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FOREWORD

As we bring forth to you the second edition of Volume 2, we take this opportunity to commend the quality submissions that we received for this issue. Being a quarterly, we are forced to limit the number of publications per issue. Thus, the biggest challenge we come up against is the selection of articles from umpteen stellar submissions. Such exceptional manuscripts deserve recognition, and we would like to thank all authors who've sent us submissions and challenged us to raise our standards of review.

Fostering debate on contemporary issues relating to constitutional and administrative law has been a key objective of this journal. The current issue highlights this endeavour. The present and past years have seen some landmark judgments being delivered by the Indian Judiciary. Our current issue covers some of these legal developments.

Judicial Appointments have warranted much debate with the advent of the National Judicial Appointment Commission Act. The opening article titled 'Transparency in Appointments to Higher Judiciary in India: Imperative of the Hour', explores the need for the establishment of the National Judicial Appointments Commission while expressing the general discontent over the non-transparency of the Collegium System. The author draws our attention to some recent events that necessitate the adoption of a new system.

On a similar note, the next article elucidates upon the introduction of the Constitution (121st Amendment) Bill, 2014 and the National Judicial Appointment Commission Bill, 2014 in lieu of the lapsed Constitution (120th Amendment) Bill, 2013 and the withdrawn Judicial Appointment Commission Bill, 2013. The author identifies the differences between the two while pointing out that the idea of inclusion of the composition of the National Judicial Appointments Commission in the Constitutional Bill is a needless attempt by the legislature

on account of an unwarranted fear. Consequently, it argues that a statutory provision can also be tested against the basic structure of the Constitution, in addition to any constitutional provision.

Tushar Jain and Sujoy Surcomment on the abrogation of the National Tax Tribunal by the Supreme Court in *Madras Bar Association* v. *Union of India*. The authors present a truly comparative analysis of the judgment examining judicial pronouncements on curtailment of judicial powers through tribunals by legislatures in foreign jurisdictions.

The final article of this issue examines the Supreme Court's decision in *NALSA* v. *Union of India.* The author vehemently argues in favour of the Supreme Court's judgment recognizing the rights of the transgender community, while surveying similar verdicts by foreign courts and successful models of gender recognition. The author while agreeing with the verdict identifies certain shortcomings of the judgment, which makes for an engaging read.

With this, another chapter in the life of this journal comes to a close, as the current editorial board's tenure comes to an end. We thank the current board for all their endeavours, and wish the new board good luck. The constant support of our Chief Patron Professor Poonam Saxena, our Director, Professor I P Massey and our Faculty Advisor Professor K L Bhatia cannot be left unacknowledged, and we are extremely grateful for their guidance and mentorship.

Abhimanyu Malik & Pooja Menon

[*Editors-in-Chief*]

TRANSPARENCY IN APPOINTMENTS TO HIGHER JUDICIARY IN INDIA: IMPERATIVE OF THE HOUR

- Ashutosh Hajela*

ABSTRACT

The Indian Judiciary enjoys the privilege and liability of acting as the custodian and the conscience keeper of the Constitutional vision, ideology and the cherished goals prescribed for the State. The Institution has been heavily armoured to immunize it from any pressure, endangering its independence in the performance of its vital role in the preservation of 'Rule of Law', starting right from the stage of nominating, short-listing and selecting the best suited candidates for the 'job'. Substantive emphasis is paid on the absence of any extraneous consideration while zeroing down upon a particular candidate and rather concentrating only on the merit, credibility and independence of a prospective candidate. Any manipulation at the level of appointments, especially by the Executive, has a direct and potent threat to the independence of the 'Judge' in the performance of his judicial duty without any prejudices in his mind. In the zeal to safeguard the Judicial Institution and to maintain and sustain its independence, the entire process of judicial appointments has turned into quite an opaque process, the bulk of which remains shrouded in mystery. There are no disclosed and settled parameters which motivate or de-motivate short-listing of candidates for Judge-ship; the grounds for selection or non-selection seldom appear, religiously, in public domain; meritorious people often do not find seat in the Bench; upward movement from the High Courts to the Supreme Court also is seen to happen on undisclosed parameters, which cumulatively, cast a negative image about the august Institution and keeps the system away from proper accountability. The need of the hour is to ensure transparency in judicial

appointments so as to strengthen the trust and confidence of the people in the Judiciary and to place it 'beyond suspicion'.

INTRODUCTION

The judiciary in India enjoys the privilege and the liability of acting as the custodian and the conscience keeper of the constitutional vision, the constitutional ideology and the cherished goals[1] which have been prescribed to be pursued by the State. The body is an important support system for the preservation of the Rule of Law and in the delivery of justice to one and all. The Rule of Law can be upheld only with an active judiciary, one to which the people can turn for the protection of their rights, liberties and freedoms whenever these are endangered or for protection against any misuse or abuse of power by the authorities.

"An independent judiciary and a judiciary with the power to issue practical orders, is more important than any number of grand theoretical declarations about the rights of man."[2] Diarmuid F. O' Scannlain, a United States Circuit Judge, has observed[3] in reference to the role of judiciary in upholding Rule of Law that "justice needs to be delivered by competent, ethical and independent representatives and neutrals." The Rule of Law would be a fallacy without independent courts to comment upon the legality of an action, to ensure equal protection of laws, to apply laws indiscriminately on all and to offer redressal to the grievances of the citizenry. The Judiciary, which is entrusted with such a mammoth task, needs to be strong, responsible and independent. In the absence of an independent judiciary, the constitutional title of justice would appear to be deceptive, ornamental and futile.

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[1]INDIA CONST. PREAMBLE (stating "Justice, Liberty, Equality and Fraternity") ["CONST."]

[2]M.N. Venkatachalliah, *Rule of Law: Contemporary Challenges*, 45 INDIAN J. PUB. ADMIN 322 (1999) [hereinafter, "Venkatachalliah"].

[3]Diarmuid F. O' Scannlain, U.S. Circuit Judge, Lecture at the Lecture at the University of Notre Dame-London Law Centre (Feb. 21, 2013)

The members of the Constituent Assembly, during the drafting of the Constitution of India, had been vociferous about the vital role to be performed by the judiciary in India and the measures required to be undertaken to ensure the independence of the institution. As far as the role to be assigned to the judiciary was concerned, they "trusted the judges to exercise the judicial power of invalidating statutes"[4] and harboured a belief that the Judges would do so "with mature self-restraint, act[ing] thus only in cases of patent unconstitutionality and not for giving effect to their personal philosophy and predilections."[5] The deliberations during the Assembly deliberations, as far as the independence of judiciary was concerned, seemed to be guided by the postulate that "if the beacon of the judiciary was to remain bright, the courts must be above reproach, free from coercion and political influence."[6] The members held a valid apprehension that the independence of Judiciary would be a vulnerable feature having witnessed the British system of appointment of judges at the unfettered discretion of the Executive. The power, thus vested in the Executive, had consequently resulted in the appointment of judges favourable to the colonial government. Such political undercurrents and experiences have been instrumental in giving a final shape to the present Constitution.

The institution of the judiciary has been heavily armoured by the varied provisions running through the Constitution of India. The provisions, as such, tend to immunize the judiciary from pressures originating from different quarters and from those bearing the potentiality of endangering its independence in the performance of its vital role in the preservation of 'Rule of Law.' The multi-layered protective cover over the sacrosanct institution operates right

[4]Soli J. Sorabjee, *Role of the Judiciary: Boon or Bane?*, ILC QUARTERLY 129 2011-12 (3 & 4).

Supreme Court of India, Report of the Ad hoc Committee 63 First Series (May 21, 1947) in GRANVILLE AUSTIN, INDIAN CONSTITUTION: CORNERSTONE OF A NATION 170 (2000) ["Austin"] (The Report recommended that "a Supreme Court with jurisdiction to decide upon the constitutional validity of acts and laws can be regarded as a necessary implication of any federal scheme.")

[5]SOLI SORABJEE, *supra* note 4 at 129.

[6]GRANVILLE AUSTIN, INDIAN CONSTITUTION: CORNERSTONE OF A NATION 164 (2000).

from the stage of nominating, short-listing and selecting the best suited candidates for the "job" to providing them security of tenure,[7] security against arbitrary removal,[8] salary,[9] service conditions,[10] jurisdiction and thus the requisite freedom from any external or internal pressure. The Constitution even places a bar on their right to practice, plead or act in any court or before any authority within the territory of India with respect to a person having retired as a Judge of the Supreme Court,[11] and in the case of a person having retired as Judge of a High Court, from pleading or acting in that High Court[12] so as to ensure that they remain truly independent in the performance of their judicial functions.

Independence of the judiciary is directly linked to the quality of personnel manning the institution and such quality, in turn, is dependent on the manner and mode of inducting judges into the system. During the process of appointments, substantive emphasis, ought to

[7]CONST., *supra* note1 at arts. 124, cl. 2, 217, cl. 1 (Judge of SC to hold the office till 65 years of age/Judge of a HC to hold the office till the age of 62 years).

[8]*Id* (A Judge shall not be removed from his office except by an order of the President passed after an address by each house of Parliament supported by a majority of the total membership of that house and by a majority of not less than two thirds of the members of the House present and voting has been presented to the President in the same session for removal on the ground of proved misbehavior or incapacity.)

[9]CONST. *supra* note 1 at art. 125, cl. 1(There shall be paid to the Judges of the Supreme Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule. Article 221 cl. 1 states -There shall be paid to the Judges of each High Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.)

[10]CONST. *supra* note 1, art. 125 cl. 2 (Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule/221(2):- Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule

[11]CONST., *supra* note 1, art. 124 cl.7 (No person who has held office as a Judge of the Supreme court shall plead or act in any court or before any authority within the territory of India).

[12]CONST. *supra* note 1, art. 220 (No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts.).

be placed on the absence of extraneous considerations or parameters while focusing on the merit, credibility and independence of a prospective candidate. It is in public interest that the system of selection of Judges be kept distant from 'irrelevant influence, untested prejudices and elitist empathies' and be guided by 'democratic circumstances, political ethos and constitutional values'.[13] Any manipulation at the level of appointments, especially by the Executive, would be a direct and potent threat to the independence of the Judge in the performance of his primary role of acting judicially without any prejudice. The Constitution of India further propels this ideology by imposing an obligation[14] upon the State to take steps to separate the judiciary from the executive. The independence of judges reflects "not only the independence of their mind and discretion but also the independence of their seat and tenure from political vicissitudes."[15] It has been aptly observed that "any method of judicial selection shall safeguard against judicial appointments for improper motives."[16]

It has been repeatedly stated that in the zeal to safeguard the Judicial Institution and to maintain and sustain its independence, the entire process of judicial appointments has turned into an opaque process, the bulk of which remains shrouded in mystery. There are no disclosed and settled parameters and criteria which motivate or de-motivate short-listing of candidates for the Judiciary; the grounds for selection seldom appear in the public domain; meritorious people do not often find a seat on the Bench; elevation from the High Courts to the Supreme Court is based on undisclosed parameters,[17] casting a negative image[18] of this

[13]V R Krishna Iyer, *Quae Curia (What a Court)! A new Indian Judicial Order is the Need of the Hour*, *in* ESSAYS ON HUMAN RIGHTS, JUSTICE & DEMOCRATIC VALUES 80 (2004).

[14]CONST. *supra* note 1, art. 50.

[15]VENKATACHALLIAH, *supra* note 2 at 322.

[16] U.N. Basic Principles on the Independence of the Judiciary, adopted by the 7th U.N. Congress on the Prevention of Crime and the Treatment of Offenders (1985) endorsed by G.A. res. 40/32 of 29 November 1985 and 40/146 of 13 December 1985 ["UN Basic Principles"]

[17]*Id.* ("Promotion of Judges, wherever such a system exists, should be based on objective factors, in particular, ability, integrity and experience").

institution and depriving it of accountability in its internal functioning. A careful analysis, hence, needs to be made in order to understand whether in seeking to insulate the institution body, we have made the entire system totally opaque and outside the realm of general scrutiny, and whether the system has become unaccountable in the garb of protecting its independence.

A quick journey through the system of appointments to the higher Judiciary amidst political and constitutional developments from 1950 to the present shall facilitate further analysis of the issue(s) at hand.

The Indian Judiciary has had a chequered past, despite a clear vision of independence running through the system of appointments, transfers, post-retirement bars and other allied provisions safeguarding the autonomy of the judiciary, contained in the Constitution of India. It is pertinent to observe that the Constitution[19] does not enumerate the criteria[20] for the selection of candidates for being appointed as a Judge; similarly it is conspicuously silent about the procedure for the selection of prospective Judges and it does not throw sufficient

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[18] News is not new disclosing that the Chief Justices have lost much of the credibility not only in matters of judicial appointments but also in administrative matters.

[19] CONST., *supra* note 1, art 124 cl. 3 (A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and-

(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or

(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or

(c) is, in the opinion of the President, a distinguished jurist.

Article 217(2)The Constitution of India :- A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and-

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession;)

[20] The Constitutional provision speaks only about the kinds of persons who may be appointed as judges of the Supreme Court.

light on the intensity[21] of the consultative process[22] preceding the appointment of judges. The men behind the drafting of the Constitution had perhaps contemplated that through the passage of time healthy practices would be generated and established to govern the system of judicial appointments, which is perhaps why they offered merely a skeletal scheme for appointment. The absence of clear-cut formulae in the Constitution regarding the subtle intricacies connected with judicial appointments, which could not possibly have been laid down in black and white, has given birth to numerous controversies in the process of judicial appointments.

Granville Austin[23] has observed that the act of recommendation or non-recommendation of names for judicial selections on 'undisclosed criteria' has been the norm since the inauguration of the Constitution. The Law Commission of India, vide its Fourteenth Report[24] of 1956, found that "the judicial selections (*made till the time of preparation of the report*) appear to have proceeded on no recognizable principle and seem to have been made out of considerations of political expediency or regional or communal sentiments. Some of the members of the Bar appointed to the Bench did not occupy the front rank in the profession either in the matter of legal equipment or of the volume of their practice at the Bar. A number of more deserving and capable persons appear to have been ignored for the reasons that can stem only from political or communal or similar grounds."

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[21] Use of words 'may' and 'shall' in Article 124(2) indicate 'directory' and 'mandatory' nature of the process respectively

[22] CONST. *supra* note 1, art. 124 cl. 2 (Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after **consultation** with such of the Judges of the Supreme Court and of the High Courts in the States as the President **may deem necessary** for the purpose.)

Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India **shall always be consulted**

[23] GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 125 (1999).

[24] MINISTRY OF GOVERNMENT OF INDIA, LAW COMMISSION REPORT ON REFORM OF JUDICIAL ADMINISTRATION 69, 14th Rep.(Vol. 1).

The lack of transparency in the system of appointments and the absence of any defined criteria for selections to the higher judiciary had become quite evident by the actions of the Government in the period of 1970s where appointments to the Judiciary were made with the intention of having 'committed' judges who would, in all probability, uphold the policies of the Government. Elevation to the top post of Chief Justice of India was done[25] on no identifiable parameter, discarding the long established and perhaps logical convention(s) of giving the privilege to the senior-most judge(s). Sixteen judges[26] of various High Courts were served with transfer orders by the government on the basis of no recognizable criteria, except the hidden agenda that those transferred comprised Judges who had defied the Government during the Emergency period by delivering 'anti- government' rulings. The Additional Judges were not given extensions in some cases,[27] were given brief extensions[28] in some cases and even reverted[29] to District Courts without disclosing reasons or material that formed the basis of such decisions. The cumulative effect of these developments was that the Government recognised no obligation to disclose reasons behind the appointment of a person as a Judge or the transfer of a Judge from one High Court to another or the elevation of a Judge, treating itself to be in the utmost custody of the prerogative of appointing judges and dealing with their service conditions. This began the process of loss of transparency in the system, giving

[25] K. Subha Rao, *The Supersession of Judges-The price of executive interference*, THE STATESMAN, May 14, 1973 *in* N.A. PALKHIWALA, A JUDICIARY MADE TO MEASURE (1973) (Breach of seniority in the appointment of the Chief Justice of India has been witnessed twice in the constitutional history of India. Justice Shelat, Grover and Hedge had been superseded by Justice A.N. Ray); H.R. KHANNA, NEITHER ROSES NOR THORNS 88 (1987) (At another point of time Justice HR Khanna was superseded by Justice M. H. Beg).

[26] Justice D. M. Chandrashekhar, M. Sadanandaswamy, A.P. Sen, Justice Rangarajan being the prominent ones.

[27] Two Judges on the Bombay and Delhi High Court, U.R. Lalit and R.N. Aggarwal were refused continuations despite favourable recommendations from the Chief Justices of the concerned High Courts

[28] O.N. Vohra, V.C. Shukla, S.N. Kumar and S.B. Wad had been granted a brief extension of three to four months

[29] R. N. Aggarwal had to suffer the humiliation of being reverted as the Sessions Judge in Delhi

birth to arbitrariness[30] and the rule of whimsical attitudes in the dealings of the government with the Institution.

The later developments in the process of judicial appointments witnessed changes with the passage of time. The power of the executive, due to its periodic misuses, gradually slipped[31] from its hands and the Judiciary came to exercise substantive influence in the process. Ultimately, the consultee member in the Constitutional setup virtually got veto power in the process by the birth of the 'Collegium System.' However, the 'fashion' of transparency in judicial appointments, transfers, promotions, securing or not securing post-retirement vocations has rarely been made public. No procedure, thus far in place, could ever boast of utmost transparency in its appointments to the Higher Judiciary. It is a blot on our democratic system that the process of selecting judges takes place under completely mysterious conditions with a mere handful of persons involved in the deliberations and the 'secrets' about the suitability or non-suitability, credibility or non-reliability of candidates remain buried in their hearts with the commoners never coming to know about the reasons for selections and rejections. It has been remarked of the British system[32] to the same tune, that

[30] Shah Commission of Inquiry Interim Report, *available at*https://archive.org/stream/137896426ShahCommissionOfInquiryInterimReportI/137896426-Shah-Commission-of-Inquiry-Interim-Report-I_djvu.txt (on Indira Gandhi's hand written *"I do not approve.."* on the continuance of U. R. Lalit as a Judge of the High Court observed that the act amounted to an "abuse of authority and misuse of power")

[31] S. P. Gupta v. Union of India A.I.R. 1982 S.C. 149 (India) ("It was open to the Central Government to override the opinion of the Constitutional Functionaries (who ought to be consulted) and take its own decision regarding suitability or non-suitability of a candidate.); Supreme Court Advocates on-record Association v. Union of India A.I.R. 1994 S.C. 268 (India) (The Chief Justice of India, being in the best position to scrutinize the worth of a Judge, and also to eliminate political influence(s) in the process, had to have the 'Final Opinion' in the matter: he needed to consult two of his senior colleagues before finalizing upon a name.); In Re Presidential Reference (1998) 7 S.C.C. 739 (India) (Upheld primacy of the opinion of the CJI and four of his colleagues.)

[32] David Pannick cited in V R Krishna Iyer, *The Higher Judiciary: Appointments and Disappointments*, *in* ESSAYS ON HUMAN RIGHTS, JUSTICE & DEMOCRATIC VALUES 96 (2004).

"the reasons why one candidate, rather than another, has been recommended to the Queen remain hidden in the files of Lord Chancellor's Department or concealed within the breasts of those senior judges amongst whom 'soundings' have been taken."

These unfortunate developments have invited the anguish of legal luminaries and stakeholders across the country. Justice Krishna Iyer once lamented[33] that in India, the Judiciary is 'handpicked confidentially in dark room operations, secret bargains and mutual adjustments.' Since the Judiciary also happens to be an institution of democracy, it is manifestly expected that that the selection to the positions of such authority and of utmost impartiality must be transparent and accountable and 'should not be by a mysterious method confined to a few *pro tem* humans in high office.'[34] The former Attorney General of India, Goolam E. Vahanvati has observed that,[35] "nobody can deny the problems that exist. Some outstanding judges were left out of promotions for reasons which may not have been explained and were, in some cases, highly doubtful. Equally, some undeserving candidates sneaked in. There is also general acknowledgement of the lack of transparency." He goes on to observe and lament how some talented individuals could find only a late entry into the Supreme Court 'for reasons which appeared to be based on personal prejudices and predilections' (of members of the Collegium).[36] The consequential impact of lack of clear and transparent norms and parameters in the process of appointments and promotions is manifest in many judges being deprived the opportunity of reaching the Apex Court or of being appointed as the Chief Justice, thus causing a loss to the institution itself, as well as career setbacks to the Judges in question individually. In the opinion of the former Attorney

[33] V R Krishna Iyer, *The Higher Judiciary: Appointments and Disappointments*, *in* ESSAYS ON HUMAN RIGHTS, JUSTICE & DEMOCRATIC VALUES 96 (2004).

[34] JEROME FRANK , COURT ON TRIAL (1973).

[35] Goolam E Vahanvati, *Judiciary at a Cross Roads*, THE TIMES OF INDIA, Aug 22, 2014.

[36] At one point of time, Executive was responsible for creating walls of secrecy around the process and even now the evil has not been remedied; the game spoiler now happens to be the Collegium System.

Generally, while admitting the lack of transparency in the process, various aspects of perusal of records of prospective candidates and analysis of their 'work' could not be expressed in public[37] since judges refrain from giving media releases or holding press conferences.

Some recent aberrations in judicial appointments deserve a careful scrutiny at this juncture of time to highlight the repercussions of having a non-transparent system of appointments and promotions and the impact of the same upon the image and credibility of the most revered Institution.

The case of the recommendation of the name of Gopal Subramanium[38] as a Supreme Court Judge, and his subsequent withdrawal of consent to be appointed as Judge, is pertinent at this point against the backdrop of transparency and the fairness of the selection process. Notably, the Government did not accept the name of Subramainum[39] for appointment as a Supreme Court Judge due to 'certain' factors which have been reported by the media[40] but have not been officially made public by the concerned authority(s). The manner of his 'non

[37]This is done under the shield of Independence of Judiciary and in the zeal to safeguard and sustain the credibility of the sacrosanct Institution.

[38] Senior Advocate of the Supreme Court of India and former Solicitior General of India; Subramanium was lead counsel for CBI in the 26/11 Mumbai terror attack case that led to AjmalKasab's conviction. He was also amicus curiae in the Sohrabuddin fake encounter case, often taking on the then NarendraModi government of Gujarat in court. He played a key role in getting the court to order a CBI probe into the case.

[39]Maneesh Chhibber, *Govt apprehensive about making Gopal Subramanium a SC judge, sends back name to collegium for reconsideration,* THE TIMES OF INDIA, June 19, 2014.

[40]Gopal Subramanium has published his letter addressed to the Chief Justice of India, reflecting anguish over the incident. He mentions "Over the past two weeks quite a few media reports have voiced the Union Government's reservations about my appointment. These reports speak of alleged adverse reports against me by the Intelligence Bureau and the CBI. I must say that these media reports are malicious insinuations based on half truths, and appear to be a result of carefully planted leaks aimed at generating doubts in the minds of the Collegium and of the public as to the suitability and propriety of appointing me as a Judge of the Supreme Court. I am fully conscious that my independence as a lawyer is causing apprehensions that I will not toe the line of the government. This factor has been decisive in refusing to appoint me. I have no illusions that this is so. I find it strange that no newspaper even spoke of my work over 34 years. The very fact that the Executive Government has not acknowledged my work, is sufficiently indicative of the true nature of its intentions." *Available at*http://media2.intoday.in/indiatoday/images/2014/download-1403683355676.pdf.

appointment' due to 'dislike' from the government is questionable as reasons behind such 'dislike' have not been substantiated or publically expressed. This episode reflects the opacity of the screening process for the Supreme Court Judges, which is ultimately against the interest, reputation and credibility of the institution.[41] The rejection of Gopal Subramanium's candidature has been challenged and questioned by people across different quarters. Karunanidhi has targeted the Centre on the rejection,[42] questioning whether his name was 'rejected' because of his service as *amicus curiae* in the *Sohrabuddin Fake Encounter* case.[43] The rejection of a candidate nominated through the Collegium by a Government with a 'powerful mandate', without cogent and tried reasons is to be viewed critically. The then Chief Justice of India, Justice Lodha, also expressed regret on the development, terming the act of rejection 'unilateral' coming from the executive without him being consulted over the matter.[44]

It has been reported that the Collegium System has resulted in a "*complete dereliction of norms of transparency in the functioning and accountability for choices made by the Collegium. No published criteria are followed by the collegiums for choosing judges, little is known about short-listing procedures and no reasons are communicated for its decisions.*"[45] It is true that a lack of transparency in the working of the Collegium has failed in giving the Constitutional Courts 'men of high erudition'.

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[42]*Karunanidhi Targets Centre on GopalSubramanium Rejection Row*, NDTV, July 3, 2014 *available at* http://www.ndtv.com/article/south/karunanidhi-targets-centre-on-gopal-subramanium-rejection-row-552561.

[43]J. Venkatesan, *Law Ministry turns down Gopal Subramanium's elevation as SC judge,* THE HINDU, June 19, 2014 *available at* http://www.thehindu.com/news/national/law-ministry-turns-down-gopal-subramaniums-elevation-as-sc-judge/article6127460.ece

[44]Utkarsh Anand, *Chief Justice Lodha breaks his silence, calls decision on Gopal Subramanium unilateral*, THE INDIAN EXPRESS, July 2, 2014 *available at* http://indianexpress.com/article/india/india-others/cji-r-m-lodha-breaks-his-silence-says-gopal-subramanium-was-rejected-without-my-consent/2/#sthash.QzSXv3iv.dpuf k

[45]Arghya Senguta, *Reform Judicial Appointments*, TIMES OF INDIA, New Delhi, July 1, 2014. She is the Founder and Research Director for the Vidhi Centre for Legal Policy.

Justice Markandey Katju,[46] demonstrated the total absence of transparency in the process of appointments to the Higher Judiciary and the occurrence of 'high-handed' political influence in the process by exposing[47] the case of an Additional Judge of the Madras High Court, who had allegedly, on the backing of an important political leader of Tamil Nadu, entered the High Court as an Additional Judge, granted two extensions of a year each and ultimately designated a permanent Judge of the High Court. Justice Katju has revealed that during the tenure of the Judge as the District Judge, there had been eight adverse entries recorded against him by various portfolio Judges of the Madras High Court, however all these entries had been deleted by an Acting Chief Justice of the Madras High Court purportedly to ensure his appointment as Additional Judge. Further, despite adverse Intelligence Bureau reports against him, he was granted extensions of his terms as the Additional Judge and consequently made permanent by the Government due to its political considerations. Justice Katju had revealed that the people involved in the matter included Justice R. C. Lahoti and Justice Y.K. Sabharwal, both of whom as the Chief Justices of India at different points of time had granted extensions of one year to the Additional Judge despite having knowledge of his 'taint' along with Justice K.G. Balakrishnan, who as the Chief Justice of India had confirmed him as the permanent Judge of the Madras High Court. The allegation clearly reflects the total opacity of the manner in which the service judges gain entry into the High Courts, the criteria for the extension or non-extension of their terms, the criteria for confirmation or non-confirmation of the additional judges as permanent judges, the scope of consultation between the Judiciary and the Government, the secret bargains between the two and the actions finally arrived at. Had there been absolute transparency in the system, no government or the Chief Justice of India would have acted thus due to the fear of public rebuke. The lack of transparency empowers people to carry out manipulations and act whimsically and arbitrarily, knowing

[46] Retired Supreme Court Judge and currently the Chairman of the Press Council of India

[47] *How a corrupt Judge continued in Madras High Court,* THE TIMES OF INDIA, New Delhi, July 21, 2014.

that they cannot be held accountable for their actions because of the veil of secrecy around them. In the case of *Shanti Bhushan v. Union of India,*[48]the decision of the Chief Justice of India in appointing Justice Ashok Kumar[49] to the Madras High Court, despite adverse reports against him and without consultation with the Collegium, had been challenged but the limitations to the process of judicial review[50] has surfaced after the opinion[51] of the Apex Court in the matter.

[48]Shanti Bhushan v. Union of India, (2009) 1 SCC 657.

[49] Justice Ashok Kumar happens to be the Judge about whom Justice Katju has been talking about.

[50] Para 8 and 11 in Shanti Bhushan v. Union of India: "So far as the scope of judicial review in such matters is concerned, it is extremely limited…." The Bench referred to the scope of review as had been laid down in Special Reference No.1 of 1998; 1998 (7) SCC 739, para 32 "Judicial review, in the case of an appointment or a recommended appointment to the SC or the HC, is available if the recommendation concerned is not a decision of the CJI and his senior-most colleagues, which is constitutionally requisite. Judicial review is also available if, in making the decision, the views of the senior-most SC Judge who comes from the HC of the proposed appointee to the SC have not been taken into account. Similarly, if in connection with an appointment or a recommended appointment to a HC, the views of the Chief Justice and senior judges of the High Court as afore-stated, and of SC Judges knowledgeable about that HC have not been sought or considered by the CJI and his two senior-most puisne judges, judicial review is available. Judicial review is also available when the appointee is found to lack eligibility.

Also as per The Supreme Court in Supreme Court Advocates on Record Association v. Union of India, 1993(4) SCC 441, para 482 "Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment or of a transfer being made without the recommendation of the CJI, these matters are not justiciable on any other ground, including that of bias, which, in any case is excluded by the element of plurality in the process of decision making."

It is pertinent to note that the challenge to Justice Ashok Kumar's appointment by Shanti Bhushan in the current matter derives support from the recent allegation of Justice Markanday Katju, a retired Judge of the Supreme Court of India that three successive Chief Justices of India recommended extensions to a 'corrupt' additional judge and who ultimately became a permanent judge under the tenure of KG Balakrishnan's Chief Justice-ship. (Katju was obviously referring to Justice Ashok Kumar in his revelations). Dhananjay Mahapatra, *MarkandeyKatju's allegations: In 2005, PMO had pushed to have 'corrupt' judge made permanent,* THE TIMES OF INDIA, July 23, 2014 *available at*http://timesofindia.indiatimes.com/india/Markandey-Katjus-allegations-In-2005-PMO-had-pushed-to-have-corrupt-judge-made-permanent/articleshow/38883679.cms.

[51]The apex court declined to quash the appointment of Justice Ashok Kumar observing that "the clock can't be put back", Para 16 and 17 of Shanti Bhushan v. Union of India,(2009) 1 SCC 657.

The manner in which the Collegium system functions stands further illustrated by the controversy involving former Chief Justice of India Altamas Kabir. It has been reported that the Chief Justice of the Gujarat High Court had written to the President and Prime Minister stating that the prime reason for him being overlooked for elevation to the Supreme Court, was the fact that he had opposed the elevation of Justice Kabir's sister as a High Court Judge when he was a member of the bench in the Calcutta High Court. His request for perusal of the material which formed the basis of Justice Kabir's decision regarding his competence and character was turned down. The allegations made by the Gujarat Chief Justice stand unverifiable as the "collegium has now become nothing more than a cabal, a secret society whose deliberations are not a matter of public record."[52]

This impact of opacity in the selection process and the fancifulness of the same is further clearly demonstrable by the impudence of the Collegium in not accepting and responding to the objection[53] raised by the Prime Minister's Office regarding the appointment of Justice Dattu, Justice Ganguly and Justice Lodha to the Supreme Court over senior Judges - Justices Shah, Justice Patnaik and Justice Gupta. The fact that Justice A.P. Shah, the Chief Justice of Delhi High Court could not find his way into the Supreme Court, despite an illustrious judicial career[54] has to be deprecated. The reasons for his non-elevation are again based on no official communiqué but on mere rumours, untested and uncorroborated facts. It has been

[52]Abhishek Sudhir, *Restoring the judiciary's credibility*, THE HINDU, July 24, 2014 *available at* http://www.thehindu.com/opinion/lead/restoring-the-judiciarys-credibility/article6242504.ece(last accessed on 03.11.2014).

[53]Diwakar & Dhananjay Mahapatra, *PMO returns 3 names mooted for SC judges*, THE TIMES OF INDIA, November 11, 2008 *available at* http://timesofindia.indiatimes.com/india/PMO-returns-3-names-mooted-for-SC-judges/articleshow/3697198.cms . (The PMO is learnt to have sought from the law ministry the reason for the seniority consideration being given a go-by.)

[54] He had delivered celebrated judgments in Delhi High Court, bringing the CJI under the RTI and decriminalizing Section 377 of the Indian Penal Code.

reported[55] that during his stay in the Madras High Court, some orders passed by him had created 'unfavourable impressions' with a Collegium Member, which perhaps led to him losing the title. Based purely on the seniority rule, he was one of the senior-most High Court Chief Justices who ought to have been a forerunner for elevation to the Supreme Court. However, other junior judges were recommended for the same, dropping his name aside. FaliNariman has criticised the Collegium for ignoring the candidature of Justice Shah for elevation to the Supreme Court.[56] In a public meeting while sharing the dias with the then Chief Justice of India, K.G. Balakrishnan, Nariman expressed "disappointment" in legal circles over Shah becoming a casualty of the "vagaries of the present system of judicial appointments", despite being a "role model for all judges." Commenting upon the lack of transparency and a consequent proportionate arbitrariness in the dealings of judicial appointments, Nariman also cited the instance of Justice A.K. Patnaik, who could not, initially, gain entry into the Supreme Court because of a consistent refusal of one member of the Collegium to do so; it was only after the retirement of that member that Justice Patnaik's candidature was accepted. He had also made a passing remark over the appointment of Justice P.D. Dinkaran to the Apex Court despite allegations of land grabbing against him, which again spoke of the high-handedness of the people responsible for the appointment(s).

Justice A.P. Shah, chairman of the Law Commission of India has time and again registered his distaste for the opaque conduct of the Collegium System, holding that appointments to the Higher Judiciary lacked transparency. He once remarked in an interview to a television channel, that "the Collegium System is so opaque that even if someone wants to speak out, he cannot do it having come from the same system." He further opined that the "Collegium

[55]As per P.P.Rao, *available at* http://www.ndtv.com/article/india/justice-a-p-shah-retires-hurt-16247.

[56]*Fali slams SC Panel for ignoring judge who penned gay verdict*, THE TIMES OF INDIA, Nov 20, 2009 *available at* http://epaper.timesofindia.com/Repository/getFiles.asp?Style=OliveXLib:LowLevelEntityToPrint_TOI&Type=text/html&Locale=english-skin-custom&Path=CAP/2009/11/20&ID=Ar01700.

System has completely failed; judges are appointed on unknown criteria….favourites get appointed and the rest are left out". Justice Shah pointed out that the Collegium had gone ahead to appoint a Judge at the age of sixty when the 'criteria' clearly says that any appointment to Higher Judiciary has to be below the age of fifty five.[57]

The past few years have also given birth to various other controversies regarding the appointment or non-appointment of several people, such as Bhaskar Bhattacharya, N.V. Ramanna,[58] and P.D. Dinakaran.[59] The Gujarat High Court Bar Association had passed a resolution,[60] "protesting" the overlooking of "legal competence, honesty, dedication and steadfastness" of its Chief Justice, Bhaskar Bhattacharya, whose appointment had allegedly been stalled because of one Collegium member's animosity towards him.[61] In a similar fashion, another resolution passed by the Madras High Court Bar Association, shared its concern over the opacity of the selection process.[62] It is pertinent to note that the process of

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[57] *Collegium System Failed; Law Panel Chief*, THE TIMES OF INDIA, New Delhi, August 26, 2014.

[58] PIL had been filed by the advocates contesting Ramana's appointment on the ground that a criminal case was pending against him at the time of his elevation to the bench and that he was guilty of suppression of vital information: PILs dismissed: cost imposed upon the petitioners. *Supreme Court junks plea for removal of Andhra Pradesh High Court judge*, THE ECONOMIC TIMES, Feb 4, 2013 *available at*http://articles.economictimes.indiatimes.com/2013-02-04/news/36743123_1_apex-court-justice-ramana-collegium.

[59] J. Venkatesan, *Balakrishnan pushed for Dinakaran's elevation: Katju,* THE HINDU, August 11, 2014 *available at* http://www.thehindu.com/news/national/katju-stokes-fresh-controversy-targets-excji-kg-balakrishnan/article6304714.ece (.

The Supreme Court has refused to disclose details regarding the decision on elevating Karnataka High Court Chief Justice P.D. Dinakaran to the Supreme Court, which has since been stalled following allegations of land grab against him." *available at* http://www.thehindu.com/news/national/details-on-dinakaran-elevation-confidential-supreme-court/article124915.ece.

[60] A.P. Shah, *Appointments in the Higher Judiciary must be based on merit and reflect social diversity*, *available at*http://www.judicialreform.in/forums/showthread.php?tid=971.

[61] AjitPrakash Shah, *Appointments in the higher judiciary must be based on merit and reflect social diversity*, THE TIMES OF INDIA, July 10, 2013 *available at* http://timesofindia.indiatimes.com/edit-page/Appointments-in-the-higher-judiciary-must-be-based-on-merit-and-reflect-social-diversity/articleshow/20992942.cms

[62] *Id.*

induction of judges is initiated by the Chief Justice of India in the case of inducting a Judge for the Supreme Court or by the Chief Justice of the High Court for selecting a Judge for the High Court. However, the important and significant process of choosing sentinels of the Constitution and the upholders of Rule of Law remains distant from any form of public participation. The very idea of open hearings, consultations with public and the stakeholders and inviting proposals for objections against recommended names is foreign to judicial selections in India.

Given the swelling discontent over the non-transparent working style of the Collegium System, the National Judicial Appointments Commission Act, 2014 and the Constitution (One Hundred and Twenty First Amendment) Bill, 2014 enacted as the Constitution (Ninety Ninth Amendment) Act, having come into force,[63] is being projected as the harbinger of transparency. However, it is amply clear that unless the proposed system under the National Judicial Appointments Commission works on settled, disclosed and publicized parameters for the performance of the assigned role, it shall be merely replacing the monopolized power of judicial appointments under the Collegium system, rather than making the system broad-based and transparent. Justice A.P. Shah has categorically remarked[64] that "we don't need a reactionary move setting up a Judicial Appointments Commission merely for the sake of it, for that would achieve nothing. We need a well thought out and consultative process of selection with identified norms and criterion…Choosing Judges based on undisclosed criterion, in largely undisclosed criterion, reflects an increasing democratic deficit and must be abandoned." It has been appropriately observed and suggested by Justice Ruma Pal[65]and Arghya Sengupta that the exercise of power by the body must be accompanied with reasons

[63]*National Judicial Appointments Commission Act Notified*, PRESS INFORMATION BUREAU, Government of India,

Ministry of Law & Justice, 13-April-2015, *available at* http://pib.nic.in/newsite/PrintRelease.aspx?relid=118224

[64] *supra* note 60

[65]Former Judge of the Supreme Court of India.

to be publicly disclosed, holding that "transparency, a key leitmotif of the reform of the appointment process, demands such disclosures."[66] There is a need to work upon the exact functional criteria for the selection of Judges and also bring the same in public domain viz., number of judgments delivered, jurisprudential significance of the judgments delivered, the personal and judicial integrity of the Judges; analysis of members of the Bar also needs to be conducted on tangible parameters viz. number of appearances in matters, appearances at the final stages of hearing, their personal integrity, etc., in order to reach to a logical conclusion.

The process of selection needs to be manned by a body which must 'exchange view(s), openly where all possible candidates are considered, using the inherent, confidential enquiries and with definite criteria rooted in the social values and functional capabilities, which the Constitution implies. The practice of maintaining secrecy about proposed names for judge-ship has to be done away with; the prospective names may be publicized to facilitate an opportunity to the stakeholders to analyse their worth and this may remove corrupt politicking in the process. The need of the hour is to ensure transparency in the judicial appointments so as to strengthen the trust and confidence of the people in the Judiciary and to place it 'beyond suspicion.' "The Judges must be selected and appointed by methods which are transparent and which ensure the independence of their functions without allegiance or loyalty to the appointing authority."[67] It is safe to conclude that it is time for overhauling the entire process of judicial appointments with a view to convey to the masses, who bestow an extreme degree of faith and reverence in the institution that it is manned by a completely transparent system and is accountable to the public at large.

[66] THE TIMES OF INDIA, New Delhi, 17th August, 2014

[67] T. R. Andhyarujina, *Challenges before the Judiciary-An Indian Perspective*, INDIAN ADVOCATE, 2010-2011

APPOINTMENT OF JUDGES AND THE COMPOSITION OF NATIONAL JUDICIAL APPOINTMENT COMMISSION: THE BASIC STRUCTURE CONUNDRUM

Harish Choudhary & Amrutanshu Dash*

ABSTRACT

This article scrutinizes the necessity of prescribing the composition of National Judicial Appointment Commission ["NJAC"] in the Constitution as opposed to the National Judicial Appointments Commission Act. It refutes the postulation of Standing Committee that since a statutory provision cannot be tested against the basic structure doctrine, the composition of NJAC being included in NJAC Act will not have protection of basic structure. While due value is given to such bona fide premise, it is argued that same level of protection is also available to a statutory provision and reliance is placed on jurisprudence of Supreme Court. In this way, the authors opine that even if the composition of NJAC had been prescribed in a statute, any alteration in the same could have been struck down for violating basic structure provided that it affected the independence of judiciary or any other aspect of basic structure of the Constitution.

INTRODUCTION

The Constitution (121st Amendment) Bill, 2014 and the National Judicial Appointment Commission Bill, 2014 have been introduced in the Parliament in lieu of the lapsed Constitution (120th Amendment) Bill, 2013 and the withdrawn Judicial Appointment Commission Bill, 2013. In most ways, the former can be considered an *alter ego* of the latter. However, the primary difference between the two sets of Bills lies in the fact that the 2014 set enumerates the composition of the Judicial Appointments Commission [hereinafter "JAC"] in

the Constitution[1] itself unlike the 2013 set which left it on the Parliament[2] to do so by enacting a statute (JAC Bill, 2013).[3] The underlying rationale for such a marked change is related to the protection offered by the basic structure doctrine to the composition of the JAC which was absent in case of a mere statutory provision.[4]

This article advocates the idea that the inclusion of the composition in the Constitutional Bill is a needless attempt by the lawmakers on account of an unwarranted fear. Consequently, it argues that a statutory provision can also be tested against the basic structure of the Constitution, in addition to any constitutional provision.

Part I of the article outlines the two sets of amendment Bills and differentiates them on the basis of the provision regarding the composition of the JAC. Part II uncovers the history of the appointment of judges in India. It makes the historical case that the procedure of appointment of judges is a significant aspect of independence of judiciary. Part III proceeds to argue that the composition could have been provided in the statutory Bill itself. The final part concludes the paper and presents the comments of the authors.

A ROAD-MAP TO THE CONSTITUTIONAL AMENDMENT BILL

Articles 124(2) and 217(1) of the Constitution of India, 1950 provide the procedure for appointment of judges in the Supreme Court and the High Courts respectively. The literal

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[1] The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, cl. 3.

[2] *Id*.

[3] *Judicial Appointments: Comparison of the 2014 Bills with the 2013 Bills*, PRS LEGISLATIVE RESEARCH (Nov. 5, 2014), http://www.prsindia.org/uploads/media/constitution%20121st/Comparison%20of%20the%20Bill,%202013%20and%202014.pdf.

[4] Standing Committee, Rajya Sabha, *64th Report: The Judicial Appointments Commission Bill, 2013*, ¶ 39.

interpretation of the provisions reveals that the appointment of judges of the Supreme Court and the High Courts is primarily an act of the President who acts in accordance with the aid and advice of the Council of Ministers under Article 74(1) of Constitution of India. A Constitutional obligation is cast on the President to *consult* the Chief Justice of India and the Chief Justice of the High Court concerned, for the appointment and transfer of judges of the higher judiciary.[5]

The Law Commission, in its 214th Report, observed that these two Articles are among the checks and balances in the Indian Constitution where both the executive and judiciary have been given an equal and balanced role.[6] The Standing Committee examining the JAC Bill has stated that these two Articles ensure the independence of judiciary, which forms a part of the basic structure of the Constitution.[7]

The Supreme Court in the three *Judges' cases viz*. the *SP Gupta* judgement (1982),[8] the *Advocates-on-Record* judgement (1993)[9] and the *Special Reference* Advisory Opinion (1999)[10] has unnecessarily upset this balance with its interpretative tools. In contrast to the literal interpretation of the provisions, the *consultation* with judges has been read as *concurrence*.[11]

[5] The Constitution of India, 1950, arts. 124(2), 217(1).

[6] Law Commission of India, *Report No. 214: Proposal for Reconsideration of Judges cases I, II and III - S. P. Gupta vs UOI reported in AIR 1982 SC 149, Supreme Court Advocates-on-Record Association Vs UOI reported in 1993 (4) SCC 441 and In Re: Appointment and Transfer of Judges reported in 1998 (7) SCC 739,* at 53 (2008).

[7] Standing Committee, Rajya Sabha, *64th Report: The Judicial Appointments Commission Bill, 2013*, at 9.

[8] S. P. Gupta and ors. v. Union of India, 1982 2 SCR 365.

[9] Supreme Court Advocates-on-Record Association and anr. v. Union of India, (1993) 4 SCC 441.

[10] In Re: Appointment and Transfer of Judges, 1998 (7) SCC 739.

[11] Supreme Court Advocates-on-Record Association and anr. v. Union of India, (1993) 4 SCC 441; ¶¶ 52-57.

In the *First Judges'* (*SP Gupta*) *case*, the majority held that *consultation* with the Chief Justice of India under Article 124 does not mean *concurrence*; therefore his opinion is not binding on the President-executive. The Apex Court in its decision gave a twofold reasoning: first, the executive is not bound to act in accordance with the opinion of all constitutional functionaries.[12] Second, primacy should be given to the executive as it is accountable to the people while the judiciary is not subject to such accountability.[13]

At the same time, in order to curtail the arbitrary power of the executive, the Supreme Court held that the consultation would have to be full and effective and any departure from the opinion of the respective judges is to be justified with strong and cogent reasons.[14] In this way, the Court maintained the balance between separation of power and the system of checks and balances.

Subsequently, a nine-judge bench of the Supreme Court in the *Second Judges'* (*Supreme Court Advocates on Record*) *case* overturned the *First Judges' case*. The majority (5)[15] held that judicial independence requires the opinion of the Chief Justice of India in the matter of appointments and transfers to be determinative.[16] It hence interpreted *consultation* to mean *concurrence*.[17]

The Court also devised a new system of appointment *viz.* the collegium system. The term *Chief Justice of India* occurring in Articles 124(2), 217(1) and 222(1) was extended to mean a

[12]S.P. Gupta case, at ¶¶ 29 (Bhagwati, J.).

[13] *Id.*

[14]*Id* at ¶ 1069.

[15] Majority comprises Hon'ble Justices J.S. Verma, YojeshwarDayal, G.N. Ray, A.S. Anand and S.P. Bharucha.

[16]Supreme Court Advocates-on-Record Association case, at ¶¶ 52-57.

[17]*Id*.

collegium of selected Judges.[18] It held that the Chief Justice of India in consultation with his two senior-most colleagues should make the recommendation under Articles 124(2), 217(1) and 222(1), and that the executive should act in conformity with such recommendation.[19]

Since then the view of the Chief Justice of India for appointment and transfer of judges to higher judiciary has been given primacy over the decision of the Union Government. It made the judiciary the *de facto* appointing authority for themselves, clearly overlooking the intention of the Constitution framers and circumscribing the aid and advice tendered by the Council of Ministers to the President of India under Article 74(1) of Constitution. A quick glance at the Constituent Assembly Debates would however suggest the contrary. The Constituent Assembly deliberately followed the procedure of appointment of judges as it existed under the Government of India Act, 1935 *i.e.* the sole discretion was given to the executive (the Crown).[20]

The *Second Judges' case* was unanimously reaffirmed by a nine-judge bench of the Supreme Court in the *Third Judges'* (*In re: Special Reference*) *case*. The third case clarified the modalities of how the judicial collegium would actually perform the task of appointments which was not clear in the *Second Judges' case*. While doing so, it further extended the collegium from three to five *i.e.* the Chief Justice of India and his four senior-most colleagues.[21] The extension of the collegium to five was done, in the absence of any detailed reasoning. The reasoning was limited to the rationale of selecting the best available judicial talent in the country for the higher judiciary, in ensuring the need for the independence of the

[18] *Id* at ¶¶ 58, 68-70.

[19] *Id* at ¶¶ 68-70.

[20] Constituent Assembly Debate, vol. VIII, 246-247 (24th May 1949).

[21] In Re: Appointment and Transfer of Judges, at ¶ 14.

judiciary.[22] However, no nexus was established between the extension and selection of the best talent.

In the light of the opinion preferred by the Supreme Court, Department of Justice, Ministry of Law and Justice prepared detailed Memorandum of Procedures [23] for the purpose of appointment and transfer of Judges of higher judiciary.

The new system was criticized[24] both factually (due to some questionable appointments) and theoretically (on the ground that it upset the system of checks and balances, and independence of judiciary). The National Commission to Review the Working of the Indian Constitution recommended the establishment of the Judicial Appointments Commission for the appointment, transfer and removal of judges of higher courts.[25]

In this regard, in order to restore the balance and to further equal and effective participation of both executive and judiciary in the appointment of judges, the Constitutional (120th Amendment) Bill was introduced. It proposed the establishment of a Judicial Appointments Commission, replacing the existing controversial collegium system, to make recommendations to the President on appointment and transfer of judges of the higher

[22] Arghya Sengupta, *Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry*, 5 INDIAN J. CONST. L. 99, 103-04 (2011).

[23] Memorandum showing the procedure for appointment and transfer of Chief Justice of India and Judges of the Supreme Court of India, http://doj.gov.in/sites/default/files/memosc.pdf accessed 10 Feb 2015; Memorandum showing the procedure for appointment and transfer of Chief Justices and Judges of High Courts, http://doj.gov.in/sites/default/files/memohc.pdf, accessed 10 Feb 2015.

[24] Law Commission of India, *Report No. 214: Proposal for Reconsideration of Judges cases I, II and III - S. P. Gupta v. UOI reported in AIR 1982 SC 149, Supreme Court Advocates-on-Record Association v. UOI reported in 1993 (4) SCC 441 and In Re: Appointment and Transfer of Judges reported in 1998 (7) SCC 739* (2008). *See generally* ArghyaSengupta, *Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry*, 5 INDIAN J. CONST. L. 99 (2011).

[25] National Commission to Review the Working of the Indian Constitution (2002).

judiciary.[26] In addition, it empowered the Parliament to pass a law providing for the functional and procedural aspects of the JAC.[27] To this end, the Judicial Appointment Commission Bill, 2013 was introduced simultaneously in the Parliament. Unfortunately, the Constitutional Bill lapsed and subsequently the JAC Bill was withdrawn.

To revive these bills, the Constitution (121st Amendment) Bill, 2014 and National Judicial Appointments Commission Bill, 2014 were introduced in the Parliament on similar lines. The National Judicial Appointments Commission Bill, 2014 received the assent of the President after being passed by both houses and is now the National Judicial Appointments Commission Act, 2014. The National Judicial Appointments Commission Act, 2014 prescribes the composition of the JAC in the Constitution[28] itself unlike the former Bill which had left it to the wisdom of the Parliament to decide by law.[29]

The following section will focus on the necessity of the incorporation of the composition of the JAC in the constitutional provision.

JUDICIAL APPOINTMENT COMMISSION: BASIC STRUCTURE AND ORDINARY LAWS

As is not unusual with any proposed law, the JAC Bill, 2013 was accompanied with some ambiguities, which needed to be clarified. Accordingly, it was referred to the Standing Committee for review. One of the several recommendations of the Committee was that the

[26]The Constitution (One Hundred and Twentieth Amendment) Bill, 2014.

[27]*Id*.

[28]*Id*.

[28]The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, cl.3..

[29]*Judicial Appointments: Comparison of the 2014 Bills with the 2013 Bills*, PRS LEGISLATIVE RESEARCH (Nov. 5, 2014), http://www.prsindia.org/uploads/media/constitution%20121st/Comparison%20of%20the%20Bill,%202013%20and%202014.pdf.

composition of JAC should be prescribed in the Constitution itself instead of in a statute,[30] while the procedure to be followed by the JAC may be determined by a statute. The Standing Committee submitted a two-pronged reason for this suggestion: *first*, the committee observed that if the composition is prescribed in the Constitution itself, in order to alter the same, the Parliament has to undergo a rigorous procedure under Article 368.[31] On the other hand, an amendment in an ordinary statute can be made by a simple majority in the Parliament. Therefore, the Standing Committee feared that if the composition is provided in an ordinary statute (JAC Bill), it can be altered at the whims and fancies of the then government and there will not be any check over such an action.

Second, the Committee was of the opinion that an ordinary legislation would not be afforded protection by the Basic Structure doctrine.[32] The Standing Committee relied on the position of law that suggested that the *vires* of a legislation can only be tested on two grounds: competence of the legislature to enact it and whether the legislation is *ultra vires* the Constitution. Therefore, it was noticed that a situation wherein the JAC Act was amended to comprise four non-judicial members as opposed to three judicial members would go without redressal as it would not fall within any of the pigeon holes. However, the prescription of the composition of the JAC in the Constitution would have made sure that the amendment was negated based on the principle of judicial independence and the system of checks and balances which formed a part of the basic structure of the Constitution.[33]

[30] Standing Committee, Rajya Sabha, 64th Report, *The Judicial Appointments Commission Bill*, 2013, ¶ 39.

[31] *Viz.* (1) enactment by a super-majority of both houses of India's Parliament (at present, the Constitution Amendment Bill has only been passed by the upper house); (2) ratification by the legislatures of half the states in India; and (3) assent by the President.

[32] Standing Committee, Rajya Sabha, 64th Report, *The Judicial Appointments Commission Bill*, 2013, ¶ 39.

[33] Supreme Court Advocates-on-Record Association case, at ¶¶ 9-11.

The Standing Committee's anticipation is based on the premise that the ground of basic structure violation is not available for the review of an ordinary statute. In this context, it is submitted that the basic structure doctrine can be applied to constitutional as well as statutory provisions.

Raj Narain[34] was the first case in which the question regarding the applicability of the basic structure doctrine to statutes was discussed and decided by the Supreme Court. The Court decided by majority (3:1)[35] that the basic structure doctrine is applied to determine the validity of constitutional provisions only – not statutory provisions. Per Justice Ray,[36] the acceptance of the theory would imply that there are two kinds of limitations for legislative measures: *first*, the competence of the legislature in accordance with Articles 245 and 246 and the requirements to be in compliance with Part III of the Constitution by virtue of Article 13. *Second*, no legislation can damage or destroy the basic features of the Constitution. The latter, according to the Judge, would amount to the rewriting of the Constitution and will be an encroachment on the separation of powers.[37] In his opinion, no legislation can be free from challenge on the ground even though the legislative measure falls within the plenary powers of the legislature.[38]

The transition towards the position of applicability of basic structure doctrine to statutory provision can be traced to Justice Beg's dissent in *Raj Narain*[39] itself. Justice Beg observed

[34] Smt. Indira Gandhi v. Shri Raj Narain and anr., AIR1975 SC 2299.

[35] The majority opinion comprises concurring opinions of Ray C.J., Mathew J. and Chandrachud J. Justice Beg dissented and Khanna J. abstained from deciding on the issue.

[36] Smt. Indira Gandhi v. Shri Raj Narain and anr., AIR1975 SC 2299, ¶ 134.

[37] *Id* at ¶¶ 134-136.

[38] *Id* at ¶¶ 134.

[39] *Ibid*.

that the courts have to test the legality of laws, whether *ordinary* or constitutional, by the norms laid down in the Constitution basing his conclusion on the supremacy of the Constitution.[40] Considering that the statutory law cannot go beyond the range of constituent power and the exercise of constituent power is itself subject to the Constitution,[41] it was concluded that even statutory law is subject to the basic structure doctrine.

The majority judgment was consistently followed in a catena of cases.[42] In spite of the stated position of law, the Supreme Court has struck down statutory provisions in the case of *L. Chandra Kumar*[43]and *Indira Sawhney*[44] – Section 28 of Administrative Tribunal Act, 1985 and Sections 3, 4 and 6 of Kerala State Backward Classes Reservation Act, 1995[45] respectively – on the basis of the violation of basic structure of the Constitution. Additionally, the nine judge bench of the Apex Court in *I.R. Coelho*[46] concluded that any statute afforded the protection from Part III of the Constitution by its inclusion in the ninth schedule[47] will continue to be subjected to the doctrine of basic structure.[48] The Court's reasoning was not nuanced: it opined that if the Parliament is incapable of enacting a constitutional amendment destroying the secular character of a state (secular character being a part of the basic

[40]*Id* at ¶ 623 (Per Justice Beg).

[41]*Id*.

[42]State of Karnataka v. Union of India and Anr. AIR 1978 SC 68; State of Andhra Pradesh and Ors. v. McDowell & Co. and ors. AIR 1996 SC 1627; Public Services Tribunal Bar Association v. State of U.P. and anr. AIR 2003 SC 1115; Kuldip Nayar v. Union of India AIR 2006 SC 3127.

[43]L. Chandra Kumar v. Union of India 1997 (3) SCC 261.

[44]Indira Sawhney v. Union of IndiaAIR 2000 SC 498.

[45]Kerala State Backward Classes (Reservation of Appointments or Post in the Services under the State) Act, 1995.

[46] I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu and ors.AIR 2007 SC 861.

[47]INDIA CONST. art. 31B.

[48]*supra*note 46 at¶ 81(i).

structure), neither can the Parliament exercise its power to produce the same result by protecting laws which produce the same effect.[49] To hold the contrary position would signify that the doctrine of basic structure can be subverted by first enacting such laws and then affording them the protection under the ninth schedule.[50]

The applicability of the basic structure test to ordinary legislations has been discussed by the Supreme Court in a couple of cases recently and has been answered in the affirmative. Interestingly, the Apex Court in *K.T. Plantations &Anr.v. State of Karnataka*[51] starts by citing *I.R. Coelho*[52] and therefore the discussion never veered towards the question as to whether a statute is subject to the basic structure doctrine. Rather, the Court has singularly focused on the question in relation to the legality of a statute in case it violates the 'rule of law'. The Court cites a number of authorities, domestic and foreign, to conclude that rule of law is a part of the basic structure of the Constitution[53] and has held that a statute may only be invalidated if it violates a rule of law which has the status of a basic structure rule.[54] Such a conclusion would further the fact that courts have accepted the notion that a statute cannot violate the basic structure. The second case relating to the decision of the Supreme Court in *Madras Bar Association*[55] which has declared the National Tax Tribunal to be unconstitutional, re-affirms the above position of law. The Court states that the basic

[49] *Id*, ¶¶ 49-50.

[50] *Id*, ¶ 49.

[51] KT Planatations & anr.v. State of Karnataka AIR 2011 SC 3430.

[52] *Id* at ¶ 134.

[53] *Id* at ¶¶ 136-139.

[54] *Id* at ¶ 140.

[55] Madras Bar Association v. Union of India (2014) 10 SCC 1.

structure doctrine remains applicable to any ordinary legislation even though the statute was enacted by following the prescribed procedure.[56]

CONCLUDING REMARKS

All in all, the overall changes in the procedure of appointment of the judges in the higher judiciary proposed by the Constitutional (121st Amendment) Bill, 2014 and enshrined in the National Judicial Appointment Commission Act, 2014 are welcome and calculated to give better security to the independence of judiciary, while preventing disregard of meritorious judges through false objective criteria. The recommendation of the Standing Committee that the composition of the JAC requires constitutional entrenchment is based on an erroneous interpretation of the basic structure doctrine of the Constitution. Notably, judicial trend evidences that even statutory provisions can be tested against the basic structure doctrine.

The National Judicial Appointment Commission Act, 2014 has a bigger fish to fry *viz.* the overriding effect of the JAC over the practices such as seniority while deciding the Chief Justice of India, judges sitting in the panel to decide their own fate etc., which have attained the status of custom over the years. These issues will be upfront while making the regulations regarding the procedure of appointment of judges. As of now, both the JAC Bill, 2013 as well as the National Judicial Appointment Commission Act, 2014 do not throw any light on these matters. The 2014 Act lays down broad criteria of seniority, ability and merit for the purposes of appointment of judges.[57] The regulations to the Act shall provide additional parameters of the same. The overriding effect of the Act on the aforementioned customs can only be further analysed in the context of these regulations, when released.

[56] *Id* at ¶ 65 (Per Justice Jagdish Singh Khehar).

[57] National Judicial Appointments Commission Act of 205 s. 5

MADRAS BAR ASSOCIATION V. UNION OF INDIA: A VEHEMENT REMINDER

- Sujoy Sur* and Tushar Jain**

ABSTRACT

Some of the fundamental ideals and conventions of the Indian Constitution are considered inviolable, having acquired the stature of being a part of the basic structure of the Constitution Out of the many such principles which have become indispensable precepts of the legal system, two of the foremost are judicial independence and (the doctrine of) separation of powers. The case of *Madras Bar Association v. Union of India* is one such reminder of the principle to both the Legislature as well as the Executive. In this case, a Constitutional Bench of five judges considered the constitutionality of the National Tax Tribunal ["NTT"], ultimately holding it to be unconstitutional as its parent statute was in violation of the Westminster system of separation of powers and the principle of judicial independence. The Court confirmed its stance on the scope of judicial power by holding that a High Court's judicial power cannot be substituted by legislation or by creation of a tribunal. The authors have attempted to critically analyse the judgment and to arrive at a comparative analysis of the Westminster model of separation of powers.

INTRODUCTION

The Indian legal system has a deep-rooted veneration for the ideals enshrined in the Constitution. The Judiciary, especially, has repeatedly stood up to the task of interpreting, protecting and nurturing these ideals. One of these ideals is that of Separation of Powers between the Legislature, the Judiciary and the Executive.[1] Of the three it is Judicial

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independence which is the most important, for it is the Judiciary which keeps the Legislature and Executive in check and is the guardian of the rights of the people.[2]

One of the latest reiterations of this principle was the case of *Madras Bar Association v. Union of India*.[3] The case concerned the constitutionality of the National Tax Tribunal ("NTT"). The NTT was a quasi-judicial authority which replaced the High Courts as the appellate authority for the adjudication of tax related disputes under the Income Tax Act, 1961, the Central Excise Act, 1944 and the Customs Act, 1962, from which the final appeal lay only with the Supreme Court of India. The Tribunal was struck down as unconstitutional by a Constitutional Bench presided over by the then Chief Justice R.M. Lodha, as many of its features subverted the Constitutional ideals of judicial independence and separation of powers.

THE CASE

Facts

The facts are constitutive of the historical background as to why the National Tax Tribunal was constituted and as to why tribunalisation was considered necessary. To ascertain the same, the Court delved into the reports of the Direct Tax Enquiry Committee, which was headed by former Chief Justice of India K.N. Wanchoo, and the Direct Tax Law Committee, which was headed by Mr. N.A. Palkhivala and Mr. C.C. Choksi. The Choksi Committee prescribed a "Central Tax Court" under a separate statute. However, the recommendations were not implemented until the 1990s when this issue was re-deliberated and put to the fore,

[1]Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461(India).

[2]Marbury v. Madison, 5 U.S. 137(1803).

[3]Madras Bar Association v. Union of India, [hereinafter NTT Case]

eventually leading to the promulgation of the National Tax Tribunal Ordinance, 2003. The Ordinance provided for transfer of appellate jurisdiction from the High Courts to the NTT, which however lapsed. The Legislature then formulated the National Tax Tribunal Bill, 2004. The Bill was referred to the Select Committee of the House, where the concerned stakeholders were granted an individualised hearing. The Bill was finally passed as the National Tax Tribunals Act in 2005, for the following reasons:[4]

i) It would lead to a reduction in the pendency of huge arrears;

ii) It would get in motion, the tax recovery which was held up in the High Courts due to long standing tax litigation, directly affecting implementation of national projects and welfare schemes;

iii) It would make the interpretation of tax laws uniform, which had become uncertain due to various inconsistent High Court rulings; and

iv) It would lead to the creation of specialised benches for taxation matters which are rather intricate and profoundly complex which is often why civil judges are not adept in deciding them accurately.

Issues and Contentions

The contentions of the Petitioners, *Madras Bar Association*, were that:

i) That it would be fallacious to contend that the High Courts were incapable of dealing with taxation.

[4]NTT Case ¶ 9.

ii) That the powers of the High Court, which is a court of record,[5] to decide important questions of law could not be abrogated by the legislature in any manner.

iii) That Article 323B of the Constitution of India,[6] inserted by the Forty-second Amendment Act was *ultra vires* as it was violative of the principles of separation of powers, judicial review and the doctrine of rule of law, which are basic features of the Constitution.[7]

iv) That many of the provisions of the NTT Act, namely Sections 5,6,7,8, and 13 undermine the adjudicatory process and in their present form cannot stand judicial scrutiny.

The submissions in opposition by the respondents were:

i) That administration of tax has an inherent tendency to lead to litigation.[8]

ii) That it is a well settled principle that a right to plead against a liability arising out of a particular statute has its particular and special remedy in the statute itself, therefore, adjudication under common law principles will be inept to grant specialised remedies as prescribed by the statute.[9]

[5]INDIA CONST. art. 215.

[6]INDIA CONST. art.323B

[7] L. Chandra Kumar v. Union of India, (1997) 3 S.C.C. 261 (India) (Judicial Review was identified as a part of the Basic Structure); Kesavanada Bharati v. State of Kerala, A.I.R. 1973 SC 1461 (India) (Wherein Rule of Law and Separation of Powers were identified a part of the Baisc Structure).

[8]*NTT Case* ¶ 31

[9]*Id* at ¶ 37; in Dhulabhai v. State of M.P. (1968) 3 SCR 662

iii) That by virtue of List I and List III of Schedule VII, the Parliament has powers to exclude jurisdiction of High Courts.[10]

iv) That the Parliament enacted the NTT Act keeping in mind the power of judicial review of the High Courts and the Supreme Court.[11]

Judgment

The Apex Court ruled in favour of the petitioners, primarily on the ground that the NTT Act was an abrogation of the powers of the High Courts and of independence of the judiciary, and that the Legislature had overreached its powers by way of this enactment. It is interesting to note that the Legislature does have the power to vest adjudicatory powers in an "alternative" authority in the form of a specialised tribunal. This does not *per se* violate the basic structure of the Constitution or any of its conventions.[12] However, the Constitution is offended if the Legislature "*substitutes*" the High Courts with a tribunal which disregards the powers of the High Courts in deciding important questions of law. This power has been vested in the High Courts by way of the Westminster model and the Constitution itself. This also amounts to a deliberate attempt at compromising the independence of the Judiciary, ultimately undermining the whole democratic and constitutional set up.

The judgment discusses a plethora of precedents in this regard, two in particular being, *L.Chandra Kumar v. Union of India*[13] and *S.P. Sampath Kumar v. Union of India*,[14] which comprehensively answer the question of substitutability of the High Courts by tribunals. It

[10]*Ibid.* ¶ 44.

[11]*Ibid.* ¶ 52(i)

[12]*Ibid.* ¶ 91(i), 91(ii).

[13](1995) SCC (1) 400

[14](1987) 1 SCC 124/ 1987 SCR (3) 233

further discusses *Dr. Mahabal Ram v. Indian Council of Agricultural Research*,[15] which held that powers instilled in the Supreme Court and High Courts by virtue of Article 32 and Articles 226 and 227, respectively, are a part of the inviolable basic structure of the Constitution and while tribunals can play a supplemental role to them, they cannot completely replace them as courts of constitutional interpretation and for deciding important questions of law.

Another point brought forward by the Court was that matters rarely pertain exclusively to taxation, rather also involve other facets of law.[16] A tax tribunal will not be competent to deal with such questions; therefore, the High Courts are ineluctably the fora that should entertain such questions.

However, the Court upheld the validity of Article 323B in light of the decision in *L. Chandra Kumar*, which restored the supervisory jurisdiction of the High Courts over tribunals constituted under Article 323B.[17] Thus, the stance taken by the Court is in consonance with the remedies which the petitioners sought.

ANALYSIS

Critique

The judgment can be unhesitatingly considered a landmark one. One of the most notable aspects of this case is the fact that it not merely refers to Constitutional norms but also strictly adheres to it. The Court deliberated the Westminster model of governance, which is

[15](1994) SCC 401

[16]*NTT Case* ¶ 31(J.Rohinton F. Nariman, concurring).

[17]*Supra* note 7 ¶ 78.

characterised by separate chapters being assigned to legislature, executive and judiciary and prescribes Montesquieun separation of powers between these three pillars.

Further, this judgment has to be seen in light of the prevailing political scenario in the country.[18] The government has been successful in establishing a National Judicial Appointments Commission (NJAC) which the Judiciary had opposed as being a threat to judicial independence.[19] This case can also be seen as a reminder to the Legislature of the Judiciary's resolve to maintain its freedom, and not to tolerate any interference from either the Legislature or the Executive in the powers and functions which have been entrusted to the institution.

However, by upholding the validity of Article 323B, the Court did not sternly rule against tribunalisation. There have been several debates against the excessive tribunalisation in India, especially following the Forty Second Amendment Act which according to many, dilutes the independence of the Judiciary.[20] The Court recognises the need for tribunals, and the role they play in reducing the backlog of cases and rendering specialised and quick justice, with utmost seriousness. However, what this judgment vehemently puts forth is that such convenience cannot be achieved and should not be attempted at the cost of judicial independence and the constitutional ideal of separation of powers, which not only form the basic structure of the Constitution but are also in consonance with the democratically proclaimed Westminster model of governance.

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[18]Joseph Avery, *Law and Politics Are Inseparable, SCOTUS at Height of 5-4 Decisions*, IVN.us (Jul. 31, 2013), *available at* http://ivn.us/2013/07/31/law-and-politics-are-inseparable-scotus-at-height-of-5-4-decisions/

[19]*See The Judicial Appointments Commission Bill, 2013*, PRS LEGISLATIVE RESEARCH, (Dec. 18, 2014), *available at* http://www.prsindia.org/billtrack/the-judicial-appointments-commission-bill-2013-2906/

[20]Anurag K Agarwal, *SC decision a big blow to tribunalisation* (Sept. 29, 2014), *available at* http://dnasyndication.com/dna/City-Ahmedabad/dna_english_news_and_features/SC-decision-a-big-blow-to-tribunalisation-/DNAHM75363

One thing which draws attention is the invocation of the basic structure doctrine to hold the National Tax Tribunal Act invalid. Usually, the basic structure doctrine is applied to legislations when they have emanated from *ultra vires* constitutional amendments.[21] Thus, an Act has never on its own been held to abrogate the basic structure even while the amendment or constitutional provision has been upheld. A similar exception was made in *S.R. Bommai v. Union of India*[22] in which the doctrine was applied to test the validity of executive action of the Governor under Article 356, although the application of basic structure was not expressly deliberated. With respect to applicability of the basic structure, *Union of India v. R. Gandhi*[23] being the latest case on this point states that legislative measures are not subject to the basic structure doctrine, and that only the validity of constitutional amendments can be put to test against the doctrine.[24] In the present judgment, the Court, while upholding the validity of Article 323B, held the NTT Act to be *ultra vires*. Therefore, this reopens the question of the application of the basic structure doctrine on purely legislative actions.

Comparative Analysis with Similar Foreign Judicial Systems

Since many references have been made to the Westminster model of governance, it is important that a juxtaposed analysis be made of the position regarding questions of separation of powers, the extent of judicial powers and judicial independence vis-à-vis other Westminster-model nations.

[21]Rishabh Shah & C. Nageshwaran, *Union of India v. R. Gandhi: Hard Case, Soft Law*, 6 INDIAN JOURNAL OF CONSTITUTIONAL LAW (2012).

[22]S.R. Bommai v. Union of India, [1994] 2 SCR 64.

[23]Union of India v. R. Gandhi [2010] 6 SCR 857.

[24]*Id* at pp. 40.

The judgement rendered by the Jamaican Court in *The Queen Director of Public Prosecutions v. Jackson, Attorney General of Jamaica (Intervener)*[25] is referred and used by the courts around the globe, time and again, when a conflict arises between the judiciary and the legislature with respect to breach of rule of law, separation of powers and abrogation of judicial independence. The Parliament of Jamaica enacted the Gun Court Act, 1974 and thus created a Gun Court having concurrent jurisdiction with the Circuit Court of the Supreme Court of Jamaica. The Act was challenged for creating a substitute/parallel forum to the Supreme Court of Jamaica without the persons appointed as judges having the necessary qualifications, thereby violating the principles of separation of powers and independence of judiciary. While delivering the judgement, the Jamaican Supreme Court laid significant stress on the Constitution-based Westminster model and held that the Parliament could not vest concurrent jurisdiction in a new court by an ordinary law, wherein the judges/members of the new court were not qualified to be the judges/members of the Supreme Court. The consequence of such Act, the Court opined, would be to threaten the rule of law and the independence of judiciary in as much as all the matters falling within the jurisdiction of the Supreme Court would then be heard by a new court appointed by the legislature.

Australia's stance must also be looked at, since it also follows a Westminster model of governance. Professor Carney in his report to the Legislative Assembly of Queensland did a comprehensive study on "Separation of Powers in the Westminster System for the Parliament House."[26] In Australia, only Courts mentioned under Section 71 of the Commonwealth of Australia Constitution Act 1900, i.e. the High Court of Australia, which is the Federal

[25]Hins v**.** The Queen Director of Public Prosecutions v Jackson Attorney General of Jamaica (Intervener), 1976 All ER Vol. (1) 353.

[26]Gerard Carney, *Separation of Powers in the Westminster System* (Sept. 13, 1993), Bond University, Brisbane, *available at* http://www.parliament.qld.gov.au/aspg/papers/930913.pdf

Supreme Court, and State Courts can have the power of adjudication. This was substantiated by the *Wheats Case*,[27] in which it was held that tribunals cannot take away or substitute such Section 71 Courts, as it would violate the Westminster model of separation of powers. In *Boilermakers Case*[28] it was held that vesting of judicial and non-judicial powers in the Commonwealth Court of Conciliation and Arbitration was invalid as it violated the doctrine of separation of powers. The situation was then remedied by the Parliament, by making an Arbitration Commission for the non-judicial functions, leaving the judicial power with the superior Courts. Similarly, reference could be made to a judgement rendered by the Supreme Court of Canada in *Reference Re Residential Tenancies Act*.[29] The Residential Tenancies Act, 1979 created a commission which was empowered to evict tenants and mandate them to strictly follow the obligations imposed under the Act. It was thus contended that such provision being in violation of Section 96[30] of the British North America Act, 1867 is *ultra vires*. The Act confers powers on the provincial legislatures to administer justice, but with a rider that such power shall be subjected to Sections 96-100 of the Act.[31]

[27]New South Wales v. Commonwealth, (2006) 231 ALR 1.

[27]Wheats Case (1915) 20 CLR 54.

[28]R v. Kirby; Ex parte Boilermakers' Society of Australia, (1956) 94 CLR 254.

[29]*Reference Re Residential Tenancies Act*, [1981] 1 S.C.R. 714.

[30] Section 97 reads, "Appointment of judges**:** The Governor General shall appoint the judges of the superior, district, and county courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

[31] Section 96-101, which as a whole constitutes Part VII of the Act, prescribe for the system of Judicature in Canada. Section 96 providing for Appointment of Judges, Section 97 for selection of judges in Ontario, Section 98 providing for selection of judges in Quebec, Section 99 providing for Tenure of Office for Judges of the Superior Courts, and Section 100 provides for Salaries of Judges.

The Supreme Court of Canada, while holding the Residential Tenancies Act, 1979 void, enunciated a three step test to decide the constitutional validity of a tribunal vested with adjudicatory functions:[32]

1. The first step required a determination whether at the time of Confederation, the power or jurisdiction now vested in an administrative tribunal, was exercised through a judicial court process. If the answer to this was in the negative, the constitution of the administrative tribunal would be valid.
2. The second step was to determine, whether the power to be exercised by the administrative tribunal, should be considered as a judicial function. If the power or jurisdiction is exercised in a judicial manner, then it is imperative to proceed to the third and final step.
3. The third step contemplates analysis and review of the administrative tribunal's functions as a whole, and to examine the same in its entire institutional context.

India, unlike Canada, still awaits such a detailed judgement specifically setting out the conditions to verify the constitutional validity of a body (tribunal) conferred with adjudicatory functions, and whether such body is encroaching upon the jurisdiction of superior courts. Such an analogous test could provide stability and certainty to this issue. Though the Court cannot be accused of deliberately missing out on such a test, it would have broken new ground in matters of tribunalisation.

Thus, there seems to be a very strong trend towards upholding the rule of separation of powers and judicial independence in Commonwealth countries, or countries which recognisably have a Westminster model of governance. This stance also can be substantiated

[32] *Id.* at¶ 734, 735.

by citing UK's example, which did not have a strict separation of powers until 2009. Until 2009, the Law Lords who were the final adjudicators of disputes used to occupy a position simultaneously in the House of Lords. But with the establishment of the UK Supreme Court in 2009, the higher judiciary was made completely independent of Parliamentary influence.[33]

The Supreme Court, by recognising the over-arching nature of tribunals over their judicial boundaries has patently delineated the frontiers of the power of higher judiciary which cannot be breached. By doing so it has also strengthened the independence of the judiciary.

CONCLUSION

In conclusion, though the legal position regarding the question of application of the basic structure doctrine to purely legislative actions has been left open, thus creating some inconsistency and paving the way for further deliberations, the authors agree with the stance taken by the Supreme Court on the whole. The higher Judiciary with its power of judicial review, is what forms one of the cornerstones upon which the democratic and republic ideals of India rest. If such acts of subordination of the Judiciary by the Legislature are held valid, the judicial power would be wholly absorbed by the Legislature and taken out of the hands of the judges. However, the Legislature cannot be accused of having any intention of depriving the Judiciary of its powers and superimposing itself on it. Rather, the tribunal was constituted with a noble intention to set up specialized, all-powerful tribunals in order to lessen the burden of the higher Judiciary and make the interpretation of taxation law uniform. But such considerations are irrelevant, and give no validity to Acts which infringe the Constitution. The Court aptly noted, "*What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances; and thus judicial power may be eroded. Such an*

[33]Part 3, Constitutional Reform Act, 2005

erosion is contrary to the clear intention of the Constitution."[34] Also, in light of the political tussle going on between the Legislature and the Judiciary it had become of critical importance for the Apex Court to assert higher judiciary's autonomy by making it clear that the principles of judicial review, judicial independence, and separation of powers, are part of the basic structure, therefore, being the foremost constitutional ideals which cannot be stepped upon.. The detailed explication of these ideals in this case, then, can be said to be a cue to the Legislature of the Judiciary's independence and paramountcy even in the context of the increasingly specialized and technical nature of legislations in modern times. Thus, this case can be said to be a reminder from the judiciary to the legislature on the former's significance and independence.

[34] NTT Case, ¶ 22(i)

NALSA v. UNION OF INDIA – THE METAMORPHOSIS OF GENDER RECOGNITION IN INDIA

- Enakshi Jha*

ABSTRACT

In the era of advancement of human dignity and the need to celebrate human rights, it is only preordained to recognize all forms of human identity. Gender, forms a pivotal part of the human identity and the Supreme Court of India in the present judgment has granted such recognition to the transgender community, thereby moving beyond the gender binary that has stayed unchanged in the Indian society from time immemorial. The success of this recognition by the Apex Court lies in giving members of the transgender community a right to enforce their Fundamental Rights espoused in Part III of the Constitution while complimenting the same with the Directive Principles of State Policy. While this judgment is worth celebrating, it comes not a moment too soon as India's neighbours[1] have already granted legal recognition to the third gender. The judiciary has advanced in its interpretation of the Constitution and catalysed the need for affirmative action and now, focuses on substantive equality; thereby moving beyond mere recognition of the third gender to elucidate the future course of action in curbing the atrocities and discrimination faced by India's transgender community. A comparative constitutional approach supports this analysis, by placing India's judicial interpretation of fundamental rights vis-à-vis their recognition in other jurisdictions, and by focusing upon their needs, according to the societal circumstances and their interface with the Constitution. Hence, this judgment truly is a glorious step forward

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[1]*See* Terrence McCoy, *India Now Recognizes Transgender citizens as third gender*,WASHINGTON POST, April 15, 2014, *available at* http://www.washingtonpost.com/news/morning-mix/wp/2014/04/15/india-now-recognizes-transgender-citizens-as-third-gender/.

in eradicating discrimination towards this community. Further, the Supreme Court needs to be applauded for leaving scope for evolution of law in the lacuna surrounding rights of the third gender. The simultaneous but clever use of discretion in the judgment, accompanied by the suggested actions enable a discourse that promises a brighter future to the third gender community in India.

INTRODUCTION

Addressing the pressing need to expound upon the status of transgender persons in India, the Supreme Court of India recently recognized the third gender, espousing the essential facets of Article 14 and Article 21 of the Constitution of India. While giving this landmark decision, the Bench of the Supreme Court of India comprising Justice A.K. Sikri and Justice K.S. Radhakrishnan answered two pivotal questions in the positive. The first being the legal recognition of transgender persons in India by creating a third gender classification accommodating their cultural identities while guaranteeing them legal status and second, the Bench rightly recognized the right of transgender people to identify with either the male, female or third gender identity guaranteeing each group, fundamental rights embedded in the Constitution.[2] In light of such developments, it would not be futile to declare this judgment as path breaking, as it explicates equal protection of the law notwithstanding an individual's gender identity.

Unfortunately, dimming the luminescence of such legal recognition is the judgment in *Koushal v. Naz Foundation*[3] which upheld Section 377 of the Indian Penal Code. Criminalizing private sexual activity between adults indulging in consensual sex, the Bench

[2]Narain, Siddhart, *Engendering A Rights Revolution.* KAFILA, April 16, 2014 *available at* http://kafila.org/2014/04/16/en-gendering-a-rights-revolution-siddharth-narrain/

[3]Koushal v. Naz Foundation AIR 2014 SC 563.

returned to days of the pre-Constitutional era discriminating against sexual minorities, including transgender persons that form a part of the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community.[4] However, escaping this conflict, the Bench stated that it would not be analyzing the Naz judgment while granting transgender individuals the status of the third gender.

In light of this discourse and the metamorphosis in the Indian position regarding the status of this community, the author seeks to analyze the redundancy of previous laws and analyze the Constitutional provisions that have conveniently been overlooked. Further, adopting an objective trajectory that attempts to balance previous judicial decisions and contemporaneous forward-looking paths, the author undertakes a comparative constitutional study. This comparative constitutional model has been used to study the status quo in other jurisdictions and their harmony, or lack thereof, with the Constitution of the said country.

FACTS AND ISSUES

Grievances of the transgender community, primarily, the discrimination faced by them in their rejection as members of society symbolized by ridicule and abusive behaviour in their daily interactions, were the primary causes of the writ petition filed by the National Legal Services Authority. The members of the transgender community are often treated as disabled or untouchables catalysing the process of social exclusion which limits their scope of personal development, primarily, by limiting educational opportunities and discrimination in employment. Centuries of societal discrimination twined with penal provisions like the Criminal Tribes Act, 1871 which penalized all *Hijras* for their identity and allowed for their arrest without a warrant, led to this case knocking on the doors of India's apex Court. [5] While

[4] *Id.*

[5] *Id.* at ¶ 16.

the Criminal Tribes Act, 1871 is no longer valid, equally grim provisions such as Section 377 of the Indian Penal Code continue to cement the trauma faced by transgender persons in India, thereby giving rise to a pressing need to address the violations of their rights.

The Supreme Court was entrusted with the responsibility of determining the recognition of this community and of whether the transgender community has the right to determine their own gender based on the identity they associate with. Further, the application of Articles 14, 15, 16, 19 and 21 of the Constitution in this context were to be determined in this case.

CRITICAL ANALYSIS OF THE JUDGMENT

Self Determination and the Gender Discourse

Gender gives an identity to an individual and the right to choose their form of expression and interact accordingly with the societal structure. Moving beyond the idea of a sex, which often has a physical and bodily connotation; connotation; gender covers a wider spectrum of emotions and expressions that are not merely physical, but also spiritual, emotional and sexual.[6] The Court, very justly identifies this spectrum by stressing upon the physical abnormalities during birth, making the individual stand out from the general classifications of the binary genders.[7] Sexual orientation too forms a crucial part of an individual's identity. The struggle for self-determination of this distinct identity is at the centre of the storm in the judgment and has been recognized by the judiciary in its interpretation of the Constitution, exemplifying its dynamic and progressive nature that is aimed at social welfare.

[6]Sharma, Gyanendra Kumar, *Rights of Transsexual Genders: The New field of Law,* UTTARAKHAND JUDICIAL AND LEGAL REVIEW 29-56.*available at* http://ujala.uk.gov.in/files/ch6.pdf.

[7]*supra* note 3 at ¶ 19.

Article 6 of the Universal Declaration of Human Rights and Article 16 of the International Covenant on Civil and Political Rights (ICCPR) grants every individual the right to live. This is a right to live freely without any arbitrary denial of rights and equal recognition before the law for every individual. Further, Article 17 of the ICCPR and the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity clearly demarcate a set of human rights that cannot be violated, including the right of expression, the right to privacy, the right to equality and non-discrimination based on gender or sexual orientation and the additional right of recognition by the law to ensure that no individual has to conceal a gender or sexual identity which forms the idea of self-determination.[8] The Supreme Court of India has placed great importance on the above in stressing upon the need to protect individual identities and equal recognition of law. Stressing upon the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) exemplifies the Court's dedication to giving the third gender legal recognition by focusing not only on Indian Statutes and their interpretation but also paying due respect to International Law standards that are binding on India as a signatory. The Court's elemental understanding of the right to life and equal legal recognition for the third gender stems from these covenants.

Noting the need to recognize gender identity and the right of equal protection as envisaged by Part III of the Constitution of India and to remove the social exclusion of the transgender community in society, the relevance of Article 14 is magnified. Article 14 expressly states that the State shall not deny "any person" equality before the law.[9] The

[8] *Id* at 21.

[9] *supra* note 3 at 54.

significance of the term "any person" characterizes the gender neutrality of the application of Article 14, extending its application to male, female and third gender identities.

On identifying transgender people in this bracket, the Bench has aptly placed them in the category of right holders who are beneficiaries of affirmative state action.[10] Further, Article 14 also studies the basic structure of the Constitution in guaranteeing equal treatment for equals as advanced by the Aristotelian approach and identifies the need to treat sections of society as "unequal" for their benefit and places a responsibility on the State to adduce necessary economic, political and social changes to confer equal protection on such "unequals", including the transgender community.[11] It is in light of this difference between equals and unequals that the need for preferential treatment or compensatory benefits emerges.[12]

Further, the vulnerability of this community extends to atrocities by Government bodies and agencies that are within the ambit of Article 12. For instance, this vulnerability is best depicted in the grave difficulty of providing toilets for this community that does not fit into the category of either male or female. This leaves them vulnerable to further sexual attacks and is a mockery of the equality clause in the Indian Constitution. This form of discrimination is merely one example of the many violations the community continues to face in the absence of any positive state action to protect them in light of the equal protection of the law clause. This, in its very essence, is the grossest violation of Article 14.[13] Hence, in

[10] *Indian Supreme Court Recognises Third Gender*, Human Rights Law Centre (HRLC),15 April, 2014 *available at*http://hrlc.org.au/indian-supreme-court-recognises-third-gender/

[11] SINGH, M. P., V. N. SHUKLA'S CONSTITUTION OF INDIA, EASTERN BOOK COMPANY, 12th Ed., at 50-51 (2006).

[12] Cohen, Ronald L. *Justice: Views from the Social Sciences*, SPRINGER SCIENCE & BUSINESS MEDIA, 1986 at 15.

[13] BASU, D. D, INTRODUCTION TO THE CONSTITUTION OF INDIA, 9th Ed at 84 (2008).

light of such gross violations of Article 14 and contravention of the State's responsibility to protect citizens irrespective of their gender, this judgment been rendered a success.

Staying in congruence with multiple judgments of this Court and its forward-looking interpretation of the Constitution is the need for compensatory benefits as a form of attaining substantive equality.[14] In the context of this judgment, substantive equality retains its prominence as it helps every person compete on the same footing by attaining benefits from the State to ensure an equal ability to have an opportunity to limit the scope of discrimination in other areas as will be discussed in the later sections.[15]

Such affirmative action of the United States Court of Appeal in the Eleventh Circuit's decision in *Glenn v. Brumby*[16] which held that the Fourteenth Amendment in the U.S. Constitution protects the transgender community from discrimination due to their identity in the workplace and recognized that identity must be construed in a wider sense to go beyond mere gender identity.[17] Unfortunately, in the American context, it is essential to note that the Fourteenth Amendment provides for protection only against discrimination by the Government. Most employees in the USA are guaranteed a right against discrimination under Title VII of the Civil Rights Act, 1964 and this is limited only to discrimination on five

[14]Lillibridge, Nicole. 2005. *The Promise of Equality: A Comparative Analysis of the Constitutional Guarantees of Equality in India and the United States*, WILLIAM & MARY BILL OF RIGHTS JOURNAL 13(4) *available at* http://scholarship.law.wm.edu/wmborj/vol13/iss4/7.

[15]This is supported by data, both in this judgment and studies conducted by Indian agencies and the United Nations backed by Yogyakarta Principles that reiterate that trans- genders can be classified as socially and economically backward classes who have remained disenfranchised of the fundamental right of .equality. *See* Koushal v. Naz Foundation AIR 2014 SC 563, at ¶4.

[16]Glenn v. Brumby, 724 F. Supp. 2d 1284 (N.D. Ga. 2010) (11th Cir. Dec. 5, 2011)

[17]Stephens, Sarah M.2013. *What Happens Next? Will Protection Against Gender Identity and Sexual Orientation Workplace Discrimination Expand During President Obama's Second Term?*19 WASH.& LEE JOURNAL OF CIVIL RIGHTS& SOCIAL JUSTICE at ¶ 376.

factors, including sex.[18] Yet, it has not been applied in the context of the transgender community facing discrimination, leaving scope for ambiguity with respect to discrimination that is not imposed by the Government.[19]

In the light of this comparative analysis, the Supreme Court of India has taken one step towards such substantive equality as is reasoned by the "one shoe does not fit all" doctrine.[20] Hence, the author agrees with the Judges in putting forward the need to confer similar educational, economic and social benefits that are granted to members of the Socially and Educationally Backward Classes (SEBC), to transgenders as well, as they wage a similar battle that has only been further catalyzed by another ground for discrimination – their gender.[21] This model of gender recognition was seen recently in Malta in the passing of a constitutional amendment allowing trans-genders to have civil rights like those of the binary genders indicating equality in its true sense.[22]

Contextualizing Article 15 and Article 16

Flowing from the idea of equality in Article 14, Article 15 prohibits discrimination on the grounds of "sex" and Article 16 guarantees equality of opportunity in public employment. While Article 15 articulates the term "sex" , which is construed in a narrower and more

[18] *Id.*

[19] Kemp, David. *Sex Discrimination Claims under Title VII and the Equal Protection Clause*, March 19, 2012.The Verdict, *available at* http://verdict.justia.com/2012/03/19/sex-discrimination-claims-under-title-vii-and-the-equal-protection-clause

[20] Sanoi, Manali, *One Size Doesn't Fit All – A Contextualist Approach to Narrow Tailoring*, NLUJ LAW REVIEW 2(2): 72 *available at* http://www.nlujodhpur.ac.in/downloads/lawreview/4.pdf (2014).

[21] *Supra* note 3 at pp. 57.

[22] Dalli, Miriam. *Transgender Europe Applauds Malta for Naming Gender Identity*, MALTA TODAY, April 15, 2014 *available at* http://www.maltatoday.com.mt/news/national/38027/transgender_europe_applauds_malta_for_naming_gender_identity

positivistic understanding of gender, this judgment has attempted to embrace gender recognition of a third gender to fall within the ambit of "sex" as third genders are included in such articulation.[23]

The concern around the use of the word "sex" and not gender in Article 15 and the lack of a detailed reasoning of the Bench for construing "sex" to mean gender identity is problematic, as gender and sex do not have the same meaning. Gender is a socio- cultural construct while sex is primarily biological.[24] The Bench extends the application of sex to include all gender identities but has failed to clear the air on the difference between gender and sex in the context of Article 15 and 16 and assumes them to be interchangeable terms.[25] This leaves scope for further challenges to the application of these Fundamental Rights and has the potential of being challenged in future litigations.

Furthering the prohibition of discrimination in Article 15, Article 16 complements equality of opportunity and is in consonance with the need for affirmative state action. This focus on providing "opportunities" is a very rational and fair method of helping the SEBC progress.[26] By providing for public employment in Article 16(2), the Constitution demands equal treatment of all citizens in public employment and appointment.[27] The true success of this judgment and its holistic reading of Articles 14, 15 and 16 lies in the Bench's ability to

[23]*supra* note 11.

[24]Narain, Siddharth, *Gender Identity, Citizenship and State Recognition*, NLS SOCIO-LEGAL REVIEW 8, 2012.

[25]Khaitan, Tarunabh. *NALSA v Union of India: What Courts say what Courts do,* UK CONSTITUTIONAL LAW ASSOCIATION, April 24, 2014 *available at* http://ukconstitutionallaw.org/2014/04/24/tarunabh-khaitan-nalsa-v-union-of-india-what-courts-say-what-courts-do/

[26]*supra* note 3 at ¶ 61.

[27]INDIA CONST. art. 125

identify the pressure on the transgender community in conforming to a gender binary and the discrimination it presents.[28]

In this context, Nelson Goodman's "Reflective Equilibrium" which attempts to balance judgments on an issue and the general principles of law and beliefs in the point of time that such judgments are delivered, in an attempt to balance the two to attain maximum acceptance through a deliberative process, attains significance.[29] John Rawls' advancement of this theory by the introduction of his "Justness as Fairness" model elaborates upon just institutions that facilitate this balance by using moral beliefs so that decisions may be acceptable to the majority of the society as it ties legal judgments with moral virtues. His theory is pertinent in analysing the circumstances and needed action in India. Rawls' focus on liberty and equality ensures that the minorities in society are identified.[30]

Unfortunately, this judgment merely mentions Rawls' doctrine instead of elaborating upon it as the first and second principles with special significance to the Difference Principle work holistically to identify and uplift weaker sections of society and include transgender individuals in this context.[31] However, it is noteworthy that these principles have been logically tied with Amartya Sen's model of Distributive Justice that is centred on the just allocation of goods in society.[32] The model of distributive justice relies on society by

[28]Deen, Thalif, May 5, 2014. *The Long Journey Towards Recognition of a Third Gender*, IPS NEWS *available at* http://www.ipsnews.net/2014/05/long-journey-toward-recognition-third-gender/

[29]*supra* note 3 at 127; Kelly, Thomas and Macgrath, Sarah. *Is Reflective Equilibrium Enough? available at* https://www.princeton.edu/~smcgrath/Reflective%20Equilibrium.pdf

[30]*Id.* at 127-128.

[31] George Ikkos & Jed Boardman, *Talking Liberties: John Rawls' Theory of Justice and psychiatric practice*, *available at*http://apt.rcpsych.org/content/12/3/202 (2006).

[32]*supra* note 3 at pp. 127.

imposing a duty on individuals to help those in need by focusing on the outcomes of this process. This model has the potential to uplift the transgender community and remove them from the umbra of discrimination and backwardness that they have faced.[33]

Another successful model of gender recognition was showcased by Argentina, which made changes to gender by surgery or medical diagnosis redundant, in order to remove discrimination based on gender identity, thereby according every citizen an equal position before the law.[34] South Africa too falls in this ambit of progressive laws and goes a step further than India in recognizing same sex marriages and sexual activities between consenting adults, thereby doing away with any contradiction in the law as faced by the transgender community in India and Section 377 of the IPC. Section 9 of the African Constitution prohibits any form of discrimination based on sex, sexual orientation or gender. Adopting this widely defined constitutional yardstick, South Africa truly grants every individual the right against discrimination and does away with any loopholes around gender identity.[35]

However, while it is pertinent to be critical of the atrocities faced by this community in India and essential to therefore rejoice this judgment, we must also recognize that other nations like Kenya have also faced an equally disgraceful position of ill treatment towards the third gender. While no Kenyan legislation or Judicial decision recognizes the transgender community, the Kenyan Constitution, like its Indian counterpart guarantees fundamental rights to every citizen. Article 27 of the Kenyan Constitution provides for freedom from discrimination and gives the right for equality similar to Article 14 in India and specifies that

[33]ROEMER, JOHN E., THEORIES OF DISTRIBUTIVE JUSTICE, Harvard University Press at 164 (1996).

[34]Sheikh, Danish. *Not Just His and Hers*, ALTERNATIVE LAW FORUM, April 25, 2014, *available at* http://altlawforum.org/publications/not-just-his-and-hers/

[35]*supra* note 4.

the State shall not discriminate on the basis of sex, yet, in the absence of recognition, this Article is merely limited in its application.[36] This perspective is essential in recognizing the similarities in the Indian and Kenyan Constitutions' and the achievement of the Indian judiciary in bridging the gap between Constitutional safeguards and their application.

Article 19 (1) (a) and the celebration of freedom of expression

The Constitution of India guarantees Fundamental rights that are to the benefit of all persons. However, Article 19 is one such exception that guarantees certain fundamental rights only to its citizens and Article 19(1)(a) forms a crucial right to freedom of speech and expression.[37] The Bench recognizes this right of freedom of speech and expression to be a natural right, thereby drawing attention to its centrality. The right to freedom of speech and expression includes the right to voice one's identity and includes sexual and gender identity in terms of behaviour, physical appearances, words and dressing to name a few forms of such expression.[38] Further, the reasonable restrictions mentioned in Article 19(2) do not restrict this expression in the form of personal appearance. This same protection has also been accorded in the First Amendment of the US Constitution which prohibits the government from censoring or barring speech and includes the right to dressing in a particular fashion, irrespective of gender as it form an expression of identity. In *City of Chicago v. Wilson et al*.,[39] a municipal law controlling cross dressing was repudiated, recognizing the incompetence of the State in regulating personal choices regarding dressing as a form of expression as it hindered the right to privacy of an individual which the Constitution of

[36]KENYAN CONSTITUTION, art 27.

[37]INDIA CONSTI, art 19.

[38]Narrain, Arvind, *Third but not insignificant*, DNA INDIA, April 21, 2014 *available at*http://www.dnaindia.com/india/report-third-but-not-insignificant-1980382.

[39]City of Chicago v. Wilson et al 75 III.2d 525(1978).

America has envisaged to protect.[40]

Immanuel Kant proposed the "Doctrine of Free Will" which is closely linked to human volition and the idea that freedom is independent of any Constitutional riders as it is the ideal state that a human would choose without being coloured by his societal experiences.[41]

This freedom is therefore independent of any moral or social rules and is a natural law ideal, signalling its quintessential nature. While this doctrine did develop in the consequent years, its essence is reflective in the interpretation of the Constitution in the present case. Bentham's hedonistic utilitarianism criticized an interpretation of the Kantian model that suggested that maximum individual freedom is the end that law wishes to achieve. Bentham's critique suggested that is essential to analyse social welfare instead of maximizing individual freedom.[42] While both schools of thought have their jurisprudential significance, this Bench rightly recognizes that in the present context, they do not contradict each other, but help the other achieve its fullest, while helping societal welfare by becoming equal citizens who can contribute towards societal advancement socially, politically and economically.

Further, in *Pant v. Nepal*,[43] this doctrine of self-identification was celebrated as it harmonized individual recognition of identity and its expression while tying them together with fundamental rights under the Nepalese Constitution. Hence, by recognizing this as a

[40] International Commission of Jurists, *Gender Expression and Cross Dressing*, SOGI Casebook, *available at* http://www.icj.org/sogi-casebook-introduction/chapter-seven-gender-expression-and-cross-dressing/

[41] Hanna. Robert, *Kant's Biological Theory of Freedom,* UNIVERSITY OF COLORADO *available at* http://www.colorado.edu/philosophy/paper_hanna_kant's_biological_theory_of_freedom_march11.pdf.

[42] *Supra* note 3 at 101.

[43] Pant v. Nepal, Writ No. 917 of the Year 2064 BS (2007) *available at* http://www.gaylawnet.com/laws/cases/PantvNepal.pdf.

form of expression and recognizing their identity, the Supreme Court has upheld the applicability of Article 19(1)(a) in the context of gender discourse.[44] Unfortunately, on the other end of this spectrum of gender rights lie nations like Malaysia, which is predominantly Islamic and follows Sharia law, which prohibits cross dressing and does not clearly define what attire is suitable for men and women along with making cross dressing in public a crime under Section 66 of the Shariah Criminal Enactment, 1992.[45] This only reflects the centrality of the Indian judiciary in implementing Constitutional safeguards and enforcing fundamental rights.

Article 21 of the Constitution – The golden thread

The most celebrated and often disputed over Constitutional protection is the Right to Life. This widely interpreted section finds itself in the centre of the controversy surrounding the status of the third gender in India as it is the campaigner of personal liberties that promotes a life worth living and not just one of mere animal existence.[46] Therefore, it is no surprise that the right to dignity is encompassed in the right to life and has been advanced as a strong argument for the recognition of a third gender. This dignity can be achieved only after overcoming the initial obstacle of recognition of an individual's identity and has been done in a few Indian states like Tripura and Bihar which hold the beacon of transgender rights activism. In *Jayalakshmi v. The State of Tamil Nadu,*[47] the Madras High Court recognized this identity.[48]

[44]Bochenek, Michael and Knigh, Kyle, *Establishing a third gender category in Nepal: Process and Prognosis*, *available at* http://law.emory.edu/eilr/content/volume-26/issue-1/recent-developments/establishing-a-third-gender-in-nepal.html

[45]*Court to rule on Transgender Rights*, HUMAN RIGHTS WATCH, May 13, 2014, *available at* http://www.hrw.org/news/2014/05/13/malaysia-court-rule-transgender-rights

[46]CHATTERJEE, DEEN K. DEMOCRACY IN A GLOBAL WORLD, 2008 at 120-121

[47]Jayalakshmi v.The State of Tamil Nadu (2007) 4 MLJ 849.

Judicial activism, in the context of moulding laws regarding the third gender discourse has played the role of a social scientist in the true sense and Justice Bhagwati very rightly pointed out in *Bandhua Mukti Morcha v. Union Of India & Others*[49] that the right to a life of human dignity is given in Article 21 and also draws from the Directive Principles of State Policy which mandate the existence of the minimum requirement of freedom and dignity.[50] Social justice, now becomes an option to the transgender community, who can demand their fundamental rights along with equality that has been enshrined in the Directive Principles of State Policy.[51]

The Pakistani Supreme Court in *Dr. Mohammad Aslam Khaki & Anr. v. Senior Superintendent of Police (Operation) Rawalpindi & Ors,*[52] gave a similar judgment in 2011, while deciding the rights granted by the Pakistani Constitution to eunuchs. Focusing on the right to live with dignity as espoused in Article 21 of the Indian Constitution, the Pakistani Supreme Court clarified that living a life of dignity coupled with recognition of individual identity forms the crux of the right to life.

Justice Sikri focuses on the "Right of choice" and focuses on the human nature, complimenting the positivistic reading of the Constitution by Justice Radhakrishnan. The seamless web proposed by Granville Austin as the spirit of the Constitution in studying the functioning of the Indian Constitution is redeemed in this context. The Constitution attempts to provide an equal opportunity of growth of an individual by fostering social reform,

[48]Jain, Dipika and Rhoten, Kimberley, *Comparison of the Legal Rights of Gender Non-Conforming Persons in South-Asia*, 58 ECONOMIC AND POLITICAL WEEKLY, 2013.

[49]Bandhua Mukti Morcha v. Union of India & Others 1984 AIR 802.

[50]DUBEY, MUCHKUND, A SOCIAL CHARTER FOR INDIA, Pearson, 1st Ed., 2009 at 17-18.

[51]*supra* note 3 at pp. 93.

[52](Constitution Petition No.43 of 2009); *See* Koushal v. Naz Foundation AIR 2014 SC 563 at ¶72.

establishing the spirit of democracy and protecting national integrity.[53] This judgment satisfies all three facets that Austin proposed in his analysis of the problem at hand.

Furthering this interpretation of Article 21, the nature of rights imposed upon the State has undergone a massive metamorphosis. Previously, the negative understanding of Article 12 and interpretation of the word "deprived" was limited to the State not interfering with an individual's right to life.[54] Hence, the evolving interpretation of the Right to Life has been carried forward in this judgment proving to be a sigh of relief to India's third gender.

CONCLUSION

This judgment marks the end of an era of discrimination by taking the first step towards granting the trans-gender community in India fundamental rights that additionally bestow upon them other civil and legal rights. This impactful judgment also paves the way to India's congruence with internationally accepted norms regarding equality and transgender rights, thereby honouring Article 51 of the Directive Principles of State Policy. The Apex Court's reliance on international human rights principles that have been followed in nations like Malta, Argentina and Germany that have faced a similar history of gender discrimination as India marks the endeavour to honour international law principles by interpreting the Indian Constitution to promote international human rights norms. The comparative analysis of equality laws across a spectrum of nations notes the acknowledgment of transcending international norms and places India in the league of nations recognizing and honouring the third gender. This model enables the Court to discern the array of available modes of gender recognition that uphold equality. In the absence of Indian legislations, this tool provides for

[53] *supra* note 3 at 91.

[54] Circle of Rights, *Justiciability of ESC Rights- THE INDIAN EXPERIENCE, available at* http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm.

possible options for future legislations that govern gender recognition, thereby amplifying the protection of fundamental rights. Further, the Court's directive to implement the recommendations of the Expert Committee formed to study the plight of this community reiterates the impact of this judgment. Lastly, another celebration of this judgment lies in its individual centric approach that enables members of the transgender community to determine their gender identity, thereby honouring both the ICCPR and the UDHR.

While this recognition is only one step forward, there is indeed a long way to go before we achieve equal status for the third gender. India's social and cultural identification of this community continues to be discriminatory in its outlook and despite this judgment, little can be done without educating the society of the evils of such discrimination and the need to spread realization of gender sensitivity, giving, every individual the space to identify with their gender and recognize their potential for growth. While the Supreme Court has not given any directions beyond those mentioned above including the recognition of trans-genders as socially and economically backward classes that avail protective and compensatory benefits, it has adduced suggestions that the legislature could incorporate in legislations to clearly define transgender rights.

The author, hence, concludes by congratulating the judiciary in a much needed decision post *Koushal v. Naz* and hopes that the legislature accounts for the Supreme Court's suggestions to take this legacy forward.