COMPARATIVE APPOINMENT OF HIGHER JUDICIARY IN UNITED KINGDOM, SOUTH AFRICA, AUSTRALIA, CANADA, AND INDIA: AN ANALYSIS

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*"Power tends to corrupt and absolute power corrupts absolutely-Financially, Intellectually, and Morality"-**Lord Action***

The above statement by Lord Action needs to be reframed and expanded in the present context of governance.

Introduction: The Indian judiciary has always been accorded independence in our constitutional frame work and respect in the minds in the people. It has in recent decades been regarded by many as the branch of government most respective to the needs of ordinary Indians and to the responsibilities of the government enshrined in the constitution. Yet former chief justice of India S.P Bharucha's recent assessment that 1 in every 5 judges is corrupt is if not an indication of how much the third branch of government has fallen then atleast a warning sign of the direction in which we are headed.

The provision as to the appointment of judges in the other countries afford some interesting material. It would be wise to mention the models available in some other countries.

1. UNITED KINGDOM: The Judicial Appointments Commission is responsible for selecting judges in England and Wales. It is a non-departmental public body which was created on 3 April 2006 as part of the reforms following the Constitutional Reform Act 2005. It took over a responsibility previously that of the Lord Chancellor and the Department for Constitutional Affairs(previously the Lord Chancellor's Department), although the Lord Chancellor retains responsibility for appointing the selected candidates. The Lord Chancellor has also given up his other judicial functions, including the right to sit as a judge in the House of Lords.

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It consists of 15 members, 2 from the legal profession (1 barrister, 1 solicitor) five judges, one tribunal member, one lay justice (magistrate), 6 lay people including the chairman.

The Commission launched its new system to select High Court judges on 31 October 2006, looking for candidates to fill 10 vacancies and 15 for a reserve list. Candidates submitted a nine-page application form, and shortlisted candidates were interviewed. All candidates were to be judged on merit alone, measured by five core qualities: intellectual capacity personal qualities (integrity, independence, judgment, decisiveness, objectivity, ability willingness to learn); ability to understand and deal fairly; authority and communication skills and efficiency.

2. South Africa:

The judiciary of South Africa consists of:

1. The chief justice of South Africa, the deputy chief justice and other judges of the constitutional court.
2. The President, deputy president and other judges of the Supreme court of Appeal.
3. The judge president, deputy judges president and other judges of each high court.

Permanent judges in the higher courts are appointed by the President of South Africa in consultation with the judicial service commission as well as leaders of political parties represented in South African National Assembly.

The judicial Service Commission's membership includes:

1. The chief justice of South Africa who presides over its meetings.
2. The president of the Supreme court of Appeal.
3. One Judge President designated by the judges President.
4. The minister of justice and Constitutional development, or his/her designated alternate.

5. Two practicing advocates nominated from within which the advocates profession.
6. Two practicing attorneys nominated from within the attorney's profession.
7. One teacher of law, designated by the teachers of law at South African universities (typically the dean of one of the faculties of law).
8. Six members from the national assembly (including 3 from the opposion parties).
9. Four members from the National Council of provinces.
10. Four more persons designated by the president as head of the national assembly.

3. Australia:

The Attorney General consults widely with interested bodies seeking nomination of suitable candidates. In addition, the Attorney General also writes to:

1. State and territory attorneys general.
2. Chief Justice of the High Court.
3. Justices of the High Court.
4. State and territory chief justices.

The Attorney General then considers the field of highly suitable candidates and writes to the Prime Minister seeking his/her and or cabinet approval. If approved by the cabinet, the Attorney General makes a recommendation to the Governor General who considers the appointment through the federal executive council process. Once the cabinet has approved the Attorney General's recommendation of the nominee, the appointment papers (including the commission of appointment) are forwarded to the executive council for consideration by the Governor General. If in agreement, the Governor General signs the commission of appointment and it is fixed with the great seal by

way of authentication. Once the appointment has been approved by the Governor General in executive council, the attorney general publicly announces the appointment.

4.Canada: Appointments to the Supreme courts in each province or territoty:

Candidaes for these courts are screened by a judicial advisory committee established for each province. Each committe is composed of representatives of the federal and provincial governments, the provincial (or territorial) law society, the Canadian Bar Association, the judiciary and the general public.

Lawyers who meet the legal and constitutional requirements can apply, as well as provincial and territorial court judges. These candidate must complete comprehensive personal history form(PHF). In its assessment of each candidate, the committee reviews the PHF and consults references and other persons both in and outside legal realm.

Following its review the committee categories lawyer candidates as "recommended" or "unable to recommended" for appointments with reasons for this decision. In case of judge candidates, the committee does not categorize the applicant, but instead formulates "comments" regarding the application. A list of All candidates reviewed by the committee, to gether with the above categorization and reasons or "comments" in the case of judge candidates is forwarded by the committee to the federal minister of justice. The minister draws an appointment form the list of names received from the committees, and recommends that individual to the federal cabinet. When the appointment is that of a chief justice or a puisine chief justice, the recommendation to the cabinet is made by the prime minister of Canada.

A more possible, practical and workable solution would be appoint the judges of the higher courts an all India Examination to be conducted by the Union public service commission (Under Art 312 of the constitution) in a fair and transparent manner and an intensive post selection one or two year training programme be framed just like

the judges of the judges of the subordinate courts are appointed by the state public service commission under Art 234 of the constitution.

In this context it would be prudent to mention the appointment system of judges in China:

In China a High court can be appointed at 23 after he/she passes the National Judiciary Examination (similar to the Indian civil service) examination and completes the stipulated period of professional training[2]

Judicial Appointment of India:-

The Union Government has taken the initiative for the constitution of a judicial appointments commission to replace the collegium system of appointment of judges in higher judiciary. In any country, the constitution is regarded as supreme law of the land, as its sets out rule for the Governance of the country and guarantees fundamental rights to its citizens. The legislature, one organ of the Government, makes law, second organ the executive practically known as Government, executes law and the judiciary, third organ adjudicates disputes in accordance with law. The supremacy of the constitution is safeguarded by the judiciary by interpreting the constitution and declaring any law made or any executive action taken against the provisions of the constitution as ultra-vires. Due to this specific role, the judiciary is regarded as the protector or guardian of the constitution and judicial independence become essential for the smooth functioning of the judiciary.

In India the president- Constitutional head of the Union executive appoints the judges of the Supreme Court after consultation with such of the judges of the Supreme Court and of the High Courts as the president may deem necessary for the purpose under Article 124(2) and the judges of High court after consultation with the chief justice of India. The Governor of the state and in case of a judge other than the chief justice, The chief justice of that High court under Article 217(1) of

[2] The Hindu dated Dec 27 2010

the constitution of India. It is clear from these provisions that the appointing authority is the president. But it is the Chief justice if India and other judges who are the expert body for selecting suitable persons to be appointed, as the phrase "after consultation" indicates. Evidently the constitutional mandate provides an excellent format for the selection and appointment of the judges in higher judiciary by determining the appropriate role of both the executive and the judiciary.

The problem in this regard arose when the Government started to exercise the power for political consideration. Over the years a convention was developed that the senior most judge will become the chief-justice, as there is no clear mandate in this regard in the constitution. However, the convention was not followed after the delivery of the judgement of Kesavananda Bharthi v/s State of kerala[3] when Justice A.N Ray was appointed as Chief justice of India after the retirement of c.j sikri superseding three judges –shelat, Grover and Hegde who had decided against the Union Government. These superseded Judges resigned in protest. Again in 1976 on the retirement of C.J Ray, Justice Beg was appointed as C.J.I superseding the senior most judge Khanna who resigned in protest. After the declaration of Emergency in June 1975 as a sequel to disqualification of then Prime Minister whose election was invalidated by the Allahabad High court on the ground of corrupt practices and she could not get remedy from the Supreme Court (Indira Gandhi v/s Raj Narayan AIR 1975 SC 2299). The constitution was extensively amended mostly through the Constitution 42nd amendment act 1976 and mass transfer of High court judges were made.

Evidently, punitive measures were adopted and attemts were made to undermine the judicial independence. The stand of the Government caused a great dissatisfaction not only in judiciary but also among persons concerned with the field of law. Consequently the collegiums system was evolved through *Supreme Court Advocates on*

[3] AIR 1973 SVC 1461

record Association v/s Union of India[4] to eliminate the political interference and to minimize the individual discretion of constitutional functionaries involved in the process of appointment of judges. The ruling of this case was clarified and elaborated in In re: Presidential Reference[5] and it was held that the opinion of the chief justice of India has primacy in appointment of judges and the C.J.I ought to consult in case of making recommendation for appointment of Supreme court judges in case of appointment of High court judges, three senior most judges of the concerned High court should also be consulted. The recommendation of the collegium is binding.

Clearly collegium system means the method of selection and appointment of judges of Higher courts in which the C.J.I recommends names with the consultation of four or three senior most judges of the Supreme Court and High court respectively. In case of difference of opinion, the opinion of the collegiums prevails over the executive.

But the executive is consistently trying to establish its predominance the judiciary. Earlier, It proposed "Judicial standards and Accountability Bill 2010" for laying down the standards of judicial conduct and to fix its accountability. An analysis of the bill reveals that the motive behind it is to undermine the judicial independence. Its relevance can be argued only in context of Article 124(4) and (5) of the Constitution. But it is disguised as being permissible under Art 124(5) which empowers parliament to make law for the regulation of proceeding of impeachment on the ground of misbehaviour or incapacity stipulated under Art 124(4). In the same year the C.J.I was asked to comment on a proposal from Union Government suggesting changes in the collegiums system of appointment of judges to give more say to the execute in the appointments[6]. So for as the relevance of the collegiums system is concerned, it has been criticized to be secretive and more subjective, as personal likes and dislikes weigh with

[4] AIR 1994 SC 268
[5] AIR 1999 SC 1
[6] The Hindu, May 9 2010

individual judges in the collegiums and mandatory effective consultation process is not transparent.

The real issue is not who appoints judges but how they are appointed. Irrespective of whether it is the executive or the judiciary or Judicial Appointment Commission (As recently proposed) that appoints Judges, the problem will exist as long as the appointments are made for personal considerations. The crucial need is to evolve an objective criteria based on the merit and capacity for the assessment of persons to be appointed.

Collegium Versus National Judicial Appointment Commission:

Judicial independence is an absolute necessity for maintaining the rule of law and fair judicial administration in the country. The independent judiciary plays an important role in controlling the arbitrary act of the administration. If the judiciary is under the control of the executive, it cannot punish the executive incase it violates the law.

The much promoted tale of judicial independence might be proved wrong in the coming days. The passing of the National Judicial Appointment Bill, abolishing the collegium system, has itself invited a number of questions on judicial independence from different sections of society. Before going into the composition, functioning, merits and demerits of the National Judicial Appointment Commission, we should first understand what the collegium system is.

The collegium is a system under which judges of the Supreme Court and High Court are appointed and transferred by a forum comprising of the Chief Justice of India, along with four senior-most judges of the Supreme Court.

The collegium system came into force based on three different judgements of the Supreme Court, popularly known as the **"Three Judges Case".** The 1981, *S.P. Gupta Vs. Union Of India* case is the first one and is popularly known as the "First Judges Case". In this case it was held that the opinion of the executive should have primacy

regarding appointment of judges to higher judiciary. But in *S.C. Advocates on-record Association Vs. Union of India* 1993 case, also known as " Second Judges Case", the decision in 'S.P. Gupta case' was overruled and was held that, the opinion of Chief Justice of India has primacy in the appointment of judges. In this case the Supreme Court has made it clear that, the appointment has to be done in consultation with a collegium of judges of the Supreme Court. The collegium should consist of the Chief Justice of India and two senior-most judges of the Supreme Court.

However, in the third judgement, which is exactly not a case but a presidential reference, the apex court has held that the collegium should consist of the Chief Justice of India and four senior-most judges of the Supreme Court. It is made clear that, in the appointment of judges of Supreme Court and High Court, primacy is given to the opinion of the Chief Justice of India which should reflect the opinion of judiciary i.e, opinion of plurality of judges. The court has observed that the expression " consultation" with the Chief Justice of India" in Article 217(1) and 222(1) requires consultation with a plurality of judges in formation of the opinion of the Chief Justice of India. This reference made by the President is known as the " Third Judges Case".

Let us now look into the advantages of this system.

1) The judges of the High Court and Supreme Court are better aware of the performance of the lawyers and lower judiciary. Therefore they are better placed to recommend names for appointment to higher judiciary.

2) The performance of the lawyer or judge of the lower judiciary is the sole consideration for recommending or selecting a name.

3) The delay in the selection process is minimal.

Above all, the most important advantage of this system is that, it guarantees independence to judiciary. It does not have room for political interference. Like all other good things, this system has some pitfalls too, like lack of transparency in selection of judges etc, but this is certainly not above the objective of this system i.e, independent

judiciary.

A series of events were recently revealed by Justice Markandey Katju, a former Supreme Court judge, that compelled everyone to question the transparency of the collegium. Apart from some other leakouts, Katju also revealed that a politically connected Madras High Court judge was allowed to stay in the bench despite having corruption charges against him. He also explained the unreliability of the collegium system by referring to the recommendation of an eminent lawyer to the bench. The Chief Justice of India came strongly in defence of this system and said, a misleading campaign was under way to defame the judiciary. He was even quoted saying that, inspite of the limitations that collegium system has, it is unfair to campaign against it basing on mere allegations on few judges.

Following the controversies, the National Judicial Appointment Commission Bill was finally passed by the Parliament along with the **121st Amendment Bill** on **14th Aug 2014** to give a constitutional status to the proposed commission.

The commission will now comprise of the Chief Justice of India, who will act as the Chairperson, two senior-most judges of the Supreme Court, Union Law Minister and two eminent citizens to be nominated by the Chief Justice of India, Prime Minister and Leader of opposition or Leader of largest opponent party in the Lok Sabha. One of the eminent citizens will be nominated from among the SC/ST, OBC, minorities or women.

The major drawback of this new commission is that, it gives enough scope for political interference which is a threat to judicial independence. It also violates the basic structure of the constitution and concept of separation of powers. Apart from this, there are also other drawbacks such as procedural delay in appointment, tampering with IB reports of a candidate not having good rapport with political parties.

Definitely, the bill has certain advantages like transparency in selection, more accountability in judiciary etc, but this does not meet

the purpose for which the collegium system was setup. National Judicial Appointment Commission does not guarantee the much needed freedom, to the judiciary. While opposing the new commission, noted jurist Fali S Nariman pointed out that, this system hits at the root of judicial independence and might be struck down by the highest court of the land.

Eminent lawyer and jurist Ram Jethmalani has strongly opposed the membership of Union Law Minister in the commission. Not necessarily, but most of the Law Ministers are advocates by profession and after few years they would have to appear in front of the same judge they have appointed while they were the member of the commission. The judge in that case might favour the then Law Minister and be biased towards him.

There are other flaws in the Bill too. The Bill allows two members of the commission to scuttle the appointment of an individual. Such a provision can be misused. Judges will have to devote extra time for discussing the issues in commission which will hamper the normal judicial process thereby increasing the pendency of cases.

So, to maintain its full-fledged freedom and uprightness, the judiciary should have predominant role in the commission. The role of executive should be limited to transparency only. In absence of these features, the survival of democracy would be in peril.

National Judicial Appointment Commission: Pros and Cons

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 .As soon as it gets the consent of different States (by virtue of being a Constitutional Bill) and the President's assent the National Judicial Appointments Commission (NJAC) with Constitutional status will become a reality. With the NJAC becoming a reality the collegiums system devised by Supreme Court in 1993 will become a thing of past. 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. On the other hand, 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 NJAC.

Composition and Function of NJAC

• The NJAC comprises of six-members which include Chief Justice of India as Chairman, Union Law Minister, two senior-most 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.
• The NJAC will recommend to the President for the appointment and transfer of judges of higher judiciary, viz., Supreme Court and High Courts.
• It will also make recommendations for the appointment of Chief Justice of India and Chief Justices of High Courts.
Before going into the arguments in favour and against the NJAC, it would be pertinent to understand about collegiums system
Collegium System

The Collegium system was in consonance with the trend of judicial activism undertaken by the Supreme Court in the late 1980s. The system got concrete shape in 1998 in Third Judge case wherein SC laid down elaborate selection process of judges of higher judiciary. Under the Collegium system, the Chief Justice of India would consult the four senior most judges of the Supreme Court for Supreme Court appointments and two senior-most judges for high court appointments.

The judiciary, in fact, 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 ensuring plurality of functionaries only within the judicial system.

Arguments in Favour

It is a fact that collegiums system over the years has come under severe criticism on account of opaqueness in appointment and transfer of judges of higher judiciary. Besides, the growing corruption and nepotism within the judiciary calls for transparency. The recent revelation by Jusitce (retd) Markandey Katju and Justice Dinakaran case is a pointer towards reforming the judiciary.

Besides, it is criticised that collegiums system does not provide an adequate tenure for the chief justices of the High Courts, the consultation process is secretive and unknown to the judiciary and the public, and meritorious candidates from the bar and high courts are denied an opportunity to serve on the bench for undisclosed reasons.

Arguments against the NJAC

The legal fraternity argues that NJAC is a ploy to bring the judiciary within the ambit of executive in the garb of reforming collegiums system. Thus NJAC will limit the judiciary in scrutinising the executive's malafide actions and its overreach. It will compromise the independence of judiciary which has been cornerstone in ensuring the peoples' faith in democracy. The recent role of judiciary in 2G and Coalgate scam is a point in this direction.

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Solutions to the important problems facing the Appointments of judges to the Constitutional courts in India:

1. The power to select and appoint Judges to the Supreme Court and the High Court is vested with the Executive under Articles 124 and 217 of the Constitution of India.

2. However, there is one requirement, which needs to be met. It is prescribed that the President shall appoint the Judges to the Supreme Court, 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. So far, as appointment of a Judge other than the Chief Justice of India, it was required to be done in consultation with the Chief Justice of India.

3. As far as the High Courts are concerned, the President shall appoint Judges to the High Court after consultation with the Chief Justice of India, the Governor of the State and in case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court concerned.

4. The machinery so created for appointment of the Judges to the higher judiciary had been in operation and had also received the approval of the Supreme Court in the case of Union of India vs Sankal Chand Himatlal Sheth (1977), where it was firmly held that "consultation" did not mean "concurrence". This view was also approved in S.P. Gupta vs Union of India (1981).

5. Article 368 of the Constitution empowers the Parliament to amend the Constitution and lays down the procedure there for.

7. Of the three modes by which the constitution may be amended, the most onerous method is prescribed for amending the provisions relating to appointments to the higher judiciary.

8. The one and only method by which it may be amended is by introducing a Bill for the purpose in either house of Parliament and passing the same by a majority of the total membership of that house and by a majority of not less than two-third members of that House present and voting, together with ratification by the legislatures of not less than one-half of the States by a resolution to that effect passed by those Legislatures and thereafter securing the assent of the President.

9. Notwithstanding the same, in the second Judges' case {Supreme Court Advocates-on-Record Association vs Union of India (1993)}, the Supreme Court ruled that the word " consultation " in Articles 124 and

217 denoted " concurrence ", and that primacy in making judicial appointments vested with the Chief Justice. The said view was also affirmed by the third Judges' case [In re: Presidential Reference (1998)].

10. By these two judgments , the procedure to select and appoint Judges to the higher judiciary was amended and the power wrested by the Judiciary from the Executive by interpreting the word "consultation" as "concurrence".

11. A Collegium was constituted in the second Judges' case and the composition of the Collegium was modified in the third Judges case.

12. The said interpretation itself came to be made, when it was noticed that no progress had been made to appoint a National Judicial Commission in order to ensure that the appointments were transparent and that such appointments contributed to upholding the independence of the Judiciary.

13. The Collegium system has worked for over twenty years. The present Judges are all appointed, both in the Supreme Court as well as in the High Courts, through this Collegium system.

15. There has been debate on the existing Collegium system and there appears to be agreement in its failure.

16. In the circumstances, efforts have been made in the past to replace the Collegium system by constituting the National Judicial Commission.

17. Though, the earlier attempts to constitute the Commission did not succeed, the newly constituted Union Government has succeeded in getting the Constitution (121st Amendment) Bill 2014 and the National Judicial Appointments Commission Bill 2014 passed by the Parliament in quick succession in August 2014.

18. The Constitution Amendment Bill awaits the ratification by the Legislatures of not less than one half of the States.

19.The proposed measure, while putting an end to the Collegium system, seeks Constitution of a Six-Member National Judicial Appointments Commission to handle all matters relating to appointment of Judges to the Higher Judiciary.

20. Our Constitution has broadly accepted the doctrine of suppression of power. However, a continuous chain of coalition Governments has substantially damaged the delicate balance between the three organs of the State, namely, the Legislature, the Executive and the Judiciary.

21. The doctrine of the checks and balances could not operate effectively as the Executive, for various reasons, has not been in a position to assert itself to discharge it's constitutional functions. Over this period, there is a steady ascendency of the Judiciary making it the most powerful Judiciary in the World.

22. As the Supreme Court itself has declared "This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of the determining of what is the power conferred on each branch of the Government, whether it is limited and if so, what are the limits and whether any action of that branch transgress such limits" [State of Rajasthan vs Union of India – AIR 1977 SC 1361].

22. The nature of power that our Supreme Court has come to enjoy has been described by a famous jurist, I quote: "..... In no other Country in the World has the Judiciary has assumed such ascendency as in India.....The Indian Supreme Court is today the mostpowerful of all Apex Courts in the World. It has surpassed in its power even the United States' Supreme Court, which Lord Bryce and Tocqueville thought in their time was most powerful of all Courts in the World." unquote.

23. Today, the Indian Supreme Court has regulated a wide range of aspects governing human life. To name a few, it has regulated admissions to the Professional Colleges, has framed law to rescue women, banned strikes, processions and bundhs, directed Municipalities to provide

24.drainages, directed framing a Scheme to increase the pension of retired Central Government employees, directed the revival of industries, so on. Telecasting of cricket matches has also been regulated. Every order made by the Executive and every Law made by the Legislature is subject to the power of Judicial Review.

25. It is significant to note that the Parliament's exercise of the constituent power to amend the Constitution has to pass the judicially invented touch stone of basic structure.

26. In this backdrop, the Indian Judiciary has grown beyond the position assigned to in the Constitution of India resulting in its emergence as the most powerful organ. The Doctrine of Checks and Balances itself will be seriously jeopardized if the delicate balance struck between the three organs through the Doctrine of Suppression of Power is altered.

27. Thus, appointment to the Higher Judiciary assumes great importance. Unless right men are appointed to the Constitutional Courts, we cannot expect an independent judiciary discharging its function without fear or favour and affection or ill-will.

28. As to who appoints the Judges, on what criteria and following what procedure also assumes great importance.

29. As Dr B. R. Ambedkar had declared on the Floor of the Constituent Assembly, I quote :

“However good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a constitution may be, it may turn out to be good, if those who are called to work it happened to be a good lot.

30. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of the State such as the Legislature, the Executive and the Judiciary.

31. The factors, on which the working of those organs of the State depend on the people and the political parties. They will set up as their

instrument to carry out their wishes and their politics.Who can say how the people of India and their parties will behave ? Will they uphold the constitutional methods of achieving their purposes or will they prefer revolutionary method of achieving them? If they adopt the revolutionary methods, however good a Constitution may be, it requires no profit to say that it will fail…." [C.A.D-volume XI, Page : 975,25th November 1949] unquote.

32. One of the most depressing features about the composition of the Judiciary today is the absence of a single Judge from among the Scheduled Castes and Scheduled Tribes on the Supreme Court Bench.

33. Thus, a significant portion of India's population has no representation on the Supreme Court Bench. The position of women and backward Classes is no different. It is woefully inadequate.

34. Even in the High Courts, the position is no better. Above all, there is no information available as to whether candidates belonging to these Sections were duly considered in making such appointments and if so why they were not appointed in adequate numbers. It is also not known if any attempts have been made to give adequate representation to these classes and reasons, if any for not providing representation.

35. This is mainly on account of the fact that the existing system does not provide any information on these aspects and there is not enough transparency in the procedure relating to the appointments of Judges to the Constitutional Courts. More importantly, if a Section of the Society is persistently neglected in providing representation on the Bench, the system is not accountable either to the Parliament or to any other Constitutional Body.

39. It is an effort to find a solution to these problems that has necessitated the constitution of the National Judicial Commission. Once that Commission is constituted and transparency and accountability is assured, the other details about the composition of the Commission and the procedure to be adopted by the Commission needs to be addressed.

40. Under a Federal Constitution, the Governor has to act on the aid and advice of the Council of Ministers. In the matter of appointment of Judges also. This is the Constitutional position.

41. Once the views of the State Government and of the Chief Minister are ascertained, consulting the Governor there after can become counterproductive, especially when a situation can be there when the Governor gives his opinion ignoring the aid and advice of the Council of Ministers. Therefore, seeking the views of the Governor after consulting the Chief Minister is also a matter which needs to be specifically addressed.

In this regard, the following suggestions:

1) The selection of judges to the higher judiciary should be made through an independent commission of high standing with the Chief justice of India as chairman and atleast the prime minister as a member of the Commission.

Justice V.R Krishna Iyer is also of the same opinion[7]. The Law commission in its 121st report issued in 1987 has also suggested for the setting up of a Judicial Appointments Commission.

Justice Verma's interview to *The Frontline,* the Law commission wrote " The Indian constitution provides a beautiful system of checks and balances under Art 124(2) and 217(1) for the appointment of judges of the supreme court and the High courts where both the executive and the Judiciary have been given a balanced role. It is time the original balance of power is restored".

2) The selection should be made on the ground of merit and capacity of the person, and the class character of the person selected to be appointed should be investigated by an independent agency functioning under the control of the commission.

Justice V.R. Krishna Iyer has also expressed the same view[8]. In England, the Judicial Appoinment Commission established under the

[7] "Judicial Appoinments and Disappoinments"-By V.R. Krishna Iyer, Published in the The Hindu, August 18, 2012.

Constitutional Reform Act, 2005 made merit the sole basis for selection to judiciary[9].

3) The selection should be made on a consensus after wide consultation with sitting judges, highly reputed retired judges and senior repected lawyers wide consultation based methodology was adopted by Justice Markandey Katju when he was C.J of Madras High court and he also informed the then C.J of India about the methodology adopted by him[10]

4) Distinguished jurists should also be appointed as Judge of the Supreme Court.

Article 124(3) of the Constitution provides for three categories of persons who are eligible to be appointed as a judge of the Supreme court- a High court judge with five years experience an advocate of the High court with ten years experience and a distinguished jurist. Right from the commencement of the Constitution till now, the judges of the Supreme Court has been appointed mostly from first category. The third category has been consistently ignored

There have been cases in U.S.A of appoinmentment of non-practicing lawyer as judges of the Supreme court *Felix Franfurter* is a living example. He was a teacher of law at Harvard Law School before he was appointed judge of the Supreme Court. His ability and deep knowledge of law can be seen in his judgements.

These suggestions should be incorporated in the Constitution through constitutional amendment so that the objective can be secured from any breach.

Conclusion:

A good, agile, efficient and transparent administration is the hallmark of democratic functioning for which independence is a pre-requisite. However one cannot ask for an all encompassing freedom so as to shield transparency and shun accountability completely which

[8] Supra note 5
[9] http://www.parliament.uk. (Last Accessed 09-02-2016)
[10] "Let's mark judges selection more transparent"- By Justice Markande Katju, Published in The Hindu Jan 3 2013. at p.10.

may harmful for governance. The need of the hour is to revisit the present system of appointment of judges to the higher judiciary to improve administrative efficiency, transparency and overall system of governance.