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Collegium and Appointment of Judges at Supreme Court: Has Supreme Court Become Imperium in Imperio

by
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"At the same time, there is the fear that in the name of the independence of the Judiciary, we might be creating, what my Friend Mr. T.T. Krishnamachari very aptly called an "Imperium in Imperio". We do not want to create an Imperium in Imperio, and at the same time we want to give the Judiciary ample independence so that it can act without fear or favour of the Executive."

—Dr. B.R. Ambedkar

INTRODUCTION — COLLEGIUM

The concept of collegium, as it exists, is the result of interpretation of proviso clause of Art. 124(2)[1], Constitution of India. Bhagwati, J. in S.P. Gupta case first suggested the scheme[2] of collegium to make recommendation to the President for the appointment of Judges of the Supreme Court (SC). However, his recommendations were based on his understanding Art. 124 (2) as a whole, contrary to its present form which is interpretation

of proviso clause of Art. 124 (2). He further observed, "*which of the Judges of the Supreme Court and of the High Courts should be consulted is left to the discretion of the Central Government*[3]." S.P. Gupta is popularly termed as First Judges case. This was suggested in the backdrop of a practice where CJI alone was consulted since the proviso of Art. 124(2) made it mandatory. However, it cautiously suggested collegium is warranted because the main body of Art. 124(2) provides for consultation with any SC and HC judge of the choice of President[4], however, practice[5] hitherto, made the consultation required in the main body thereof redundant for some inexplicable reason[6]. It also decided that President (read Central Government or Counsel of Ministers under Art. 74) is not bound by the opinion rendered by CJI, who is, however, equally a constitutional functionary as the President itself, vis-à-vis appointment of SC judge[7].

In Second Judges[8] case, however, collegium was interpreted solely in the light of proviso clause, which was a significant departure from the rightful

interpretation of First Judges case. In the words of Second Judges case[9], "*This ensures that the opinion of the Chief Justice of India is not* merely his individual opinion, *but an opinion formed collectively by a body of men at the apex level in the judiciary.*" Justice Pandian invoked the summary, for the procedure for the appointment of SC judge, of One Hundred and Twenty First Reports of the Law Commission of India (1987) and two different memoranda that were submitted to the court on behalf of Ministry of Law of that time[10]. The judgment of Second Judges was never subjected to

a judicial review until recently in *Supreme Court Advocates-on-Record Assn.* v. *Union of India*[11] (NJAC case). However, an Advisory Opinion[12], through

Presidential reference under Art. 143; was sought on certain queries and the Advisory opinion rendered by SC is popularly termed as Third Judges case[13]. The Third Judges cases reiterated the position of Second Judges case vis-à-vis proviso clause of Art. 124 (2) *that "the Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court*[14]." The scheme of consultation of CJI as advised by Third Judges case is now the part of Memorandum Showing the Procedure For Appointment of the Chief Justice of India And Judges of The Supreme Court of India (the Memo)[15]. In NJAC case[16] SC agreed to put the decision of Second Judges case to judicial review. However, it found that none of the contention put forward by Union of India and concerned States had any merit that could move SC to depart from its view in Second Judges case and thereafter in Third Judges case[17]. Thus, I am going to examine the law laid down by these two judgments in light of constitutional provision and argue that collegium system is miscarriage of constitutional justice and scheme. It was not a question of primacy, because it was always about balancing the power and privilege of appointment of SC judge by President and CJI as the guiding factor. The relationship is same that we see between Part III and Part IV of constitution, the SC has described this relationship as something that complements each other and not trump each other[18]. Following are the assertions and arguments.

First and foremost, the Second Judges case dealt with two main questions, inter alia, whereas it actually should have dealt with three. The questions it dealt with was within the umbrella question of "independence of

judiciary" vis-à-vis appointment of SC and HC Judges. The questions were, in general terms, what does it mean to consult with CJI under proviso of Art. 124(2), and in the event of conflict between the opinion of two independent constitutional functionary, i.e. President (Council of Ministers) and CJI, regarding the suitability of the recommendee, whose opinion would prevail. Second question was what would be the justiciability thereof? The third question should have been if mandatory consultation with CJI under Art. 124 (2) means consultation with some other judges of the SC as well and not the sole opinion of CJI, would this take away the power of President, which is non-mandatory, but yet a power, to consult other judges of SC and HC in the main part thereof[19]. The third issue is important because consultation under Art. 124 (2) has two inherent components or two different forms, if not components, one is of external and other is internal. External consultation is writ large in the scheme of Art. 124, according to which two equal yet independent and separate constitutional functionaries[20] discuss between themselves as to the suitability of the candidature of a prospective SC judge. This external aspect of consultation has two further branches; one was compulsory consultation with CJI, and non-compulsory consultation with any SC and HC judges of President's choice. Internal aspect of consultation was the result of the First and Second Judges case, where consultation with CJI was interpreted as the consultation by CJI with judges of SC inter se. Internal aspect of consultation was not between two independent constitutional functionaries or inter-institutional, it was

intra-institutional. This distinction is of great significance. Further, the content of third question has two ingredients therein within the scheme of Art. 124(2), one is the question of justiciability of appointment made therein, and other is inbuilt mechanism to counter the Power of CJI to act in arbitrary manner regarding the candidature of a prospective candidate. These two ingredients deal with some crucial and cardinal constitutional issues;

a) Constitutional remedy under Art. 32 or justiciability of appointment[21]: for example, can an HC judge file a writ petition against the

decision of Collegium; if the aggrieved person wishes to bring an action who would be the party and what would be the forum. Can an HC judge bring a writ petition against the President who is de facto appointing authority where as de jure it is CJI led collegium? As to the forum of pleadings, Art. 32 and Art. 226 constitute horizontal relationship between SC and HC. With respect to writ jurisdiction under Art. 226 SC is not superior to HC, in fact, has lesser power. Despite having lesser power than HC, SC and HC are horizontally placed for the purpose of Arts. 32 and 226. The assertion of J.S. Verma, J. that since judiciary is making the appointment thus element of justiciability[22] is inherent is extremely perplexing. Because it is laced with an assumption that a judge acting in administrative capacity never shed his judicial robe. Does selection of a candidate require application of judicial mind? Or does it require the administrative appreciation of a candidate's merits. Is not there a conflict in this statement of Verma, J. because two judges, in Constitutional matters, may have disagreement, or even in the case of agreement, a different analysis, so if a candidate is being discussed for appoint, are they applying judicial mind or administrative mind.

b) In practice the appointment has been made either of a practicing lawyer or sitting judge of a HC who are qualified under Arts. 124(3)(a) and (b). Appointment of a jurist, under Art. 124(3)(c) has been nullified. Why?
c) Does a prospective candidate, such as jurists, for the appointment of SC Judge have no FRs? Collegium being de jure authority for appointment, which reduces the matter to administrative rather than judicial. If there is no settlement of dispute, is not it a denial of right to remedy under Art. 32?
d) The declaration of law in Second and Third Judge case has the effect of amendment[23] to the constitution vis-à-vis the power of President?

e) Further, a scrutiny of the inbuilt mechanism under Art. 124(2) versus the collegium system is needed. The inbuilt mechanism would have been that post mandatory consultation with CJI, President was at liberty to cross check the merit of the recommendee from any other SC judges, of any number, and with HC judges, presumably the HC whose sitting judge is being elevated to SC. The inbuilt[24] mechanism was more of a "second opinion" rather than an appeal against the recommendation of CJI. Though analogy between second opinion and appeal is inappropriate because recommendation of name is not a judicial act, however, in light of the J.S. Verma's, J. finding that judicial act is part of the

recommendation process, this analysis hold water. Post Second Judges case President is bound by the CJI led collegium[25]. This has led the second opinion, which is also a power of President, perhaps a right of the prospective candidate also against the possible foul play, a dead letter of law. Despite the fact that concurrence[26] between President and CJI was expressly ruled out by Constituent Assembly and approved by SC.

f) Another question is why in the collegium[27] system there is no place for judge of a HC[28]? The existing constituents of collegium sans the HC judge is testimony to the fact that, collegium is the interpretation of proviso clause of Art. 124(2).

g) It unsettles me to think what is the status of President's power to consult any other judges of SC and HC in addition to the Collegium. For example if post recommendation by Collegium, President chooses to exercise its power under the main body of Art. 124(2), and the collegium of Judges chosen under Art. 124(2) differs in its opinion regarding the appointment of a recommendee. To the best of my understanding Collegium is safeguard against the caprices and prejudice of the CJI. Power of the President to consult other judges as mentioned in Art. 124(2) cannot be clubbed with the "Collegium". By the same token, proviso clause of Art. 124(2) can neither subsumes nor club the Power of President under main body of Art. 124(2). Judiciary cannot prevent President from seeking additional feedbacks from those who are qualified under Art. 124(2), i.e. any SC judges and HC judges[29].

INDEPENDENCE OF JUDICIARY VERSUS CONSTITUTIONAL COURT — A THEORETICAL EXPLANATION

Independence of Judiciary is question when we consider SC as an institution which falls under the scheme Art. 50, which mandate the separation of

power between executive and judiciary, although there is nothing that suggest that similar instruction is there to separate judiciary from legislature, or executive from legislature[30]. In the words of SC constitution does not prohibit overlap of functions[31]. Therefore, a question arises that if we analyse the meta-physics of various power that SC enjoys under constitution, then, are all such powers requires independence of judiciary or in other words are all powers of judiciary is judicial power? Moreover, are there some powers that it shares with other organs of the state? If it does, then is the veil of independence of judiciary need to be pierced vis-à-vis appointment of SC judges, specifically and exclusively, and need to be globalized. Legal structures all across the world are being harmonized, then should not we follow the universal practice vis-à-vis appointment of judges? In this regard, it must first be established that SC and all those courts whose appointment we are trying to compare are similar in its nature and content. This comparison is to see if SC in India is Constitutional Court, if it is then we can take a lesson from comparative study[32] of appointments of these constitutional courts and harmonized it according to our need.

SC exercises power of judicial review[33] which, in constitutional sense, is sharing of

power of legislation with Parliament, in the same fashion as executive

shares the power of legislation as subordinate legislation or executive performs judicial function in certain administrative matter.

The underlying principle that distinguishes Constitutional Court from all other ordinary courts of the land is that ordinary judge is strictly restricted in his power, which is to apply the law as legislated by the Parliament or State Legislature, whereas Constitutional Court is an extralegal body[34] with powers to keep legislature and executive within the bound of a basic norm[35] by sharing the power but in negative sense. This basic norm here is Constitution. The idea and model of Constitutional Court different from regular courts owes its life to Hans Kelsen[36].

He distilled the basic philosophy that distinguishes ordinary court from constitutional court by terming **the later as negative legislator**. A negative legislature is power of a court to dislodge legislations or executive fiat from the constitutional scheme of a country, and hence, it "*shares a legislative power with the Parliament*[37]." Power to legislate inherently includes power to repeal it. The power to reject legislations, i.e. Judicial Review, by Constitutional Courts has political ramifications, and in that capacity they are as much political players as other branches of government[38]. It is for

this reason Kelsen contemplated a Constitutional Court distinct from ordinary courts so that later could be insulated from political influence, which is inevitable in the case of former.

SUPREME COURT OF INDIA — A MIX OF CONSTITUTIONAL AND ORDINARY COURT

Before I set out the nature of Supreme Court of India (SC), it is important to highlight the nature of functionality and instrumentality of courts under Indian Constitution. In *S.P. Gupta* v. *Union of India*[39] the question of independence of judiciary vis-à-vis appointment and transfer of Judges in High Court and SC came for consideration. In this case SC dealt with the philosophical contours of 'independence of judiciary' while discharging judicial function. The SC observed that a *judicial function is primarily aimed at preserving legal order by confining the legislative and executive organs of government within their powers in the interest of the public*…[40]"

In the same vain, SC, further, observed that Indian Courts are different from their British counterpart, from which we have inherited our system in following terms,

> "The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the king and the subject or between a subject and a subject presented in a form enabling judgment to be passed upon them, and when passed, to be enforced by a process of law. There begins and ends the function of the judiciary.
>
> Now this approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice between chronic un-equals[41]."

The above mentioned assertion of SC may be construed as something which paints

a picture which insulates judiciary from other organs, and these other organs inter se, by conferring the responsibility to do so is on the SC. However, this is not the constitution scheme as laid down in various

decision of SC which was recently revisited by it in NJAC case[42]. Thus, what is the import here is that SC, as a watchdog of Constitution, puts on various responsibilities, viz. Legislator and Executive-and as Constitutional expert it is in better condition to analyse the impact of power exercised by these organs as one of them, however, from a different platform. When it does so, it does not do that from the point of view of supremacy but rather from the point of neutrality. Further, these observations of SC about core of judicial function cannot be true for the nature of sub-ordinate courts of India because review of constitutional matters is not under the competence of sub-ordinate courts. Thus, it is true only for High Courts, generally, and SC specifically, or collectively (for High Courts and SC) for *superior judiciary*[43]. Hence, judicial function of ensuring each organs play within their role is to be harmonized with the inherent overlap in the functions of constitutional entity. And this balance can be strike by the principle of sharing these power and analyzing it from the position of neutrality, and not supremacy[44].

Now, in light of the above, SC is a mix of ordinary court[45] and constitutional court. It has three kinds of jurisdiction; namely — Original (Art. 32 and Art. 131), Appellate and Advisory. These powers are entrenched in Constitution as writ jurisdiction[46], original jurisdiction[47], appellate jurisdictions — Civil and Criminal[48], and advisory jurisdiction[49]. Thus, Indian constitutional scheme does not provide for a distinct and separate provision for constitutional court. SC has, however, been vested with certain powers and competencies which is specific and exclusive to the Constitutional Courts under the Kelsenian model as practiced in most European states. The power of judicial review of SC or Original jurisdiction under Art. 32 and Art. 131 makes it at par with the constitutional courts of Kelsen. Similarly Advisory

Jurisdiction, where President seeks the opinion of the SC regarding a legislation which is otherwise a prerogative of Parliament under Arts. 245, 246 read with Art. 248, or regarding the constitutionality of an executive action, would place it in the bracket of constitutional court. In its advisory capacity the SC would not be solving a judicial dispute rather answering a political question as to the efficacy of a proposed legislation or executive fiat. A judicial dispute would be when there is question of legal rights and obligation underlying a law, however, question that whether a legislation or executive fiat would be constitutional or not is not a judicial dispute, it is inherently a constitutional question. Thus, a judicial dispute must be distinguished from constitutional inquiries. One involves interpretation of law and other involves question of power and inter-relationship of constitutional instrumentalities. It is in the second capacity that judiciary is watchdog of constitution and not in the first one. For example, analysis of the relationship between Parts III and IV of the Constitution, later deals with Directive Principles and have been made non-justiciable[50] while former is Fundamental Rights and justiciable, such analysis of constitutional scheme is solely the prerogative of constitutional court. Indeed time and again SC has asked why Parliament is not legislating on certain topic dealt in Part IV such as Uniform Civil

Code[51]. Further, a judicial dispute involves evidence and other procedures, where as in constitutional dispute mere affidavit is sufficient. In a judicial dispute the validity of law is presumed, whereas in constitutional issues, the very validity of the law is questioned[52]. The Constituent Assembly was well aware of this nature of functionality of SC which is evident from the speech of Shri. M.A. Kamath,

> *"A practicing lawyer barely comes across constitutional problems*[53]*."* Thus, he suggested appointment of those persons who were legal connoisseurs but not a practicing lawyer, given the specific nature of constitutional duty to be performed by Judges of SC.

Constitution of India mandates the States to separate executive from judiciary[54]. Since the organs that constitute state are Legislative, Executive

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and Judiciary. Therefore, it is naturally, owing to its nature of function and power, incumbent upon legislature to do the same, as the organs inter se cannot provide for the normative rules to distinguish them from each other. And declaration of such separation is inherently a legislative domain. While dealing with question of constitutionality of such norms laid down by legislature, SC exercises its power as negative legislator. Most of the legal theorists have accepted the view that Judges do legislate[55], especially Kelsen vis-à-vis constitutional court[56]. Doctrine of separation of power is about creating a broad silhouette of such powers; no system on earth can have an exact separation of power without overlap. For example, when Parliament is confused as to whether a legislation would be constitutional or not, isn't it that it is applying the constitution which is in fact task earmarked for SC. Kelsen wrote that, *"The so called unconstitutional law is not viod ab initio, it is only voidable; it can be annulled for special reason*[57]*."*

A. Constitutional Scheme and conceptual framework of authority

Let us see the conceptual framework of authority, and its ambit of power. A constitutional scheme signifies nothing but the manifestation of social order, which creates authority[58], as explained by Kelsen in his magnum opus

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Pure Theory of Law. According to which power of authority includes power to commit delict. Thus, even if President or Parliament commits delict while regulating the employment at SC, it will be well within its authority. For example, judiciary in its judicial function commits delict and corrects it[59]. Similar view was expressed by Dr. Rajendra Prasad in Constituent Assembly which was approved and cited in Second Judges case by SC[60].

B. Appointment in constitutional court: A comparative study

The power of Constitutional Court is crucial because it ensures the principle of checks and balances within a constitutional democracy. Therefore, the appointment of judges always has the say of political representative[61]. Since, SC is more or less modeled on the US Supreme Court, it is pertinent here to peruse the appointment in the US Supreme Court. US Constitution provides in its "Appointments Clause" that the President *"shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the supreme Court*[62]*."* More importantly, Art. II thereof deals

with

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the Executive, and Power of Executive, similarly as Art.III deals with the Supreme Court. Art.III deals with Judicial Power[63]. There is precise distinction between the Judicial Power and Executive Power, which leaves no ambiguity to the norm that President has the prerogative[64] of appointing the judge as per the scheme of Art.II, i.e. by *and with aid and advice of Senate*[65].

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A comparative list of appointment procedure for constitutional court in European states suggests that Executive dominance in appointment of judges[66].

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JURIST AS JUDGE OF SUPREME COURT OF INDIA — THE CONSTITUTIONAL SCHEME

Art. 124(3)[67] of Constitution of India empowers an individual to become a Judge of SC if s/he is an accomplished jurist[68] and President of India acknowledges it. It is absolutely imperative here to underscore the fact (or law) that Art. 217(2) does not accommodate a Jurist for the appointment as HC Judge. A jurist is eligible under Art. 124(3)(c) signifies their importance as an expert of laws such as Public International Law[69] (viz., UN charter,

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Law of Treaty, Law of Sea among other things), Private International Law, Family Law, Comparative Law to name a few which requires special study to master the subjects. The Constituent Assembly in its debate over the appointment of judges specifically discussed the issue of appointment of jurist as judges. In the words of Shri M. Ananthasayanam Ayyangar[70] (Madras: General)

> "Then, Sir, I agree with my honourable Friend, Mr. Kamath, when he says that the choice of Supreme Court judges ought not to be limited to judges already in service and of ten years' standing. He has moved that it ought to be open to the President, if he so chooses, in the interest of proper administration of justice, to include a distinguished jurist. His amendment does not make it obligatory upon the President to choose only a jurist only among jurists. In various cases a Supreme Court has to deal with constitutional issues. A practicing lawyer barely comes across constitutional problems. A person may enter the profession of Law straightaway. He might be a member of a Law College or be a Dean of the Faculty of Law in an

University."

Dr. Ambedkar[71] accepted the proposal, and Art. 103(4) (presently Art. 124(3)) was adopted and was made the part of Constitution. Art. 124(3) provides for the qualification of the judges, a special position has been carved out for Jurist amongst those who are also eligible under Arts. 124 (3)(a) and (b)[72], i.e. a sitting judge or an advocate as specified therein respectively. As the wording of Art. 123(3) is negative which suggests that except

those mentioned no one else can join the SC as Judge. This perplexes me as to why appointment of Jurist has been practically excluded despite restrictive group of person who possesses such eligibility to be appointed as SC Judge. Art. 124(3)(c) is merely an enabling clause, the power to appoint a judge flows from Art. 124(2), therefore Judges to be appointed must be those who are mentioned in the former, because it is Art. 124(3) which regulates the qualification of such judges to the SC. Additionally, Art. 19(1)(g) and Art. 16(1)[73] guarantees freedom to pursue any profession of choice in public employment, which is reinforced by preamble[74] that ensures equality in terms of opportunity and status. Denial of opportunity to jurist of becoming a judge would be violative of not only fundamental rights but also the spirit of constitution itself[75]. To illustrate a denial equality of opportunity — if a practicing lawyer can become judge, by the same token academician teaching and researching law and writing books[76] is entitled to be appointed as a Judge under the auspices of Art. 124 (3)(c). Let us examine if employment under Art. 124 is "*employment or appointment to any office under the State*" under Art. 16 or not.

State, for the purpose of Art. 16, has been defined under Art. 12. In *A.R. Antulay* v. *R.S. Nayak*[77] a distinction was made between judicial act, and administrative function thereof. And judiciary was brought within the purview of Art. 12 in its administrative capacity. Union Judiciary discharges functions of appointment of various positions such as law clerks etc, or rule

making under Art. 145, which is not judicial act. Therefore, the question that would vacancy of SC judge come within the purview of Art. 16(1) has an affirmative answer. Hence, employment under Art. 124 is "*employment or appointment to any office under the State*" (public employment) under Art. 16. I, for one, am convinced that vacancy of SC judge(s) constitutes public employment[78] as any other employment under State because its beneficiary is not Judiciary, it's us: We, the people. Therefore, Art. 124 must be read with Art. 16 and Art. 309.

An exaggerated question could be, if, within vacancies for various public employments, **there is any distinction between vacancy of Judge of the SC, and all other vacancies for the employment at SC**? I would like to point out that the concept of public service commission — Union as well as State, — is firmly embedded in the Indian Constitution, which conducts exams for various employment opportunities. For example, Union Public Service Commission (UPSC) conducts recruitment exam for Indian Armed Forces[79], Civil Services for Union Government, Combined Medical Services etc. All employment activity for which recruitment is made at the SC is carried out by the SC itself, thus such activities cannot be termed as

judicial activity which need protection from executive intervention.

A case of Armed Forces could be illustrated; recruitment is made by Armed Forces themselves as well as by the UPSC. Armed Forces are within the exclusive domain of Union[80], however, they can be deployed in States

under certain situation — **to aid the civil power**[81] -in such disturbed area as may be determined under Police Act, 1861 or special legislation such as Armed Forces (Special Power) laws[82] for a particular territory. Misuse of armed forces by the Union[83] may very well disturbed what is termed as federalism; and it is needless to point out federalism is basic structure.

In arguendo, a judicial process starts with the sub-ordinate courts, and Judicial Magistrates are appointed through examination conducted by State Public Service Commission (SPSC)[84]. Interestingly, exams for Higher Judicial Services are conducted by High Courts. It is also in public domain that High Courts elevates judges from subordinate courts — who have joined judicial services through SPSC. If the argument is that except judiciary no other institution could be allowed to interfere in appointment of Judges of High Court or Supreme Court as it will be incompatible with judicial independence, then such argument is breached at two layers; firstly when SPSC conducted the exam for appointment of Judicial Magistrate who are elevated (some of them) to High Courts and from High Courts they can be elevated to SC. The special provision for the appointment of SC judges is made because it performs judicial review, which is exclusive domain of a Constitutional Court.

REGULATION OF PUBLIC EMPLOYMENT — VACANCY OF SC JUDGE IS NOT ABOVE Art. 309

Art. 309 empowers an "Act of appropriate Legislature" to regulate the recruitment, and conditions of services for public employment, however, such power to regulate the recruitment, and conditions of services is also vested with the President too. Moreover, Art. 309, uses the word Union[85]-which is inclusive of Judiciary-in terms of recruitment, and is thus subject thereto. In State of *Karnataka* v. *Umadevi (3)*[86] (Umadevi), the

Constitutional Bench of Supreme Court laid down following ratio, "*For sanctioned posts having vacancies, such posts have to be filled by regular recruitment process of prescribed procedure otherwise, the constitutional mandate flowing from Articles 14, 16, 309, 315, 320 etc. is violated*." The ratio of Umadevi is that there must **be a fair recruitment process** for public employment of Union or State or other instrumentalities of Art. 12. The mandate of Umadevi and Art. 309 seeks for such conditions for the appointment of SC Judge must be laid down as to the further qualification in addition to the general condition as mention in Art. 124(3), especially for Jurist.

CONCLUSION

It appears from the judgments pronounced by SC regarding interpretation of Art. 124 that it has exceeded the role of judicial interpreter and has donned the role of executive and legislative both. Judicial legislation in the cases of gap of law is different from the legislation in the garb of interpretation by intruding into areas proscribed therefor. Interpretation of Constitution, which dilutes power of other organs and in the favour of Judiciary, is only going to see growing distrust between constitutional functionaries, i.e. Executive and Legislative.

Last but not least, judicial vacancies at the apex level are like any other employment must be made more transparent and accessible to general public qualified to be a judge of SC. It is expected that soon a rapprochement would be struck between constitutional functionaries and appointment of Judge of SC would be streamlined as it was envisaged originally, because post First Judges case all the decision are not in constitutional spirit. The central problem with present day appointment method of SC judges is that it overlooks many explicit provision of Constitution, viz. Art. 124(2)(3), Art. 309, Art. 16 etc. For the purpose of appointment in SC judiciary does not only mean functionaries from Bar and Bench, because it is erroneous. The real stakeholders of judiciary within the purview of Art. 124 is Bar, Bench and Academics. This historical mistake needs corrections, as it is violative of fundamental right of people involved in academia.

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[1] See, Art. 124. Establishment and constitution of Supreme Court:

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years:

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

[2] *See*, *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87, para 31. It observed, "That is perhaps the reason why the Constitution makers introduced the requirement in Clause (2) of Article 124 hat one or more Judges out of the Judges of the Supreme Court and of the High Courts should be consulted in making appointment of a Supreme Court Judge. But even with this provision, we do not think that the safeguard is adequate because it is left to the Central Government to select any one or more of the Judges of the Supreme Court and of the High Courts for the purpose of consultation. We would rather suggest that there must be a collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge"

[3] *Ibid*. It suggested that, "*but consultation there must be with one or more of the Judges of the Supreme Court and of the High Courts. The Central Government must consult at least one Judge out of the Judges of the Supreme* Court and of the High Courts before exercising the power of appointment conferred by Clause (2) of Article 124.

[4] *Ibid*. But it seems that this requirement is not complied with in making appointments on the Supreme Court Bench presumably under a misconception that it is not a mandatory but only an optional provision. The result is that the Chief Justice of India alone is consulted in the matter of appointment of a Supreme Court Judge and largely as a result of a healthy practice followed through the years, the recommendation of the Chief Justice of India is ordinarily accepted by the Central Government, the consequence being that in a highly important matter like the appointment of a Supreme Court Judge, it is the decision of the Chief Justice of India which is ordinarily, for all practical purposes final.

[5] *Ibid*. the Court quoted the decision of Krishna Iyer, J. in *R. Pushpam* v. *State of Madras*, 1952 SCC OnLine Mad 258 : AIR 1953 Mad 392, The practice of appointment was summarized as following, "…therefore, it follows that the President must communicate to the Chief Justice all the material he has and the course he proposes. The Chief Justice, in turn, must collect necessary information through responsible channels or directly, acquaint himself with the requisite data, deliberate on the information he possesses and proceed in the interests of the administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the justice system…"

[6] Courts analysis was that it was done so because the requirement of consultation in the main body was non-obligatory. In the words of Court, "But it seems that this requirement is not complied with in making appointments on the Supreme Court Bench presumably **under a misconception that it is not a mandatory but only an optional provision**. The result is that the Chief Justice of India alone is consulted in the matter of appointment of a Supreme Court Judge and largely as a result of a healthy practice followed through the years, the recommendation of the Chief Justice of India is ordinarily accepted by the Central Government, the consequence being that in a highly important matter like the appointment of a Supreme Court Judge, it is the decision of the Chief Justice of India which is ordinarily, for all practical purposes final."

[7] It would therefore be open to the Central Government to override the opinion given by the constitutional functionaries required to be consulted and to arrive at its own decision in regard to the appointment of a Judge in the High Court or the Supreme Court, so long as such decision is based on relevant considerations and is not otherwise mala fide. Even if the opinion given by all the constitutional functionaries consulted by it.

[8] *See*, *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441.

[9] *Ibid*, para 478. In the words of the SC, "In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice of India in the consultative process has to be formed taking into account the views of the two seniormost judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the seniormost Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124(2) is an indication that ascertainment of the views of some other Judges of the Supreme Court is requisite. The object underlying Article 124(2) is achieved in this manner as the Chief Justice of India consults them for the formation of his opinion. This provision in Article 124(2) is the basis for the existing convention which requires the Chief Justice of India to consult some Judges of the Supreme Court before making his recommendation. This ensures that the opinion of the Chief Justice of India is not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary."

[10] The long and short of both the submissions was that Ministry of Law was never bound by the CJI's opinion, because under Art. 124(2), it had recourse to other Judges of SC and HC. This was correct interpretation of law by the Law Commission as well as Government's Counsels to the SC, which was rejected by SC in Second Judges case. See, Separate Judgment by Ratnvel Pandian, J., *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441, para 191. Justice Pandian invoked the summary of One Hundred and Twenty First Reports of the Law Commission of India (1987) and two different memoranda that were submitted to the court on behalf of Ministry of Law of that time, Following is the summary of appointment procedure as summarized by Justice Pandian according to Memoranda submitted to the SC, "Whenever a permanent vacancy is expected to arise in the office of a Judge of the Supreme Court, the Chief Justice of India will intimate the fact to the Minister of Law and Justice and at the same time forward his recommendations as to the manner in which the vacancy should be filled. Unless the Minister of Law and Justice considers that the recommendation of the Chief Justice of India should be accepted straight-away, he may consult such Judges of the Supreme Court and High Courts as he may deem necessary and, if after such consultation, the Minister of Law and Justice considers it desirable to bring any point to the notice of the Chief Justice of India or to suggest the consideration of the claims of any other person not recommended by the Chief of India, he may by personal correspondence convey his suggestions to the Chief Justice of India. On obtaining the views of the Chief Justice of India finally, the Minister of Law and Justice will, with the concurrence of the Prime Minister, advise the President of the selection."

Procedure as explained by report of Law Commission of India was following, "The present situation is that ordinarily a formal proposal for filling up of a vacancy in the Supreme Court is initiated by the Chief Justice of India by recommending the name of the person considered suitable by him to the Minister of Law and Justice. If the Minister accepts the recommendation, the proposal is forwarded to the Prime Minister of India who, if he approves, advises the President to issue a formal warrant of appointment under his own signature."

[11] *See*, *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (2016) 5 SCC 1 : 2015 SCC Online SC 1224.

[12] *See*, Special Reference No. 1 of 1998, In re, (1998) 7 SCC 739, para 11, in the words of SC, "We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case, (1993) 4 SCC 441 and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference."

[13] Special Reference No. 1 of 1998, In re, (1998) 7 SCC 739 (Nine Judges Bench).

[14] *Ibid*.

[15] *See*, Memorandum Showing the Procedure For Appointment of the Chief Justice of India And Judges of The Supreme Court of India, online available at http://doj.gov.in/sites/default/files/memosc.pdf (Last accessed on November 12, 16), For scheme see infra at note 14.

[16] *See*, *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (2016) 5 SCC 1 : 2015 SCC Online SC 1224.

[17] *Ibid* at para 90. In the words of the SC, "We have also delineated hereinabove, the views of the Judges recorded in the First Judges case, which was rendered by a majority of 4:3. Not only, that the margin was extremely narrow, but also, the views expressed by the Judges were at substantial variance, on all the issues canvassed before the Court. The primary reason for recording the view of each of the Judges in the First Judges case hereinbefore, was to demonstrate differences in the deductions, inferences and the eventual outcome. As against the above, on a reconsideration of the matters by a larger Bench in the Second Judges case, the decision was rendered by a majority of 7:2. Not only was the position clearly expressed, there was hardly any variance, on the issues canvassed. So was the position with the Third Judges case, which was a unanimous and unambiguous exposition of the controversy. We, therefore, find ourselves not inclined to accept the prayer for a review of the Second and Third Judges cases."

[18] For relationship between DPSP and FR please see, *Mohini Jain* v. *State of Karnataka*, (1992) 3 SCC 666.

[19] This issue is also important because as per the Memo governing the scheme of appointment of SC judges the definition of collegium has no place of HC judge. *Ibid*.

> "3.1. The opinion of the Chief Justice of India for appointment of a Judge of the Supreme Court should be formed in consultation with a collegium of the four senior most puisne Judges of the Supreme Court. If the successor Chief Justice of India is not one of the four seniormost puisne Judges, he would be made part of the collegium as he should have a hand in selection of Judges who will function during his term as Chief Justice of India."
>
> 3.2 The Chief Justice of India would ascertain the views of the seniormost Judge in the Supreme Court, who hails from the High Court from where the person recommended comes, but if he does not have any knowledge of his merits and demerits, the next senior most Judge in the Supreme Court from that High Court should be consulted."

[20] Independent and separate constitutional functionaries within the scheme of Art. 124(2) is Executive represented through President and Judiciary, represented through CJI.

[21] It is important here to quote J.S. Verma in this regard in Second Judges case, please see *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441, "The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judiciary review of those decision, which is ordinarily needed as a check against possible executive excess or arbitrariness. Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated."

[22] *Ibid* at para 480. "The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judiciary review of those decision, which is ordinarily needed as a check against possible executive excess or arbitrariness."

[23] On the question that needed to answered as to SC's decision practically amending the constitution please see, *Suraz India Trust* v. *Union of India*, (2012) 13 SCC 497, the case was placed before the CJI without looking into its merits as the matter came before a smaller bench. The Court decided that, "At this juncture, Mr. Ganguli as well as Mr. Vahanvati have submitted that even at the stage of preliminary hearing for admission of the petition, the matter requires to be heard by a larger Bench as this matter has earlier been dealt with by a three Judges Bench and involves very complicated legal issues. In view of the above, we place the matter before the Hon'ble Chief Justice for appropriate directions." In essence the plea was to revisit the 1993 nine judges bench decision of *Supreme Court Advocates-on-Record Association* v. *Union of India*. Following interesting questions were asked by Mr. A.K. Ganguly which is exactly sums up my inquisitiveness

> "(1) Whether the aforesaid two verdicts, viz. the 7-Judge Bench and 9-Judge Bench decisions of this Court referred to above really amount to amending Article 124(2) of the Constitution?
>
> (2) Whether there is any 'Collegium' system for appointing Supreme Court or High Court Judges in the Constitution?
>
> (3) Whether the Constitution can be amended by a judicial verdict or it can only be amended by Parliament in accordance with Article 368?

[24] The nature of inbuilt mechanism was to safeguard the abuse of authority by CJI. It was not inter-institutional checks and balances, it was intra-institutional checks and balances.

[25] *Ibid*. In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, do not accept the stated reasons the appointment should be made as a healthy convention.

[26] For SC's position on distinction between consultation and concurrence under Art. 124(2) in light of Constituent Assembly debate please see, *Union of India* v. *Sankalchand Himatlal Sheth*, (1977) 4 SCC 193 : AIR 1977 SC 2328 (Sankalchand case). In Sankalchand SC decided that consultation could not be taken as concurrence. The decision of Sankalchand case was upheld in First Judges case. First Judges case Bhagwati. J. declared the discussion as to the real import of consultation res integra.

[27] For what constitutes collegium see supra note 10.

[28] *See*, supra note 13.

[29] This is so because the scheme of Art. 124(2) were simply to give autonomy to President as to who should s/he consult in addition to the mandatory consultation with the CJI. This autonomy was not to impose his personal choice but to protect a qualified person to become SC judge. Thus, dilution of consultation of the SC and HC judge in addition to mandatory consultation with CJI, is depriving the prospective candidate of his right. Institutional, especially, constitutional functionaries does not work with distrust or mistrust, a rule of executive action upheld by SC in various cases of FR violation. The problem with collegium system is that it subsumes or practically amend the power of President under Art. 124(2) under which s/he has choice of consulting any judge of SC and HC or not to discuss at all. It is evident from the fact that there is no HC judge or any Chief Justice of HC in the collegium. It is also intriguing should Chief Justice of High Court be consulted or any judge of the HC, because Chief Justice of High Court is conspicuously absent in main part of Art. 124(2). Furthermore, it is President's prerogative, not merely his/her power, under Art. 124(2) to consult SC and HC judges. It would have work as checks and balances against the mandatory consultation with CJI. In other words, freedom to seek opinion from any other source, i.e. SC and HC judge, would minimize the abuse of authority by CJI. An element of surprise second opinion would have further diminished any biasness against a prospective candidate. This is more important because justiciability of judicial appointment raises the question on the trustworthiness of Judiciary as a constitutional functionary. These two provisions, Art. 124 (2) main body and proviso clause thereof, would have offset each other for a fair selection. For example, if collegium has recommended the name of Mr. A and A's credential does not impresses President. President applies his power and decides to consult any judges of SC and HC and of any number that President deems fit, and this inherent, informal, and unstructured in-built collegium (separate from the collegium of proviso) of Art. 124(2) opines against the name of Mr. to be SC judge, would it then not contradict the Collegium constructed under proviso clause. If this possibility is not possible post collegium system, then constitution stands amendment because this Collegium not only limits the number of judges to be consulted, it also restricts President's power to choose among other Judges of SC and HC. And denies the SC and HC judges an opportunity to be heard in the matter of appointment of SC judge.

[30] For a detailed discussion of separation on power please see, *Bhim Singh* v. *Union of India*, (2010) 5 SCC 538, "While understanding this concept, two aspects must be borne in mind. One, that separation of powers is an essential feature of the Constitution. Two, that in modern governance, a strict separation is neither possible, nor desirable. Nevertheless, till this principle of accountability is preserved, there is no violation of separation of powers. We arrive at the same conclusion when we assess the position within the constitutional text. The Constitution does not prohibit overlap of functions, but in fact provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of function of the other branch which results in wresting away of the regime of constitutional accountability." Also see, *Ram Jawaya Kapur* v. *State of Punjab*, AIR 1955 SC 549.

[31] *Ibid*.

[32] On the need of benefits of comparative study please see McDougal, Myres S., "*The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*" (1952). Faculty Scholarship Series. Paper 2475, online available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3483&context=fss_papers (last accessed on November 14, 2016) where he writes, "In this contemporary world, people are increasingly, demanding common values that transcend the boundaries of the Nation-State; they are increasingly interdependent in fact, irrespective of nation-state boundaries, for controlling the conditions which affect the securing of their values; and they are becoming ever realistic in their consciousness of such interdependence, and hence widening their identification to include in their demands more and more fellow human."

[33] For legal and constitutional construction of the scope and ambit of judicial review please see, in *State of Madras* v. *V.G. Row*, AIR 1952 SC 196, in the words of Patanjali CJ, in this case, "Judicial review is undertaken by the courts "not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid down upon them by the Constitution". Further see, *Bidi Supply Co.* v. *Union of India*, AIR 1956 SC 479 in which SC observed, "We are unable to see how the power of judicial review makes the judiciary supreme in

any sense of the word. This power is of paramount importance in a federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process". The aforementioned observation were cited in *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, in which SC decided that "Indian Constitution does not recognize strict separation of powers. The constitutional principle of separation of powers will only be violated if an essential function of one branch is taken over by another branch, leading to a removal of checks and balances."

[34] *See*, Extralegal in the sense that a constitutional court must be part of constitutional scheme, i.e. a scheme that establishes other organs of the state, and not a result of an ordinary statute by a competent legislature. For example, Arts. 323A and 323B talks about Administrative and Other Tribunals respectively, or courts constituted under S.20, IPC, 1860, or SEBI Act, 1992.

[35] *See*, Hans Kelsen, General Theory of Law and State, pp. 142-158, 1945. Online available at https://books.google.de/books?id=4dAr24lK4BEC&printsec=frontcover&dq=general+theory+of+law+and+state&hl=en&sa=X&ved=0ahUKEwjrze_GnpHQAhWKWywKHX3aC-AQ6AEIHTAA#v=onepage&q=general%20theory%20of%20law%20and%20state&f=false (last accessed on November 5, 2016). In the words of Kelsen, "The application of the constitutional rules concerning legislation can be effectively guaranteed only if an organ other than the legislative body is entrusted with the task of testing whether a law is constitutional, and of annulling it if-according to the opinion of this organ — it is "unconstitutional". There may be a special organ established for this purpose, for instance, a special court, a so called "constitutional court"; or the control of the constitutionality of statues, the so called, "judicial review" may be conferred upon the ordinary courts and especially upon the supreme court. The controlling organ may be able to abolish completely the "unconstitutional" statute so that it cannot be applied by any other organ."

[36] *See*, Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution', 4 J.Pol. 183, 187(1942). Also see, Tom Ginsburg, 'Building Reputation in Constitutional Courts: Political and Judicial Audiences, 28 Ariz. J. Int'l & Comp.L, Vol. 28. No. 3, 539-568. Online available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2441&context=journal_articles (last accessed on November 5, 2016). For the importance of the Kelsenian model of Constitutional Courts and their importance.

[37] *Ibid*.

[38] For European experience of such interplay between politics and constitutional courts in Europe see, John Ferejohn & Pasquale Pasquino, '*Constitutional Adjudication: Lesson from Europe*', 82 Tex.L.Review 1671, 1672 (2004). And for the American Supreme Courts tryst with the interplay between politics and judicial review, and constitutional courts of the other countries see, Barry Friedman, '*The Politics of Judicial Review*', 84 Tex.L.Review, 257, 258 (2005),

[39] *See*, *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87, para 26.

[40] *Ibid*, para 18.

[41] *Ibid*, para 27.

[42] *See*, supra note 11. As seen the SC has accepted that overlap in the function of various constitutional functionaries is inherent part of constitutional scheme, the assertion of SC in First Judges need proper and adequate explanation which does not contradict SC's position, and rightly so, in its earlier decision such as Kesavananda Bharati or Bhim Singh et all.

[43] As used by SC in *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441, para 22.

[44] *See*, See, *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, "We are unable to see how the power of judicial review makes the judiciary supreme in any sense of the word. This power is of paramount importance in a federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process".

[45] The ordinary courts in those having power under Criminal Procedure Code, 1973 or Civil Procedure Code, 1908 or various courts and tribunals established under administrative tribunals under Art. 323A, and other tribunals under Art. 323B. A distinction is that those courts, which are not competent to exercise the power of judicial review, would be ordinary courts or we may call them subordinate courts as per the constitutional scheme. Part VI chapter VI deal with Subordinate Courts, thereby providing for the distinction between superior judiciary from subordinate judiciary.

[46] *See*, Art. 32, Constitution of India.

[47] *See*, Art. 131 *Ibid*.

[48] *See*, Art. 133, civil appellate jurisdiction, and Art. 135, criminal appellate jurisdiction, *Ibid*.

[49] *See*, Art. 143, *Ibid*.

[50] *See*, Art. 37, Constitution of India.

[51] Art. 44, *Ibid*.

[52] *See*, H. Kelsen, '*Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*', The Journal of Politics, Vol.4, No. 2, pp. 183-200 (1942). Kelsen states, "The fact that law applying organ declares a general principle unconstitutional and does not apply it in a given case means that this organ is authorized to invalidate the general rule for the concrete case, but only for the concrete case, since the general rule as —the statute, the ordinance-remains valid and can

[53] *See*, Constituent Assembly Debates (Proceedings), Volume VIII, dated 24th May, 1949, Part II, online available at http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm (last accessed on November 9, 2016).

[54] *See*, Art. 50, Constitution of India which states that, "*The State shall take steps to separate the judiciary from the executive in the public services of the State*."

[55] See, John E. Ferejohn, '*Constitutional Review in the Global Context*', NYU Journal of Legislation and Public Policy, Vol. 6. No. 1, pp. 49-59 (2007) at p. 52. Online available at http://www.nyujlpp.org/wp-content/uploads/2012/11/John- E-Ferejohn-Constitutional-Review-in-the-Global-Context.pdf (last accessed on November 6, 2016).

[56] See, *Ibid*. "Kelsen recognized the need for an institution with power to control or regulate legislation. In the case of post-World War I Austria, the concern was mostly for maintaining federal arrangements, that is, regulating the relationship between the national and provincial governments. He recognized, too, that constitutional control essentially involves legislative activity. He recognized, in other words, that constitutional adjudication involves legislating as well as judging. The processes by which constitutional adjudicators make or declare general rules are different from those employed in ordinary legislatures, and the considerations and arguments taken into account are different, but constitutional adjudicators are still legislating."

[57] *See*, Hans Kelsen, *General Theory of Law and State*, pp. 142-158, 1945, Also see, Hans Kelsen, '*Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*', 4 J.Pol. 183, 187 (1942).

[58] See, Hans Kelsen, *Pure Theory of Law*, NewJersy, 2005, p. 146. Online available at https://books.google.de/books?id=6XQNJe8OdEC&printsec=frontcover&dq=pure+theory+of+law&hl=en&sa=X&ved=0ahUKEwjc04ytxITQAhWLbZoKHc1RBJEQ6AEILTAB#v=onepage&q=multitude&f=false (Last accessed on 31 October, 16)

> "The function of the legal order described as authorization relates only to human behaviour. Only human behaviour is authorized by the legal order. In the broadest sense, a certain behaviour by a certain individual is "authorized" by the legal order not only if a legal power is conferred upon him (that is, the capacity of creating legal norms), but also generally, if the individual's behavior is made the direct or indirect condition of the coercive act as the legal consequence, or if this behaviour is in itself the coercive act as the legal consequence, or if this behaviour is in itself the coercive act. Other facts determined by the legal order as conditions are not to be regarded as "authorized". When the legal order stipulates: "if a man is suffering from an infectious disease he ought to be confined to a hospital," then the legal order authorizes an individual to execute the act of internment; but it does not authorize anybody to get sick. In the broadest sense, any human behaviour, determined by the legal order as a condition or consequence may be regarded as being authorized by the legal order. The man who can exhibit such a behaviour is enabled by the legal order to behave in this way. He has a capacity conferred upon him by the legal order. If this capacity is designated as authorization this word does not imply approval. Even the capacity of committing a delict is a capacity conferred by the legal order only upon certain qualified individuals to commit delicts by their behaviour, which means: to realize a condition of the coercive act that functions as a sanction — of the act which directed against them..
>
> However the word authorization is also used in narrower sense when it does imply approval; in this authorization does not include capacity of committing a delict."

[59] For the concept of per curium See, *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602 : AIR 1988 SC 1531.

[60] *See*, *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441, para 16, It will be pertinent here to quote the same, "Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it…. If the people who are elected are capable and men of character and integrity, they would be able to make the beat even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the

country before them. There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language differences, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance…"

[61] This point was made in Constituent Assembly debates that Judges of SC must be different from regular lawyer as they seldom come across the question of constitutional importance. See, See, *Constituent Assembly Debates (Proceedings)*, Volume VIII, dated 24th May, 1949, Part II, online available at http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm (last accessed on November 9, 2016).

[62] *See*, Art. II(2)(2), Constitution of the US. It states, inter alia, "—and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court,…"

[63] *See*, Art.III, Constitution of the USA. Art. III has 3 sections therein, dealing with constitution of Supreme Court and it vest Judicial Power of the USA therein, (S.1); what constitutes Judicial Power therefor is dealt in S.2; and S.3 deals with what constitutes Treason, its trial, and punishment. It is important to reproduce some provision thereof. It states, inter alia,

> "S.1: The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.
>
> S.2: The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state:—between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.
>
> For a detail method of appointment of the Judge of Supreme Court in the US, please see, Report for Congress, Congressional Research Service by Denis Steven Rutkus, titled as, "Supreme Court Appointment Process: Roles of President, Judiciary Committee and Senate", July 6, 2005. Online available at http://fpc.state.gov/documents/organization/50146.pdf (last accessed on November 6, 2016).

[64] The framer of the US constitution had debate on two models of appointment one was favouring Executive control over appointments, and others were pitching for Legislature control over the appointments, in general, and appointment of Judges, in particular. The proposal that supported the Legislature's control over appointment is known as Virginia Plan. One of the modalities of the Virginia Plan, as mooted by Benjamin Franklin, was for an idea where lawyers would appoint the judges. This proposition was based on Scottish Model, as Franklin himself came from Scottish tradition. This suggestion did not find buyers, and therefore, was not discussed at length. For a crisp and concise discussion on the Constituent Assembly debate of the US constitution please see, Adam J. White, '*Toward the Framers*' Understanding of "Advice and Consent": A Historical and Textual Inquiry', Harvard Journal of Law & Public Policy, Vol. 29, pp. 110-147 (2005). Online available at http://www.law.harvard.edu/students/orgs/jlpp/Vol29_No1_White.pdf (last accessed on November 6, 2016).

[65] See, Art. II(2)(2), Constitution of the US. For a detailed discussion on the conflict between President's privilege to appoint and Senate's power to approve, and meaning of the word aid and advice see, Adam J. White, '*Toward the Framers*' Understanding of "Advice and Consent": A Historical and Textual Inquiry', Harvard Journal of Law & Public Policy, Vol. 29, pp. 110-147 (2005). In the words of the Congressional report on Supreme Court Appointment Process,

> "While the process of appointing Justices has undergone some changes over two centuries, its most essential feature — the sharing of power between the President and the Senate — has remained unchanged: To receive lifetime appointment to the Court, one must first be formally selected ("nominated") by the President and then approved ("confirmed") by the Senate— For the Senate, a decision to confirm is a solemn matter as well, for it is the Senate alone, through its "Advice and Consent" function, without any formal involvement of the House of Representatives, which acts as a safeguard on the President's judgment."

[66]

Country	Number of judges	Appointment procedure
Austria	14	8 members on proposal by the federal government, 3-3 members on proposal by the two houses of the parliament → the federal president appoints them

Bulgaria	12	3 members appointed by the head of state, 3 by the parliament, 3 by the two supreme courts jointly
Czech Republic	15	the head of state appoints them with the consent of the Senate
Germany	16	8-8 members elected by the two houses of the federal parliament (out of whom 3-3 members have to be former judges of one of the federal supreme courts)
Hungary	15	ad hoc parliamentary committee composed of representatives of all parliamentary parties reflecting the parliamentary strength of the parties → two-thirds majority voting
Italy	15	5 members elected by the two houses of the parliament in joint session, 5 members appointed by the head of state, 5 members appointed by the three supreme courts (2 by the Court of Cassation, 2 by the Council of the State, 1 by the Court of
Latvia	7	3 members on proposal by at least 10 members of the parliament, 2 members on proposal by the government, 2 members on proposal by the supreme court → the parliament appoints them
Poland	15	on proposal by 50 members of parliament or the Presidium → the lower house of the parliament (Sejm) elects them by absolute majority
Portugal	13	10 members elected by the parliament, 3 members co-opted by the constitutional court itself
Romania	9	3-3 members elected by the two houses of the parliament, 3 members appointed by the head of state
Spain	12	4-4 members on proposal by the two houses of the parliament (by three-fifth majority), 2 members on proposal by the government, 2 members on proposal by the General Council of the Judiciary → the King appoints them
Slovakia	13	the President of the Republic on proposal of the parliament Slovenia 9 the lower house of the parliament by absolute majority in secret voting, on proposal by the President of the Republic

The table is borrowed from, Katalin Kelemen, 'Appointment of Constitutional Judges in a Comparative Perspective — with a proposal for New Model for Hungry', Act Juridica Hungarica, 54, No. 1, pp. 5-23. Online available at file://Users/abhishekmishra/Downloads/Appointment%20of%20Constitutional %20Judges%20in%20a%20Comparative%20Perspective%20%E2%80%93%20with%20a%20 Proposal%20for%20a%20New%20Model%20for%20Hungary.pdf (last accessed on November 5, 2016).

[67] Art. 124(3), Constitution of India, provides that, A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—(c) is, in the opinion of the President, a distinguished jurist.

[68] Black's Law Dictionary defines Jurist as someone who is versed or skilled in law. It further elaborates, "One who is skilled in the civil law, or law of nations. The term is usually applied to those who have distinguished themselves by their writings on legal subjects. Oxford dictionary defines jurist as someone "who is an expert in or writer on law." If we analyse the service rule of academician we would find that publication of paper or manuscript is an essential part of their employment. It predicates their further growth as an academician, Thus, it is safe to argue that an academician would be Jurist for the purpose of Art. 124(3).

[69] See, *Republic of Italy* v. *Union of India*, (2013) 4 SCC 721. An interesting and unique decision was rendered where State of Kerala was found lacking the criminal jurisdiction to try the Italian Marine, accused of murdering Indian citizen in Exclusive Economic Zone, and Union of India was given the criminal jurisdiction (territorial jurisdiction) and Union of India was directed to set up a special court with the consultation of CJI. It is strange because law and order is a state matter. Union of India does not have criminal jurisdiction for trial of a murder of individual, a special case was carved out in this case.

Let me mention the constitutional provisions dealing with international law to have a grasp its importance legally. Factually the world has become more connected as never before giving rise increasing international legal relationship and international dispute that might come across Indian courts.

If we peruse Art. 131 we trace that SC's jurisdiction does not extend to those matter which results out of treaty entered into or executed before commencement of this Constitution. It reads, inter alia, "Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute."

Following Articles in Indian Constitution that deals with the provision of international law Art. 51, Constitution of India, provides that,

Art. 51. "The State shall endeavour to— (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration.

Art. 73. Subject to the provisions of this Constitution, the executive power of the Union shall extend— (a) to the matters with respect to which Parliament has power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Art. 253. "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

In addition to this SC has been expressly barred to have jurisdiction in disputes arising out of certain treaties, agreements etc.

Art. 363. Notwithstanding anything in this Constitution but subject to the provisions of article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.."

[70] See, Constituent Assembly Debates (Proceedings), Volume VIII, dated 24th May, 1949, Part II, online available at http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm (last accessed on November 9, 2016). He further cited the example of experiment done at Harvard University.

[71] *Ibid*. In the words of Dr. Ambedkar, "Mr. President, Sir. I am prepared to accept two amendments. One of them is No. 1829 moved by Mr. Santhanam, and the other is No. 1845 moved by Mr. Kamath, by which he proposes that even a jurist may be appointed as a Judge of the Supreme Court."

Later constituent assembly adopted, "That in clause (3) of article 103, the following new sub-clause be added:— (c) or is an eminent jurist.'"

[72] Art. 124(3) states that, 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;

[73] Art. 16(1), Constitution of India states that There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

[74] For the importance of preamble please see, See, *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 (Kesavananda Bharati case). The judgment as delivered by Chief Justice (as he was then) S.M. Sikri surveyed the not only decision of Supreme Court of India but also the writing of notable jurists and courts cases of jurisdictions outside India. For example see, Kesavananda Bharati case cites Story's book on Commentary to the American Constitution as well as H.M. Servai's book Indian Constitution.

[75] See, *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : AIR 1993 SC 477, para 4 which reads, "The doctrine of equality has many facets. It is a dynamic, and an evolving concept. Its main facets, relevant to Indian Society, have been referred to in the preamble and the articles under the sub-heading "Right to equality"- (Articles 14 to 18). In short, the goal is "equality of status and of opportunity." The decision establishes that preamble provides unique and dynamic value to the concept of equality of opportunity from its manifestation under Arts. 14-18, in general and public employment under Art. 16.

[76] It is needless to state that plethora of Supreme Court cases have referred to books for legal queries and they have been cited too, this signifies the importance of books, apart from decision. They have legal value, they might not be binding, but certainly have persuasive value.

[77] *See*, *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602 : AIR 1988 SC 1531. The Supreme Court issued a writ against the erroneous decision of High Court which it found violative of fundamental right of freedom of speech and expression of the petitioner. The Court also discussed the distinction of Court in its rule making power under Art. 145, which is more of an administrative act and not judicial act. Therefore, it brought judiciary within the ambit of Art. 12. However, this paper is concerned with appointment of Judges in the Supreme Court, and it

being covered under Art. 16(1), i.e. employment or appointment to any office under the State. In other words appointment as Judge in the Supreme Court of India comes within the purview of Art. 16(1).

[78] For a detailed discussion on Public Employment please see, *State of Karnataka* v. *Umadevi (3)*, (2006) 4 SCC 1.

[79] Indian Armed Forces, as distinguished from Police and other forces, are those forces which are at the command of President of India, and are covered by the Union List that reads as follows:—"Entry 2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any state in aid of the civil power, powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment." A definition of armed forces for the purpose of distinguishing it from Police and similar other forces can be traced in Armed Forces (Special Powers) Act, 1958, "armed forces' means the military forces and the air forces operating as land forces, and includes other armed forces of the Union so operating." Similar and in verbatim definition of Armed Forces is provided under S.2(a), Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.

Indian Armed Forces are apolitical institution; any executive interference would also question their impartiality, which may erode the trust they people of India have posed in them. Armed forces are effective only when people have respect therefor. For a detailed discussion on the role of Armed Forces vis-à-vis a federal structure see Sarkaria Commission report on Centre-State relationship, which deals with the matter in great detail and must be studied for this purpose. The Sarkaria Commission was constituted by Government of India vide Ministry of Home Affairs Notification No. IV/11017/1/83-CSR dated June 9, 1983 under the Chairmanship of Justice R.S. Sarkaria with Shri B. Sivaraman and Dr. S.R. Sen as its members. The Commission submitted its report in January 1988. Available at http://interstatecouncil.nic.in/Sarkaria_Commission.html (last accessed on 28 October, 2016).

[80] See, Art. 246 and Seventh Schedule, Constitution of India, List 1 (Union List) which is concerned with exclusive vires of Parliament's legislative competency puts defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilization.

[81] There are two sections in Code of Criminal Procedure that deals with use of Armed Forces to disperse assembly which is beyond the control of security apparatus at the disposal of State. Ss. 130 and 131 deals with such situation the former provides for the power of the executive magistrate to seek assistance of Armed Forces in dispersing such assembly, the later deals with the same situation but in those cases where executive magistrate is not available to take a call and in such it empowers the commissioned or gazette officer of Armed forces to disperse such assembly.

Section 130, Code of Criminal Procedure, 1973 states "use of armed forces to disperse assembly- (1) If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces. (2) Such Magistrate may require any officer in command of any group of persons belonging to the armed forces o disperse the assembly with the help of the armed forces under his command, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law. (3) Every such officer of the armed forces shall obey such requisition in such manner, as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons."

Section 131 states that, "When the public security is manifestly endangered by any such assembly and no Executive Magistrate can be communicated with, any commissioned or gazetted officer of the armed forces may disperse such assembly with the help of the armed forces under his command, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law, but if, while he is acting under this section, it becomes practicable for him to communicate with an Executive Magistrate, he shall do so, and henceforward obey the instructions of the Magistrate, as to whether he shall or shall not continue such acting."

[82] The concept of disturbed area which runs central to the Armed Forces Special Powers law be it of North East reason or Jammu and Kashmir, is not an isolated situation such factual situation. The provision for deployment of Police Forces in those area which were declared disturbed by State Government has its root in S. 15, Police Act, 1861. S. 15(1) reads, "(1) It shall be lawful for the State Government, by proclamation to be notified in the Official Gazette, and in such other manner as the State Government shall direct, to declare that any area subject to its authority has been found to be in a disturbed or dangerous state, or that, from the conduct of the inhabitants of such area or of any class or section of them, it is expedient to increase the number of police." S. 3 of Armed Forces (Special Powers) Act, 1958 reads, "If, in relation to any state or Union Territory to which this act extends, the Governor of that State or the administrator of that Union Territory or the Central Government, in either case, if of the opinion that the whole or any part of such State of Union territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary,

[83] One may argue that Armed Forces is an executive force, and President is executive head therefore UPSC conducting recruitment exam does not conflict with impartiality of Armed Forces. However, that is not the point here, the social construction of a State is responsibility of the ideology of the political parties. Today, when the territories of States under international law cannot be altered, Art. 2(4), UN Charter, it is the internal forces that decides what kind of society they wish to have. If internal forces become so powerful that they want to see particular kind of society which is antagonistic to vision of constitution, constitution would be reduced to mere piece of paper. And Armed Forces would become a potent tool in their hand to subvert the constitution as it will have people subscribing to the ideology that particular ideology in the power, Thus, constitutionalism is as important as constitution. Constitutionalism requires good faith while interpreting the constitution and its provision by any organ of the state.

[84] See, *Ashok Kumar Yadav* v. *State of Haryana*, (1985) 4 SCC 417 : AIR 1987 SC 454.

[85] If we peruse the constitutional scheme Part V is termed as The Union and contains four chapters, of which first chapter is Executive, second chapter is Parliament; and fourth chapter is the Union Judiciary. Thus, the word Union in Art. 309 includes Union Judiciary.

[86] See, *State of Karnataka* v. *Umadevi (3)*, (2006) 4 SCC 1. It is imperative here to re-produce important part of the judicial pronouncement and observation of this case,

> "1. Public employment in a sovereign socialist secular democratic republic has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme.
>
> 3. But, sometimes this process is not adhered to and the Constitutional scheme of public employment is by-passed. The Union, the States, their departments and instrumentalities have resorted to irregular appointments."

A summary was neatly laid down by Delhi High Court in *Dharmendra Prasad Singh* v. *SBI*, 2015 SCC OnLine Del 7427. Two of such ratio as summarized by Delhi High Court is following;

> (VI) If there are sanctioned posts with vacancies, and qualified persons were appointed without a regular recruitment process, then, such persons who when the judgment of Umadevi is passed have worked for over 10 years without court orders, such persons be regularized under schemes to be framed by the concerned organization.
>
> (VII) The aforesaid law which applies to the Union and the States will also apply to all instrumentalities of the State governed by Article 12 of the Constitution".