A Step into the Turbulent Stream: Judicial Appointments in India

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Abstract

Over the past century, the Supreme Court of India has gradually evolved from being restraint to being activist. This shift in the attitude of the judges took off during the period of emergency in the mid 1970's. In an effort to curb executive dominance, the judiciary began to take it upon itself to expand its role in administering justice. In the pursuance of its activist role, the judiciary has often overstepped its boundaries and ventured into the business of the executive wing. This calls for serious questions regarding their independence and accountability.

The paper ventures into the appointment of judges in the Supreme Court and High Courts in order to examine the extent of judicial independence in the country. However, on tracing the development of judicial appointments in India, there has been a steady shift from absolute judicial independence to judicial supremacy in appointments. With the apex court decisions from 1982 to 1998, there has been a clear reliance on the independence of the judiciary. However, with the growth of nepotism, secrecy and executive interference in matters of appointment, the Parliament has introduced the Judicial Appointments Commission Bill, 2013.

Although, the Bill symbolizes national awakening to executive dominance, it only provides superficial answers to the flaws of the Collegium system. This paper critically analyses the Bill and provides for an alternative means to achieve the desired end – to strike a balance between the doctrine of separation of powers and the independence of judiciary. Further, this paper also lays emphasis on the importance of accountability and transparency in the judicial organization.

Key Words: judicial, activism, appointment, councils, collegium, JAC Bill, 2013

I. INTRODUCTION

There is no judiciary in the world that exercises complete judicial restraint and applies only the law as it is to a case. India is no exception to this. Judicial activism exists in India, up to the extent in fact, that some regard the Indian judiciary to be the most activist and most powerful in the world.[1]

To define judicial activism is no mean feat. Some state that it is the use of judicial power to articulate and enforce what is beneficial for the society in general and people at large.[2] Judicial restraint, the converse of judicial activism has been defined by Dworkin below.

> The program of judicial restraint ... argues that courts should allow the decisions of other branches to stand, even when they offend the judges' own sense of principles required by the broad constitutional doctrines, except when these decisions [of the other branches] . . . would violate the provisions of any plausible interpretation [of the Constitution][3]

Thus, the programme of judicial activism holds that courts should void the decisions of the other branches of government whenever they offend the judges' own sense of principles required by the Constitution, even though the decisions of the other branches were backed by admittedly reasonable understandings of the Constitution.[4] It is also important to know when a judge is being activist or what kind of decision is an activist decision. An activist decision is one where there is a lack of judicial deference to other branches of government and/or a lack of

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[1] S. P. SATHE, JUDICIAL ACTIVISM IN INDIA TRANSGRESSING BORDERS AND ENFORCING LIMITS 5 (Oxford University Press, 2nd ed. 2002).

[2] Lipika Sharma, Judicial Activism in India: Meaning and Implications, available at http://www.academia.edu/2148025/JUDICIAL_ACTIVISM_IN_INDIA_MEANING_AND_IMPLICATIONS (last visited on 26 August, 2013).

[3] Stanley Brubaker, *Reconsidering Dworkin's Case for Judicial Activism*, The Journal of Politics, Vol. 46, No. 2, 503, 504 (1984).

[4] *Id.*

proper respect for judicial precedent and the principle of *stare decisis*.[5] Judicial activism may be negative[6] or positive[7]. Executive inaction is one of the prime justifications for activism in India. Normally, the judiciary's power is limited to passing directions to the government to remedy a lacuna in the law. However, it may not take over the role of the legislature as it violates the theory of separation of powers. India has been witness to a judiciary-executive tussle from the mid 1960's. The trade-off between judicial independence and separation of powers has remained unresolved till date.

On a close inspection of how the judiciary has evolved over the past century, a distinct variation in the degree of judicial activism is identifiable. From the pre-independence period to the present, the judiciary has grown in its understanding of justice and how it may be achieved. It is a settled notion that the role of the judiciary is to administer justice through interpretation of law in force. However, when such law falls short of justice, is it legitimate for a judge to restore the same?

Before discussing judicial activism in India, it is imperative for us to have an understanding of judicial review, which is one of the major reasons why judicial activism would have any existence at all. Judicial review is the power of the judiciary to check that the other two legs in the three legged stool, that is the legislature and the executive, do not act *ultra vires* their jurisdiction[8]. The British implemented judicial review in all the dominions under their rule, and India was no exception. However, it is interesting to note that judges at the time hardly exercised this power of judicial review, and on the contrary exercised judicial restraint to a towering

[5] John Hagan, *Patterns of Activism on State Supreme Courts*, Publius, Vol. 18, No. 1, 97, 98 (1988).

[6] Dred Scott and Lochner are considered to be examples of negative judicial activism because they involved the restriction of rights to a certain group of persons in society. Dred Scott upheld slavery and Lochner upheld the employment of young children. [Dred Scott v. Sanford 60 US 393 (1856) and Lochner v. New York 198 US 45 (1904)].

[7] Brown (prevention of segregation on the basis of colour in schools) is considered as an example of positive legal positivism as it involved the furtherance of rights of certain disadvantaged persons in society. An example of positive judicial activism may also curb the absolute power of the State or facilitate access to justice. [Brown v. Board of Education 347 US 483 (1954)].

[8] S. P. SATHE, *supra* note 1 at 5.

degree. It is said that the British had trained judges then that Parliament was the more powerful part in the 'triumvirate' government[9].

II. PHASES OF JUDICIAL ACTIVISM IN INDIA

When India became an independent nation, the Constitution was regarded as the supreme document by all wings of the Government. The Judiciary remained highly restraint and refused to read into the law.[10] They regarded the Parliament as the only 'law maker', whose intention was to be ascertained from the language used to promulgate the law.[11] *A. K. Gopalan's case*[12] was a clear indication of how the judiciary relied heavily on the literal rule of interpretation, adjudging that it was not the job of the judiciary to check the reasonability of an enacted law.[13] Further, cases like *Champakam Dorairajan v. Government. Of Tamil Nadu*[14], portrays the Court's belief that justice could be administered by established law, and that it would be *ultra vires* for it to step beyond the said law.[15] Slowly but steadily, the judiciary's understanding of its role began to evolve. It started being more assertive post 1960's, much to the dislike of the executive. The Court began playing the role of a vigilante that strived to vindicate the rights of the people. However during the 1970's, the executive began exercising 'judicial control' by unreasonably transferring judges.[16] In 1973, this control was fuelled by the then Law Minister, Mohan Kumaramangalam, who proposed that the political philosophy of judges, as determined by the government, would be a relevant criterion for appointment of judges.[17] This immensely

[9] *Id.*. Academics have come up with an explanation as to why judges exercised judicial restraint during British rule and even a few years after. In England, since there is no written constitution and the Parliament is supreme, no judicial review of legislation enacted by the Parliament exists. Subsequent European charters (especially those on human rights) required English courts to point out to Parliament that if a legislation violated certain human rights. However it could do just that, and not declare the legislation void. Following this, when the British introduced judicial review in their dominions, they conditioned judges in exercising maximum judicial restraint and in observing the supremacy of Parliament.

[10] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 173 (Vol. 1, Universal Law Publishing Co., 4th ed., 2012).

[11] M. P. V. Sundararamier and Co. v. A. P. (1958) S.C.R. 1422, 1478.

[12] AIR 1950 SC 27.

[13] SEERVAI, *supra* note 10 at 172.

[14] (1951) SCR 525.

[15] P. K. Majumdar and R. P. Kataria, Commentary on the Constitution of India 643 (Vol. 1, Orient Publishing Company, 10th ed., 2009).

[16] S. P. Gupta v. President of India AIR 1982 SC 149.

[17] Mohan Kumaramangalam, *Judicial Appointments: An Analysis of the Recent Controversy over the Appointment of the Chief Justice of India* 83 (Oxford & IBH Pub Co, New Delhi 1973).

increased executive discretion in the matter of judicial appointment, therefore jeopardising the independence of the judiciary.

Executive submissiveness began affecting judicial pronouncements, which often supported the men in authority. It was observed in *A. D. M. Jabalpur*[18] that the life and personal liberty of the citizens were at the mercy of the State.[19] However subsequently, the Supreme Court rued its decision in cases like the aforementioned one, where the fundamental rights of the people were not a priority.[20] It went on (post *Maneka Gandhi*[21]) to interpret the Constitution, especially A. 21, in a liberal manner and held that it included all those 'residuary rights' other than the one expressly mentioned in A. 21. Other provisions of law including A. 14, 19 and 32 were interpreted widely in order to provide freedom to the press[22], protect the environment[23], nurture personal liberty[24], making the court *aam aadmi* friendly.[25] This move of the Supreme Court was directed to undo the restraint behaviour of the Courts during the Emergency.

The court in *Maneka Gandhi v. Union of India*[26] altered the whole dynamics with respect to judicial activism in India. Judges began taking it upon themselves to remedy any lacunae in the statutes through their judgments. Although this step had positive intentions, their ramifications were varied. A few decisions[27] greatly affected the functioning of the executive

[18] AIR 1976 SC 1207.

[19] The Supreme Court was viewed with great disgust especially during the period of emergency, as their judgments reflected executive subordination. The court went on to hold that Art. 21 was the 'sole repository' of the right to life and the government, by law, could validly suspend the same. A.D.M. Jabalpur v. Shivkant Shukla (1976) 2 SCC 521.

[20] Supreme Court: Majority judgment in A.D.M.Jabalpur was wrong, (Dec. 31, 2010) available at: http://www.indian-advocates.com/law_and_order.asp?legal=145 (last visited Oct. 30,2103).

[21] AIR 1978 SC 597.

[22] Indian Express Newspapers (Bombay) P. Ltd. v. Union of India AIR 1986 SC 515.

[23] M. C. Mehta v. Union of India AIR 1987 SC 1086, Vellore Citizens Welfare Forum v. Union of India (1996) 5 SCC 647, Murli S. Deora v. Union of India AIR 2002 SC 40.

[24] Sunil Batra v. Delhi Administration AIR 1978 SC 1675.

[25] Hussainara Khatoon v. Home Secretary, State of Bihar AIR 1979 SC 1360, Olga Tellis v. Bombay Municipal Corporation AIR 1986 SC 180.

[26] AIR 1978 SC 597.

[27] P. V. C. Pipe Manufacturers Welfare Association of Bihar v. State of Bihar AIR 2008 SC 930, Madhav Rao Scindia v. Union of India AIR 1972 SC 530, M. C. Mehta v. Union of India (1997) AIR SCW 552 (Delhi Pollution Case), M. C. Mehta v. Union of India AIR 1987 SC 1086.

government. The independence of the Judiciary was misused as 'judicial legislation'[28] began replacing executive inaction. The theory of separation of powers intended to preserve liberty[29] and negate direct administrative subordination.[30] Furthermore, it was intended to reduce tyranny by keeping a check on legislative powers.[31] Independence and impartiality of the judiciary delimits the expression of justice and entails political influence.[32] However, judicial independence doesn't include the right of the judiciary to shake the nerve of the executive government. The role of the judiciary shifted from interpreting law to administering justice. Hence the Indian courts, through their decisions began to even out the odds that affected their functioning during the mid 1970's.

The independence of the judiciary was for the first time scrutinized in 1982 when JUSTICE S. H. SHETH filed a writ petition[33] challenging his transfer from the Gujarat High Court to the Andhra Pradesh High Court. It was the time where the judiciary was subject to immense political pressure as their transfers, promotions and retirement posts were at the mercy of the executive. Hence the period of emergency shook the independence of the judiciary especially when the judges were subservient to the executive wing.[34] However, the Government themselves admitted in the court, that the decision to transfer was made without any reason whatsoever. The judges realised the need to overcome executive dominance that pressured judicial independence for over a decade.

III. THE COLLEGIUM SYSTEM

[28] Ratan Chand Hira Chand v. Askar Nawazung, reported in 1991(3) SCC 67. The court opined that "the legislature often fails to keep pace with the changing needs and values nor is it realistic to except that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the Courts to steps in to fill the lacuna. When Courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands."

[29] SIR IVOR JENNINGS, THE LAW AND THE CONSTITUTION 22 (University of London Press Ltd., 5th ed., 1967).

[30] D.D.BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 4178 (Vol. 3, Lexis Nexis Butterworths Wadhwa, 8th ed., 2012).

[31] T.M.COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATION: THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION, 46 (Martinus Nijhoff Publishers, 2005).

[32] Union of India v. Prathiba Bonnerjea 1995 SCC (6) 765.

[33] S. P. Gupta v. President of India AIR 1982 SC 149.

[34] (1978) 1 SCR 423.

With the emergence of various apex court decisions like *Lily Thomas v. Union of India*[35], the 2G Spectrum case[36], the COAL Scam case[37] , it is clear that the judiciary has become increasingly activist over the years. While the judiciary helps weed out corruption in the country, it also infringes into policy matters, in turn affecting the doctrine of separation of powers.[38] Thus the appointment of judges has been a matter of debate and deliberation for the past decade or so. Post independence, the judges were appointed by the Union Government based on the recommendation of the Chief Justice of India, in consultation with senior judges in the court. However, with the increasing executive control over the judiciary in the 1970's, the *Judges case*[39] proposed an alternative method to the appointment of judges. The Court held that the opinion of the Chief Justice of India in the matter of appointment should not be exclusive[40] and it also vested the executive with the last word in such appointments.[41] Further many feared that the judgment affected the independence of the judiciary and failed to provide safeguards.[42]

This fear was addressed in what is known as the *Second Judges' case*[43], where a nine judge bench laid down a collegium system to appoint judges. In brief, the Chief Justices of the High Court must recommend certain judges for the appointment. This recommendation would be scrutinized by a constitutional functionary and then given to the Chief Justice of India. The Chief Justice in consultation with other senior judges of the Supreme Court may send his preferred list to the President for his assent. However, the judgment was unclear about what would constitute the 'constitutional functionary' and hence was not adopted in the form of a procedural memorandum. Further, the procedure, laid excessive powers in the hands of the Chief Justice of India in the appointment of judges. The procedure lacked transparency and accountability. However, with the *Presidential Reference (The Third Judge's case)*[44], the primacy of the CJI was diluted by a collegium consisting of five members – the CJI and four other senior judges. The

[35] AIR 2000 SC 1650.
[36] Re: Special Reference No. 1 of 2012.
[37] Manohar Lal Sharma v. The Principal Secretary & Ors. W.P.(C) No. 120 of 2012.
[38] JENNINGS, *supra* note 29 at 24.
[39] S. P. Gupta v. President of India AIR 1982 SC 149.
[40] UPENDRA BAXI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES 23 (NM Tripathi Pvt. Ltd., Bombay 1985).
[41] *Id*. at 55.
[42] ARUN SHOURIE, MRS. GANDHI'S SECOND REIGN 266-268 (Vikas Publishing House, New Delhi 1983).
[43] Supreme Court Advocates-on-Record Association v. Union of India AIR 1994 SC 268.
[44] (1998) 7 SCC 739.

collegium system however came under the scanner over the years. A critical appraisal of the collegium system in India will reveal the following.

Firstly, the collegium system is one that is shrouded in secrecy and mystery. India is probably the only democracy where judges appoint judges.[45] One is not fully aware of the criteria the collegium looks into when it comes to selecting a candidate as a Judge of the High Court or Supreme Court. The collegium is not bound to give any reasons for their decisions either. The general public is not privy to their conversations or the correspondence between members of the collegium. It also lacks accountability in rendering appointments and transparency in procedure.[46] Thus, it begs the question whether the collegium relies on a set of objective criteria or not when it comes to the appointing of judges to the higher judiciary.

It has also been alleged that the collegium system is an avenue for nepotism and favouritism when it comes to the choice of candidates. The post of Judge of a court in the higher judiciary tends to become a gift to the children of those who have, in the past, served the judiciary at various levels. Thus, it has been alleged that a considerable number of children of retired judges who once served the judiciary end up being appointed to the very same posts their parents once held, they deserving such 'largess' or not a whole new question altogether for which there can be no objective answer as this largely depends on the facts of each case.

Another demerit of the collegium system is that the true competence of the candidate can never be properly ascertained by the public (or members of the Bar for that matter) before appointment. It is meet to mention here the process of appointment of Judges to the higher judiciary in the United States. The Senate Judiciary Committee in the USA pulls out all the stops when it comes to appointing candidates for posts in the higher judiciary (such as Chief Justice and Associate Justices of the Supreme Court of the United States) by putting them through phases of rigorous, public interviews that often go on for days. The Committee will often ask candidates important questions of law and will garner the candidate's opinion on the same, a

[45] PTI, Bill on appointment of judges referred to Parliamentary panel, Sep. 15, 2013, available at: http://www.thehindu.com/news/national/bill-on-appointment-of-judges-referred-to-parliamentary-panel/article5130107.ece (last visited on Oct. 30, 2013).

[46] TR Andhyarujina, Appointment of Judges by Collegium of Judges, The Hindu, Dec. 18, 2009 available at: http://beta.thehindu.com/opinion/op-ed/article66672.ece (last visited on Mar. 13, 2011).

process after which the Committee votes on whether the candidate is fit and competent for appointment or not.

There are also no procedural guidelines for the conductance of the collegium when they deliberate. Thus in a way, the collegium simply rolls with the punches when it comes to appointment of judges as their decision making process is not time bound or regulated, much like their conduct in the deliberating process. As a consequence, it is unknown if all members of the collegium had their say or not in the decision making process. There not being a limit of time for their decision has led to a large number of vacancies in the higher judiciary today. It is not uncommon to find a host of High Courts not functioning at their full strength, leading to a backlog of cases and delay in disposing of matters. Chief Justice of India, JUSTICE P. SATHASIVAM, has stood up in defence for the collegium system. He said that the present system is not completely secretive as it involves the discretion of extra-judicial members like the Law Minister, the Prime Minister, the President, the Intelligence Bureau and other eminent people.[47] However, in practice, these members either give their consent to the selection as they often are unaware of the credibility of the judges, or their say in the appointment process in limited to a mere opinion, which may be evaded.

Hence, the Central Government has woken up to the inadequacies of the collegium system and has initiated the 120th Constitutional Amendment Act, 2013 amending A.124[48] and A. 217 of the Constitution and also passing the Judicial Appointments Commission Bill, 2013 (*hereinafter referred to as* JAC Bill). The Bill seeks to establish a Judicial Appointments Commission (*hereinafter referred to as* JAC) for the purpose of recommending persons for appointment as Chief Justice of India and other Judges of the Supreme Court as well as the High Court. The essay attempts to provide a critical appraisal of the bill and aims to provide

[47] PTI, Bill on Appointment of Judges Referred to Panel, Sep. 15, 2013, The Hindu, available at: http://www.thehindu.com/news/national/bill-on-appointment-of-judges-referred-to-parliamentary-panel/article5130107.ece (last visited on Oct, 24. 2013).

[48] 120th Constitutional Amendment Bill, 2013 introduced Article 124 which reads, "124A. (1) There shall be a Commission to be known as the Judicial Appointments Commission. (2) Parliament may, by law, provide for— (a) the composition of the Commission; (b) the appointment, qualifications, conditions of service and tenure of office of the Chairperson and other Members of the Commission; (c) the functions of the Commission; (d) the procedure to be followed by the Commission in discharge of its functions; (e) the manner of selection of persons for appointment as Chief Justice of India and other Judges of the Supreme Court, Chief Justices and other Judges of High Courts; and (f) such other matters as may be considered necessary.'

recommendations for a comprehensive Commission that strikes an equitable balance between the theory of separation of powers and the preservation of an independent judiciary.

IV. CRITICISMS OF THE JAC BILL, 2013

The 120th Constitutional Amendment Bill, 2013 has been subject to a lot of criticism from eminent personalities. The paper attempts to identify the substantive loopholes in the Bill that greatly affect the independence of the judiciary.

1. Equal Powers of both the Executive as well as the Judiciary

The Judicial Appointments Committee consists of six members in total. The executive members include the Union Law Minister and two other eminent persons, to be nominated by the collegium consisting of the Prime Minister, Chief Justice of India and the Leader of Opposition in the Lok Sabha.[49] The judicial members include the Chief Justice of India[50], the *ex-officio* Chairman and two other Supreme Court judges, next to the Chief Justice in seniority.[51] Therefore the intent of the legislature was to ensure that the executive as well as the judiciary is placed at an equal footing in matters of judicial appointments.[52] Further, Union Law Minister Kapil Sibal said in a parliamentary debate, "*Appointment of judges is the role of the executive and not the judiciary*."[53] The attitude of the executive wing seems power thirsty. Agreed, the collegium system was secretive, but injuring the independence of the judiciary, does not undo the fallacies of the previous system.

[49] The Judicial Appointments Commission Bill, 2013, § 3(1)(d).
[50] The Judicial Appointments Commission Bill, 2013, § 3(1)(a).
[51] The Judicial Appointments Commission Bill, 2013, § 3(1)(b).
[52] Cl. 7, Statements of Object and Reasons, The Judicial Appointments Commission Bill, 2013, reads : "The proposed Bill would enable equal participation of Judiciary and Executive, make the system of appointments more accountable, and thereby increase the confidence of the public in the institutions."
[53] Sandeep Joshi, Elders Clear Bill to Appoint the Judicial Appointments Committee, The Hindu, Sep. 5, 2013 available at: http://www.thehindu.com/news/national/elders-clear-bill-to-set-up-judicial-appointments-commission/article5096598.ece (last accessed on Oct. 28, 2013).

The judiciary must have a dominant, but not exclusive say in the appointment of judges. Mr. Arun Jaitley, the leader of opposition in the Upper House, opined that the Commission should be based on the twin considerations of judicial primacy and executive participation.[54] Whatever form the selection and recommendatory mechanism may take, it is essential that judicial appointments be made independently and transparently, based on merit and without improper considerations, political or otherwise.[55] However, by placing the judiciary at par with the executive in matters of appointment, the entire institution of justice is going to remain scarred by the sword of the executive. The judicial prominence in matters of appointment has been accepted even in the European Charter on the Statute of Judges, 1998.[56] Therefore, the constitution of the commission must consist of a greater number of judicial members and cut down on executive dominance.[57]

2. Constitution of the Commission

One of the most draconian provisions of the Bill is S. 6. The clause provides that the Central Government may appoint any number of officers to the Commission, either by a simple majority or by an ordinance, for the proper functioning of the provisions of the Bill.[58] The law does not provide for any cap on the number of officers, and leaves it to the sole discretion of the executive to decide the appointment of such officers or employees. The officers and employees of the

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[54] Arun Jaitley, Judicial Appointments, Dec. 20, 2012, available at: http://www.arunjaitley.com/en/my-opinion-inside.php?id=150&mode=Read&icatId=28 (last visited on Oct. 26, 2013).

[55] Dato Param Cumaraswami, Tension between judicial independence and judicial accountability, Asian Human Rights Commission, available at: http://www.humanrights.asia/resources/journals-magazines/article2/0205/tension-between-judicial-independence-and-judicial-accountability (last visited on Oct. 21, 2013).

[56] In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the Statute envisages the intervention of an authority independent of the Executive and Legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representative of the judiciary. (European Charter on the Statute of Judges, General Principles, p.5, DAJ/DOC (98) 23, available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf (last visited on Oct. 29, 2013).)

[57] J. Venkatesan, "Withdraw the Judicial Appointments Commission Bill" The Hindu, Oct. 16, 2013 available at: http://www.thehindu.com/news/national/withdraw-judicialappointmentscommissionbill/article5237968.ece (last visited on Oct. 24, 2013).

[58] "6. (1) The Central Government may appoint such number of officers and other employees as it may consider necessary for the discharge of functions of the Commission under this Act. (2) The terms and other conditions of service of the officers and other employees of the Commission appointed under sub-section (1) shall be such as may be prescribed."

Judicial Appointment Commission will be government servants and act as the eyes and ears of the government.[59] They are required to perform the 'functions'[60] of the Bill which include recommending names for the post of Chief Justice and Judges of both the High Courts and the Supreme Court. Hence, the executive reserves the power to determine the strength, conditions of service and the representation ratio of officers from each wing of the government. It is opined that this discretion may be abused by ruling parties in the long run. The law should be framed such that it rules out every scope for the abuse of power.

Further, the Supreme Court held that 'independence of the judiciary' is the basic feature of the Constitution, which cannot be amended by the Parliament.[61] Thus, the constitutional amendment raises crucial questions with regard to the legitimacy of the Union Legislature to enact the same. Even if the most basic features of the Constitution can be amended by the Parliament, it raises concerns regarding the consistency, uniformity and stability of the laws in the country. This move by the Parliament also threatens the rule of law in the country. Is there any law at all that would be immune from parliamentary interference? The answer is steadily heading towards a 'no'.

3. Accountability of the Commission

The Bill is constituted under an ordinary law and the composition of the Committee has not been incorporated in the Constitution. This makes it easily amenable to change at the hands of the Government, as opposed to if it were incorporated as part of the Constitution. It may thus be inferred that such a committee may lead to more accountable judges, but definitely leads to ones that are less independent.[62]

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[59] K.N.Bhat, Beware of the 120th Amendment, The Asian Age (Sep. 07, 2013) available at: http://www.asianage.com/columnists/beware-120th-amendment-819 (last visited Oct. 18, 2013).

[60] The functions under the Bill include, "4. It shall be the duty of the Commission,— (a) to recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts; (b) to recommend transfer of Chief Justices of High Courts and the Judges of High Courts from one High Court to any other High Court; and (c) to ensure that the person recommended is of ability, integrity and standing in the legal profession."

[61] Keshavnanda Bharati v. State of Kerala AIR 1973 SC 1461.

[62] Nuno Garoupa and Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, The American Journal of Comparative Law, Vol. 57, No. 1, 123 (2009).

There is also one provision of the Bill that instantly raises eyebrows. S. 10 states that no act or proceedings of the Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy in, or defect in the constitution of, the Commission. Would this mean that if there were fewer judicial members in the Commission for some reason, than executive ones (thus providing for executive dominance in the appointment of a candidate), then such action of the Commission cannot be questioned? This is a blatant attack on the independence of the judiciary.

Nowhere in the Bill, does it provide for a check on the decisions of appointment. The only remedy available is by filing a writ of *quo warranto*[63] . However, since there is no objective and transparent criterion that is used for such appointment, the writs will be dismissed. The merits of the case will be decided by looking into the minimum statutory requirements[64] to be a judge, and not why one judge was preferred over the other. Further, the Commission is not bound to disclose reasons for its decision. Thus there needs to be sufficient mechanisms in place where the Commission must disclose the reasons why a particular judge was appointed over the others. Unless there are avenues to check accountability, the element of suspicion will always haunt the Commission.

4. Executive has the last word

The Bill also provides certain law making powers to the government. S. 12[65] of the Bill, allows the legislature to make procedural rules in regard to recommendation and short listing of candidates. Thus, the extent of parliamentary overreach into judicial independence is colossal. The Parliament may, by a simple majority decide the procedure to be followed by the

[63] THE CONSTITUTION OF INDIA, Art. 32, 226.
[64] Hari Bansh Lal v. Sahodar Prasad Matho and Ors. (2010) 9 SCC 655.
[65] 12 (1) The Commission may, by notification in the Official Gazette, make regulations consistent with this Act and the rules made thereunder to carry out the provisions of this Act.
(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:— (a) the procedure for recommendation with respect to appointment of Judge of a High Court under section 5; (b) the procedure for short-listing of candidates for considering their appointment as Judges of the Supreme Court under sub-section (2) of section 8; (c) the procedure for short-listing of candidates for considering their appointment as Judges of the High Court under sub-section (3) of section 8;
(d) the procedure to be followed by the Commission in discharging of its functions under sub-section (2) of section 9; (e) any other matter which is required to be, or may be, specified by regulations or in respect of which provision is to be made by regulations.

Commission in appointing judges, which may breed nepotism. The mischief must be nipped in the bud. Although, such procedure can be challenged in the court of law, the real problem will only be addressed by tackling the provision that provides for such arbitrary powers to one wing of the government over the other.

Further, the Bill also provides that any rule made by either the Commission or the Government, will be laid down before both houses of the Parliament. The houses may make any modifications to the rules of may even decide to reject it. Furthermore, the Commission need not be consulted before making any modifications to the rules and regulations. Thus, the bill is draconian and unconstitutional[66], and has no place in a democratic society. Manan Kumar Mishra, the Chairman of the Bar Council of India, opined that this move is aimed at taking revenge against the Supreme Court for its activist role in the recent years in exposing corruption cases within the executive.[67]

V. RECOMMENDATIONS

There is no doubt that the collegium system has to be liberated and made transparent, but the JAC, in its present form does not provide the best means towards that end. Therefore, the paper provides an alternative to the proposed Commission. It is opined that the Commission must consist of greater judicial representation, amplified accountability, transparent selection process and negligible executive discretion. Both the collegium system as well as the proposed JAC do not provide for the same. However, the present system may be retained with a considerable amount of modifications in order to overcome the criticisms identified above.

The Bar Council of India has recommended the setting up of a Central Advisory Committee comprising the PM or his/her nominee or the Union Law Minister; the Leader of the Opposition in either of the *Lok Sabha* or the *Rajya Sabha* or his nominee; the Attorney-General; a representative of the Bar Council of India and a representative of the Supreme Court Bar Association. The Committee might be formed by the apex court itself to aid and advise the

[66] PTI, Bill on Appointment of Judges Referred to Panel, Sep. 15, 2013, The Hindu, available at: http://www.thehindu.com/news/national/bill-on-appointment-of-judges-referred-to-parliamentary-panel/article5130107.ece (last visited on Oct, 24. 2013).

[67] Staff Reported, Advocates Against Judicial Appointments Commission Bill, The Hindu, (Aug. 18, 2013) available at: http://www.thehindu.com/news/cities/Madurai/advocates-against-judicial-appointment-commission-bill-bci/article5034920.ece (last accessed on Oct. 25, 2013).

collegium for appointment of Supreme Court Judges.[68] Although, this system will help incorporate executive discretion, such discretion will only be recommendatory and not binding. Further, the appointment of three out of the six members of the Committee is in the hands of the very same collegium, further diluting executive opinion. A personal discussion with the Advocate General of Karnataka, Prof. Ravivarma Kumar, revealed that the collegium system is nothing but a system "of the judiciary, by the judiciary and for the judiciary."[69] He further said that there exists no accountability, and on filing a writ of *quo warranto* questioning the selection, the very same judges decide the matter. Therefore, accountability is quintessential for the smooth functioning of a democracy.[70]

1. Ensuring Accountability:

The people have a right to know every public act, everything that is done in a public way, by their public functionaries.[71] The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.[72] The Commission must not only disclose their decision, but must give adequate reasons for their appointment. Reason erases doubt and favouritism. The Bill should contain provisions for an appeal against the decision of the JAC and such an appeal will lie before judges who have either not been appointed by the Commission or who have retired from service. Further, the bill must also require that the Commission disclose all objective criteria used to appoint judges and provide a chart with the filled in criteria of all the recommended candidates. This will help the public compare and contrast the criteria used in the appointment, thus bringing in transparency into the system.

The Commission must also make rules with due effect, providing for the objective criteria used to appoint judges. The criteria must include seniority, fields of specialization, number of publications, number of conferences attended, number of papers presented, number of cases decided – reported and unreported, academic qualifications, number of decisions overruled

[68] Venkatesan, *supra* note 57.
[69] Prof. Ravivarama Kumar, Advocate General of Karnataka, (personal communication, Oct. 26, 2013).
[70] *Id.*
[71] State of UP v. Raj Narain, AIR 1975 SC 865.
[72] Dr. E. Venkatesu, *Right to Information in India*, Paper was presented in national seminar on 'Human Rights in the era of Globalization', Nov. 3-4, 2006, Department of Political Science, University of Hyderabad, Hyderabad.

by the Supreme Court, number of decisions upheld by the Supreme Court, medical condition, average time taken to dispose cases, and so on. Once such criteria are made clear, it minimises the extent of subjectivity in the decision making process.

Much like the Senate Judiciary Committee in the United States, candidates can be interviewed publicly so that it is open to all to gauge his competence. Once, the judges have been shortlisted, before the final appointments are made, the judges must be publically interviewed by the Commission. This will ensure three things. Firstly, the credibility of the judges can be determined by one and all. Secondly, these interviews may be useful for legal aspirants to understand the mindset of a judge and to acquire more knowledge. Lastly, it weeds out any scope for secrecy and suspicion.

Further, the JAC itself must also be given charge to tackle the issues of judicial accountability. The functions of the proposed Commission that is to be set up under the Judicial Accountability Bill, 2013[73] must be integrated with the JAC. This way, the ones who appoint judges themselves would be aware of the irregularities in the system. This will help in better appointment standards and a better solution to judicial miscarriage. The impeachment system in India[74] has been reserved only for extreme cases. Impeachment proceeding have been initiated only twice in sixty years of independence.[75] Supreme Court decisions are not infallible, but are final. Thus, judges that deliver paid judgments and erroneous decisions must be made accountable for the same. A complaint registered against a judge must be placed before the Commission, and enquiry orders may be initiated.

2. An International Perspective:

In the United States, at the State level, judges are appointed by 'Merit Commissions'.[76] Traditionally, judges would either be appointed by politicians or would be elected by the general

[73] The Judicial Standards and Accountability Bill, 2010. Ministry of Law and Justice, (Introduced on Dec. 01, 2010). The Bill has been severely criticised as it harms the independence of the judiciary. This is because the Oversight Committee comprises exclusively of executive members and also that the bill does not provide appeal provisions for the judge. (See Judicial Standards and Accountability Bill, 2013, available at: http://www.prsindia.org/billtrack/the-judicial-standards-and-accountability-bill-2010-1399/ (last visited on Oct. 21, 2013)).

[74] THE CONSTITUTION OF INDIA, Art. 124 (4).

[75] Lavika Gupta, Impeachment of Judges, (Aug. 22, 2011) available at: http://www.lawyersclubindia.com/articles/IMPEACHMENT-OF-JUDGE--3952.asp (last visited on Oct. 30, 2013).

[76] Supra note 62 at 113.

public, but this was done away with as it was felt that it would only be prudent to appoint judges based on merit. These Merit Commissions consist of judges, lawyers and political appointees.[77] Merit Commissions have been observed to have created high levels of judicial independence.

When it comes to appointing judges of the federal courts, such as the Supreme Court, they are nominated by the President, but are confirmed by the Senate.[78] It is apparent that this process of appointment of judges is highly politicized. Candidates are nominated based primarily on their political leanings, although it cannot be denied that their standing in law has also played a key role in their being nominated. They are subjected to confirmation hearings by the Senate Judiciary Committee where they are questioned intensively on various aspects of the law. These hearings are not done in secret, but are made public and can be accessed by anyone. It is pertinent to note here that judges appointed via this method are appointed to the federal courts where the tenure is life. They therefore have a greater scope to be independent once appointed, yet the fact remains that their nominations remain highly politicized.

This problem of appointing judges keeping in mind their political leanings would appear to have been taken care of by the German model. In Germany, a candidate must be selected (approved) by a two-third majority; therefore he must appeal to a wider cross section of persons across the political spectrum.[79]

In Italy, the judiciary was known for its independence. The judicial council (*Consiglio Superiore della Magistratura*) controlled all aspects of judicial appointment and promotion.[80] The judiciary remained independent to a great extent which led to a host of investigations into scams involving politicians, businessmen and bureaucrats. The question of judicial accountability was raised and the composition of the judicial council was changed in 2002 to increase the influence of the Parliament.[81] Is what happened in Italy an eerie, yet accurate

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[77] *Id.* at 114. For example, in Missouri the Merit Commission comprises the Chief Justice, three lawyers elected from the bar and three laymen nominated by the Governor.

[78] Judicial Nominations and Confirmations, United States Senate Committee of the Judiciary, http://www.judiciary.senate.gov/nominations/judicial.cfm (last visited Oct. 27, 2013).

[79] Santhosh Paul, Fading Judicial Independence, The Hindu, 26 October, 2013 http://www.thehindu.com/todays-paper/tp-opinion/fading-judicial-independence/article5274215.ece (last visited on Sep. 30, 2013).

[80] *Supra* note 62 at 108.

[81] *Id.*

parallel to what is happening in India with the Judicial Appointments Commission? Is this a prelude to a greater degree of subterfuge by similar entities in our nation, who would be emboldened by a pliant judiciary under their control?

Singapore is a country known for its progress and low rate of corruption. When it comes to the appointment of judges in Singapore, it is done by the Legal Service Commission. In Singapore, judges of the Supreme Court are appointed by the President in consultation with the Prime Minister and the Chief Justice.[82] The Commission supervises and assigns the placements of the subordinate judges, who are appointed by the President in consultation with the Chief Justice. The Chief Justice of Singapore is probably the most well paid judge in the world, with a salary of over a million U. S. dollars. It has been observed that even though the judiciary in Singapore remains independent to a high degree, it remains 'docile' in its rulings where the ruling party is involved.[83] Thus, it begs the question, is the extremely high salary of the Chief Justice a legal way of bribing him? It must also be remembered that he has a say in the appointment of judges to the subordinate judiciary as well, where the same trend as regards rulings where the ruling party is involved has been observed.

The United Kingdom has a Judicial Appointments Commission constituted under the Constitutional Reforms Act, 2005. The Indian Judicial Appointments Commission Bill is, to a great extent, modelled on this Act, except that the UK Act excludes the executive completely when it comes to the appointment of judges. The Commission in the UK comprises seven judges and magistrates, two lawyers and six laymen.[84] The Act thus preserves the independence of the judiciary to a large extent, and has been has been functioning well. The sole criterion for appointment in the UK remains to be merit and merit alone.

Having seen how different countries around the world appoint judges, one thread of commonality runs through them all, India included. When it comes to the appointment of judges, there seems to be a tussle between judicial accountability and the maintenance of the independence of the judiciary. It has been observed that where one exists, the other does not exist

[82] *Id.* at 113.
[83] *Id.*
[84] *Id.* at 112.

to high degree. Despite this, it cannot be denied that an independent judiciary is the *sine qua non* of any civilized, democratic society.

Some scholars are of the opinion that it is impossible to eliminate political pressure on independence.[85] It is obvious from the above discussion that a clear balance must be struck between judicial independence and judicial accountability. Where one is adopted in a country while completely ignoring the other, it makes for an imbalance in the distribution of powers between the organs of the State which could be detrimental to the preservation of democracy, as it would result in vesting too much or too little power in the judiciary. The two concepts are two sides of the same coin, for where there is greater judicial independence judges take on more and more important responsibilities in a democracy, giving rise to the need for there to be greater judicial accountability.[86] There is a tension between the need to 'de-politicise' the judiciary and the trend towards 'judicializing politics'[87], yet it must be remembered that in the grand scheme of things, Montesquieu's theory of separation of powers espouses that each organ of the state keep a check on the other; and not that each organ of the state control the other.

3. Constitutional Recognition:

When it comes to the Indian scenario, judges appointing judges can never be too good in the long run, as this paper has discussed in an earlier section. There is a need for an independent body that performs this all important function in a democracy like India. First off, the composition of this body must be provided for in the Constitution, lest it be determinable per the whims and fancies of a fickle government. This would ensure its independence and is declaratory of the fact that such a Commission is not the servant of the government doing its bidding, but is a constitutional body performing a constitutional function.

Another recommendation is that the executive should have no role to play in the appointment of judges. The Bill must be amended to exclude the Law Minister as if independence of the judiciary is to be maintained, the executive must be kept a safe distance away. In place of the executive members, eminent persons in the law, such as Senior Advocates or Professors of Law who've taught for a certain number of years as may be specified, can be

[85] *Id.* at 117.
[86] *Id.* at 118.
[87] *Id.*

appointed to the Commission. They must be persons who have no interests in the matter, and must have a good standing in society among right thinking individuals. They ought to be persons capable of making sound and rational decisions.

Although other jurisdictions provide for laymen to be on the Commission, this poses to be a problem as such individuals may be easily influenced by the other members of the Commission given that they are not fully acquainted with the standards by which they must gauge the candidates before them. A person who knows the law on the other hand, and has been in the field for a substantial amount of time will be aware of these standards and is therefore less likely to be influenced and is more likely to remain independent in his decision. Thus, merit will be the sole criteria for appointment. The question which then arises for consideration is who appoints these eminent persons? To ensure neutrality in appointment, both the executive and judiciary should be avoided. It is suggested that the Bar Council of India or the State be entrusted with this task, as it is an independent body.

It is also recommended that there be a State Judiciary Committee as well to function at the State Level. The records of the Department of Justice as on 25 October, 2013, prate that of the sanctioned strength of 906 High Court Judges all over India, 280 vacancies exist.[88] There is no way a single Commission could possibly effectively fill up all those vacancies within a framework of time that would allow the judiciary function at optimum capacity.

VI. CONCLUSION

There is no democracy in the world that has a strict separation of powers. India has thus far tried to insulate the judiciary from the interference of the legislature and the executive. This, as has been observed through the years, has led to the Supreme Court encroaching into the activities of the executive. Upendra Baxi calls this the 'creeping jurisdiction' of the Supreme Court. This may lead to the judiciary becoming less accountable.

However, at the cost of judicial accountability, the independence of the judiciary must not be compromised. Various other jurisdictions in the world have adopted a plethora of methods

[88] Vacancy Position, Department of Justice, Ministry of Law and Justice, available at: http://doj.gov.in/?q=node/90 (last visited on Oct, 28. 2013).

to appoint their judges. Some have created Committees with executive dominance, and others with judicial dominance. It must be remembered that a balance between the two must be struck in order to preserve the ideals of democracy, while at the same time balancing judicial independence and accountability.