IN DEFENCE OF COLLEGIUM SYSTEM WITH A CAVEAT

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ABSTRACT

This article undertakes a detailed examination of the arguments put forth on both sides of the debate and critically evaluates them in light of the fundamental principles of the country's jurisprudence, constitutional morality, its seventy five years long experience as a democratic polity and its wider socio-cultural milieu. The Collegium System is not perfect, just like any other constitutional institution in our democratic set up, it plays an important role in ensuring the independence of judiciary. Despite its shortcomings, like democracy, it continues to be the best system amongst available alternatives. Truly, if the last bastion of independent judiciary falls, then the country would enter the "abyss of a new dark age". What is the independence of the judiciary if independent and fearless judges are not being appointed?' This article do recommendations for judicial reform with regard to the Collegium system. These include broadening the process of consultations for choosing meritorious judges by including consultations with the bar and other judges of the same court and taking into account principles of judicial federalism inculcated under article 124 of the constitution. It also recommends making the selection procedure faster, more efficient and inclusive by ensuring greater representation of women, Scheduled Caste and Schedule Tribes and other disadvantaged groups.

1. THE CONSTITUTIONAL BACKGROUND

"The bedrock of our democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing". The idea of an independent judiciary was first propounded by Montesquieu, the famous French philosopher. He believed in the theory of separation of powers of the three

branches of the Government- Legislature, Executive and Judiciary, to ensure it. In most democracies, the constitution is guided by constitutionalism, which means a constitution dividing powers amongst the three wings to limit the government's absolutism. This idea was further propagated by John Locke, who can well be called architect of constitutional liberalism, which kept citizens over the elected government. Subsequent generation of political thinkers mostly followed them. Montesquieu had a different but identical proposition: to divide the government and its powers and limit its concentration in one wing. In his opus, *The Spirit of the Laws* (1748), Montesquieu provides a detailed overview of the differences between political power and government which were one and the same, though operated differently in philosophy and practice, i.e., policy. The fathers of the American Constitution were very much impressed by his theory. They, therefore, established an independent judiciary in their country. The American people have great faith in the independence of the judiciary. They have been convinced that if any fetters are placed on the independence of judiciary, the rights and liberties of the people might be endangered. In U.K., however, there being no written constitution, the Parliament is supreme, though there has hardly been a conflict between the House of Lords & the Government.[i]

In a country like India, which is governed by a written constitution, the judiciary is the protector of the Constitution and, as such, it may have to strike down executive, administrative and legislative acts of the Centre and the states. *"In an independent judiciary, judges are such who can make decisions independent of the political winds that are blowing*."

An independent judiciary is a *sine qua non* of any vibrant democratic system. Only an impartial and independent judiciary can stand as a bulwark for the protection of the rights of the individuals and meet out even handed justice without fear or favour or ill will.

Independence of judiciary also means that the other organs of the government, the executive and legislature, must not restrain the functioning of the judiciary in such a way that it is unable to do justice. Judges must be able to perform their functions without fear or favour. The underlying purpose of the independence of the judiciary is that judges must be able to decide a dispute before them according to law, uninfluenced by any other factor. In UK, before 1701, judges held their office during the pleasure of crown and like any other crown servant they could be dismissed by the king at will. The judicial independence was secured by the Act of Settlement 1701[ii] . Though, in India there is no express provision in the Constitution but the

independence of Judiciary and rule of law are the basic features of the Constitution and cannot be abrogated even by constitutional amendments as declared by the Supreme Court in the Keshvanand Bharti's Case decided in 1973 [iii].

I fully concur with Faizan Mustafa, an imminent jurist, when he says that the independence and impartiality of the judiciary are not the private rights of judges — they are the rights of citizens. Ultimately, judicial legitimacy (and power) rests on the public's confidence in the courts, in the judges themselves, and in their decisions. The independence of the judiciary is the most cherished goal of any legal system, and the process of appointment of judges is rightly seen as a crucial mechanism to achieve this goal. Judges must be independent of the executive, senior judges, and in their ideology. Even in mature democracies, there is a widespread public concern that judges have been appointed in most of the countries through cronyism and secret soundings. How can we avoid it?[iv].

2. APPOINTMENT OF JUDGES BEFORE 1993

We may remember well that till 1993, the executive had primacy in the appointment of judges. Most of the judges picked up under that system were independent, upright and fearless, to begin with. But we must not lose sight of the fact that it was the time when political leadership was in the hands of freedom fighters and intellectual giants who respected dissent. For an example, Jawaharlal Nehru had formed his first cabinet with overwhelming majority, still he inducted towering personalities having difference of opinion with him on many points, like Dr. B.R.Ambedkar & Dr.Shyama Prasad Mukherjee, in it. It is an unfortunate reality that as the time passed & the leadership travelled from statesmen to politicians, the government was often able to induct some judges of its choice. The process enabled several judges, who were pliant and submissive to the executive, also to reach the highest court. This in turn, resulted in the criticism of the judiciary in the public & voices were raised in the Bar also against the prime role of executive in appointment of the judges.

Indira Gandhi was widely criticised for twice indulging in the supersession of senior judges and appointing Justice A N Ray, who was junior to three judges, as Chief Justice of India on the day the Keshvanand Bharati judgment (1973) was delivered. Then, Justice M Hameedullah Beg superseded Justice H R Khanna (1976).

All this ultimately resulted in judicial scrutiny of Article 124(2) of the Constitution in the case of Advocates On Record Association vs. Union of India[v], which is more famous as the Second Judges case (1993), which introduced the present Collegium system. The said Article 124(2) reads as under; "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…"[vi] The Constitution Bench of the Apex Court held that "consultation"(with Chief Justice) really meant his "concurrence". It added that it was not the CJI's individual opinion, but an institutional opinion formed in consultation with the two senior-most judges in the Supreme Court.

3. POST 1993 --SELECTION OF JUDGES THROUGH COLLEGIUM

Thus, to achieve the object of having free and independent judges, the Supreme Court of India came out with a unique system of appointment of judges called Collegium system, replacing supremacy of Executive prevailing till then, through its Constitution Bench judgment in the case of 'Advocates on Record Association vs. Union of India', which is more famous as the Second Judges case (1993)**.** Now the Judges of the higher judiciary are appointed only through the collegium system and the government has a role only after names have been decided by the collegium. The SC collegium is headed **by the CJI (Chief Justice of India) and comprises four other senior most judges** of the court. While a HC collegium is led by its Chief Justice and four other senior most judges of that court. Names recommended **for appointment by a HC collegium reach first to the Supreme Court Collegium, then after its approval, to the government.**

Under the Collegium system, the government's role is limited to getting an inquiry conducted by the Intelligence Bureau (IB) if a lawyer is proposed for elevation as a judge in a High Court or the Supreme Court. The government can also raise objections and seek clarifications regarding the Collegium's choices, but, if the Collegium reiterates the same names after considering those objection/reports, the government is bound, under Constitution Bench judgment, to appoint them to the post.

4. GOVERNMENT TRIES TO CHANGE COLLEGIUM SYSTEM: SUPREME COURT QUASHES NJAC

Not satisfied with the existing arrangement, in 2014, the newly elected NDA Government led by BJP under the prime ministership of Narendra Modi, introduced the NJAC Act, which was passed unanimously by Parliament to set up a commission for appointing judges which would have included the Law minster and another government nominee also as its members, replacing the Collegium system. This would obviously have greatly enhanced the government's role in the appointment of judges. It is the striking down of this Constitution (99th Amendment) Act-2014 & the NJAC Act by the Constitution Bench of the Supreme Court in 2016, which is in the centre of the political and judicial storm in the country.

5. GOVERNMENT REVIVES CONTROVERSY IN 2022

After seven long years of the judgment striking down of the Constitution (99th Amendment) Act-2014 by the Constitution Bench of the Supreme Court in 2016, the Union Law Minister Kiran Rijju , or by all indications, the government, felt the yearning to revive its claim by pioneering attacks on Collegium System declaring that, "Across the globe judges do not appoint judges. But in India, they do," & he further went on to call the collegium system **"opaque and not accountable".** He further kick started the controversy afresh by claiming that the government's power to amend the constitution is absolute. He pointed out that the NJAC and the NJAC Act, was passed unanimously by Parliament in 2014 for setting up a commission for appointing judges, replacing the Collegium system.

Rijiju also went to the extent of holding Collegium system responsible for the **huge pendency of cases** in courts & vacancies on posts of judges. He added that most names recommended/appointees belong to high castes & percentage of SCs & OBCs are very low. He told the Rajya Sabha on December 15 that the only way to resolve the issue was to bring in a "new system" of appointments of judges[vii]. He further asserted that the validity of any amending act cannot be reviewed on the basis of judicially evolved doctrine of "Basic Structure".

The Vice President and Rajya Sabha Chairman, Jagdeep Dhankar, went a step ahead to tell the Rajya Sabha on December 7,2022, that it was "never too late to reflect" on the NJAC.

He said the Supreme Court's 2016 judgment striking down the NJAC Act was a "severe compromise of parliamentary sovereignty and disregard of the "mandate of the people"

Dhankhar emphasised that, "We need to bear in mind that in democratic governance, Basic of any 'Basic Structure' is the prevalence of primacy of the mandate of the people reflected in the Parliament. Parliament is the exclusive and ultimate determinative of the architecture of the Constitution,"[viii]. He, along with OM Birla, the Lok Sabha Speaker, repeated even more forcefully that the Basic Structure case was wrongly decided, in the Conference of Presiding Officers of Legislative Assemblies & Councils held at Jaipur.[ix]

6. THE SUPREME COURT REACTS

Undeterred by government's criticism of collegium system, the supreme Court retorted back by asserting that **it is the "final arbiter" of the law** under the Constitutional scheme and as the law stands, the government will "have to appoint" all names reiterated by its Collegium. A three-judge bench, presided over by Justice S K Kaul also asked the Attorney General, R. Venkataramani, to advise Union ministers who are criticising the Collegium system to control themselves. "You must advise them to exercise some control," said Justice Vikram Nath. "You must advise them to exercise some control," said Justice Vikram Nath, who was part of the bench hearing a plea by the Advocates Association Bengaluru, seeking contempt of court proceedings against the government for not approving names reiterated by the SC Collegium within time-lines laid down by the court.[x]

Against this back drop, the CJ I Chandracud , while delivering the Nani Palkhivala Memorial Lecture , remarked that craftsmanship of a judge lies in interpreting against text of the Constitution with the changing times while keeping its soul intact. He further declared that,

"The basic structure of our Constitution, like the North Star, guides and gives certain direction to the interpreters and implementers of the Constitution when the path ahead is convoluted"..."The basic structure or the philosophy of our Constitution is premised on the supremacy of the Constitution, rule of law, separation of powers, judicial review, secularism, federalism, freedom and the dignity of the individual and the unity and integrity of the nation", he went on." While paying glowing tribute to Palkhiwala, he said that, "from time to time, we require people like Nani Palkhivala, who was an eminent jurist, to hold candles in their steady

hands to light the world around us. Continuing in the same strain, he added that,"Nani told us that our Constitution has a certain identity which cannot be altered." He said the doctrine of basic structure has shown that it might be beneficial for a judge to look at how other jurisdictions have dealt with similar problems for them.[xi]

In fact the basic structure principle propounded in the Keshvanand Bharti's case has become the ground for setting aside several Constitutional amendments, including the quashing of the Constitutional amendment and the corresponding NJAC Act on the appointment of judges in the higher judiciary since then.

In Keshavanand Bharti's case, & in the subsequent judgments , the said basic features have been identified very broadly & clearly , which the CJI Chandrachud has aptly listed as :' ***Supremacy of the constitution, rule of law, separation of powers, judicial review, secularism, federalism, freedom and the dignity of the individual and the unity and integrity of the nation'.*** [xii]. Our founding fathers and mothers have left an ample room in the writing of Constitution to adapt and evolve.

In the similar vein, former Supreme Court judge Rohington Fali Nariman termed the remarks made by Rijiju against the Collegium system for appointment of judges as a "diatribe", and added that if the last bastion of independent judiciary falls, the country will enter the "abyss of a new dark age", while delivering a lecture recently on 27 feb.2023. He also said that "sitting on names" recommended by the Collegium was "deadly against democracy".[xiii]

Former CJI T.S. Thakur also emphasized that the Collegium system can be improved like any other institution….Instead of simply criticising the system without coming up with an alternative does not lead us anywhere. These are issues, whether it is protecting federalism or the fundamental rights or secular credentials of the country, these are aspects which can eventually be taken care of only by an independent judiciary. That is where I think the role of the judiciary and the media assumes great importance."[xiv]

7. VALIDITY OF GOVERNMENT CRITICISM OF COLLEGIUM SYSTEM

7.1 Is parliament Supreme?

Now let us examine the validity of criticism of the Collegium system point by point. The basic fallacy in the government's stand appears to be in their basic premise when they say that Parliament is sovereign, perhaps taking inspiration from the British system where there is no written constitution. But there are two things where founding father of our constitution have chosen to differ from the British & American systems, after much deliberations & for very valid considerations. When there is a written Constitution as fundamental law of the land like in India, it is bound to be supreme. Likewise, the idea of elected judges & denial of any role to judiciary in selection of judges under U.S. constitution was out rightly rejected by them. There is no uniform system of appointment of judges in U.S. There are a least four brad conflagrations of such appointments: 1. appointment by political institutions; 2. appointment by the judiciary itself; 3. appointment by a judicial council (which may include non-judge members); 4. Selection through an electoral system. Wisdom of our Constitution makers is reflected in the fact that many states in U.S. itself are switching over from elected judges to the other systems of appointment.

In India, our Constitution is written & supreme, to whom THE PEOPLE OF INDIA have submitted themselves as fundamental law of the land. Separation of power amongst Executive, who would be answerable to the Legislature, an elected Legislature to make laws, and an independent Judiciary to interpret the constitution & to test the validity of laws passed by the legislatures on the anvil of constitution, besides adjudicating other disputes of the citizens. There is also a fine & delicate principle of checks & balances at work to make the system work for the good of the people.

Even otherwise, the government has never filed petition for a review of the Keshvanand Bharti judgment & it is being applied for almost four decades. Why then challenge it now in pre-election year, that too orally, but by no less an authority than the Vice President of the Republic, a Constitutional Authority himself?

Secondly, if the power of the Parliament to amend the Constitution is absolute brooking no judicial review, even fundamental right including freedom of expression, right to live & to go to court, holding of free & timely elections or the democratic set up itself can be done away with by some government & ultimately the constitution it-self can be made to turn into a dead letter like Weimar constitution of the third German Reich by enacting a legislation like Reich's Enabling Act of 1933 by Hitler, or in the way constitutions of other Axis Powers were

twisted. Majoritarianism, not constitutionalism, only would be the rule then. Our Constitution is not only a jumble of words, but a document prepared by the freedom fighters to reflect the conscience of the Nation, its cherished values, and aspirations & vision of the people of India. It has certainly got an "identity" of its own, which has been defined as its Basic Structure by the Apex Court. If any law violates its spirit, it is liable to be struck down.

Undoubtedly independence of judiciary from executive's pressures, its impartiality, its being free from political, social or cultural bias, is the basic right of all citizens without which no right of them is safe, every word of constitution would be hallow without it. The process of selection of judge therefore becomes crucial to achieve this cherished goal. Should it then be in the hands of the reigning government or in the hands of judge's Collegium?

Let us turn pages of our constitutional history to learn from them. No doubt that the argument of the government that the term "Collegium System" as such does not find place in the Constitutional document, & that it has evolved through judgments of the Supreme Court only, is correct. But much water has flown since the adoption of the Constitution. Continuous course correction is the sign of a vibrant democracy.

7.2 Huge pendency of cases- Failure of administrative Justice: No Matching Increase in number of Judges: No timely appointments

The next objection raised is about huge pendency of cases, an issue much talked about but hardly ever analysed in its proper perspective.. But one cannot but wonder how Law Minister can correlate it with Collegium system of appointment of judges? Was it an attempt on his part to arouse public sympathy linking it with "Tarikh pe tarikh" (date after date) issue. True, Justice delayed is Justice denied. But does the judiciary alone is responsible for it? But it is a subject which begs detailed & objective analysis separately. The relevant quarry should be whether in Supreme Court & High Courts, judges do not work and hear cases throughout the working hours? If they do so, then we would have to look for its reason somewhere else.

In brief, most important reason of increasing pendency may be the unprecedented explosion of cases after coming into force of our Constitution which has made people aware of their rights & guaranteed them a judicial remedy by introducing writ jurisdiction under Article 226. Before 1950, Court dockets contained mostly first and second appeals, while 80% of case filed after 1950 & pending are under its writ jurisdiction made available by our Constitution. We must not forget that in 80% litigation, state is party. Is it not a sign of administrative failure

to give its employees and people justice by the government itself which compels them to flock the dockets of our courts? Almost 70% of the cases in the said writ jurisdiction also are service matters. I have learned in fifty years of my practice as advocate & Senior Advocate that hardly any one wishes to come to court unless he fails to get due relief at administrative level despite his best efforts, may be because of rampant corruption in the government departments & political interference. If people are provided justice at the hands of the competent authority in the government itself, at least 50% of the pendency would be reduced.

7.3 Delay in filling vacancies

The other obvious way to reduce pendency is to increase strength of judges in the matching ratio. While the government is not raising the sanctioned strength & necessary infrastructure for the same to match the pendency, hardly any high court ever works with whatever strength has been sanctioned to them. Many of them are running at 50% to70% strength. Leaving apart the time that is taken by Supreme Court's three Judges Collegium & then the government in making appointment, even the proposal of names for filling total vacancies from high court are rarely finalised or sent to Supreme Court in time. Generally names for a fraction of vacancies are sent, & by the time those appointments are actually made, more vacancies are created because of retirements. According to available data, appointment of more than 100 judges recommended by collegium for high courts are pending with the government.

Therefore the crucial question is, has the government increased the strength of the judiciary with infrastructure & technology in the ratio of pending cases? The answer is undoubtedly in negative by a very large margin. Reducing of pendency needs not only significant increase in prescribed number of judges but filling them also in minimum possible time before fresh vacancies are created by retirement. This needs a relation of trust in the wisdom of members of the Collegium, who have experience & good record of administering justice in courts & the government. However, usually the government has conveniently slept over the collegium's recommendations especially after 2016, or made only selective appointments out of the recommendations sent by the collegium. Inconvenient judges, especially those who had given adverse verdict like in Uttarakhand dissolution of Assembly case are held up for years, & even if the government is forced to appoint them, they are made to lose their seniority. Despite repeatedly urged by the Supreme Court, even the Memorandum

of Procedure (MoP) to be followed in inter- communications between Supreme Court & the government is kept in cold storage by the Government.

Situation is no better in the Apex Court.

Even the Supreme Court has rarely worked at full strength throughout its history, Till recently at the beginning of the controversy, there were 27 judges in the Supreme Court now, seven short of the sanctioned strength of 34. (The judges sit in smaller panels to decide cases) .Fewer judges also means slower justice. More than 40 million cases are estimated to be pending in India's choked courts. Over 70,000 of these are pending in the Supreme Court, many of them more than five years old.

According to Rahul Hemrajani of University of South Carolina, the court typically functions with 87% of its sanctioned strength - and the average number of vacancies has been steadily increasing and been particularly high in recent years, he says. In his paper, using appointment and retirement data of the Supreme Court from 1950 till 2020 shows that there have been, on average, more vacancies in the SCI since 2015 than any other comparable period in recent history.

Despite an increase in sanctioned number of judges, only 28 judges have been appointed to the top court between 2015 and 2020, compared to 30 judges in the previous five years. Appointments after 2015 have been delayed with an average of 285 days taken between the vacancy and an appointment, up from 274 days earlier.[xv] Some scholars point out that the collegium meets too infrequently. Meetings happen only when the chief justice and four senior-most judges are available. Between October 2017 and 2020, the collegium met only 12 times to discuss appointments to the Supreme Court, Mr. Hemrajani found. (Three of them were to discuss a single judge's name.)

Everyone is aware that top court judges retire at 65 years & High Court judges at 62 – then why collegium doesn't plan for their replacements in advance? Since 1977, no judge of the top court has been appointed immediately after a vacancy happened. Also, recommendations for new judges are sent to the government in batches rather than to fill individual vacancies - 81 of the last 100 top court judges were appointed in batches of two to five, Mr Hemrajani found.

Many believe much of the delay is happening because the government has pushed back hard by "interfering and delaying" appointments of judges. In mid-December, the collegium proposed the names of five judges to be elevated to the Supreme Court to 32 out of total strength

of 35 judges. The government is yet to clear the names. Madan Lokur, a former top court judge, believes the "government is playing games with the Supreme Court"[xvi].

The Supreme Court on Friday expressed “extreme concern” over 10 recommendations for transfer of High Court judges pending with the government and said “keeping it pending sends a very wrong signal that other factors are coming into play”. Calling it “a matter of great concern”, Justice Kaul pointed out that two of the names were sent by the end of September 2022 and eight by the end of November.[xvii]

The Law minister retorted back while addressing an event on the 150th anniversary of the Allahabad High Court Bar Association in Uttar Pradesh's Prayagraj as the chief guest by saying that,” The country will be governed according to the Constitution and the wishes of the people and nobody can give a warning to anyone, Union Law Minister Kiren Rijiju said on Saturday5.2.2023. "Public is 'malik' (master) of this country and we are servants. We all are here for service and the Constitution is our guide. The country will be governed under the guidance of the Constitution and the wishes of the public. Nobody can give a warning to anyone," Rijiju said, "Sometimes discussions are held in the country on some matters and in a democracy, everyone has the right to express their opinion. But people sitting in responsible positions have to think before saying anything, whether it will benefit the country or not," he said, referring to reported remarks of a Supreme Court Bench[xviii].

However, the Supreme Court’s sublime warning seems to have worked. The government has on 05.01.2023 cleared five names sent by the collegium for appointment in Supreme Court which have been pending for a long period and three more today, on 11.2.2023, within ten days of their sending, bringing its strength to full, a rare thing in the recent past.

7.4 Selection of Meritorious Judges

So far as the concern of the government about merit of the names chosen by Collegium is concerned, we can depend more on the judgment of the senior judges than on government & its bureaucracy. Members of Supreme Court collegium are in better position to know the merits of names they choose for the judges. They know better their colleagues in the high courts, and daily hear appeals against their judgments. They also hear arguments made by advocates of high courts and the Supreme Court and are, therefore, in the best position to make fair judgements about their competence and suitability for elevation. “That’s why the collegium

system looks like a better option" says Faizan Mustafa in his article published in the Indian Express[xix].

7.5 Should Judges appoint Judges?

The government's next objection is that it is in India only that judges choose judges. The counter question of most of the jurists is, whether it is better to leave it into the hands of the government which is a party in at least 80% of the litigation? While Chief Justice of India D. Y. Chandrachud himself has candidly admitted in reference to Collegium System in his address to Supreme Court Bar Association on Constitution Day that, "No institution in a constitutional democracy is perfect. We work within the existing framework of the Constitution. We act as faithful soldiers who implement the Constitution…When we talk of imperfections, we should evolve solutions within the existing system," he added that, "We cannot be constitutional statesmen when we are only finding fault with each other." He advised avoiding a "public grandstanding" in such matters[xx].

Interestingly, Fali S. Nariman, Senior Advocate who had appeared & won the Second Judges case , had initially expressed his dissatisfaction over the Collegium System in his book "Before Memory Fades" published in 2010, has also changed his opinion now. In an interview recently given to Jan Satta, he says that there is no doubt that there are many drawbacks in the Collegium System & am not very happy with it, but it is certainly lesser evil than NJAC .It is like democracy-best system amongst other worst system of governance .[xxi]

The rationale of Nariman's & other critics' opposition to the idea of state primacy in the matter is crystal clear. As pointed out above, when the government is a party in some 80 per cent of the cases, the collegium seems to be the lesser evil. There is a real apprehension that if the government gets an upper hand in judicial appointments, judges may be appointed on petty political or ideological considerations.

On allegation of Collegium not proposing fittest persons, Faizan Mustafa has a witty answer: "the government does make almost all the other appointments. Can we really say that all its appointments are made based only on "merit"? Senior advocate Arvind Datar commented that National Judicial Appointments Commission is an "absolutely unworkable principle". Delivering the 19th Justice PD Desai Memorial Lecture virtually on 'Fifty years of Basic Structure' in Ahmedabad, he added that "The most important pillar of the rule of law is a

written constitution…The most important pillar of the written Constitution is its basic structure."[xxii]

8. THE CAVEAT : 'THE CREASES', AND HOW TO REMOVE THEM

Political influence playing a major role in selection of judges, is another charge which is levelled by general people & Bar. Cases of Chief Ministers unduly influencing & successfully including their own names during the consultation process at High Court level is not uncommon. Inclusion of all sections of the society, casts, religion & sex is also today's demand.

Many of the problems pointed out above can be reduced by creating a cell in each high court & Supreme Court to function like a secretariat exclusively devoted to this job, collecting & processing data regarding all eligible & willing members of the Bar required for the purpose under the supervision & directions of the Chief Justice & two senior most judges. Intelligence input about short listed candidates can also be gathered from the state in advance.

8.1 Need to involve Bar for wider consultation & transparency

As to the lack of wider consultation from all stake holders & transparency at High Court level selections, it is to be taken note of that now Chief Justices come from another state & may be at the time of holding collegium meetings, hardly know about most of the lawyers of their new court. Therefore, it is all the more necessary now that he should not depend solely on the opinion of two other senior most colleagues, especially about lawyers practicing at other Benches than principal Bench where they usually sit.

Above all, it is the question of knowing about character, honesty, integrity, political & socio- cultural biases of the names under consideration besides their merit. Bar is the best source of knowing it. Nothing remains hidden from the members of the fraternity. Admittedly, there are jealousies & personal rivalries also, but they can be filtered through by a large scale cross-consultation with at least designated Senior Advocates of that court, who are better informed about their colleagues.

Significantly, while deciding the Judges Transfer case (S.P. Gupta vs. UOI), the Constitution Bench of the Supreme Court has itself observed that they had done "the exercise with a view to emphasising the importance of the independence of the judiciary and the independence of

the Bar which are fundamental to a Republican Constitution whose main characteristic ought to be virtutue"[xxiii].

8.2 Relationship between High Courts & Supreme Court : emergence of a new equation

The Supreme Court itself may need to introspect on recent developments in its relationship with high courts. Under the constitutional scheme, the High Courts of the Country are fully independent constitutional institutions & are in no way subordinate to Supreme Court.
Only the law laid down by the latter is binding precedent for them.

Article 226 gives High Courts the ability to issue instructions, orders, and writs to any person or authority, including the government. Whereas, Article 227 gives High Courts the power of superintendence over all courts and tribunals in the territory over which they have jurisdiction. In some ways, scope of Article 226 is wider even than of Supreme Court under Article 32. The Article141 of the Constitution merely declares that:
"141. The *law declared by the Supreme Court shall be binding on all courts within the territory of India."*

However, after the First & Second Judge's cases permitting transfer & elevation to Supreme Court of the high court judges by the Supreme Court Collegium, the developments may not be called ideal. The relationship appears to have turned into all round subordination of high courts to Supreme Court. At some places, names of future judges are said to be coming from Apex Court, including lawyers practicing exclusively in Supreme Court, & the high Court collegium is supposed to rubberstamp them. Very recently, there have been protests & boycott at both benches of the Allahabad High Court, the biggest one of the Country, over this issue. Lawyers pleaded that this practice encroaches upon the right & opportunity of the local High Court practitioners.

Further, now most Chief Justices are hardly satisfied by continuing in the High Court to where they have been transferred. It is alleged in the Bar that from the first day they start looking for their elevation to Supreme Court rather than solving controversial issues of their court or providing leadership to their team & embolden then to give bold & fearless judgments unaffected by instrumentalities of the state. If a course correction happens, burden on Supreme Court itself would be substantially reduced.

High Courts even today have many outstanding jurist as their judges. In the present scenario, if they stand by-passed in the elevation process to Supreme Court, the same creates frustration in them. Extension in retirement age by government may give them some solace. Unfortunately, the Chief Justices or the members of the Collegium do not hold discussions even

with their own colleague judges, what to say of the Bar. Many judges told me in personal talks that they do not want even to suggest names on their own to the Chief Justice lest it may not be misconstrued.

8.3 Transparency

There also has been perennial complaint about complete lack of transparency in appointment of judges. During the pre- Collegium days also, when state had primacy in appointment of judges, due to the near absence of transparency, accountability had been a causality. Supersession of senior judges and appointing Justice A N Ray & Justice M Hameedullah Beg as Chief Justices of India by Indira Gandhi has been cited as an illustration. The only difference now is that it is no more the government but the CJI and four senior-most judges who cherry-pick judges. Their decisions are, at times, unpredictable. Several judges have been superseded in the last three decades. Many of the senior-most chief justices of various high courts were not elevated.

On the other hand, In April, 2022, the then CJI N.V. Ramana, defending the collegium system, had said that, "there is an impression in India that judges appoint judges". He said: "It's a wrong impression and I want to correct it. The appointment is done through a lengthy consultative process, and many stakeholders are consulted. I don't think that this process can be more democratic than this."

While he may well be right about the lengthy consultative process but the real problem is of transparency. Consultations that are never in public domain even partially cannot be termed as transparency. Even Judges themselves do not know the reasons of their supersession & they, as well as the Bar at large thinks it to be result of a cherry-pic process.

In 2019, the five-judge Constitution Bench led by then Chief Justice of India Ranjan Godai itself had declared on 13.11.2019 that the Office of the Chief Justice of India (CJI) is a 'public authority' under the Right to Information (RTI) Act. The main judgment of the Constitution Bench authored by Justice Sanjiv Khanna said the Supreme Court is a 'public authority' and the office of the CJI is part and parcel of the institution. Hence, if the Supreme Court is a public authority, so is the office of the CJI Justice Khanna, who shared his judgment with Chief Justice Gogoi and Justice Deepak Gupta He further observed that "transparency and accountability should go hand-in-hand". "Increased transparency under RTI was no threat

to judicial independence, he hel ". Justice N.V. Ramana, in his opinion, struck a cautionary note, saying judicial independence was the basis of the trust public reposes in the judiciary. Only the right dose of transparency should be calibrated with judicial independence. The Bench, however, agreed, in one voice, that the right to know under RTI was not absolute. The right to know of a citizen ought to be balanced with the right to privacy of individual .On this aspect, Justice Khanna held that personal information of judges should only be divulged under RTI if such disclosure served the larger public interest." "Personal information, which if disclosed, could lead to an unwarranted invasion of privacy right… what should be disclosed would depend on authentic enquiry relating to the public interest," the Supreme Court observed sure[xxiv].

The present CJI Chsandrachud is perhaps the most enthusiastic judge about transparency in selection & transfer of judges. As another member of the said Constitution Bench, Chandrachud, in his separate but concurring opinion emphasised that, "Judicial independence is not secured by the secrecy of cloistered halls". He further held that the information about assets of judges and official communication during the process of elevation of judges to the Supreme Court are treated as confidential third-party information. In such cases, the PIO should follow the procedure mandated in Section 11 of the RTI Act. That is, a notice should be first issued to the third party — the judge concerned — about the RTI request for information. The view of the third party should be considered before the PIO takes a call. Acknowledging the right of the people at large as well as members of the Bar to know as to what criterion is followed in selection by the Collegium and for accepting or returning recommended names for appointment of judges by the government. Justice Chandracud in the aforesaid judgment admitted that, "In significant respect, the Collegium is an victim of its own birth pangs." There can be no denying the fact that there is a vital element of public interest in knowing about the norms, which are taken into consideration in selecting candidates for higher judicial office & making judicial appointments.

8.4 Appointment of sons & relatives of judges in abundance

The government has also alleged that sons & relatives of judges are being recommended in abundance. This is a very delicate & intricate issue. No doubt if they are as meritorious as other candidates, they cannot be barred from selection merely because they happen to be son

or relatives of siting or former judges. We have had a number of most illustrative judges whose father also have been imminent judges of their time. Our present CJI is an apt example himself. Interestingly, he himself narrated that when he came back to home after obtaining Law degree from Harvard, his father, who himself was CJI at that time, did not allow him to practice till he remained a Judge. Such examples are no doubt rare. But the Collegium should treat such occasions as its own test-stone, sons & relatives of judges should be subjected to same test and criterion as other eligible candidates & no one should be given preference on extraneous considerations. By selecting best person Collegium system would win acclaim in the eyes of Bar & the civil society.

8.5 Government re-news its attack on Collegium system

The debate on transparency took a sudden turn for worse when in a four page letter to CJI D.Y. Chandrachud, the Union Law Minister Kiren Rijiju raised a long list of complaints and sought the formation of a search-and-evaluation committee, which will have government representatives, to suggest names to the collegiums for appointment as judges in constitutional courts.[xxv] The Law Minister's proposal gives a clear indication that the Narendra Modi government is determined to restructure the collegium system of appointments to the higher judiciary. The Law Minister has further written to Chief Justice of India D.Y. Chandrachud to suggest a nominee of the Union government in the Supreme Court Collegium and a State representative in each of the High Court collegiums. Faced with the barrage of attack, The Supreme Court chose to assert its own position. In what could be a first, in its statements published on the Supreme Court website, the Collegium revealed in detail why the Central government objected to the candidature of various persons recommended by the judges' body for elevation to High Courts & its point wise response terming government objection as irrelevant & extraneous and re-forwarded same names for appointment.

While the Deccan Herald welcomed the so called rebuttal: "The Supreme Court collegium has done well to stand by its earlier recommendations to appoint some advocates as High Court judges and to go public with reasons for their reiteration in the face of the government's objections.[xxvi]", Kiren Rijiju questioned the conduct of the Supreme Court Collegium in putting "sensitive, secret reports" in the public domain, in an interview given to

NDTV. Asked why the Centre has issues with the step, which many have hailed as a leap forward to ensure transparency, Mr Rijiju said standards for transparency are different. "There are some matters which should not be disclosed in national interest, and there are matters which should not be concealed in public interest," he replied. The Minister expressed concern that intelligence agency officials, who work in a secret manner for the nation, will think twice in future if their reports are put out in the public domain[xxvii].

But it is definitely in the national interest & an indefeasible right of the people to know what types of names are being recommended by the collegium as also whether government is withholding/ returning them for valid or extraneous reasons. In fact it is perhaps the first step towards transparency in appointment of judges. Considering every aspect discussed above, the Supreme Court & High Courts can began their exercise in transparency by disclosing Bio-data of short listed candidates & giving some time to file objections on affidavit with prescribing punishment for furnishing false information., if any, & thereafter finalise the names. Informal consultation with fellow judges & Senior advocates would bring transparency & may be valuable source of information to Collegium, which would be certainly a better feedback than provided by Local Intelligence Units or Central agencies which may not be free from influences & biases. The very recent & unsavoury controversy about appointment of a lawyer as judge of Madras High Court, who is alleged to be an office bearer of ruling party at centre & had been making hate-statements, could have been saved by a pre-publication of the candidate's bio-data with opportunity to file objections.

In the meantime, Vice President Jagdeep Dhankhar on Friday the third February2023 rebutted CJI' statement by declaring that the Parliament is the "North Star" of democracy, "a place of discussion and deliberation to realise the aspirations and dreams of the people".[xxviii]

8.6 Better representation of Female, S.C.,& O.B.C Judges

The law Minster has also alleged caste bias in favour of upper casts in Collegium recommendations. Objecting the same, he assured better representation to them if government's primacy is established & responsiveness to society. A related concern is the inclusiveness of the judiciary. In recent years, there has been concern in several societies about the composition of the judiciary on ethnic and gender lines. The underlying concern is that the judiciary should loosely mirror, to a certain degree, the diversity of the society in which it

operates. Otherwise justice will be viewed as perpetuating dominance of one group over another. Several countries have revised their systems of appointing judges in recent years in order to ensure wider representation to all sectios of the society.

There was already growing public contestation among judges for the appointment of judges from SC/ST community, said former CJI Thakur[xxix].

However, present CJI Chandrcud himself is an ardent advocate for making institutions more inclusive on all fronts-- class, cast, ethnicity, gender and sexual orientation. Recently, in his address to the IIT Delhi, he emphasised the value of inclusion & declared that, "Diversity is a virtue, it has an intrinsic worth in itself, and it furthers our understanding of fairness and social justice."[xxx]

8.7 Is the government has no role in judges appointment at present?

The government never looked powerless post the NJAC judgment (2016). It has not yet finalised the Memorandum of Procedure (MoP) and it has successfully blocked the recommendations of those judges where it had reservations. It can always, & in fact at least at High Courts level, been suggesting names which are given due weightage by their Collegiums. Its agencies are free to find a real fault and at least once return back proposals of collegium with its objections, which also are thoroughly considered by the Collegium, both at High Court and Supreme Court. It is the veto that the government wants to have.

There is a probable answer to the much asked question as to why government has chosen to challenge Collegium system now after 1993,or at the least, after seven long years of the setting aside of NJCA. May be, it was trying other ways to keep appointment of inconvenient names at bay. But now the Supreme Court appears to have become impatient with these tactics. Or, the government wishes appointment of its choice in the pre-election year.

8.8 Why the Jurists & Opposition parties are critical to government's meddling with judicial appointments?

We have already seen the vast majority of eminent jurists expressing themselves totally against any sort of government interference in the working of collegium system.

However, the government has been emphasising that NJAC was passed unanimously by Parliament. But one may ask why it is not so today? Why the very same parties, barring the ruling BJP, are opposing it? Whether the subsequent years have belied their hope of

Government acting fairly at least in his field? They are charging that post- NFJC , they have seen that all other constitutional & other institutions have already been captured by BJP which has evaporated their faith in Modi Government's intentions & they fear if it succeeds in taking appointment of judges in its hand, nothing wold remain to save democracy.

The Congress Spokesperson, Randeep Surjewala, alleged that," In the last two months, the ruling regime has unleashed a carefully crafted and pre-meditated campaign to capture yet another democratic institution.

The timing of these statements is no coincidence. Despite the government's best efforts, it has found that the Supreme Court cannot be "tamed" as easily as other institutions. It was the Supreme Court which struck down the government's attempt to deny the Indian people their fundamental right to privacy. It was the Supreme Court which directed the holding of floor tests in Karnataka and Maharashtra, both of which were being delayed for purposes apparent to everyone. It was the Supreme Court which curtailed the unexplained and expansive use of Aadhar. It was the Supreme Court which intervened in Arunachal Pradesh when President's rule was imposed without the due process of law. It is the Supreme Court and various high courts that have called out hate-mongering. It was the Supreme Court which passed an order to prevent the government from giving extensions to the ED Chief without the authority of law. Our Supreme Court is far from a perfect institution, but at its best, it is a guardian of our Constitution and our democracy.

The government's concerns, therefore, flow not from a desire for administrative expediency or a higher standard of justice. They flow from a desire to be not held accountable. For eight years, the BJP government has displayed a clear pattern of attempting to undermine and subordinate institutions. Posts such as those of the RTI commissioners were kept vacant and then reluctantly filled after the Supreme Court's intervention. The Lokpal was appointed after a similar intervention in 2019, 5 years after it was championed as a game changer by the BJP at the time.

Serving officials perceived as incompatible with the ruling regime's interests have seen their tenures cut short, such as former CBI chief Alok Verma or have been treated unceremoniously such as former Election Commissioner Ashok Lavasa"[xxxi]

9. CONCLUSION

Replacing the Collegium system calls for a Constitutional Amendment Bill; it requires a majority of not less than two-thirds of MPs (Members of Parliament) present and voting in Lok Sabha as well as Rajya Sabha. It also needs the ratification of legislatures of not less than one-half of the states. In the present scenario when the opposition is hell bent to defeat any such government's effort, it hardly seems possible.

The whole analysis makes it clear that the controversy against the working of Collegium system for appointment of our judges raised by the government is uncalled for, untimely and unwarranted, to say the least. It affects the public trust both in government and the judiciary at a time when we need to strengthen people's faith in the constitutional institutions most. Raising the issue after seven years in a pre-election year raises doubts on intentions. This is not to say that objective discussions on improvement of working of any institution is an anathema. It is the manner in which it is raised & its timings that is creating problem. It is quite understandable that the two constitutional authorities interact & exchange views in a cordial atmosphere in private. But public grandstanding over such sensitive issues do not benefit either of the two.

In fact a virulent attack on equally important & independent Constitutional authority by such a high dignitary like Vice President of the Republic, Speaker of Lok Sabha, Union Law Minister, all constitutional authorities themselves, is hardly understandable. Every Organ has to follow Constitutional Laxman Rekha. The job of interpretation of the Constitution has been assigned to Supreme Court. How can then highest executive authority can sit over its judgments & pronounce off hand that judgment propounding Basic Structure doctrine or the Second judge case has been decided wrongly? The judges normally do not enter into public debate or answer things by issuing press statements. They speak through their judgments. It is not good to exploit their position, or to compel them to take recourse to lectures or memorial addresses. Let all organs of the state respect each other and avoid raising controversies. Interest of the Nation and its people are supreme & the democratic set up of governance is to be protected at all costs. We must remember that each country adopts a constitution that suits to its genius & solves its problems. Our Constitutional fore fathers & mothers have kept in its folds ample space to evolve & capacity to solve future problems. Judicially evolved doctrines primarily framed to cover such fields. So let us not demean them.

ENDNOTES

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