

HIGHER JUDICIAL APPOINTMENTS AND JUDICIAL INDEPENDENCE: TUSSE BETWEEN JUDICIARY AND EXECUTIVE

DR. K. SHANTHI ^{1*} , DR. SUKHVINDER SINGH DARI ² , DR. PRASHANT DHAGE ³

¹ Assistant Professor, Symbiosis law School, Hyderabad, Symbiosis International (Deemed University), Pune - India

² Associate Professor, Symbiosis Law School Nagpur, Symbiosis International (Deemed University), Pune - India

³ Assistant Professor, Symbiosis Law School Nagpur, Symbiosis International (Deemed University), Pune - India

*Email: sravyashaanthi@gmail.com

Abstract

Executive, legislature and judiciary, the three organs of the government, need to be independent and accountable to each other as propounded by Montesqui's Separation of Power doctrine and Checks and Balances. These doctrines are very much essential for good governance of any democratic country. Judiciary, being the protector and guardian of the constitution, which is the will of the people, is required to be more independent and outside the influence of the legislature and the executive. There have been many instances of conflict between the tripartite organs of the government. But, the ongoing tussle between the Judiciary and the executive regarding higher judicial appointments where the central law minister commented and criticized the present Collegium system of appointing judges as opaque, unaccountable and also is very firm in having representation of a member from the executive has once again raised the issue of Independence of Judiciary. This paper mainly emphasizes on the concept of Independence of judiciary its linkage to Rule of law. It also speaks about the higher judicial appointment and the conflict between the executive and the judiciary. This paper finally concludes with possible suggestions.

Keywords: (Separation of Powers, Judiciary, Independence of Judiciary, Higher Judicial appointments, Collegium)

Table of Contents

Introduction

1. Independence of Judiciary: Meaning and Significance
2. Independence and Impartiality
3. Rule of Law and Judicial Independence
4. Rule of Law in Ancient India
5. Rule of Law in Medieval India
6. Role of Judges
7. Higher Judiciary and Appointment of Judges
8. Battle of Supremacy between Legislature, Executive and Judiciary
9. Conclusion
10. Suggestions

Introduction

The concept of judiciary is as ancient as Aristotle, who said that every Constitution contains three elements: *deliberative element concerned with common affairs, element concerned with public office and judicial element*¹, thus, sowing seed to distinct *legislative, executive and judicial functions* and paving way for Montesquieu to be first to fully formulate *Theory of Separation of Powers*, although its traces could be found in John Locke's *Civil Government*. According to Hamilton, judiciary is the least dangerous branch of the government because it lacks control over the military and finances. The judiciary relies on the executive branch to enforce its decisions and only has the power of judgment².

¹ARISTOTLE, POLITICS iv:14:1(1297^b35)/165 (Tr. Ernest Barker and Rvd. Intr. and Notes R.F. Stalley).

²ALEXANDER HAMILTON, FEDERALIST NO.78 at 402.

http://files.libertyfund.org/files/788/0084_LFeBk.pdf

However, David Pannick argues that the judiciary is not the least dangerous branch and that judges hold significant power, such as the ability to send individuals to prison and make decisions with significant impacts on individuals and society.³ This statement has also been supported and argued by Justice Krishna Iyer.⁴

The doctrine of Separation of Powers envisages that the legislature, the executive and the judiciary, essential organs of the government are the basic pillars required for the smooth functioning of the government. Though there is no express declaration of Powers being Separated under the Constitution of India, there are traces of the doctrine. The powers are divided among the three organs of the government by the Constitution. The law making power is to the Legislative, interpreting the laws is to the Judiciary and its implementation is to the Executive. The smooth functioning of any democratic government is not possible, by individual functioning of the institutions. As Lord Acton says, "Power tends to corrupt and absolute power corrupts absolutely." There need to be a check on the functioning of the organs and this is possible by making the organs accountable to each other. The doctrine of Checks and Balances says that the organs need to be independent and at the same time need to be accountable to each other without overriding or interfering into others powers. In India, which is a blend of constitutional sovereignty and parliamentary supremacy there is no strict separation of powers. The independent nature of the three organs is the constitutional requirement. Judiciary being the custodian of the Constitution, it mandates that Judicial Independence be maintained for the welfare of its citizens in any democratic country. The judiciary should not be interfered neither by the legislative nor the executive.

In India, Judiciary is the most significant pillar of the democratic government. It is the custodian and the protector of the Constitution. It is held in high esteem among the masses, due to its unbiased and impartial discharge of the constitutional mandates without fear or favour, or enmity or affection. Its strength lies in its integrity, its impartiality and its independence⁵. In recent times there is much of scope for conflict of interest among the institutions of democracy. The functioning of the judiciary is being interfered either by the legislative or the executive, leading to tyranny and loss of democratic will of the citizens. The main emphasis of this paper is to understand the concept of Independence of Judiciary, Rule of law, autonomy and impartiality, and interference instances paving the way for the emerging threats to judicial independence.

1. Independence Of Judiciary: Meaning and Significance

Senator Sam Ervin, who was known for his involvement in the Watergate scandal, wrote that an independent judiciary is crucial in a free society,⁶ as it protects against tyranny and ensures that those in power abide by the law.⁷ O. Hood adds that the principle of judicial independence from executive interference has long been a fundamental aspect of British constitutional law.⁸ His statement strengthens Dicey on judicial independence in England.⁹

The British Constitution does not explicitly separate legislative and executive powers, but it does provide a complete separation of the judiciary from both branches, except for the Lord Chancellor who is part of all three branches and the Law Lords who are part of two.¹⁰

The New Delhi Conference on judicial independence concluded that an independent judiciary is vital for a liberalized society governed by the rule of law, and that a judge's compensation should not be abridged throughout their term of office.¹¹

³DAVID PANNICK, JUDGES 204-5 (1st ed. 1987/1988).

⁴V.R. KRISHNA IYER, CONSTITUTIONAL MISCELLANY 277, (2d ed. 2003).

⁵<http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=53f5a9eb-791d-400c-a63f-6612b586cd8f&txtsearch=Subject:%20Jurisprudence>

⁶ARCHIBALD COX, THE COURT AND THE CONSTITUTION 171-72.

⁷Sam Ervin, Jr., Separation of Powers: Judicial Independence, 35 LAW AND CONTEMP. PROBL. 108, 121 (1970), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3279&context=lcp>

⁸PAUL JACKSON & PATRICIA LEOPOLD, O. HOOD PHILLIPS AND JACKSON CONSTITUTIONAL AND ADMINISTRATIVE LAW 431 (8th ed. 2001 (South Asian ed. 2015)).

⁹A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 409-10 (10th ed. 1959).

¹⁰ TOM BINGHAM, LIVES OF THE LAW: SELECTED ESSAYS AND SPEECHES 2000-2010, 71- 72.

According to Professor Bhat, the independence of judges involves more than just job security and a decent salary. It means creating an environment where judges can uphold the Constitution and laws impartially, without fright or favoritism.¹² Justice Bhagwati reiterates the concept in 5-Judge Bench and quotes from judgment rendered by 7-Judge Bench:

‘for the principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values’.¹³

However, *judicial independence is no armour to judicial misbehaviour or incompetence*.¹⁴

Concept

Concept of independence of judiciary was *sine qua non* to Founding Fathers of American Constitution. At the 19th International Bar Association’s Biennial Conference held in New Delhi in October 1982, the “Draft Minimum Standards of Judicial Independence” presented in Dr. Shimon Shetreet’s manuscript was discussed and eventually embraced as the “Delhi Minimum Standards” of judicial autonomy. According to Dr. Shetreet, the modern understanding of judicial autonomy must encompass not only the individual independence of judges, but also as an institution the judiciary has to be collectively independent.¹⁵

In both theory and practice, the independence of the judiciary is composed of two crucial aspects: the independence of the judiciary as an institutional body and the independence of individual judges.¹⁶ Lord Mackay says, *while sitting in a case, any direction by a judge, however eminent he may be, to his colleagues* ‘is just as inappropriate as interference from any other outside agency, such as the executive’.¹⁷ Referring Huges CJ, Justice Khanna in his dissenting judgment in *habeas corpus*¹⁸ case reiterates that *unanimity should not be secured through sacrifice of individual conviction*.¹⁹ The independence of the judiciary refers to the freedom from interference by the executive branch, litigants, or influential groups.²⁰ This concept was developed by the International Jurist’s Commission in 1981 and outlined in Article 2 of the Syracuse Draft Principles.²¹ The guiding principle behind judicial independence should be a judge’s conscience, ensuring that justice is not only done, but appears to be done,²² as exemplified by McNaughton who strictly followed the law without bias.²³

2. Independence and Impartiality

The impartiality of the judiciary is considered as crucial, if not the most crucial aspect of administering justice.²⁴ According to Bailey-duo, independence is a necessary requirement for impartiality and, as a result, for fair trials.²⁵ ‘Impartiality involves various psychological factors but also requires certain institutional conditions. The first of these conditions is the independence of the judiciary.’²⁶ Thus, independence of judiciary is an essential ingredient of impartiality. Lord Denning and Bailey both emphasize the importance of judges being not just impartial in their decision-making,

¹¹ R.F.V. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* 52-3 (2d Ed. 1964).

¹² PROFESSOR P. ISHWARA BHAT, *DURGA DAS BASU LIMITED GOVERNMENT AND JUDICIAL REVIEW* 85.

¹³ *Madras Bar Assn v Union of India*, (2014) 10 S.S.C. 1, para 88 (India)..

¹⁴ PANNICK, *Supra* note 3 at 99.

¹⁵ RAM KISHORE CHAUDHURY & TAPASH GAN CHUDHURY eds. *SELECTED SPEECHES AND WRITINGS OF JUSTICE BHAGWATI* 276.

¹⁶ *Id.* at 277.

¹⁷ TAPASH GAN CHOUDHURY, *PENUMBRA OF NATURAL JUSTICE* 316 (3d ed. 2016).

¹⁸ *A.D.M. Jabalpur v Shivkant Shukla*, (1976) 2 S.C.C. 521, Para-594 (India).

¹⁹ H.R. KHANNA, *MAKING OF INDIA’S CONSTITUTION* 538-39.

²⁰ S.H. BAILEY & M.J. GUNN eds. *SMITH & BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM* 239 (3d ed.).

²¹ CHAUDHURY, *supra* note 15.

²² *R. v. Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256.

²³ PANNICK, *supra* note 3 at 39.

²⁴ JACKSON, *supra* note 7 at 437.

²⁵ BAILEY, *supra* note 20.

²⁶ TAPASH, *supra* note 17 at 228.

but also perceived as impartial by the public.²⁷ Bailey adds that a display of impartiality, or "ostentatious impartiality," will strengthen confidence of the public in the judiciary.²⁸ This view is echoed by Professor Sathe.²⁹

Several international human rights instruments lay great stress on 'independence and impartiality'. The Universal Declaration of Human Rights (UDHR) through Article 10, the European Convention for Protection of Human Rights and Fundamental Freedoms (1950) through Article 6, and the International Covenant on Civil and Political Rights (1966) through Article 14(1), all require Member States to establish independent and impartial judiciaries to provide fair and public hearings for the rights and obligations to be determined in criminal cases. To support Member States in this endeavour, the UN General Assembly vide Clauses-(1) and (2) endorsed the Fundamental Principles on the Independence of the Judiciary in 1985.³⁰ Additionally, Clause 8 mandates that judges must behave in a manner that maintains the respect and impartiality of the judiciary and their own position. As noted by American judge and professor Bhat, independence and impartiality are closely linked, and impartiality is not just a technical term, but a mindset.³¹

However, it is not exaggeration that however upright might be a judge, in certain circumstances, unconscious-bias is unavoidable. In 1911 Winston Churchill (then Home Secretary) told House of Commons that where class issues are involved, courts are 'unconsciously, no doubt, biased'. In 1920 Lord Justice Scrutton made similar point that judicial impartiality is difficult to attain.³² It is unrealistic to expect judges to be perfect, as they are human and therefore fallible. They are not immune to the influences and pressures that affect other people.³³ As Justice Cardozo stated, judges are not exempt from the currents that affect the rest of society.³⁴ Analyzing the factors that contribute to a judge's independence and impartiality is not a straightforward task, according to Justice Bhagwati.³⁵

3. Rule of Law and Judicial Independence

The term "Rule of Law" is inherently vague and has multiple interpretations, due to its overuse.³⁶ As a result, Sir Ivor Jennings referred to it as an "unruly horse".³⁷

The expression originates from the French phrase "La Principe de Legalite," meaning a government that operates based on laws and not individuals, making the concept of "Rule of Law" refer to the principle of legality and not of men.³⁸ In thirteenth-century, Bracton is said to have introduced the notion of Rule of Law, but without naming it as such.³⁹ O. Hood says, Bracton, adopting Middle-Ages general theory held, a king should not be beholden to people, but to God and the law,⁴⁰ thus vindicating supremacy of law over pretensions of executives.⁴¹ Heuston combined this idea that a monarch is subject to God and the law with the doctrine of Parliament's supremacy in the seventeenth century. As a result, the law was supreme, but Parliament had the power to change it. After the

²⁷O. CHINNAPPA REDDY, THE COURT AND THE CONSTITUTION OF INDIA: SUMMITS AND SHALLOWS 207 (2008).

²⁸BAILEY, *supra* note 20.d ed. 1966).

²⁹S.P. SATHE, ADMINISTRATIVE LAW 192 (7th ed. 2004).

³⁰U.N. GENERAL ASSEMBLY RESOLUTIONS 40/32 (29.11.1985) & 40/146 (13.12.1985).

<https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>

³¹PROFESSOR P. ISHWARA BHAT, DURGA DAS BASU LIMITED GOVERNMENT AND JUDICIAL REVIEW 85 (2016).

³²PANNICK, *supra* note 3 at 44-5.

³³K.K. MATHEW, THREE LECTURES 23.

³⁴BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1961).

³⁵CHAUDHURY, *supra* note 15.

³⁶JACKSON, *supra* note 7 at 29.

³⁷Soli J. Sorabjee, Rule of Law: Its Ambit and Dimension in N.R. MADHAVA MENON ed. RULE OF LAW IN A FREE SOCIETY 3.

³⁸<https://www.lawteacher.net/free-law-essays/administrative-law/origin-and-concept-of-rule-of-law-administrative-law-essay.php>

³⁹*Id.*

⁴⁰JACKSON, *supra* note 7 at 30.

⁴¹BLOG, *supra* note 40.

Glorious Revolution of 1688, the law made by Parliament and interpreted by an independent judiciary became supreme.⁴² However, last stage conceptual development in history came when Dicey *first coined* Rule of Law expression in 1885 in his *Introduction to Study of Constitution*,⁴³ and 'his formulation was at once accepted as authoritative'⁴⁴. Therefore, 'he would deserve to be remembered for this phrase if for nothing else'⁴⁵. The concept of 'rule of law' is frequently contrasted with 'rule by men,' meaning rule based on the whims of political leaders.⁴⁶ According to Zuckert, the rule of law involves the use of power that can be publicly justified. This means that moral standards, whether written or unwritten, are applied to legislative decisions.⁴⁷

Dicey says, the deep-rooted principle of the constitution, which is Rule of Law, includes under one expression at least three distinct conceptions, which he explained.⁴⁸

Prof. Wade in introduction to Dicey's *Constitutional Law* says, *preservation of rule of law rested upon independence of judges*; and that independence has been granted by the Parliament⁴⁹. Therefore, Lord Denning asserted, 'The keystone of the rule of law in England has been the independence of the judges'.⁵⁰ Justice Bhagwati says, the term being 'multi-conceptual having different ingredients and components', is *totally different* from Socialist State to Western Democracy.⁵¹ Nevertheless, individual integrity is indispensable to judicial independence to preserve Rule of Law which is 'bedrock of democracy'.⁵²

4. Rule of Law in Ancient India

Concept of Rule of Law in India is as ancient as Vedas. Holland quotes Vedas that Law is 'King of Kings' that it is 'mightier than kings, omnipotent'.⁵³ Dr. S. Radhakrishnan, former President of India, observes: 'Even kings are subordinate to Dharma, to the Rule of law.'⁵⁴ SC quotes⁵⁵ from Karna Parva-Ch.69:58 which enlightens how Dharma rules in society.

Justice Rama Jois illustrates an illuminating instance related in *Rajatarangini*, which not only shows protection of poor individual by King against action of his officers, but also deep rooted faith in Rule of Law (*Dharma Rajya*).⁵⁶

5. Rule of Law in Medieval India

To highlight existence of independence of judiciary imparting justice *impartially without fear or favour*, and to draw attention to fact that *law is not respecter of any person and none is above law*, Dr. Vijaya Kumar narrates interesting incident of a widow from Bengal complaining against King Ghyas in Court of Siraz Uddin, *Qazi-e-Suhab* during A.D. 1490 and *how both King as well as Qazi respected superiority of Law*, each being ready to punish other if either disobeyed Law.⁵⁷

⁴²HEUSTON, supra note 10 at 33.

⁴³BINGHAM, supra note 9 at 9.

⁴⁴HEUSTON, supra note 10 at 33.

⁴⁵BINGHAM, supra note 9 at 54.

⁴⁶Gerald F. Gaus, Public Reason and The Rule Of Law in IAN SHAPIRO ed. THE RULE OF LAW 328.

⁴⁷Michael P. Zuckert, Hobbes, Locke, and The Problem Of The Rule Of Law in IAN SHAPIRO ed. THE RULE OF LAW 63.

⁴⁸DICEY, supra note 8 at 183-203.

⁴⁹Id. at xxv.

⁵⁰SIR ALFRED DENNING, THE CHANGING LAW 4 (1st ed., 1953).

⁵¹CHAUDHURY, supra note 15.

⁵²J.S. Verma, Judicial Independence: Is It Threatened? in SANTOSH PAL ed. CHOOSING HAMMURABI: DEBATES ON JUDICIAL APPOINTMENTS 159.

⁵³SIR THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 19

⁵⁴JUSTICE M. RAMA JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA: ANCIENT LEGAL, JUDICIAL AND CONSTITUTIONAL SYSTEM 10.

⁵⁵Ramesh Yeshwant Prabhoo v P.K. Kunte, A.I.R. 1996 S.C. 113 paras 32-45. Quoted: M. RAMA JOIS, DHARMA: THE GLOBAL ETHIC, 2 (2deEd. 1997).

⁵⁶RAMA JOIS, SEEDS OF MODERN PUBLIC LAW IN ANCIENT INDIAN JURISPRUDENCE 49- 52 (2d ed. 2000).

⁵⁷DR. P.B. VIJAYA KUMAR, DYNAMICS OF JUSTICE a la SUPREME COURT OF INDIA 228-30.

Likewise, to show that in the land of Dharma, Supremacy of Law was not compromised by protectors of law, come what may, Justice Rama Jois illustrates an illuminating instance on fearlessness of judiciary and assertion of supremacy of Dharma. It was a case decided by Ramasastry, Chief Justice of Peshwas, in Maharashtra, in 1774 A.D. who convicted ruler Raghunatha Rao, with others, for ascending throne after murdering his nephew Narayana Rao, and was finally dethroned. Rama Jois asserts that the case serves as a constant source of inspiration, paying homage to the supremacy of Dharma, the independence of the judiciary, and the exemplary behavior demonstrated by a judge.⁵⁸

6. Role of Judges

Former President of India, V.V.Giri, addressing gathering of Judges and Lawyers at the inaugural of the Third Conference of Commonwealth Chief Justices at New Delhi on 4.1.1971, said that, they are persons who are engaged in very important pursuit in their different ways of bringing about society that is essentially just. He further said that in society, Judges play vital role and they are concerned not only with solution of problems presented to them, but with justice of the principle underlying problems.⁵⁹ Justice Ramaswamy expressing almost identical view suggests exercising judicial review power 'with dexterity and social values kept in mind to supplement changing social needs.'⁶⁰

Lions under throne.

In his essay 'Of Judicature' written in 1625, Francis Bacon argued that judges should remember their role is to interpret the law, not to make or give the law.⁶¹ Comparatively declaring judges as lions, he cautioned them to be as lions *under* Solomon's throne, meaning subject to Authority.⁶² But, as cited *supra*, according to Pannick, Judges are not mere 'lions under the throne';⁶³ and, as per Krishna Iyer, judges are 'most despotic, unaccountably empowered and unreviewably authoritarian, with discretionary largesse.'⁶⁴ Therefore, in India people reposed greater faith in judges than politicians.

7. Higher Judiciary and Appointment of Judges

Judges are appointed under the Constitution vide Article-124(2), Chapter-IV, Part-V for SC and Article-217(1), Chapter-V, Part-VI for HCs, by the President under his hand and seal. SC and HCs constitute country's superior judiciary; its judges are constitutional functionaries. 'Subordinate courts are not empowered to decide constitutional cases.'⁶⁵

President appoints CJI and other judges of SC 'after' consultation with some judges of SC and HC. However, for appointing SC judges, CJI 'shall always' be consulted. Similarly, President appoints CJ and other judges of concerned HC 'after' consultation' with CJI and State Governor, and CJ also in case of other judges. Provision both in Articles-124(2) and 217(1) speaks of 'after' consultation, not 'in' consultation.

Article-222(1) empowers the transfer of judges from one High Court to the another by the President, after consultation with CJI.

Three Judges' Cases

Though *prime facie* appear to be 'innocuous', appointment of judges and their transfer gave rise to considerable controversy leading three important cases to SC threshold for decision to 'disentangle the situation but resulted in further entangling the situation'⁶⁶.

⁵⁸JOIS, *supra* note 58 at 169-70.

⁵⁹V.V. GIRI, SPEECHES OF PRESIDENT V.V.GIRI (MAY 1969–DECEMBER 1971) 58 (1974).

⁶⁰JUSTICE K. RAMASWAMY, CEASELESS AND RELENTLESS JOURNEY 17.

⁶¹<https://www.bartleby.com/3/1/56.html>

⁶²Id.

⁶³PANNICK, *supra* note 3.

⁶⁴IYER, *supra* note 4.

⁶⁵ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION: UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA 72.

⁶⁶CHINNAPPA, *supra* note 27 at 303.

In *S.P. Gupta*,⁶⁷ popularly referred as *First Judges'* case, one of points decided was whether among three consultees, CJI has primacy. Slim majority (4:3) ruled that Article-217(1) placed all three constitutional functionaries on par and no primacy given to CJI. It was argued Article-124 meant *there had to be effective consultation with CJI but government was ultimately free to take decision*;⁶⁸ "Consultation" could not possibly mean "concurrence".⁶⁹ In that case no question arose about SC Judges' appointment.⁷⁰

Decade later, in *Second Judges'*⁷¹ case, 'enriched by the experience of dealing with successive governments, the new judges on the court, sitting in a larger Bench',⁷² realizing previous 'great' mistake, virtually reversed decision in *First Judges'* case, and accorded primacy to CJI's views, thus restoring his original position. Court held "consultation" could only mean "concurrence".⁷³ According to majority, President's consultation is absolutely necessary but with collegium consisting of CJI and two of his next senior most judges. In case of difference, CJI's opinion so formed should be determinative and binding on President. The same principle applies to the transfer of judges from one court to another. With regard to the appointment of High Court judges, the majority decision stated that the Chief Justice of India may ask for the views of one or more senior judges of the relevant High Court, whose opinions would carry significant weight in forming the CJI's opinion. The view of the CJI would carry the most weight. The Chief Justice must form his opinion after consulting with at least two of his most senior judges..⁷⁴

*Third Judges'*⁷⁵ case is result of reference made by President against some thoughtful complications arose out of *Second Judges'* case. 9-judge Bench unanimously held that Collegium would now be five-member body consisting of CJI plus four judges next senior to him instead of three-member Collegium as in *Second Judges'* Case.

Ultimate Effect of Three Judges' Cases

Celebrated judge, late Justice J.S.Verma was principal architect of Collegium.⁷⁶ According to NCRWC, consequence of *Second* and *Third Judges'* cases is, emphasis on *integrated participatory consultative process*.⁷⁷ However, Justice Chinnappa Reddy suggests reverting to old system of consulting only CJI.⁷⁸

National Judicial Appointments Commission

As seen *supra*, barring *First Judges'* case, judicial decisions in *Second Judges'* and *Third Judges'* cases paved way for judges appointing judges under 'Collegium' system, which expression nowhere found in Constitution. But, this was not found favour with successive governments. Even legal fraternity and also judges divided on this system, demanding NJAC for appointing judges of higher judiciary. Justice Krishna Iyer believes that the Collegium system of having judges appoint judges is viewed as appointments "for judges" rather than "by judges," leading to the appointment of judges who are incompetent, inefficient, and ethically compromised.⁷⁹ After taking reins of government, Narendra Modi government introduced in Parliament NJAC Bill, 2013 and 99th Amendment to Constitution and got them passed, which aimed at ending collegium system. But, SC in its decision on 16-10-2015, in *Supreme Court Advocates-On-Record Association And Another v UOI*, struck down both, holding that entire 99th Amendment is *ultra vires* the basic structure of Constitution and, consequently, NJAC Act 2014 is also *ultra vires*.

⁶⁷GUPTA, *supra* note 12.

⁶⁸SATHE, *supra* note at 535.

⁶⁹NARIMAN, *supra* note 73 at 31.

⁷⁰REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION 7.3.3.

⁷¹Supreme Court Advocates-on-Record Association v Union of India, A.I.R. 1994 S.C. 268 (India).

⁷²NARIMAN, *supra* note 73 at 31.

⁷³Id.

⁷⁴NCRWC, *supra* note 122 at 7.3.5.

⁷⁵*In Re Presidential Reference*, A.I.R. 1998 S.C. 1 (India).

⁷⁶K.N. BHAT, D. CHRONICLEC, Aug 8, 2014.

⁷⁷NCRWC, *supra* note 122 at 7.3.5.

⁷⁸CHINNAPPA, *supra* note at 305.

⁷⁹JUSTICE V.R. KRISHNA IYER, THE CONSTITUTION CORRUPTION, PATHOLOGICAL CASUALTIES AND RADICAL REMEDIES, REFORMS 143.

8. Battle of Supremacy between Legislature, Executive and Judiciary

Whatever be system of governance, there have always been conflicts between different organs of State. In British Parliamentary system, as in America, there is no separation of powers of government. Yet, *great battles have been fought* between British Parliament and Queen's Bench, particularly, over existence and extent of Parliamentary Privileges.

In ancient India, King performed both executive as well as judicial functions with clear distinction. During the British rule in India, the judiciary existed as a separate entity, but was not independent. After independence, the Indian Constitution incorporated Montesquieu's doctrine of separation of powers, which the Supreme Court of India deemed in the case of *Indira Nehru Gandhi v Raj Narain* as a "basic feature" of the Constitution.⁸⁰ Yet, no dearth of trio trying to overreach one another as occasion arises in disregard of separation of powers. Executive being Legislature's offspring, no problem arises between them. But conflicts between judiciary and Executive/Legislature occasionally erupt. Once former PM, Bajpai, said in Parliament, *when I saw tension was mounting between judiciary and executive, as my duty as PM, I used my power to ensure 'balance between the two wings is maintained'*⁸¹.

The existence of tussle between the three organs of the government has been witnessed in a number of cases. In the famous case of Golakhnath, the tussle between the judiciary and executive began when the judiciary has exercised judicial review power to meet the ends of justice and defended the fundamental rights against the parliamentary supremacy. It is very much required that the Judiciary has to be kept out of the influence of the government to protect the welfare of its individuals. The expanded view of Article 21 which includes protection of life and personal liberty has been possible by judiciary supremacy and judicial independence. The ongoing tussle between the judiciary and the executive regarding the appointment of judges to the higher judiciary is more evident in recent times with criticisms by the executive and the judiciary reacting to the comments. The names suggested by the Collegium and the government retaining the recommendations without proper in time appointments has been a major clash. It is observed that the government is not refrained from conveying its objections to the recommendations made by the Collegium but cannot hold back names without conveying any reservations. The personal interview for a TV channel by the Law Minister Mr. Kiren Rijjuon 25th November 2022, commented that, NJAC is an Act passed by the will of the people which has been undermined by the judiciary. He said that, the current mechanism to appoint SC and HC judges is "alien" to the constitution.⁸² He also stated that the alternative appointment methods proposed were not better than the NJAC, but since the Supreme Court declared the NJAC unconstitutional, the time-consuming Collegium system must be sustained for the time being. The Chief Justice of India Justice D.Y Chandrachud, ensured that, Collegium system has to be retained and refined as it is a *sine quo non* of independence of judiciary which cannot to be interfered with.

9. Conclusion

As article surveys, there were occasional setbacks to judicial independence when higher judiciary yielded to sword-wielding mighty Executive and Parliament's purse-power, but soon suspending siesta, roared like Lion and ensured established dynamic Rule of Law in democratic India is unshakable, enabling public repose confidence in Judiciary than Politicians. Nevertheless, two recent unhealthy incidents agitated public serenity. Four-judges through open letter addressed to CJI and subsequent Press Conference revolted against CJI on 'internal independence'. On 30.1.2019, two SC judges in 75-page hard-hitting judgment specifically referred to political insinuations being attributed to judiciary by unscrupulous persons/advocates besides addressing Press/making media-trial. Excepting these, undoubtedly, in India, independence of judiciary is unparalleled, as Allen boasts of England:

⁸⁰A.I.R. 1975 S.C. 2299 (India).

⁸¹NALINI GERA, RAM JETHMALANI: THE AUTHORIZED BIOGRAPHY 327.

⁸²<https://thewire.in/law/supreme-court-kiren-rijju-collegium-system>

Probably on no constitutional question would there be greater unanimity throughout the country than upon the independence of the judiciary...⁸³

To maintain the dignity and the integrity of the judiciary and to uphold the trust and confidence of the general public imposed on the judiciary, Judicial independence is of paramount importance. According to Justice Krishna Iyer, the judiciary acts as a barrier between the citizen and the state, protecting against abuse of power by the executive. To ensure that the judiciary is not subject to executive pressure or influence, the Constitution contains detailed provisions. Though various authors have difference of opinion, this conflict which arises in the best interest of the administration of the justice system and to provide just, fair and reasonable justice as enshrined in the preamble and to achieve the constitutional goals, is considered to be a healthy conflict. Not only it is necessary that the judiciary should be in conflict with the executive or legislature but it is equally important that the judges also need to be accountable to each other.

The work of the Collegium, led by Chief Justice N V Ramana and Justices U.U. Lalit, A.M. Khanwilkar, D.Y. Chandrachud, and Nageshwara Rao, has made history by appointing a female judge who could potentially become India's first female Chief Justice of India. The elevation of Justice Nagaratna to the role of Chief Justice by 2027 is a positive development. The initiation by the then Chief Justice of India, Justice N V Ramana of recommending the appointment of woman judges to be elevated to the Supreme Court is a welcoming approach to ensure social justice and wider representation of women to the higher judiciary. The first female Chief Justice of the Telangana High Court, Justice Hima Kohli, who is being considered for elevation to the Supreme Court, expressed her contentment over the increase in the number of judges in the High Court and thanked the former Chief Justice of India, N.V. Ramana, for his efforts in obtaining approval from the central government. The current Chief Justice of India and head of the Collegium, Justice D.Y. Chandrachud, supports the Collegium system of judicial appointments, stating that it makes administrative decisions while considering the "national perspective"⁸⁴.

10. Suggestions:

The Supreme Court of India has been acclaimed worldwide the best. Its judgments are quoted in many countries in the common law world. Therefore, the higher judiciary in India, as generally echoed and re-echoed of the higher judicial institutions worldwide, should be graced with the Judges of high calibre, integrity and philosophy of the country. At present, the *Collegium* under which judicial appointments for the higher judiciary are made in India is, no doubt, aiming to achieve this goal and efforts to maintain the Independence of Judiciary. But, for want of transparency and accountability it is vehemently criticized. As such, through this paper it is suggested that judges to the higher judiciary need to be appointed on the basis of merit and their capability to effectively deal with public and private matters without being inclined to political pressures. For this purpose, a proposal was made for Judicial Appointments Commission, but the Court struck down the same for the reason of interference to judicial independence. Therefore, the need of the hour is to aim for a best method where judicial independence is not sacrificed. It is generally considered that the South African system of appointing judges is best but still criticized of a private indulgence.

Even constitution of a system exclusively with judges is considered, it should not be forget that a judge is also a human being, and as once said by the great Judge, Benzamin Cardozo, judges are not immune to the powerful forces and influences that affect everyone else.

⁸³C.K. ALLEN, LAW & ORDERS 4 (3d ed. 1965).

⁸⁴<https://www.ndtv.com/india-news/law-minister-present-chief-justices-big-remark-on-collegium-system-3536847>