Court in several cases.

S.P. Gupta v Union of India

In 1982, the matter regarding appointment of the High Court Judges as well as of the Supreme Court Judges came before the Supreme Court by way of public interest litigation in the famous case of ***S.P. Gupta v Union of India***[22].

Several writ petitions were filed in the various High Courts under Article 226 by several lawyers practising in the various High Courts. All these petitions were transferred to the Supreme Court for disposal. The main question considered by the Court was: of the several functionaries participating in the process of appointment of a High Court Judge whose opinion amongst the various participants should have primacy in the process of selection?

[21] Swapnil Tripathi, "April 26-Revisiting the Black Day of Indian Judiciary", available at http://www.livelaw.in/april-26-revisiting-black-day-indian-judiciary (April 26, 2018) (Time – 09:00 PM).

[22] S.P. Gupta v Union of India AIR 1982 SC 149

The majority[23] took the view, in substance, that the opinions of the Chief Justice of India and the Chief Justice of the High Court were merely consultative and that "the power of appointment resides solely and exclusively in the Central Government" and that the Central Government could override the opinions given by the constitutional functionaries (viz., the Chief Justice of India and the Chief Justice of the concerned High Court). This meant that the view of the Chief Justice of India did not have primacy in the matter of appointment of the High Court Judges; that the primacy lay with the Central Government which could decide after consulting the various constitutional functionaries and that the Central Government was not bound to act in accordance with the opinions of all the constitutional functionaries consulted, even if their opinions be identical.

The majority thus gave a literal meaning to the word 'consultation' in Articles 124(2) and 217(1) in relation to all consulates and final decision in the matter was left in the hands of the Central Executive. The majority thus took an extremely literal and positivistic view of Article 217(1). In reality, this view made consultation with the Chief Justices inconsequential in the matter of appointment of High Court Judges.

However, even after *Gupta*, the Central Government always maintained that it had, as a matter of policy, not appointed any Judge without the name being cleared by the Chief Justice of India.

Supreme Court Advocates-on-Record Association v Union of India

Subsequent to Subhash Sharma case, the question of the process of appointing the Supreme Court and High Court Judges came to be considered by the Supreme Court in ***Supreme Court Advocates-on-Record Association v Union of India***[24]. A public interest writ petition was filed in the Supreme Court by the Lawyer's Association raising several crucial issues concerning the Judges of the Supreme Court and the High Court's and the court has sought to interpret the constitutional provisions concerning the Supreme Court and the High Court's so as to strengthen the "*foundational features and the basic structure of the Constitution*". The petition was considered by a bench of nine Judges. The majority judgement was delivered by J.S. Verma, J., on behalf of himself and Yogeshwar Dayal, G.N. Ray, A.S. Anand and Bharucha, JJ. The majority now gave up literal interpretation and adopted a wider meaning of the constitutional provisions concerning the judiciary. The word "*consultation*" in Articles 124(2) and 217(1) was given a broad meaning.

The court considered the question of the primacy of the opinion of the Chief Justice of India in regard to the appointment of the Supreme Court and High Court Judges. The court emphasized that the question has to be considered in the context of achieving *"the constitutional purpose of selecting the best" suitable for composition of the Supreme Court and the High Court's "so essential to ensure the independence of*

[23] Bhagwati, Fazal Ali, Desai and Venkataramiah, JJ. The Bench consisted of five Judges.

[24] Supreme Court Advocates-on-Record Association v Union of India AIR 1994 SC 268: 1993(4) SCC 441

the judiciary and thereby to preserve democracy"[25].

Thus, the majority view expressed in S.P. Gupta –

i. That the last word in appointment of Supreme Court and High Court Judges rests with the government; and

ii. That the Chief Justice of India has no place of primacy in selection of Supreme Court and High Court Judges was now overruled.

Referring to the '*consultative*' process envisaged in Articles 124(2) and 217(1) for appointment of the Supreme Court and High Court Judges, the court emphasized that this procedure indicates that the Government does not enjoy 'primacy' or "absolute discretion" in the matter of appointment of the Supreme Court and High Court Judges[26].

The Court has pointed out that the provision for consultation with the Chief Justice of India was introduced because of the realisation that the Chief Justice of India is best equipped to know and assess the worth of the candidate and his suitability for appointment as a Supreme Court and High Courts Judges, and it was also necessary to eliminate political influence.

The court has also emphasized that the phraseology used in Article 124(2) and 217(1) indicates that it was not considered desirable to vest absolute discretion or power of veto in the Chief Justice of India as an individual in the matter of appointments so that there should remain some power with the Executive to be exercised as a check, wherever necessary. Accordingly, the court has observed[27]:

"The indication is that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight, the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word 'consultation' instead of 'concurrence' was used, but that was done merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as an individual".

Thus, in the matter of appointment of a Supreme Court and High Court Judges, *the primary aim ought to be to reach an agreed decision taking into account the views of all the consultees giving the greatest weight to the opinion of the Chief Justice of India. When a decision is reached by consensus, no question of primacy arises. Only when conflicting opinions emerge at the end of the process, the question of giving primacy to the opinion of the Chief Justice arises, "unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable"*[28].

The court has further clarified that *"the primacy of the opinion of the Chief Justice of India" is, in effect, "primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his*

[25] Supreme Court Advocates-on-Record Association v Union of India AIR 1994 SC 268 at 425

[26] Ibid at 429

[27] Ibid at 430

[28] Supreme Court Advocates-on-Record Association v Union of India AIR 1994 SC 268 at 430

senior colleagues who are required to be consulted by him for the formation of his opinion"[29]. The Chief Justice of India is expected "to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court". The majority of the Judges has emphasized that this process would achieve the constitutional purpose of selecting the best available for composition of the Supreme Court and the High Court's which is so essential to ensure the independence of the judiciary, and, thereby, to preserve democracy[30].

Emphasizing upon this aspect further, "the court has said that the principle of non-arbitrariness is an essential attribute of the Rule of Law and is all pervasive throughout the Constitution. An adjunct of this principle is "the absence of absolute power in one individual in any sphere of constitutional activity. Therefore, the meaning of the "opinion of the Chief Justice" is "reflective of the opinion of the judiciary" which means that "it must necessarily have the element of plurality in its formation". The final opinion expressed by the Chief Justice is not merely his individual opinion but "the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function"[31]. The court has observed in this connection[32]:

"Entrustment of the task of appointment of superior Judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive much less in any individual, be the Chief Justice of India or the Prime Minister".

The court also laid down the following propositions in relation to the appointment of the Supreme Court and High Court Judges:

1. Initiation of the proposal for appointment of a Supreme Court Judge must be by the Chief Justice of India and in case of appointment of a High Court Judge it must be made by the Chief Justice of the concerned High Court.
2. In exceptional cases alone, for stated and cogent reasons, disclosed to the Chief Justice, indicating that the person who was recommended is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice and other Supreme Court Judges who have been consulted in the matter, on reiteration of the recommendation of the Chief Justice of India, the appointment should be made as a healthy convention.
3. No appointment of any Judge to the Supreme Court or any High Court can be

[29] Ibid at 431
[30] Ibid at 425
[31] Supreme Court Advocates-on-Record Association v Union of India AIR 1994 SC 268 at 434
[32] Ibid at 434-435

made by the President unless it is in conformity with the final opinion of the Chief Justice formed in the manner indicated above.

4. As the President acts on the advice of the Council of Ministers in the matter of appointment of a Supreme Court and High Courts Judge, the advice of the Council of Ministers is to be given in accordance with Article 124(2) and 217(1) as interpreted by the Supreme Court.

5. All consultation with everyone involved, including all the Judges consulted, must be in writing. Expression of opinion in writing is an inbuilt check on exercise of the power and ensures due circumspection.

6. Appointment to the office of Chief Justice of India ought to be of the senior-most Judge of the Supreme Court considered fit to hold the office. "The provision in Article 124(2) enabling consultation with any other Judge is to provide for such consultation, if there be any doubt about the fitness of the senior-most Judge to hold the office, which alone may permit and justify a departure from the long-standing convention" i.e., to appoint the senior-most Supreme Court Judge to the office of the Chief Justice of India.

7. "*Inter se* seniority among Judges in their High Court and their combined seniority on all India basis" should be "kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court".

The main purpose underlying the law laid down by the Supreme Court in the matter of appointing Supreme Court and High Court Judges was to minimise political influence in judicial appointments as the Central Government could no longer appoint a Judge bypassing the Chief Justice of India as well as to minimise individual discretion of the constitutional functionaries involved in the process of appointment of the Supreme Court and High Court Judges. The entire process of making appointments to high judicial offices is sought to be made more transparent so as to ensure that neither political bias nor personal favouritism nor animosity play any part in the appointment of Judges.

In conclusion, the confluence of equity, fairness, and independence forms the cornerstone of the Indian judiciary's efficacy. Upholding these principles requires continuous efforts to streamline processes, address societal biases, and safeguard the judiciary's autonomy. By embracing this trifecta, the Indian judiciary can continue to serve as a beacon of justice and uphold the rights of all citizens impartially.

In our quest for a just society, the Indian judiciary remains a beacon of hope, tirelessly upholding the ideals that define the nation's character. As we walk alongside this journey, we carry with us the profound understanding that equity, fairness, and independence are not mere concepts – they are the embodiment of our shared vision for a society founded on the principles of justice, equality, and dignity for all.

Suggestions for promoting Independence of Judiciary, Constitutionalism, Constitutional Morality and Legitimacy

1. Primacy of Judiciary in appointment of Judges is integral part of Independence of Judiciary which is constitutional part of the basic structure of the constitution flowing from interpretation the term

consultation. Hence the present system of **Collegium** should be continued.

2. The executive should not be allowed in appointing Judges under any other method like NJAC act 2014.
3. Basic structure doctrine is to be applied to any constitutional provision for effective enforcement of **Fundamental Rights** and **Directive Principles Of State Policy**
4. Constitutional Supremacy should be recognized avoiding any attempt to establish Parliamentary Supremacy.
5. Judicial Review as a basic feature should be honored under constitution of India.