# A Critical Review of National Judicial Appointments Commission, Act 2014.

## A Dissertation Submitted To

New Law College

Bharati Vidyapeeth University,

In Partial Fulfillment of the Requirement

For The Degree Of LL.M

By,

Miss. Neha K. Nagargoje

LL.M. 1Yr Course

Under The Guidance & Supervision Of

Prof. Dr. Mukund S. Sarada,

Principal, Dean New Law College, BVDU.

# CERTIFICATE

It is certified that the work incorporated in this Dissertation entitled 'Critical Review of National Judicial Appointments Commission, Act 2014' was carried out by the Research Candidate under my guidance and supervision. The material obtained from other sources has been duly acknowledged in the Dissertation. It is further certified to the best of knowledge that it is her original work.

Place: Pune

Date:

Research Guide

Dr. Mukund S. Sarada

Dean and Principal,

New Law College, BVDU.

# DECLARATION

I hereby declare that the research work done on the topic title as 'Critical Review of National Judicial Appointments Commission Act, 2014', is written and submitted under the guidance of Prof. Dr. Mukund Sarada, Dean and Principal of New law college, Bharati Vidyapeeth University.

The findings and conclusion drawn in the dissertation are based on the data and other relevant information collected by me during the period of research study for the award of LL.M. Degree in the faculty of Law from Bharati Vidyapeeth University, Pune.

I further submit that the thesis submitted on the research study is my original work and if at all there are any lapses in acknowledging the sources, the Researcher shall be liable and not the Guide.

Place: Pune

Date:

Miss. Neha K. Nagargoje

NEW LAW COLLEGE, BVDU.

# ACKNOWLEDGEMENT

I convey my heartfelt gratitude to Prof. Dr. Mukund S. Sarada, LLB., LL.M., PhD, Principal and Dean, New Law College, Bharati Vidyapeeth Deemed University, for the valuable guidance, constant encouragement and valuable suggestions, without which this present study would not have come to its present shape. I have no words to express my deep sense of gratitude towards encouragement.

I am equally grateful to all faculty members of New Law College, BVDU, for providing all required academic facilities in accompanying my research work.

At the end, I dedicate this small piece of work especially to my Dearest Father and ever so caring Mother as without their consistent encouragement, motivation, support, I would not have been able to complete this work.

**Place: Pune** **Miss. Neha K. Nagargoje**

**Date:** **LL.M. 1yr. New Law College,**

# Chapter1.
# INTRODUCTION

According to Thomas Paine, LAW IS THE KING! And there can be no one above the law.

We can come to the above conclusion from his writing in pamphlet 'common sense'.

Rule of law can be traced back to great thinkers like Aristotle who wrote "LAW Should Govern", English philosophers like Hobbes, Locke, Rousseau who created theory of 'Social contract', Montesquieu who is also known as modern day philosopher because of his work on 'Separation of Power Theory', the term 'rule of law' is derived from the French phrase 'la principe de legalite' i.e. principles of legality. This 'Rule of Law' phrase refers to a Government which is based on the legal principles that means on the law and not on the men.

The power used by the government to function should be well within the statutory ambit and should not exceed its limits and turn arbitrary, which was there in monarch times. In today's democracy our representatives, policy makers have to justify to the public at large the reasoning and the need behind the policies they make.[1] The makers

[1] Reference legal Service India.com article Rule of law Author: Chhavi Agarwal.

have to justify how their use of power is legally valid and socially just.[2]

The natural law principles derived from natural law school with the passage of time has turned from 'jus naturale' by the Romans, to 'law of god' by the medievalists, Coming ahead in time, Rousseau, Hobbes and Locke called it 'social contract' or 'natural law' to the modern concept of "Rule of law". Rule of law clearly states that every citizen is subject to the law including the law makers themselves.

Credit for popularizing the concept of 'the rule of law' in modern times is usually given to A.V. Dicey. In his book, **'The Law and the Constitution',** published in the year 1885, Dicey attributed three meanings to the doctrine of rule of law:[3]

1. Supremacy of Law: means the absolute power of law, dominance and the supremacy of it. It is opposed to the influence of arbitrary power and wide discretionary power. In Dicey's words, "wherever there is discretion, there is room for arbitrariness and that in a republic is less than under a monarchy"[4]

2. Equality before Law: the ordinary rule of law should be applicable to all the citizens evenly irrespective of

[2] Reference legal Service India.com article Rule of law Author: Chhavi Agarwal,2013
3. Reference legal Service India.com article Rule of law Author: Chhavi Agarwal,2013
[4] Reference legal Service India.com article Rule of law Author: Chhavi Agarwal,2013

caste, creed and religion. Hence everyone stands on the same footing with another before the law.[5]

3. Predominance of legal spirit: the constitution is the consequence of the rights of individuals. Courts are the guarantors, protectors of the liberty. Rights would be more secured and used properly if they are enforceable in courts rather than just being written in the constitutional document. The effective remedies for the enforcement and protection of the rights are very much important, only mere mentioning of the rights in constitution is of little use.[6]

Hence, the rule of law is a system of, rules and rights that enable fair and principle based functioning of the societies. The rule of law consists of the following four Universal principles:

1. The government and its officials as well as individuals and private entities are accountable under the law.
2. The laws must be well publicized, clear, stable, just and are applied evenly, protects fundamental rights including security of person's life and property.

[5] Reference legal Service India.com article Rule of law Author: Chhavi Agarwal
[6] Reference legal Service India.com article Rule of law Author: Chhavi Agarwal

3. The process through which laws are enacted, executed, administered is accessible, fair and efficient.[7]
4. Justice is delivered by competent machinery which consists of ethical, neutral, unbiased representatives, has adequate resources, and should be well aware of the type of community they serve.

## 1.1 INDIA AND RULE OF LAW:

The doctrine of rule of law has been adopted by our Constitution. The ideals of rule of law can be seen in the preamble of the constitution which talks about Justice, Liberty and Equality. The constitution of India is the supreme law; it's the mother of all the laws, all the laws flow through the constitution. Any law or any provision of law which is against the constitution is declared invalid.

Part 3 of the constitution guarantees fundamental rights to its citizen as well as few rights are also guaranteed to non-citizens. The rights guaranteed are equality before law, equal protection of law, freedom of speech and expression, right to life and personal liberty, freedom to choose religion, right to seek courts interference in cases of violation of fundamental rights(U/A. 32 or 226) against any government machinery (included under article 12).

7. Reference legal Service India.com article Rule of law Author: Chhavi Agarwal

Indian constitution by and large seeks to promote rule of law, parliament and state legislatures are democratically elected on the basis of adult suffrage. Constitution makes provisions guaranteeing the Independence of the judiciary. Judiciary is regarded as supreme machinery to interpret the law, protect and enforce the fundamental rights. With the changing times judiciaries' role from mere interpreter of law has changed to the vigilant protector of rights and interests of humanbeings. Judicial review has been guaranteed through various provisions and judicial pronouncements today it is inalienable facet of the constitution. It helps in placing checks on the actions of the government. So that the government should not assume to itself unfettered powers and turn arbitrary and unreasonable. In India, rule of law doctrine forms the basic structure of the constitution.[8]

## 1.2 Concept of Basic Structure:

The Supreme Court recognized BASIC STRUCTURE concept for the first time in the historic

[8] Reference legal Service India.com article Rule of law Author: Chhavi Agarwal

## Kesavananda Bharati

## v/s

## State of Kerala [9]

In this case validity of 25th amendment was challenged along with the 24th and 29th amendments. The court by majority overruled the **Golak Nath v/s State of Punjab** [10](1967) case which denied parliament the power to amend fundamental rights of the citizens. The majority held that Article 368 even before the 24th amendment contained the power as well as the procedure to amendment. In addition to it the Supreme Court declared that Article 368, did not enable Parliament to alter the Basic structure or framework of the constitution and hence parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change', or 'alter' the 'Basic structure or framework of the constitution.

In the verdict of the case each Judge laid out separately, what he thought were the basic or essential features of the constitution.

---

[9] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225: AIR 1973 SC 1461.

10. I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643.

Some of the common features are as follows[11]:

1. Supremacy of the constitution.
2. Republican and democratic form of government.
3. Secular character of the constitution.
4. Separation of power between legislature, executive and the judiciary.
5. Fundamental freedoms and directive principles.
6. Justice social, economic, political etc.

In **L. Chandra Kumar v/s Union of India[12]** (1997) case, a larger bench of seven Judges unequivocally declared;

> "That the power of judicial review over legislative action vested in the high courts under article 226 and in the Supreme Court under article 32 of the constitution and it is an integral and essential feature of the constitution, constituting part of its Basic structure."[13]

[11] I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643.

[12] L Chandra kumar v/s U.O.I. 481 of 1980

[13] L Chandra kumar v/s U.O.I. 481 of 1980

## 1.3 Independence of Judiciary in India:

The Constitution of India provides for a single integrated judicial system with the Supreme Court at the apex, High Courts at the middle (state) level and District Courts at the local level. It also provides for an independent and powerful judicial system. Judiciary in India acts as the guardian, protector of the Constitution and the fundamental rights of the people.[14]

**Salient features of Indian Judiciary are as follows[15]**

**1. Single and integrated judicial system**: In India there is a single judicial system unlike U.S.A., where a dual type of judicial system exists.

**2. Independence of judiciary:**

The Constitution of India makes judiciary truly independent.

It provides for:

(i) Appointment of judges by the President,

[14] Judiciary in India: 11 Salient Features of Indian Judiciary By K. K Ghai [http://www.yourarticlelibrary.com/essay/judiciary-in-india-11-salient-features-of-indian-judiciary/40371/]

[15] Judiciary in India: 11 Salient Features of Indian Judiciary By K. K Ghai [http://www.yourarticlelibrary.com/essay/judiciary-in-india-11-salient-features-of-indian-judiciary/40371/]

(ii) High qualifications for appointment as judges,

(iii) Removal of judges by a difficult method of impeachment,

(iv) High salaries, pension and other service benefits for judges,

(v) Independent establishment for the Judiciary, and

(vi) Adequate powers and functional autonomy for the Judiciary.

All these features together make the Indian Judiciary an independent judiciary.

## 3. Judiciary as the Interpreter of the Constitution:[16]

The Constitution of India is a longest written and enacted constitution. The right to interpret and clarify the wordings of the Constitution has been given to the Supreme Court. It is the final interpreter of the provisions of the Constitution of India.

[16] Judiciary in India: 11 Salient Features of Indian Judiciary By K. K Ghai [http://www.yourarticlelibrary.com/essay/judiciary-in-india-11-salient-features-of-indian-judiciary/40371/]

## 4. Judicial Review:[17]

The Constitution of India is the supreme law of the land. The Supreme Court acts as the interpreter and protector of the Constitution. It is the guardian of the fundamental rights and freedoms of the people. For performing this role, it exercises the power of judicial review. Through judicial scrutiny the Supreme Court gets the power to determine the constitutional validity of all laws. It can reject any such law which is held to be unconstitutional. High Courts also exercise this power.

## 5. High Court for each states as well a Provision for Joint High Courts: [18]

The Constitution lays down that there is to be a High Court for each states. However, two or more states can, by mutual consent, have a Joint High Court.

## 6. Supreme Court as the Arbiter of legal disputes between the Union and States[19]:

[17] Judiciary in India: 11 Salient Features of Indian Judiciary By K. K Ghai [http://www.yourarticlelibrary.com/essay/judiciary-in-india-11-salient-features-of-indian-judiciary/40371/]
[18] Judiciary in India: 11 Salient Features of Indian Judiciary By K. K Ghai [http://www.yourarticlelibrary.com/essay/judiciary-in-india-11-salient-features-of-indian-judiciary/40371/]
[19] Judiciary in India: 11 Salient Features of Indian Judiciary By K. K Ghai [http://www.yourarticlelibrary.com/essay/judiciary-in-india-11-salient-features-of-indian-judiciary/40371/]

The Constitution gives to the Supreme Court the jurisdiction in all cases of disputes:

(i) Between the Government of India and one or more states,

(ii) Between the Government of India and any state or states on one side and one or more states on the other, and

(iii) Between two or more states.

## 7. **Guardian of Fundamental Rights:**[20]

Indian judiciary acts as the guardian of fundamental rights and freedoms of the people. People have the Right to Constitutional Remedies under which they can seek the protection of the courts for preventing violation of their rights. The Supreme Court and the High Courts have the power to issue writs for this purpose under article 32 and 226 respectively.

[20] Judiciary in India: 11 Salient Features of Indian Judiciary By K. K Ghai [http://www.yourarticlelibrary.com/essay/judiciary-in-india-11-salient-features-of-indian-judiciary/40371/]

## 8. Separation of Judiciary from the Executive:[21]

The Constitution of India provides for a separation between the judiciary and the other two organs of the government. The judiciary is neither a branch of the executive nor in any way subordinate to it. The judicial administration in India is organized and run in accordance with the rules and orders of the Supreme Court.

## 9. **Open Trial:**[22]

The courts in India are free. They conduct open trials. The accused is always given full opportunity to defend himself. The state provides free legal aid to the poor and needy.

## 10. **Judicial Activism:**

Indian Judicial System is becoming more and more active. The Supreme Court has been coming out with judicial decisions and directives aimed at active protection of public interest and human rights. Judiciary has been giving directives to public officials for ensuring a better security to the rights of the public. The Public Interest Litigation system has been picking up. The system of Lok Adalats has also taken a proper shape and health.

---

[21] Judiciary in India: 11 Salient Features of Indian Judiciary By K. K Ghai [http://www.yourarticlelibrary.com/essay/judiciary-in-india-11-salient-features-of-indian-judiciary/40371/]

[22] Judiciary in India: 11 Salient Features of Indian Judiciary By K. K Ghai [http://www.yourarticlelibrary.com/essay/judiciary-in-india-11-salient-features-of-indian-judiciary/40371/]

## 11. **Public Interest Litigation System:**[23]

Under this system the courts of law in India can initiate and enforce action for securing any significant public or general interest which is being adversely affected or is likely to be so by the action of any agency, public or private.

Under it any citizen or a group or a voluntary organization, or even a court suo moto, can bring to notice any case demanding action for protecting and satisfying public interest.

It provides for an easy, simple, speedier and less expensive system of providing judicial relief to the aggrieved public. With all these features, the Indian Judicial System is an independent, impartial, free, powerful judicial system.

[23] Judiciary in India: 11 Salient Features of Indian Judiciary By K. K Ghai [http://www.yourarticlelibrary.com/essay/judiciary-in-india-11-salient-features-of-indian-judiciary/40371/]

# Chapter2.
# APPOINTMENT OF JUDGES

Now let's discuss how the judicial appointments are done.

In the cycle of governance the role of the judiciary is of paramount importance. The role of the judiciary is not just to enforce the law but to protect the rights of the human society which cannot be achieved without efficient and independent judiciary. The judiciary plays the dual role of acting as a counter check mechanism for the actions of the legislature as well as a decisive role in the administration of the country. For this role of the judiciary, the appointments in the judiciary should be free from legislative control or should be of minimal legislative control. It is true that the legislature has the power to make the laws, but this doesn`t mean that the legislature should have absolute control.[24]

In India, time and again the issue of judicial appointments and transfers of judges have surfaced due to lack of transparency and due diligence in the way it is carried. But before going towards the lacunae part, first we will discuss how the judicial appointments in other civilized developed as well as developing countries work.[25]

[24] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php
[25] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

We will look into the working of **United Kingdom**, **Australia, United States of America, Argentina, Germany, France, South Africa, Spain, Japan, Russia** regarding the appointment Judges.

## United Kingdom:

Before 2005, the appointments to the higher judiciary in U.K. were made on the recommendations of Lord Chancellor in consultation with the Lord Chief Justice. It was the duty of the Chancellor to see that the base of the appointments should not be any charade of politics because he himself was from political position. In 2005, The Constitutional Reforms Act came into force. Now the appointments of the judges are governed by the act of 2005.[26]

## The Constitutional Reform Act 2005:

Reading this act gives a fair impression of how a legislature can guide or help the judiciary in the appointment process of a Judge. It also indicates how important it is to keep this process almost independent of the executive and legislature as well as give the judiciary the important role of selecting the right candidates. Prior to this the Government through the office of the Lord Chancellor had a major role to play in the appointment process which many a times resulted in political appointments into the judiciary. This act is intended for

[26] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

achieving the independence in the functioning of the judiciary as well as judicial appointments.[27]

Firstly and most importantly the act recommends setting up of the Supreme Court of U.K. This is intended so as to separate the judicial role exercised by the House of Lords prior to the act which would now be taken up by the Supreme Court. The first members of the court are the 12 persons who are then the Law Lords.[28]

Gist of provisions regarding judicial appointments made as per the new act:

Supreme Court:

The Prime Minister shall recommend the names to the Queen. But this shall be preceded by an elaborate process conducted by a selection commission. The commission shall consist of five members consisting of the President and Deputy President of the Supreme Court and representatives of the Judicial Appointments Commission. The process involves the mandatory consultation with the senior Judges, The Lord Chancellor and the devolved executives (S.27 (2)).

[27] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php
[28] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

Though the role of Lord Chancellor has been curtailed he can exercise some power with regards to the appointment[29]:-

He can reject the name of a person if he considers the person unsuitable or he may require the commission to reconsider a recommendation on any key matters. Once the name is rejected, the commission cannot propose the name again but on reconsideration if the name is proposed Lord Chancellor must oblige[30].

Part 4 of the act provides for the judicial appointments. It mandates the creation of a judicial appointment commission which is to play the key role in all the judicial appointments, except the Supreme Court. It shall consist of a lay Chairman ("lay" means someone who has never held judicial office or been a practicing lawyer) and
14 other members which includes:5 Judges (one each from Court of Appeal and High Court, one from either Court of Appeal or High court, one circuit judge and one district judge), 2 practicing lawyers, 5 lay members, 1 legal tribunal member and 1 lay magistrate. The general rules to make appointments have clearly been laid down from S.63-97 of the act. Separate rules apply to appointment of Judges at different levels.[31]

[29] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php
[30] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php
[31] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

There is also provision for making any complaints on the appointment process. Such complaints may be made only by the person affected adversely in the selection process.

The selection procedure of Lord of Chief Justice, Heads of Division and The Lord Justices of Appeal are laid down from sections 67-84 of the new act.[32]

The Lord Chancellor is given the power to issue Guidelines for the Commission or to the selection panel regarding identification of the candidates as well as while assessing them. The Chancellor requests the Commission to select a suitable person for appointment as The Lord Chief Justice and such request must be with the consultation of Lord Chief Justice (unless it is vacant or is incapacitated).

In case of senior appointments a special selection panel is formed from the Commission which includes senior most Judges , Lord Chief Justice (or his nominee), Chairman of the Commission and a layman from the commission. They then make a report as per the form approved by Lord Chancellor.[33]

[32] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php
[33] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

The selection process is consisting of 3 steps wherein a Chancellor may opt to reject or request reconsideration of the names proposed by the selection committee.[34]

1. Step One, if the Lord Chancellor rejects or requests reconsideration of the selected name then process enters step 2.

2. In Second step, when a name is recommended, Lord Chancellor may accept the name, reject it (if power of rejection not used in step1) or request reconsideration (if the same has not been exercised in step 1). Now if he rejects or requests for reconsideration, the selection process enters step 3.

3. Third step, this time he must accept the latest candidate selected by the selection panel or from the candidate selected in step 1 or 2 whose name was not resubmitted by the panel after reconsideration but who has not been rejected.

The highlight of this is that the Lord Chancellor cannot arbitrarily reject or request reconsideration of a candidate. He can reject a candidate only if he is not considered suitable for the office concerned and request for reconsideration only if there is not sufficient evidence that the candidate's suitable to the office concerned. Anyhow these provisions do not prevent the rejected candidate or candidate who was withdrawn on reconsideration from

[34] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

being selected for appointment on a subsequent occasion of request for selection by the Lord Chancellor.[35]

[35] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

## Australia[36]:

In early 2008, the Australian Government implemented new processes for the appointment of judicial officers.[37]

These new processes aim to ensure:

• Greater transparency, so that the public can have confidence that the Government is making the best possible judicial appointments

• That all the appointments are based on merit, and

• That everyone who has the qualities for being appointed as a judge or magistrate is fairly and properly considered.

The Attorney-General, as the nation's first law officer and part of the executive branch of government, is responsible for recommending judicial appointments, to the Cabinet and the Governor-General. Before an appointment process commences, the Attorney-General, in consultation with the courts and his Department, decides whether an appointment should be made. Vacancies may result from a judge retiring or resigning.[38]

Appointment process for Federal Court of Australia, Family Court of Australia and Federal Magistrates Court:

---

[36] www.ag.gov.au/cca

[37] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

[38] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

1stly the vacancies are identified in the abovementioned courts.

2ndly advertisement regarding the vacancies are made as well as the criteria for the position are also given in the newspapers as well as on the Attorney-General's Departments website.

Next through Attorney General's office letter are sent to various heads of the courts, tribunals and various other legal bodies seeking for nomination of names of candidates suitable for the position.[39]

The Attorney General has established advisory panel, in front which the nominated names are placed The Advisory Panel may interview candidates it considers suitable for appointment. The Advisory Panel subsequently presents the Attorney-General with a report that lists those candidates that it has assessed as being highly suitable for appointment. Attorney‑General considers report and writes to the Prime Minister seeking his and/or Cabinet approval.[40]

Once the approval is received by the Attorney-General then he makes a recommendation to the Governor-General who takes the appointment through the Federal Executive Council process.

---

[39] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

[40] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

## Appointments to the High Court and Heads of Court:[41]

The High Court, as the apex of Australia's judicial system, enjoys a different status to other federal courts and therefore, a slightly different appointment process has been adopted for this Court. Similarly, appointments to the positions of Chief Justice of the Federal Court or Family Court and Chief Federal Magistrate are likely to come from the serving judiciary and would therefore already be known to government.

The Attorney-General's Department therefore does not place notices in the newspapers or place the appointment criteria on its website. Rather, the Attorney‑General consults widely with interested bodies seeking nominations of suitable candidates.

Attorney‑General also writes to[42]:

- State Attorneys-General
- Chief Justice of the High Court
- Justices of the High Court
- State and Territory Chief Justices

The Attorney‑General then writes to the Prime Minister seeking his and/or Cabinet approval. If approved by the Cabinet, the Attorney-General makes a recommendation

[41] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php
[42] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

to the Governor-General who considers the appointment through the Federal Executive Council process.

Duration/tenure of Appointments:[43]

- Under section 72 of The Constitution, the appointment of a Justice of the High Court is for a term that expires when the Justice turns 70 years of age.

- Appointments to other courts created by the Parliament are for a term expiring upon the maximum age for that court, which can be set by the Parliament.

- Presently the terms of appointment of all Justices of the Family and Federal Courts and Magistrates of the Federal Magistrates Court expire on the day before their 70th birthday. All Justices and Federal Magistrates may resign at any time.

## UNITED STATES OF AMERICA[44]:

The United States is governed by a federal system, the federal government and the governments of the fifty states of the United States make and enforce the law. Similarly in the United States there exist two distinct forms of judicial systems; i.e. the Federal Courts and State Courts. At State level there is a variance in the hierarchy of the courts. A typical judicial hierarchy in the states would

[43] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php
[44] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

include the Justice of Peace also known as Magistrate or Squire at the bottom, at the next level would be the Municipal Court, next would be the County Court and at the topmost ladder would be the State Supreme Court.

At the federal level there are two types of courts, constitutional courts and legislative courts. The constitutional courts are established under **Article III** of the United States constitution whereas the legislative courts are established under **Article I** of the constitution. The legislative courts are part of the constitutional appellate structure; the purpose of these courts is to help in the administration of particular statues. The legislative courts are basically non-judicial or quasi-judicial bodies. The role of constitutional courts is one of pure judicial nature. The most important distinction between the two forms of federal courts is that the judges of the constitutional courts hold their offices till death or vacate the office by resignation or by impeachment by the House of Representatives and conviction by the Senate.

The constitutional courts comprise of the three main courts, the Supreme Court, United States Court of Appeals and the United States District Courts.

The appointments to the Federal Courts are pure political appointments. Under the constitution Articles II the President has the power to choose the candidates for the judicial offices; the choice of the President to the judicial office is subject to confirmation of the choice by the Senate. The Senate has the power to veto the choice made by the President. Usually the Presidents choose

Judges who tend to have an ideology similar to that of his own.

At the state level appointment of Judges varies with state to state. In some other states the judges are appointed by the process of election while in some states the legislatures elect them. In some of the states the governor has full discretion in the appointment of judges.

**Judicial Appointment: Merit Plan or the Missouri Plan[45]:**

The Merit Plan or the Missouri Plan as it is popularly known used in the judicial appointments in the US state of Missouri is a fine balance between the executive process and the elective process of appointment of judges. Nonpartisan nominating boards or commissions take the initial step in the nomination process. These boards usually consist of the Chief Justice of the state Supreme Court as Chairman, three lawyers appointed by the state bar representing the states appellate districts and three laymen appointed by the Governor. The members of the board are unsalaried and serve for staggered six-year terms of office, the commission members nominate three candidates for every vacant judgeship to the governor, who is obliged to choose one of them to serve for one year. After this one year period the appointed judge faces the electorate, without any political affiliations. The

[45] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

question on the ballot is whether the judge should be retained or not. If he is elected he can continue in office. The judge then serves a definite term of twelve years.

## Judicial Appointments: California Plan:[46]

Under the California plan of judicial appointments the governor has complete discretion to choose his nominee for the judicial office. But the choice of the governor is subject to the approval to a three member committee comprising of the Chief Justice of the State Supreme Court, the Presiding Officer and the Attorney General of the State.

The Governor nominates one individual per vacancy. The nomination is then deliberated by the three member committee. The nomination once approved by the committee, the nominee is declared to be appointed for a provisional period of one year. At the year's end the appointee stands for popular election on a nonpartisan, non-contested ballot after winning it he is allowed to work for a full term usually of 12 years.

## Judicial Appointments: Federal Courts:

Under the Article II of the American constitution the President of the United States has full discretion in choosing candidates to fill the vacancies in judicial offices.

[46] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

The choices of the Presidents have traditionally been of those judges who share the same ideology that of his and his party. On the face of it most of the judicial appointments are the President’s personal choices, but such an important responsibility is carried out by the President in consultation with many other people. The President considers the judicial nominations with friendly political leaders of the nominee`s state, his attorney general and also at times with the sitting members of the court. The nominee`s appointment is subject to the approval of the Senate. Between the President`s selection of his nominee for the judicial office and the subsequent confirmation by the Senate, there are lot many factors that shape the appointment process.

There are many persons involved in the appointment process. Members of the Senate and House of Representatives, political leaders of the President`s own party from the nominees home state, Governors and Mayors, members of the court where the appointment is being made, public and private groups which lobby for the selection of a candidate of their choice.

## Argentina:[47]

Under Article 108 of the Constitution of Argentina the judicial power of the Nation is vested in a Supreme Court and in such lower courts as Congress may constitute in the territory of the Nation.

Article 109 divests the President (executive) of any judicial functions or assumption of any jurisdiction over the judicial functions. Article 110 makes the judges to hold office during 'good behavior', remuneration as ascertained by law and immunity from being diminished while holding office. Article 111 provides for the necessary qualification as lawyer of eight years of practice and the same as that of senator.

Article 113 grants autonomy in internal administration to the Supreme Court.

For the purpose of judicial appointments, the Article 114 provides for constitution of "The Council of Magistracy" ruled by special law enacted by the absolute majority of all members of each House which shall be in charge of the selection of judges and the administration of judicial power.

Article 114(2) provides that the Council shall be periodically constituted so as to achieve the balance among the representation of the political bodies arising

[47] https://www.academia.edu/9109429/National_Judicial_Appointments_Commission_a_critique

from popular election, of the judges of all instances, and of the lawyers with federal registration.
It shall likewise be composed of such other scholars and scientists as indicated by way in number and form.

Article 114(3) empowers the Council
(1) To select the candidates to the lower courts by public competition.
(2) To issue proposals in binding lists of three candidates for the appointment of the judges of the lower courts.
(3) To be in charge of the resources and to administer the budget assigned by law to the administration of justice.
(4) To apply disciplinary measures to judges.
(5) To decide the opening of the proceedings for the removal of judges, when appropriate to order their suspension, and to make the pertinent accusation.
(6) To issue the rules about the judicial organization and all those necessary to ensure the independence of judges and the efficient administration of justice. Article 115 provides for the procedure for removal of judges of the lower courts by a duly constituted special jury.

Needless to point out that the Argentine model for the judicial appointments and also of accountability in the form of “Council of Magistracy” is more comprehensive machinery that provides for an independent judicial appointments commission to take care of a fair procedure for appointments as well as for the accountability of judges and the procedure for their removal from office. And-- all these without compromising on the independence of the

judiciary and keeping it free from executive control or subordination.

## Federal Republic of Germany:[48]

In Germany, the judicial authority is vested in the judges; it is exercised by the Federal Constitutional Court, by the Supreme Federal Court, by the Federal courts provided for in the Basic Law (constitution) and by the courts of the Länder. Independence of the judges is guaranteed in Article 97.

Appointments to the Federal Constitutional Court are made by way of election by the Bundestag (Lower House) and the Bundesrag (Upper House) as provided in Article 94: half of the members by each House.
The appointees may not be from among the members or from Government or any organ of the State.

The judges of the Supreme Federal Court are selected jointly by the Federal Minister of justice and a committee for the selection of judges consisting of the Land Ministers of justice and an equal number of members elected by the Bundestag. The legal status of the Federal Judges is regulated by a Special Federal Law [ Article 98(1)]. The legal status of the judges in the Leander is regulated by special Land laws. The Länder may provide that the land Minister with a committee for the selection of judges shall decide on the appointment of judges in the Länder [Article 98(4)]. The decision of impeachment of a judge rests with the Federal Constitutional Court.

[48] https://www.academia.edu/9109429/National_Judicial_Appointments_Commission_a_critique

## France:[49]

The Constitution of France provides that the President of the Republic shall be the guarantor of the independence of the judicial authority. He shall be assisted by the High Council of the Judiciary. An institutional act shall determine the regulations governing the members of the judiciary. Judges shall be irremovable (Article 64). Article 65 provides that the High Council of the Judiciary shall be presided over by the President of the Republic.

The Minister for Justice is to be its vice-president ex officio. The High Council of the Judiciary shall consist of two sections, one with the jurisdiction for judges, the other for public prosecutors. The section with jurisdiction for judges shall comprise, in addition to the president of the Republic and the Minister of Justice, five judges and one public prosecutor, one conseiller d'Etat appointed by the Consel d'Etat, and three prominent citizens who are not members of either Parliament or of the Judiciary, appointed respectively by the President of the Republic, the President of the National Assembly and the President of the Senate.

The section of the High Council of the Judiciary with jurisdiction for judges makes nominations for the appointment of judges in the Court of Cassation, the first presidents of the courts of appeal and the presidents of the tribunaux de grande instance. Other judges are

[49] https://www.academia.edu/9109429/National_Judicial_Appointments_Commission_a_critique

appointed with its assent. This body also acts as disciplinary council for judges.
When acting in that capacity, it is presided over by the first president of the court of Cassation.

Article 67 provides for the establishment of a High Court of Justice and its composition. Its members, in equal numbers, are elected from among their ranks by the National Assembly and the Senate, after each general or partial renewal by election of these assemblies. It elects its president from among its members.

## JAPAN:[50]

While the Emperor appoints the Chief Judge of the Supreme Court under Article 6 of the Constitution of Japan, he does so as designated by the Cabinet.

Article 76 of chapter VI of the constitution declares that the whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

No extraordinary tribunal can be established nor any organ or agency of the executive be given final judicial power.

All judges are declared to be independent in the exercise of their conscience and shall be bound only by the Constitution and the laws.

Article 79 provides that all other judges of the Supreme Court except the Chief Judge shall be appointed by the cabinet.

The appointments are to be reviewed every ten years by the House of the Representatives after the first review following a general election.

The judges of the inferior courts are appointed by the Cabinet from a list of persons nominated by the Supreme Court [Article 80].

[50] https://www.academia.edu/9109429/National_Judicial_Appointments_Commission_a_critique

## Russian Federation:[51]

In Russia there are three kinds of Supreme Courts viz.,

(i) The Constitutional Court of the Russian Federation;

(ii) The Supreme Court of the Russian Federation and

(iii) The Supreme Arbitration Court of the Russian Federation.

Under Article 118 justice in the Russian Federation is to be administered only by the law courts.

Article 128 provides that the judges of the aforesaid three supreme courts are appointed by the Federation Council following nomination by the President of the Russian federation.

The judges of other Federal courts are appointed by the President of the Russian Federation in accordance with the procedure established by Federal law.

[51] https://www.academia.edu/9109429/National_Judicial_Appointments_Commission_a_critique

## South Africa:[52]

Under the Constitution of South Africa, the judicial authority of the Republic is vested in the courts. The courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favor or prejudice.

No person or organ of state may interfere with the functioning of the courts (Section 165).

There is a Constitutional Court (Section 167),
A Supreme Court of Appeal (Section 168),
High Courts (Section 169),
and Magistrate's Courts and other courts in South Africa.

The procedure for appointment of judicial officers is provided in Section 174. Under Section 174(3) , the President as head of the national executive, after consulting the Judicial service Commission and the leaders of parties represented in the National Assembly, appoints the President and Deputy President of the Constitutional Court and, after consulting the Judicial Service Commission, appoints the Chief Justice and Deputy Chief Justice.

The other judges of the Constitutional Court are appointed by the President as head of the national executive, after

[52] https://www.academia.edu/9109429/National_Judicial_Appointments_Commission_a_critique

consulting the President of the Constitutional Court and the leaders of parties represented in the National assembly, in accordance with the following procedure:

(a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made and submit the list to the President.
(b) The president may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
(c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list [Section174 (4)].

At least four members of the Constitutional court must be persons who were judges at the time of their appointment [Sec. 174(5)]. The President must appoint the judges of all other courts on the advice of the Judicial Service Commission. Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favor or prejudice.

The constitution of the Judicial Service Commission is provided in Section 178(1) of the Constitution of South Africa. It shall consist of:
(a) The Chief Justice, who presides at meetings of the Commission;

(b) The President of the Constitutional Court;

(c) One Judge President designated by the Judges President;

(d) The Cabinet member responsible for the administration of Justice, or an alternate designated by that Cabinet member;

(e) Two practicing advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(f) Two practicing attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;

(g) One teacher of law designated by teachers of law at South African universities;

(h) Six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the assembly;

(i) Four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;

(j) Four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and

(k) When considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned.

The Judicial Service Commission so constituted has been given powers and functions assigned to it in the Constitution and national legislation [178 (4)]; advisory role relating to the judiciary and administration of justice [178(5)]; and to determine its own procedure [178(6)].

## Spain:[53]

The Constitution of Spain provides for “Judicial Power” in TITLE VI.
Article 122 in the aforesaid chapter provides for Organization, General Council.
According to Article 122(2), the General Council of the Judicial Power is the governing organ of the latter. The organic law shall establish its statute and the system of incompatibilities for its members and their functions, particularly in matters of appointments, promotions, inspections, and disciplinary regime.
Article 122(3) provides for the composition of the General Council which shall consist of the President of the Supreme Court, who shall preside, and twenty members appointed by the King for a period of five years. Of these, twelve shall be judges and magistrates of all the judicial categories under the terms the organic law establishes; four will be proposed by the House of the Representatives; and four by the Senate, elected in both cases by three-fifths majority of their members, from among lawyers and jurists of recognized competence with more than fifteen years in the exercise of their profession.

For the sake of brevity I skip comments on the constitutional provisions of other countries. On scrutiny of the afore-mentioned and other constitutions of the world one cannot avoid the inescapable conclusion that the trend, the world over, has been of liberating the judiciary

[53] https://www.academia.edu/9109429/National_Judicial_Appointments_Commission_a_critique

from executive control and not of reverting back to subordinating it to the political executive of the day.

## 2.11. India

As we all know India is the world's largest democracy which has longest written constitution containing 395 articles. It is the most elaborate constitution focusing on all the aspects of the governance of the country. With evolving time many amendments have been brought to the constitution.

Our constitution clearly demarcates 3 organs of the government and their respective functions. These provisions also indirectly include checks and balance system which is a modern form 'separation of power theory' of Montesquieu. Constitution clearly shows independence of judiciary through its provisions like 'Judicial Review'. We have discussed those features in earlier chapter.

In this chapter we are going to discuss how the judicial appointments were done till 2014, the so called Collegium system and the history behind the Collegium system.

## i. HISTORY of Collegium:

Judiciary is one of the three wings of the State. Though under the Constitution the polity is dual, the judiciary is integrated which can interpret and adjudicate upon both the Central and State laws[54].

The appointment of Judges of the Supreme Court and their removal are governed by Article 124 of the Constitution of India. Articles 125 to 129 provide incidental matters.[55]

The appointment and removal of the Judges of the High Courts are governed by Article 217.

Articles 218 to 221 and 223 to 224A provide for certain matters incidental thereto.

Article 222 provides for transfer of Judges from one High Court to another.

So far as the subordinate judiciary is concerned, the constitutional provisions relating thereto are contained in Articles 233 to 237.

[54] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

[55] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

These provisions are, of course, supplemented by the rules made by the respective Governors of the States under the proviso to Article 309 of the Constitution.

Now let's see in detail what the provision under Article 124 is[56]

A.124: Establishment and constitution of Supreme Court

(1)There shall be a Supreme Court of India constituting 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;

[56] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

(b)A Judge may be removed from his office in the manner provided in clause (4) A practice had developed over the last several decades according to which the Chief Justice of India initiated the proposal, very often in consultation with his senior colleagues and his recommendation was considered by the President (in the sense explained hereinabove) and, if agreed to, the appointment was made. By and large, this was the position till 1981.

**So what happened in 1981?[57]**

Year 1981-82

**S.P. Gupta vs. Union of India (AIR 1982 SC 149)** - Judgment in this case created problems for judiciary and Executive became Powerful.

In a decision rendered by a seven-judge Constitution Bench in **S.P. Gupta vs. Union of India (AIR 1982 SC 149)[58]**, the majority held that 'consultation' does not mean 'concurrence' and ruled further that the concept of primacy of the Chief Justice of India is not really to be found in the Constitution.

[57] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

[58] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

It was held that proposal for appointment to High Court can emanate from any of the four constitutional functionaries mentioned in Article 217 – and not necessarily from the Chief Justice of the High Court.[59]

This decision had resulted in unsettling the balance which existed till then between the executive and judiciary in the matter of appointment.

The balance tilted in favour of the executive.

Not just the role of the Chief Justice of India got diminished in importance, the role of judiciary as a whole in the matter of appointments became less and less.

After this judgment, certain appointments were made by the Executive over-ruling the advice of the Chief Justice of India.
Naturally, this state of affairs developed its own retaliation.

In 1993,

a nine-Judge Constitution Bench of the Supreme Court in **Supreme Court Advocates-on-Record Association Vs. Union of India (1993 (4) SCC. 441)** over-ruled the decision given in S.P.Gupta case.

[59] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

The nine-Judge Bench (with majority of seven) not only overruled **S.P. Gupta's** case but also concocted a specific procedure for appointment of Judges of the Supreme Court in the interest of "protecting the integrity and guarding the independence of the judiciary." For the same reason, the precedence of the Chief Justice of India was held to be essential.[60]

It held that the recommendation regarding appointments should be made by the Chief Justice of India in consultation with his two senior-most colleagues and that such recommendation should normally be given effect to by the executive.

Elaborate reasons were recorded in support of the proposition that selection of judges must be in the hands of the judiciary in this country and how the systems prevailing in other countries are alien to our constitutional system.
One of the judges relied upon Article 50 of the Constitution, which speaks of separation of judiciary and executive and excluded any executive say in the matter of appointment to safeguard the "cherished concept of independence."

It held at the same time that it was open to the executive (if they have any objection to the name recommended) to ask the Chief Justice of India and his two colleagues to

[60] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

reconsider the matter, but if, on such reconsideration, the Chief Justice of India and his two colleagues recapitulate the recommendation, the executive was bound to make the appointment.

In short, the power of appointment got reversed into the hands of judiciary and the role of the executive became merely formal.

**{214th Report on Proposal for Reconsideration of Judges cases I, II and III - S. P. Gupta v/s U.O.I. reported in AIR 1982 SC 149, Supreme Court Advocates-on- Record Association v/s U.O.I. reported in 1993 (4) SCC 441}**

**The 1993 decision was reaffirmed in 1998 [1998 (7) SCC 739]** in a collective opinion rendered by a nine-Judge Bench of the Supreme Court on a reference being made by the President under Article 143 of the Constitution.[61]

All the basic conclusions of the majority in the 1993 decision were reaffirmed but with some changes.

It was held that the recommendation should be made by the Chief Justice of India and his four senior-most colleagues (instead of the Chief Justice of India and his

[61] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

two senior-most colleagues) and further that Judges of the Supreme Court hailing from the High Court to which the proposed name comes from must also be consulted.

In fact, the Chief Justice of India and his four senior-most colleagues are now generally referred to as the 'Collegium' for the purpose of appointment of Judges to the Supreme Court.

## Appointment of Judges to High Courts[62] –

Procedure for appointment of Judges of High Courts:

The procedure for appointment of Judges of the High Courts is slightly different from the one concerning the appointment of Judges of the Supreme Court.

Clause (1) of Article 217 says that "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 and shall hold office, in the case of an additional or acting judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years".

[62] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

A reading of this clause shows that while the appointment is made by the President, it has to be made after consultation with three authorities,
Namely,
The Chief Justice of India,
The Governor of the State,
The Chief Justice of the High Court.

Just as the President is the constitutional head, so are the Governors.

However, according to the practice, which had developed over the last several decades and which was in vogue till the aforementioned 1981 decision of the Supreme Court in S.P.Gupta case, the Chief Justice of the High Court used to make the recommendation which was considered by the Governor of the State (Council of Ministers headed by the Chief Minister) who offered his comments for or against the recommendation.[63]

The matter then would go to the Central Government.

At that stage, the opinion of the Chief Justice was sought and based upon such advice; the appointment was either made or declined.[64]

[63] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

[64] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

It may be noted that even clause (1) of Article 217 uses the expression ‘consultation’ and not ‘concurrence’.

The decision of the Supreme Court in S.P. Gupta on the meaning of ‘consultation’ applied equally to this Article. After the decision in S.P. Gupta, the executive made quite a few appointments to the High Courts which gave rise to a good amount of dissatisfaction among the relevant sections including the Bar leading to the nine-Judge Constitution Bench decision of the Supreme Court in 1993 aforementioned.[65]

The decision laid down that the recommendation for appointment to the High Court shall be made by the Chief Justice of the concerned High Court in consultation with his two senior-most colleagues.[66]

The opinion of the Chief Justice of India was given importance in the matter and was to prevail over that of the Governor of the State or even that of the High Court, if inconsistent with his view.

The President was of course to make the formal appointment just as in the case of a Judge of the Supreme Court. This position was affirmed in the **Third Judges case (1998 (7) SCC 139).**

---

[65] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

[66] http://www.realityviews.in/2014/04/facts-history-about-collegium-system-sc.html

## Why Constitution gave the importance to the Supreme Court of India?

**At this juncture it is worthwhile to ponder over the view expressed by Dr. B.R. Ambedkar while drafting Art.124 of the Constitution: "The circumstances in which we live today, where the sense of responsibility has not grown in the same extent we find in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, i.e. merely on the advice of the executive of the day.**
**Similarly it seems to me that to make every appointment which executive wishes to make subject to the concurrence of the legislature is also not a very suitable provision."[67]**

Evidently, at that time they did not trust the Executive in India to make proper appointments and hence 'entrenched' the requirement of 'consultation' in the Constitution itself expressly.

But after the Third Judges case, judiciary rewrote the constitutional arrangement enumerated in Article 124 and Article 217 of the Indian Constitution which provided for a plurality of functionaries (executive and judiciary) by changing it to plurality of functionaries only within the judicial system.

[67] http://www.lawteacher.net/free-law-essays/constitutional-law/review-of-judicial-appointments-india-law-essays.php

As we have said earlier after the decision of S.P.Gupta case, government acted without consulting the judiciary regarding appointment and they received a backlash of it. Same way today, no step by step procedure for selection, no advertisement as to vacancy of the positions, no exact criteria, the secretive way of selecting candidates, and while rejecting, the candidate is not provided with the reasoning these things have laid to question the transparency and due diligence of judiciary regarding appointment.

It was also criticized that collegium does not provide for adequate tenure to the Chief justices of High Court. Further the recent revelation by Jusitce (Rtd) Markandey Katju and Justice Dinakaran is a pointer towards reforming the judiciary. Recent controversies of the retired Honorable Justice A.P.Shah of New Delhi High Court being not Promoted to the Apex court has raised the questions on the insufficiency of the current process.

Regarding his non-appointment to the Apex Court, a constitution expert opined "**It is travesty of Justice. Collegium works on rumors not facts".** The general feeling existing is that a candidate must at least be informed of the reason for his rejection by the collegium.

Hence to get the transparency, to deal with other problems as to the clear procedure for appointment and also to get the judiciary in line of All India Services, to increase the role of legislature and executive, legislature came up with a Bill in 2014 naming National Judicial Appointment

Commission. Simultaneously another Constitutional Amendment Bill was passed. That will be discussed in next chapter.

# Chapter-3
# National Judicial Appointments Commission & Constitutional Amendment

## Introduction:

The Constitution (120th Amendment) Bill, 2013[68]

The Constitution (One Hundred and Twentieth Amendment) Bill, 2013 was introduced in the Rajya Sabha on August 29th, 2013 by the Minister of Law and Justice, Mr. Kapil Sibal.[69]

Pursuant to a review of constitutional provisions providing for the appointment and transfer of Judges, and relevant Supreme Court decisions on the matter, the need for a broad based Judicial Appointment Commission, for making recommendations for selection of judges was felt.[70]

[68] http://www.prsindia.org/billtrack/the-constitution-120th-amendment-bill-2013-2905/
[69] http://www.prsindia.org/billtrack/the-constitution-120th-amendment-bill-2013-2905/
[70] http://www.prsindia.org/billtrack/the-constitution-120th-amendment-bill-2013-2905/

The Bill seeks to enable equal participation of Judiciary and Executive, make the appointment process more accountable and ensure greater transparency and objectivity in the appointments to the higher judiciary

The Bill proposes to insert a new Article 124A, and amend Article 124(2) (a).

The proposed Article 124 A contains two clauses; Clause (1) provides for a Commission, to be known as the Judicial Appointments Commission.[71]

Article 124A(2) enables Parliament to make a law that provides the manner of selection for appointment as Chief justice of India and other Judges of the Supreme Court, Chief justices and other judges of the High Courts.[72]

Furthermore, Article 124A(2) enables that law to lay down the following features of the Commission[73]:

(i) the composition,

(ii) the appointment, qualifications, conditions of service and tenure of the Chairperson and Members,

[71] http://www.prsindia.org/billtrack/the-constitution-120th-amendment-bill-2013-2905/
[72] http://www.prsindia.org/billtrack/the-constitution-120th-amendment-bill-2013-2905/
[73] http://www.prsindia.org/billtrack/the-constitution-120th-amendment-bill-2013-2905/

(iii) the functions,

(iv) procedure to be followed,

(v) other necessary matters.

Consequently, the Bill amends Article 124 (2) (a) of the Constitution, providing for appointment of Judges to the higher judiciary, by the President, after consultation with Judges of the Supreme Court and High Courts in the states[74].

The National Judicial Appointments Commission Bill, 2014 and the 121st Constitutional Amendment Bill was passed by the Rajya Sabha on 13 March 2014. Earlier on 12 March 2014 the two bills were passed by the Lok Sabha by voice vote. It received President's assent on 31st December 2014.

The Constitutional Amendment Bill seeks to amend Article 124 (2) of the Constitution that provides for the appointment of the judges of higher judiciary and inserts Article 124A, Article 124B and Article 124C providing for composition and function of the National Judicial Appointments Commission[75].

[74] http://www.prsindia.org/billtrack/the-constitution-120th-amendment-bill-2013-2905/
[75] Indian constitution bare act 2015

National Judicial Appointments Commission Bill, 2014 lays down the procedure to be followed by the proposed six-member body for appointment and transfer of judges of higher judiciary. It empowers Parliament to enact a law regarding composition, function and procedure of the National Judicial Appointments Commission henceforth referred as NJAC.

## i. Composition and Function of NJAC[76]:

- The NJAC comprises of six-members which include Chief Justice of India as Chairman, Union Law Minister, two senior-most sitting Supreme Court judges and two eminent persons.

- The two eminent persons will be selected by a collegiums comprising of Prime Minister, Chief Justice of India and leader of the opposition or the leader of the single largest party in the Lok Sabha.

- Besides, one eminent person should belong to the SC, ST, women or minority community, preferably by rotation and will have tenure of three years.

---

76 http://www.prsindia.org/uploads/media/national%20judicial/National%20Judicial%20Appointment%20comm%20bill,%202014.pdf

- The NJAC will recommend to the President for the appointment and transfer of judges of higher judiciary, i.e. Supreme Court and High Courts.

- It will also make recommendations for the appointment of Chief Justice of India and Chief Justices of High Courts.

- It will elicit in writing the views of the Governor and the Chief Minister of the State concerned before making such recommendation.

- The recommendations made by the Commission shall be sent to the President, but if the President considers it may call upon the commission to reconsider the recommendation. Provided further that if the Commission makes a recommendation after reconsideration in accordance with the provisions contained in sections 5 or 6, the President shall make the appointment accordingly.

- Every rule and regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament.

# Chapter4
# Critical Review of the NJAC, Act of 2014

In this final chapter discussion is made on the points regarding how some changes can be made in to the NJAC Act and with this also the objections on NJAC and counter replies to it.

One of the objections was that, the judiciary was not been consulted. The simple counter to this charge is this: when the purpose of the new law is to end something that was never intended by the constitution but was interpreted by the judges in above discussed cases, and the current CJI has openly defended the collegium system, what is the purpose of consultation, will it be any fruitful? The powers of parliament to legislate and amend the constitution are paramount. The Supreme Court will get its chance to confirm the law's constitutional validity if it finds any irregularities in it.

Two, the law has been changed with undue haste. This is certainly true. In theory, the government could have gone through an elaborate process of consultation. But the fact

is law changes have been suggested for years now. Even the author of the 1993 judgment which created the collegiums, the last CJI J. S. Verma, admitted that the "collegiums system had failed. And it is the government's job to judge the political climate for what laws will pass and when". It was so suggested by the Law commission of India in its 121st report way back in 1987 and by the National Commission to Review the Working of the Constitution in 2001.[77]The fact that no major political party had serious issues with the NJAC bills shows that the laws have widespread acceptance among legislators.

Three, the NJAC diminishes the judiciary's role in the appointment of judges. This is not quite true. The new law says that judges will be chosen or transferred by a six-member NJAC. Of the six, among the three one would be the CJI and other two senior-most sitting Supreme Court judges, two would be undefined "eminent persons", and one would be the Law Minister. According to Sec. 5 (2) proviso, the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation so that shows the matter would end there. The two eminent persons are themselves to be nominated by a three-member team –

[77] https://www.academia.edu/9109429/National_Judicial_Appointments_Commission_a_critique

the CJI, the PM and the Leader of the Opposition (or leader of the single largest party in the Lok Sabha)[78].

If half the NJAC members are judges, how it can be said that it is reducing the role of the judiciary in judicial appointments?

The two-member veto can, of course, stop the judges from getting their choices in, but the reverse could also be true: two judges, or two politicians, or two eminent persons, or a combination of any two members of NJAC could hold a veto. If relationships in the NJAC are frayed, there could be deadlock, but the fact is no one can shove a judge down anyone's throat. The judiciary's role is not diminished; it is being counter-balanced by giving the executive and politicians some say hence actual checks and balance system in some way has been adopted. This was anyway the original intent of Article 124.

It is worth noting that in the US, judge selection is entirely a political process (existing judges have no say) and in Britain (for England and Wales), the 15-member Judicial Appointments Commission has 15 members, among whom only five are judges. The chairman of the JAC is a lay person, and not a judge.

[78] https://www.academia.edu/9109429/National_Judicial_Appointments_Commission_a_critique

In contrast, in the Indian NJAC, the CJI is the head. There is no way anyone can say the new law diminishes the judiciary's role.

Four, it is wrong to give the executive (or politicians) a voice in judicial appointments. As the US and UK examples show, globally it is not judges who appoint judges, only in India that is the situation. Moreover, democracy means laws are made by elected representatives, and not by judges. Judges only have to interpret the laws and check if there exists any impugn on the basic freedoms guaranteed by the constitution. In recent years, judges have been foraying into everything, including policy (as in the 2G judgment, when the judges said natural resources can only be sold through auctions), due to the general loss of faith in politicians. But voters elect the same politicians. It cannot be the job of the judiciary to thwart the people's will. The will of the people means the right to change the laws – as long as they are not in contravention of the basic features of the constitution.

And so as far as the section of the society who still defends the collegium system, well I have one simple

question for them, if the same opaqueness, secretive way was taken up by the executives while making appointment, wouldn't they be scrutinized for denying equal opportunity to the qualifying citizens by not being transparent in the process? If I am not wrong they will not only be scrutinized but also be punished in some way under the veil of protecting fundamental rights of citizens. Then why not the collegium system to be asked the same question, why it should be allowed to still function under the name of Independence of Judiciary!!

For once it could be that the composition of the NJAC could be improved, or that some features (like the two-member veto) could be problematic. But we will know this only when the law is implemented – just as we discovered the flaws in the collegium system only after 15-20 years of its operation.

The NJAC may not be the best thing to happen to judicial appointments, but it is an open sight better than the opaque collegium system. We can fix the problems once they are visible. Parliament can always fix what is broken, but right now it is the collegium system that is broken and according to government's stand through Attorney General in the Supreme Court regarding the petition going on about NJAC, collegium can or in clear warning way will never be revived.

Now, through the 99th Constitution Amendment Bill and the NJAC Bill, Parliament has merely sought to re-establish the process of appointments in consonance with a general principle of separation of powers. It is therefore surprising to note that the act has met with such widespread dissent from important quarters. The composition of the NJAC may not be perfect, but it is, in fact, tilted in favor of the judiciary. If any two of the three judges on the panel believe that a candidate is unsuitable for appointment, they can together veto the elevation of such a nominee. The Union government, on the other hand, merely has a single vote in the NJAC, and cannot, by itself, place a proscription on any appointment. It will require the additional backing of either one of the judges or one of the 'eminent persons' for the government to thwart any nomination.

Any fears that the composition of the NJAC will vest an unrestrained power in the executive therefore appear unfounded. Even in the U.K., where the Judicial Appointments Commission is completely divorced from executive involvement, the Lord Chancellor retains the power to reject a nomination made by such a commission.

The NJAC might not be as broadly constructed as the U.K. Commission, but its constitutional sanction will infuse in the process of judicial appointments greater transparency and an enhanced democratic involvement, as is the case

of the U.K. No doubt Parliament will have to introduce through legislation, as part of the NJAC, suitable infrastructure including the presence of full-time staff, to aid its members to arrive at considered decisions. The failure to include such a support structure is one of the collegium's many shortcomings.

But Article 124C, introduced by the new Constitution Amendment, allows Parliament that authority. Needless to say, any legislation introduced by Parliament in this regard, if in violation of any provision of the Constitution or the Constitution's basic structure, can be struck down by the courts as unconstitutional.

Given that the originally enacted Constitution placed overriding power on the executive to make judicial appointments, it is unfathomable how the proposed system, which accords the judiciary not merely a consultative role but a determinative one, can be found to infringe the independence of the judiciary. The pre-existing provisions, which the drafters of India's Constitution inserted to ensure judicial autonomy, continue to remain in force. This realignment is both in keeping with the original intent of the Constitution's framers and also with the larger principle of separation of powers that pervades the document.

# RECOMMENDATIONS:

## 1. No Appointment to Profitable offices:

If The National Judicial Appointments Commission's aim is to achieve success and transparency then the members especially from judiciary side after their retirement, should not be given any position in Government's profitable offices because any such future perks of working might have effect while appointing the present judges.

## 2. Inadequate procedure for Discharge of JAC Functions:

The procedure for the JAC in discharging its functions is specified in Section 9(1) and (2) of the Act. It merely states that the JAC has the power to specify, by regulations, the procedure for discharge of its functions. This appears inadequate. The said Act should clarify the powers of the JAC in discharging its functions but as it currently stands, the Act has entirely delegated this authority to the arena of rules.

Further, the regulation of the JAC in its everyday functioning is also crucial. UK which recently adopted the JAC model of appointment is facing problems due to delay in the process of appointments. The average time in each stage of review and the length of the whole process is an

urgent concern in the implementation of the law. The other concern in implementation faced by UK is in its capability to forecast vacancies. A more accurate forecasting makes the selection process timely. Hence, a full time body for forecasting such vacancies will be more useful.

It is recommended that the Act may clarify-

(a) regulations and quorum for meetings of JAC in taking decisions;

(b) Provisions for removal of the members of the JAC when necessary;

(c) a basic framework for making appointments such as the process of inviting applications, eligibility for applications, criteria for short-listing of candidates based on merits and ensuring diversity in candidates. The legislation instead of delegating it to executive decision making can incorporate these provisions in the main body of the act;

(d) The power of the JAC to reconsider or review its nominations;

(e) The regulations may propose a specified time frame during which vacancies should be filled or recommendations be made.

## 3. REVIEW AND CASTING OF VOTE:

It may be recommended, after studying USA appointment procedure and Judicial Services Commission report 2010 of South Africa, that after the judicial appointment is done, a specific year time to be given to the appointee for ex. 3 years. After the period of 3 years is complete his/her work is can be reviewed on following criteria.

The criterias can be[79]:

1. Is the appointee a person of integrity?

2. Is the appointee a person with the necessary energy and motivation?

3. Does the appointee exhibit expected performance?

Once the commission receives the report on, the review of the working of appointee, the appointee should be given a fair chance to present himself for the queries of the commission. When it's done the commission after thorough discussion, should cast voting as 'to allowing the appointee further to carry on with his/her working or to call back'.

For such casting of vote the composition of the commission which is as mentioned under Article.124 should be there but with one addition of an eminent jurist so that, the total number of voters will be 7 and that will

[79] The judicial services commission report 2010, Republic of South Africa.

enable the commission to come to the conclusion without; facing a situation like tie in votes.

This way the result will be that, appointee will be more accountable. The review of his/her work by the commission, will allow the commission to appoint the judges having the requisite qualities.

# Chpater5.
# CONCLUSION

Honorable Justice **Ruma Pal**, a former judge of the Supreme Court expressed her sentiment:

**“The insulation of the judiciary from executive interference in the matter of appointment and transfer of judges is now almost complete. But the question remains, has this almost complete insulation achieved the object for which the constitutional interpretation was strained to an extent never witnessed before or after? In my opinion it has not..”**

Most constitutional democracies in the world follow an inter-institutional model of appointing judges. This could be either an ‘executive-judiciary’ model or an ‘executive-legislature’ model. The recent trend however is a JAC model of appointment, realizing it as the best of the available models. India is the only nation where till now the appointment of judges to the higher courts was an insulated process with little or no involvement of the executive or the legislature. Restoring parallelism between the executive, legislature and the judiciary in the appointment process is in accordance with rule of law and separation of powers. The proposed Indian model of the

JAC though with some lacunas is therefore a great shift into an institution, allowing for a transparent coordinative process between the executive and the judiciary and as well as protecting the rights of citizens regarding right to know.

All mechanisms for judicial appointment may have some advantages and disadvantages and therefore, no particular system can be treated as the best system. The above line can be supported by looking at how many times our constitution has been amended so as to suit and protect the needs of people with the changing times, in order to maintain public confidence in the appointment system and to ensure judicial independence, the commission system, is perhaps a very effective mechanism for judicial appointment. However, to ensure the effectiveness of this mechanism the commission should be representative in nature comprising members of the executive, legislature, judiciary, legal profession and lay persons. In addition, it should be ensured that the commission uses a system which is transparent and open to public scrutiny. In this regard the composition and working system of the South African Judicial Service Commission may be an acceptable model. Such a mechanism may be very effective to ensure the appointment of the best-qualified people to judicial office.[80]

[80] Appointment of Judges: A Key Issue of Judicial Independence (2004) 16.2 Bond Law Review

## References/Bibliography:

1. The Constitution of India bare act 2015.

2. National Judicial Appointment Commission, Act 2014.

3. Papers by

   I. 'Rule of Law' by Author Chhavi Agarwal
   II. 'Salient Features of Indian Judiciary' by B.K. Ghai.
   III. 'Critical view of NJAC', by Adv. Jai S. Agarwala.
   IV. 'Recasting the Judicial Appointments Debate Centre for Law and Policy Review.
   V. 'Review of Judicial Appointments in India, United Kingdom, United States of America' by Deepak Bhavadassan & Prateek Khupse

4. Articles in the News papers

   I. Times of India
   II. The Indian Express
   III. The Hindu.