

CONSTITUTIONALITY OF THE NATIONAL JUDICIAL APPOINTMENTS
COMMISSION: THE ORIGINALIST ARGUMENT

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INTRODUCTION

The procedure for appointment of judges to the Supreme Court of India is provided for in article 124(2) of the Constitution ('the Judges Appointment Clause').¹ The Judges Appointment Clause provides that the judges of the Supreme Court are to be appointed by the President upon consultation with the Chief Justice of India. In the *Second Judges Appointments Case*² a 9 judge bench of the Supreme Court held that 'no appointment of any judge to the Supreme Court or any high court can be made unless it is in conformity with the opinion of the Chief Justice of India'.³ It is widely accepted that the *Second Judges Appointments Case*'s key holding that made the opinion of the Chief Justice of India's binding on the President, in the matters of judicial appointments, thus making the proverbial buck stop at the Chief Justice's office, was arrived primarily to preserve the independence of judiciary⁴ and has been hailed as 'a dramatic event in the international history of jurisprudence'.⁵ Thus came into existence the system of appointment of judges popularly known as the 'Collegium' system of appointments of judges.⁶ The Collegium system was critiqued on the ground that the key holding in this case making the Chief Justice's opinion binding on the President was akin to the promulgation a judicially interpreted policy,

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¹ INDIA CONST. art. 124, § 2

² Supreme Court Advocate-on-Records Association v. Union of India, (1993) 4 S.C.C. 441 ("Second Judges Appointments Case")

³ See Lord Cooke of Thorndon, *Where Angels Fear to Tread*, (hereinafter "Lord Cooke") in RAJEEV DHAVAN ET. AL. (EDS.), SUPREME BUT NOT INFALLIBLE, at 97. ("... in *Supreme Court Advocates-on-Record-Association v. Union of India* ... Verma, J. was giving judgment on behalf of a majority of five judges in a court of nine holding *inter alia* that, under the Constitution of India, no appointment of any judge to the Supreme Court or any high court can be made unless it is in conformity with the opinion of the Chief Justice of India.")

⁴ Lord Cooke, *supra* note 3 at 105 ("On the other hand, there will be the advantage that overtly political appointments or transfers are unlikely."); Arghya Sengupta, *Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry*, 5 INDIAN JOURNAL OF CONSTITUTIONAL LAW 100 (2011) (hereinafter "Sengupta") at 104 ("The need for an independent judiciary provided the underpinning for the initial system envisaged by the drafters, and every reform instituted or recommended thereafter by the Supreme Court, the Law Commission of India or the government.")

⁵ See eg. Lord Cooke, *supra* note 3 at 98; Ajit Prakash Shah, *Judges Appointment and Accountability*, 2 LAW WEEKLY (JOURNAL SECTION) 21 (2012) (hereinafter "Ajit Prakash Shah") at 27-28; Arghya Sengupta, *supra* note 4.

⁶ See eg. Sengupta, *supra* note 4 at 103.

than an exercise in constitutional decision making⁷; that it shifted power to a small number of Supreme Court judges.⁸ The principal concern to which the creation of the Collegium system was addressed i.e. independence of judiciary⁹ has also been questioned on the ground that independence of judiciary means different things to different people.¹⁰ It is said that absolute independence of judiciary is not necessary and might not be desirable, rather what matters is to examine whether the judiciary is adequately independent.¹¹ Basing this argument on the authority of Montesquieu¹² and the Federalist No. 78¹³ it has been argued that, “The mere fact that the judge is appointed by the executive and can be removed by the legislature should not lead to the conclusion that the judge is related to other organs of government, capable of being influenced and threatened by them and hence not independent.”¹⁴

The NJAC Bill was introduced in the Parliament (Lok Sabha) on August 11, 2014¹⁵, was enacted as NJAC Act on December 31st, 2014¹⁶ and was notified by the Ministry of Law & Justice, Government of India on April 13th, 2015.¹⁷ It was enacted to replace the Collegium system with the new NJAC system for appointment of judges to the High Courts and the Supreme Court.¹⁸ Along with the NJAC Act, the Parliament also passed the Constitution (One Hundred and Twenty-First Amendment)

⁷ Lord Cooke, *supra* note 3 at 103. (“... it reads more like a promulgation of policy than an exercise in juridical reasoning drawing inferences from the provisions of the Constitution.”)

⁸ Lord Cooke, *supra* note 3 at 105. (“Rather than underlining the primacy of the Chief Justice, the opinion thus appears to have shifted power, to a significant extent, to a small number of Supreme Court judges other than the Chief Justice. ... There may be some risk of dominance by a particular school of thought.”)

⁹ See Ajit Prakash Shah, *supra* note 5 at 25. Shah, former Chief Justice of the Delhi High Court and the current Chairman of the Law Commission of India, noted that the prescribed mode of judicial appointments became liable to political interferences as a result of certain opinions of the Supreme Court regarding right to property.

¹⁰ See Sengupta, *supra* note 4 at 100. (“Judicial independence has meant different things to different people over time ...”)

¹¹ Sengupta, *supra* note 4 at 107 (“... absolute independence is not necessary and may not be desirable for a judge ... the key question to ask of a judiciary is not whether it is independent or not but rather how independent it is and whether the extend of independence serves the rationale of impartial adjudication adequately ...”), and at 108 (“... the key issue is not a binary determination of whether the institution of the judiciary is independent or not but rather how independent it is and whether such independence serves the end of impartial and effective adjudication ...”)

¹² Sengupta, *supra* note 4 at 109-111

¹³ *Id.* at 111-114

¹⁴ *Id.* at 114-15

¹⁵ *The National Judicial Appointments Commission Bill, 2014*, PRS LEGISLATIVE RESEARCH, <http://www.prsindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014-3359/> (last visited May 12, 2015)

¹⁶ The National Judicial Appointments Commission Act, 2014 (No. 40 of 2014), INDIA CODE, http://www.indiacode.nic.in/acts2014/40_of_2014.pdf (last visited May 12, 2015)

¹⁷ *National Judicial Appoints Commission Act Notified*, PRESS INFORMATION BUREAU, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=118224> (hereinafter “PIB”) (last visited May 12, 2015)A

¹⁸ PIB, *supra* note 17; *No more judges appointing judge; 22-yr old collegium system scrapped*, HINDUSTAN TIMES (April 28, 2015), <http://www.hindustantimes.com/india-news/no-more-judges-appointing-judges-22-yr-old-collegium-system-scrapped/article1-1336889.aspx> (last visited May 12, 2015)

Bill, 2014 that inserts article 124A into the Constitution.¹⁹ Article 124A provides for the composition of the NJAC as follows – (1) The Chief Justice of India as ex-officio Chairperson; (2) two other senior Judges of the Supreme Court next to the Chief Justice; (3) the Union Minister for Law & Justice as ex-officio Member; (4) two ‘eminent persons’ to be nominated as members of the NJAC by a committee consisting of the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the House of the People or where no such Leader of Opposition, then, the Leader of the single largest Opposition Party in the House of the People.²⁰ The NJAC is therefore a body comprising six people – the Chief Justice of India, two senior most judges next to the Chief Justice of India, the Union Minister of Law & Justice and two eminent persons to be nominated jointly by the Prime Minister, Chief Justice and Leader of the Opposition in Lok Sabha. All the acts done by the NJAC are declared non-justiciable on the ground that the NJAC was not fully constituted at the time of taking its decisions.²¹ Both the NJAC Act and the Constitutional Amendment were challenged before the Supreme Court almost immediately after their coming into force.²²

The Preamble of the NJAC Act itself provides that it is –

An Act to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of the High Courts and for their transfers and for matters connected therewith or incidental thereto.²³

The NJAC system requires that the process of judicial appointments shall be initiated by the Central Government by intimating the vacancies for the post of Judges in the Supreme Court and the High Court.²⁴ Section 6(6) of the NJAC Act provides that if any two members of the NJAC do not agree to recommend any candidate for appointment as a judge of the High Court or the Supreme Court, the NJAC is not authorized to make such recommendation.²⁵ This is one of the most controversial provisions in the NJAC Act for it vests in the hands of any two members of the NJAC a virtual veto power over any judicial appointment.²⁶ Also, it is worth noting that three out of six members of the NJAC are ‘either politicians or people in whose appointment a politician would have a hand’.²⁷ This veto power, if allowed to be

¹⁹ The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 (as passed by both Houses of the Parliament), RAJYA SABHA, http://rajyasabha.nic.in/rsnew/bill/rs_bill_debate/121-Houses-E.pdf (last visited May 12, 2014)

²⁰ The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, § 3.

²¹ *Id.* at § 3

²² J. Venkatesan, *Five-judge SC bench will hear NJAC please today*, THE ASIAN AGE (May 12, 2015), <http://www.asianage.com/india/five-judge-sc-bench-will-hear-njac-pleas-today-834> (last visited May 12, 2015)

²³ The National Judicial Appointments Commission Act, 2014, Preamble

²⁴ *Id.* § 4 (1)

²⁵ *Id.* at § 6 (6)

²⁶ C. Raj Kumar, *Reasons why the NJAC Act is bad in law*, THE ECONOMIC TIMES (May 3, 2015), http://articles.economictimes.indiatimes.com/2015-05-03/news/61768151_1_cji-njac-act-national-judicial-appointments-commission (last visited May 12, 2015).

exercised on purely political considerations (against which there is no safeguard in either the NJAC Act or the accompanying Constitutional amendment), can result in a potential constitutional crisis.²⁸ Also, the seniority norm²⁹, whereby the senior most judge of the Supreme Court is elevated to the office of the Chief Justice of India when the incumbent Chief Justice leaves the office³⁰ is done away with.³¹

As this article will argue, giving maximum weight to the opinion of the Chief Justice of India (by inserting a ‘Concurrence Clause’) in order to protect the appointments of judges to the Supreme Court and the High Courts being made on purely political considerations was a method proposed during the drafting stage itself. The NJAC system, however, affords no such protection to the process of appointments.³² One of arguments against the NJAC Act before the pending litigation before the Supreme Court right now, in fact, is that by giving no weightage to the views of the Chief Justice of India the NJAC Act violates the basic structure of the Constitution.³³ Meanwhile, whereas any judicial commission being set up for the purpose of regulating the procedure of judicial appointments to higher judiciary has ensure ‘the independence of the system from inappropriate politicization’³⁴, the NJAC system of appointments suffers from systemic inefficiencies that make the system dangerously susceptible to political influence. As it is, a retired Supreme Court judge has alleged political pressures in appointment of judges during the previous UPA administration that has been reported in the media.³⁵ In this context, one commentator has very aptly noted that the NJAC system is akin to, “... trying to reduce match-fixing by including casino owners in the team selection committee.”³⁶

²⁷ Sachin P. Mampatta, *Judges, research analysts and the fine art of breath control*, BUSINESS STANDARD (April 13, 2015), http://www.business-standard.com/article/opinion/judges-research-analysts-and-the-fine-art-of-breath-control-115041300567_1.html (last visited May 12, 2015)

²⁸ C. Raj Kumar, *supra* note 26. *See also Appointment of 125 High Court judges put on hold after NJAC notification*, INDIA TV (May 12, 2015), <http://www.indiatvnews.com/news/india/appointment-of-125-high-court-judges-put-on-hold-49737.html> (last visited May 12, 2015)

²⁹ *See* Abhinav Chandrachud, *Supreme Court’s Seniority Norm: Historical Origins*, ECONOMIC & POLITICAL WEEKLY, Vol. XLVII, No. 8 (February, 2012), 26

³⁰ Abhinav Chandrachud, *supra* note 29 at 26.

³¹ The National Judicial Appointments Commission Act, 2014, § 5(1)

³² *NJAC Act violates ‘basic structure’ of Constitution, SC told*, DECCAN HERALD (April 28, 2015), <http://www.deccanherald.com/content/474386/njac-act-violates-basic-structure.html> (last visited May 12, 2015)

³³ *Id.* The news-report records the arguments made by Fali S. Nariman, Senior Counsel, who is appearing on behalf of the Supreme Court Advocates-on-Record Association before a 5 judge constitution bench of the Supreme Court. The Bench comprises of Justices J. S. Khehar, Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel.

³⁴ Ajit Prakash Shah, *supra* note 5 at 29

³⁵ *Katju stings judiciary again, makes fresh corruption claims*, BUSINESS STANDARD (August 11, 2014), http://www.business-standard.com/article/current-affairs/justice-katju-stings-judiciary-again-makes-fresh-corruption-claims-114081100090_1.html (last visited May 12, 2015). The news-report says, “Former Supreme Court judge Markandey Katju, currently Chairman of Press Council of India, has made fresh allegations of corruption in the judiciary. His recent comments follow earlier allegations that [a] “corrupt” judge was reinstated because of political pressure during the UPA tenure.”

³⁶ Sachin P. Mampatta, *supra* note 27

All this makes it necessary to understand the ideas and concerns captured by the phrase ‘independence of judiciary’ by the framers of the Constitution. If the concerns expressed by the framers by use of the phrase ‘independence of judiciary’ were correct, and if it is the case that those concerns have not been addressed adequately by the process of appointments that they put in place, then we owe to the framers and the generations to come to revisit those concerns and put in place a system of appointments of judges that is suited to our conditions and is in accordance with concerns that arise in our system.

‘INDEPENDENCE OF JUDICIARY’: THE ORIGINALIST ARGUMENT

The corresponding provision to article 124 of the Constitution in the draft Constitution was article 103 that was exhaustively discussed on May 24th, 1949.³⁷ A total of 23 speakers spoke for a total of 52 times that day.³⁸ A clearer understanding of the concerns and apprehensions of the founding fathers, as they faced them on May 24th, 1949, while debating the methods that would be best suited to ensure the independence of the judiciary are extremely important, especially if in 2015 a workable solution to this problem is to be arrived at. Many of these concerns are very similar to the concerns as faced in contemporary times. But a deeper examination of these concerns also shows that the phrase ‘independence of the judiciary’ was understood by the founders in a certain way. Our experience has shown that several of their key concerns were correct. The unfortunate incidents of supersession of judges by the executive for political reasons has happened more than once in the history of the Supreme Court of India.³⁹

³⁷ CONSTITUENT ASSEMBLY DEBATES, VOL. VIII (May 24th, 1949), 229-263. Even the President of the Constituent Assembly observed (*id.* at 257) as the debate closed to an end, but before Dr. B. R. Ambedkar made the last speech on that day, “I think we better close this discussion. We have had so many speeches.”

³⁸ The names of the 23 speakers who spoke on May 24th, 1949 are as follows – (1) Mr. Tajamul Hussain, (2) Dr. B. R. Ambedkar, (3) Mr. Krishna Chandra Sharma, (4) The President of the Constituent Assembly, (5) Prof. Shibban Lal Saxena, (6) Mr. B. Pocker Sahib, (7) Mr. H. V. Kamath, (8) Prof. K. T. Shah, (9) Mr. Jaspat Roy Kapoor, (10) Mr. Satish Chandra, (11) Mr. Mahboob Ali Baig Sahib, (12) Dr. P. K. Sen, (13) Mr. Mohd. Tahir, (14) Dr. Bakshi Tek Chand, (15) Mr. Tajamul Hussai, (16) Mr. K. Santhanam, (17) Pandit Thakur Das Bhargava, (18) Pandit Jawaharlal Nehru, (19) Mr. R. K. Sidhva, (20) Mr. Biswanath Das, (21) Mr. Rohini Kumar Chaudhari, (22) Mr. M. Ananthasayanam Ayyangar, and (23) Mr. Nazirudding Ahmed.

³⁹ See H. V. KAMATH, NANI A. PALKHIWALA – A LIFE (hereinafter “KAMATH”) at 325-44. In this book, a biography of the legendary constitutional lawyer Nani. A. Palkhiwala, Kamath notes the ‘Supersession of Judges’. Kamath notes that it all started after a 13 judge bench of the Supreme Court delivered its opinion in the landmark case *Kesavananda Bharti v. State of Kerala*, (1973) 4 S.C.C. 225 and by a narrow majority of 7 against 6 ruled that whereas the power of the Indian Parliament to amend the Constitution extends to all provisions of the Constitution, any amendment that violates the basic structure of the Constitution is beyond the amending powers and therefore void. After this opinion was delivered, Justices Grover, Shelat and Hegde were superseded and Justice A. N. Ray was appointed as the Chief Justice. Kamath notes (*id.* at 328) that, “It evoked sharp reactions from the Bar, and there was a near unanimous vote at meetings of the various bar associations strongly condemning the government’s actions.” See also H. R. KHANNA, NEITHER ROSES NOR THORNS (hereinafter “KHANNA”) at 63-82. Justice Khanna in his memoirs discussed the above noted supersession of these three judges and later his talks about his own supersession that came after his world famous dissent in *A.D.M. Jabalpur v. Shiv Kant Shukla*, (1976) 2 S.C.C. 521.

Our experience also tells us that the methods proposed to address those concerns have not worked as well as the founding fathers would have liked. Any attempt to put in place a new constitutional solution for this problem without taking a moment to consult the concerns that went behind older solutions that did not work is bound to result in further disappointment. The executive has attempted to influence the working of the judiciary in the past. Prime Minister Indira Gandhi attempted, and almost succeeded, to have a ‘committed judiciary’⁴⁰ for purely political reasons.⁴¹

It is important to investigate what was the understanding of the phrase ‘independence of judiciary’ as used by the founding fathers. It is equally important to understand what kind of constitutional safeguards they were willing to provide in order to make sure that the judiciary stays independent. It appears that the founding fathers had three primary concerns in mind – (1) Protections at the stage of appointment; (2) Protections while the judge is on the Bench; and (3) Protection against post-retirement entitlements and prohibitions being used to influence judicial behavior. The first concern was addressed mostly by suggesting a ‘Concurrence Clause’ (whereby the concurrence of the Chief Justice of India was made mandatory in appointment of judges to the Supreme Court). Another suggested method was a ‘Confirmation Clause’ (requiring the confirmation of the Chief Justice of India from the Council of State). The second concern was mostly addressed by suggesting changes in the age of retirement and impeachment provisions. The third concern was addressed by suggesting changes in (a) what the judges may or may not be allowed to do after their retirement, and (b) inserting a ‘Permission Clause’ (that required the retired judge to take permission of the President to engage in any post-retirement job). There were discussions about tenure, salaries and pension of the judges as well. By examining the speeches made on May 24th, 1949 we can gain considerable understanding in what was meant by the founding fathers when they used the expression ‘independence of judiciary’ and what were the methods they thought were desirable to achieve that end.

KEEPING THE JUDICIARY INDEPENDENT – ORIGINALIST EVIDENCE SUPPORTING THE IDEA OF A ‘CONCURRENCE CLAUSE’

The first important speech on the subject was made by Prof. Shibban Lal Saxena.⁴² The primary concern expressed by Prof. Saxena was regarding ‘complete independence’ of judiciary from the Executive.⁴³ He was concerned that the Chief Justice will end up being ‘a creature merely of the executive’, which, he argued,

⁴⁰ KAMATH, *supra* note 39 at 328. (“Indira Gandhi wanted a ‘committed’ judiciary, just as she wanted a ‘committed bureaucracy’, and in her opinion the judges of the Supreme Court were not in step with the revolutionary changes that were sweeping the country.”)

⁴¹ *Id.* at 328. Writing in the context of the first supersession after *Kesavananda Bharti v. Union of India*, (1973) 4 S.C.C. 225 (India), Kamath notes, “The general belief was that this was a political decision that the Indira Gandhi government had taken. It had long been felt among her close advisers, particularly after the *Bank Nationalization* and privy purse cases, that the judiciary as constituted in the past had insulated itself against the popular cross-currents in the country, and was therefore unable to identify and reflect the need for social change.”

⁴² CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 37 at 230-32.

⁴³ *Id.* at 231. Saxena argued that, “The Chief Justice of the Supreme Court should be completely independent of the Executive and it is this principle which I want to introduce in this section.”

would result in jeopardizing the ‘independence of the Supreme Court’.⁴⁴ In order to prevent this, Saxena suggested that the power to propose the names for the Chief Justiceship should be rested solely in the hands of the President.⁴⁵ He also suggested that a ‘Concurrence Clause’ be inserted in the provisions governing the appointment of judges to the Supreme Court whereby, “Every judge of the Supreme Court should be appointed on the advice merely of the Supreme Judge of the Supreme Court, so that they may derive their authority from the Chief Justice and not from the Executive.”⁴⁶ The relevant part of Prof. Saxena’s speech is worth examination in full

At present, Sir, the judges also have not to be appointed on the advice merely of the Chief Justice of the Supreme Court, but they are appointed in consultation with the Supreme Chief Justice, which means even in their appointment the Executive has got the major hand. I think, Sir, that this should not be. **Every Judge of the Supreme Court should be appointed on the advice merely of the Supreme Judge of the Supreme Court, so that they may derive their authority from the Chief Justice and not from the Executive. This, I think, Sir, is a very important thing and should be incorporated in our Constitution.** We have all along said that we want an independent judiciary; that is the pride of many peoples and that is the pride of the United States of America. I think we too want that our Chief Justice and the Supreme Court should be above suspicion. These should be completely independent, so that a man can feel that they shall be absolutely independent of the Executive.⁴⁷

It is worth noting here that for Prof. Saxena, the independence of the office of the Chief Justice of India and the independence of the judiciary generally are almost synonymous. To preserve the independence of judiciary, the Chief Justice of India has to be involved. This cannot be successfully achieved unless the independence of the Chief Justice of India can also not be ensured. But more importantly, the idea behind the phrase ‘independence of judiciary’, for Saxena, was insulating the process of appointment from interference or influence by the Executive branch of the government.⁴⁸

The idea of a ‘Concurrence Clause’ was supported by B. Pocker Sahib who formally moved an amendment to that extent⁴⁹, and the principle concern expressed by him was also to insulate the process of appointment from any ‘political influence’.⁵⁰ A ‘Concurrence Clause’ would act as a ‘safeguard against political and party

⁴⁴ *Id.* at 231. (“At present [the Chief Justice of India] shall be a creature merely of the executive and the President shall appoint him on the advice of the Prime Minister. This will take away some independence of the Supreme Court.”)

⁴⁵ *Id.* at 231. (“... the President shall and will be the prime mover in the appointment ...”)

⁴⁶ *Id.*

⁴⁷ *Id.* (Emphasis Added)

⁴⁸ *Id.* (“This tribunal [i.e. the Supreme Court] should be above suspicion and no executive should be able to have any influence upon him. *If the Chief Justice is appointed by the President or the Prime Minister then his independence is compromised.*”) (Emphasis Added)

⁴⁹ *Id.* at 232-234. Pocker Sahib’s amendment called for the insertion of the following clause making the concurrence of the Chief Justice of India mandatory – “Every judge of the Supreme Court other than the Chief Justice of India shall be appointed by the President by warrant under his hand and seal *after consultation with concurrence of the Chief Justice of India, ...*” (Emphasis Added)

⁵⁰ *Id.* 232. (“Now, Sir, in giving this amendment, I wanted to see that the appointment of the judges of the Supreme Court *is not in any way affected by political influences.*”) (Emphasis Added)

pressure'.⁵¹ Sahib's idea of 'independence of judiciary' was also similar. For him, unless the process of appointment of judges to the Supreme Court is not completely insulated from the political considerations of the day, the independence of judiciary is not secured.⁵² Sahib viewed the participation of politicians in this process with extreme suspicion –

Of course, if a Judge owes his appointment to a political party, certainly in the course of his career as a Judge, also as an ordinary human being, he will certainly be bound to have some consideration for the political views of the authority that has appointed him. That the Judges should be above all these political considerations cannot be denied. Therefore, I submit that one of the chief conditions mentioned in the procedure laid down, that is the concurrence of the Chief Justice of India in the appointment of the Judges of the Supreme Court, must be fulfilled.⁵³

Sahib seems to be of the view that for a judge to feel sympathetic to the political views of the party to which the judge 'owes' his appointment, does not necessary have to appoint the judge on the ground that the judge is sympathetic to their political views. Clearly, for Sahib, the merely involvement of the politicians in the process is enough to jeopardize the independence of the judiciary, notwithstanding whether or not any political considerations are actually exercised in the process of appointment or not.

Prof. K. T. Shah expressed a concern very similar to Prof. Saxena and Pocker Sahib i.e. the process of appointment of judges of the Supreme Court needs full insulation from any 'political influence'⁵⁴ so to ensure 'absolute independence of the judges'.⁵⁵ His method, however, was not to suggest a 'Concurrence Clause' but a 'Consultation Clause' that required consultation with the Council of States.⁵⁶ This suggestion was

⁵¹ *Id.* at 232. ("The necessity for obtaining the concurrence of the Chief Justice of India would provide a safeguard against political and party pressure at the highest level being brought to bear on the matter.")

⁵² *See eg.* CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 39 at 233. ("It is of the highest importance that the Judges of the Supreme Court should not be made to feel that their existence or their appointment is dependent upon political considerations or on the will of the political party.")

⁵³ CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 39 at 233.

⁵⁴ *Id.* at 234. ("Sir, this is an amendment *seeking to make the appointment of Judges free from any particular influence.* ... [T]his constitution concentrates so much power and influence in the hands of the Prime Minister in regard to appointment of judges ... that there is every danger to apprehend that the Prime Minister may become a Dictator if chooses to do so. *I think there are cases which ought to be removed from political influence ... And here is once case, viz. Judges of the Supreme Court, who I think should be completely outside that influence.*") (Emphasis Added)

⁵⁵ *Id.* at 236. ("But the supreme principle that I have all the time been pressing upon the House is the necessity of securing the absolute independence of the judges.")

⁵⁶ *Id.* at 234. The 'Consultation Clause' as suggested by Prof. Shah stated – "Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal *after consultation with the Council of States* and such of the judges of the Supreme Court and of the High Courts in the States as may be necessary for the purpose ..." (Emphasis Added). Kamath, in his speech, stated that he was moving his amendment, "... so that *the party element may be eliminated or minimized, and any political influence also may be avoided.*" (Emphasis Added).

strongly opposed by R. K. Sidhwa.⁵⁷ But even while opposing Prof. Shah's suggestion of having the Council of States involved, his concern was similar that of Prof. Shah's i.e. ensuring that the process of appointment is insulated from political considerations so that 'impartial and independent judges' could be appointed.⁵⁸ Consultation with the Council of States was also opposed by Biswanath Das on the same ground as Sidhwa i.e. it would amount to judicial elections.⁵⁹

Another suggestion was a 'Confirmation Clause' type suggestion was made by Prof. Saxena⁶⁰ and supported by Pandit Thakur Das Bhargava⁶¹ that required a judicial appointment to be confirmed by 2/3rd of the Parliament in a joint session. This suggestion was similar to the suggestion made by Prof. Shah and was inspired by the method of judicial appointments in the United States and so much was also pointed out by Prof. Shah.⁶² Bhargava, supporting a 'Confirmation Clause' like solution argued that such a process would provide democratic legitimacy to the appointment of the Chief Justice of India.⁶³ This idea also met strong opposition. In a speech that

⁵⁷ *Id.* at 248. Sidhwa was of the view that a 'Consultation Clause' requiring the consultation of the Council of States will result in appointment of judges becoming similar to judicial elections. He said, "Now coming to the amendment of Professor Shah, he wants the Council of States to decide the question of appointment of Judges. This I must strongly oppose. *We want impartial and independent Judges*; and if you leave it to the Council of States there is bound to be individual canvassing, in which case the question of ability, etc., will be set aside. ... You cannot have it decided by a Council of 150 people or more; canvassing will go on and ability will be discarded." (Emphasis Added)

⁵⁸ *Id.* at 248. Sidhwa clearly stated that the Prime Minister, "... is likely to make appointments of his choice or show favoritism ...", but he was convinced that the Prime Minister being 'subject to our votes' will not engage in such behavior. As it happens, history has proven that Sidhwa was correct in raising the concern about the independence of judiciary but he was not correct in trusting the Prime Minister to exercise this power in a manner befitting the Constitution. *See eg. KAMATH, supra* note 39 at 328. Kamath refers to a speech made by the Steel Minister Mohan Kumaramangalam in Prime Minister Indira Gandhi's Cabinet and reports the substance of the Minister's speech as, "... *there was no constitutional requirement that the chief justice should be consulted on the appointment of his successor.*" Kamath is discussing the Minister's speech in the general context of the first supersession of judges that was the result of *Kesavananda Bharti v. State of Kerala*, (1973) 4 S.C.C. 225 (India) that resulted in Justices Grover, Shelat and Hedge being superseded for delivering opinions that incurred the wrath of the then Prime Minister Indira Gandhi.

⁵⁹ *Id.* at 249. ("Consulting the Legislature and election are certainly technical two different processes. But in a democracy functioning, as we propose it should, under this Constitution, is it anything less to say that my Friend, Prof. Shah, wants to import election into the appointment of the Judges? ... We have seen the difficulties and distress of the countries which have accepted the principle of such election.")

⁶⁰ *Id.* at 231-32. Prof. Saxena's amendment read – "The Chief Justice ... shall be appointed by the President subject to confirmation by two-thirds majority of Parliament assembled in a joint session of both the Houses of Parliament."

⁶¹ *Id.* at 245. Bhargava supported the 'Confirmation Clause' that required that the, "... Chief Justice of the Supreme Court must be made by a two-third majority of the total number of members of Parliament assembled in a joint session ..."

⁶² *Id.* at 235. "There is of course the obvious precedent of the U.S.A. Senate which is associated in such matters, even though the Constitution of the U.S.A. is based, fundamentally speaking, on a somewhat different principle than that which we have adopted in his draft. Nevertheless, here is a case I which I think it would be well for us to adopt that line and associate the Council of State for advising the President in the appointment of the Supreme judiciary."

⁶³ *Id.* at 245. ("This would inspire much more confidence in the Chief Justice of the Supreme Court and at the same time, the Chief Justice also shall get more influence and prestige when

makes an important part of this debate, Rohini Kumar Chaudhari, called this ‘a very dangerous principle’ who in fact had come to the proceedings that day, “... purposely to warn the House against the acceptance of the suggestion made by my Friend Mr. Shibban Lal Saksena.”⁶⁴ However, Chaudhari was also not a very big supporter of the ‘Consultation Clause’ solution (making the consultation with the Chief Justice mandatory).⁶⁵

The idea of a ‘Concurrence Clause’ was also shared by Mahboob Ali Baig who also moved an amendment to that effect.⁶⁶ The principle concern expressed by Baig, again was remarkably similar to Prof. Saxena, Pocker Sahib and H. V. Kamath. Concurrence of the Chief Justice was necessary because that was the only method to keep the process of appointment free from political influences in order to preserve the independence of the judiciary.⁶⁷ However, for Baig, the concurrence of the Chief Justice did not mean that the final word rested with the Chief Justice. We should note his views carefully here –

This is a salutary principle and it is necessary that the concurrence of the Chief Justice should be made necessary for the appointment of the Judges of the Union Judicature. It may be said there might be disagreement between the opinion of the President and the Chief Justice and there might be a sort of deadlock. I submit, Sir, at that higher level between the Supreme Judge and the President, there is not likely to be any such difference of opinion. **Even if there was any such difference of opinion it is open to the President to just propose another name which will be acceptable to the Chief Judge.** So there cannot be any serious objection to make the concurrence of the Chief Justice a necessary prerequisite for the appointment of Judges of the Union Judicature **and that will certainly guard us against any party influence being brought to bear upon the appointments.**⁶⁸

it is known that his appointment has not only been supported by the President, who practically represents the majority in the legislature, in so far as that it will be the Prime Minister who will give his advice to the President. All the same, if a two-thirds majority is insisted upon, it shall give him more influence and prestige.”)

⁶⁴ *Id.* at 251. Chaudhari opened his speech by saying – “Mr. President, I have come here purposely to warn the House against the acceptance of the suggestion made by my Friend Mr. Shibban Lal Saxena. He seems to think that any appointment which is made should be made subject to confirmation by two-thirds majority of the Houses of Parliament. I submit that this is a very dangerous principle. Confirmation by two-thirds majority of the Houses of Parliament means that the appointment will be at the pleasure of the leader of the majority party.”

⁶⁵ *Id.* at 252. (“... this is a matter which should be entirely dealt with by the President. He can, if he likes, consult anybody; if he does not like, he need not consult anybody. If he knows the man to be out outstanding ability, it is not necessary for the President to consult anybody. It should not be made obligatory.”)

⁶⁶ *Id.* at 238. Baig’s amendment read as follow – “That in the first proviso to clause (2) of article 103, for the words ‘the Chief Justice of India shall always be consulted’ the words ‘it shall be made with the concurrence of the Chief Justice of India be substituted.”

⁶⁷ *Id.* (“So the President would be guided by the Prime Minister or the Council of Ministers who are necessarily drawn from a political party. Therefore the decision of the President would be necessarily influenced by party considerations. It is therefore necessary that the concurrence of the Chief Justice is made a pre-requisite for the appointment of a Judge of the Supreme court in order to *guard ourselves against party influences that may be brought to bear upon the appointment of judges.*” (Emphasis Added)

⁶⁸ *Id.*

The first Prime Minister of India and a very important member of the Constituent Assembly, Jawaharlal Nehru, in his speech, also expressed a concern about independence of the judiciary.⁶⁹ His speech was mostly concerned with the age of retirement of the judges.⁷⁰ Nehru wanted the best available talent for the job and didn't want age to become a barrier in that and even invoked Albert Einstein to make his point.⁷¹ Nehru realized that the number of High Court and Supreme Court judges is going to increase⁷² and that most of them will be elevated to the Bench from the Bar.⁷³ He was very clear that these judges will have to 'first-rate' individuals, of the 'highest integrity' and most importantly, "... people who can stand up to the executive government ...".⁷⁴ Nehru also stressed that the judges of the higher judiciary 'should be outside political affairs'.⁷⁵ For Nehru, in addition to the efficiency and productivity of the judge, his independence was an equally important factor. He wanted judges that could take a stand against the party that would be in office at any given point of time. If the politicians are allowed to interfere with the process of appointment of judges, it would be almost impossible to appoint judges who can stand up to the executive, like Nehru desired. Though, Nehru did not speak on the issue directly, it is clear that insulating the process of appointment of judges from political interference and influence is of paramount importance. To that extent Nehru has expressed a concern similar to that expressed by other members of the Constituent Assembly before him. Nehru's concerns, which were similar to those expressed by almost every other member and expressed more directly than Nehru, were soon to be proved correct by the third Prime Minister of India, Indira Gandhi, when she would interfere with the judiciary not once but twice and for purely political reasons.⁷⁶

⁶⁹ *Id.* at 246-47

⁷⁰ *Id.* at 246. ("Sir, I wish to say about one particular matter with which some amendments have dealt, that is, the age-limit of the Supreme Court judges.")

⁷¹ *Id.* ("... how can you get the best service out of an individual for the nation. Each country spends a lot of money for training a person. Now, we have to get the best out of the training you give to a person. ... Take Einstein. I do not know what his age is, but certainly it should be far above sixty; and Einstein is still the greatest scientist of the age.")

⁷² *Id.* at 247. ("We are going to require a fairly large number of High Court Judges and Supreme Court Judges.")

⁷³ *Id.* ("Judges presumably in future will come very largely from the bar and it will be for you to consider at a later stage what rules to frame so that we can get the best material from the bar for the High Court or Federal Court Judges.")

⁷⁴ *Id.* ("It is important that these judges *should be not only first-rate, but should be acknowledged to be first-rate in the country, and of the highest integrity, if necessary, people who can stand up to the executive government, and whoever may come in their way.*") (Emphasis Added)

⁷⁵ *Id.* ("But the High Court Judges and Federal Court Judges should be outside political affairs of this type and outside party tactics and all the rest, and if they are fit, they should certainly, I think, be allowed to carry on.")

⁷⁶ See KAMATH, *supra* note 39 at 325-44; KHANNA, *supra* note 39 at 63, 79, 82-89. Justice Khanna writes, regarding the supersession of Justices Grover, Shelat and Hedge, that he was, "... extremely perturbed because in my opinion it was it was bound to generate fear complex or hopes of reward and thus undermine the independence of the judiciary." Later he discussed how his own supersession, "It was also plain that if I gave the judgment as I was contemplating, I would have to lose the office of the Chief Justice of India as then then incumbent of office was due to retire in some months' time and I was next to him in seniority. I could not entertain any illusion in this respect as there had already been a precedent in 1973, when three senior judges had been superseded for the office of Chief Justice when they gave their judgment against the State."

The only person to raise the most important point pertaining to the need of having totally fearless and independent judges was M. Ananthasayanam Ayyangar. His words are so important they deserve to be quoted in full –

The Supreme Court is the watchdog of democracy. In an earlier part we enacted the Fundamental Rights and we are very anxious to provide the means by which these Fundamental rights could be guaranteed to the citizens of the Union. This is the institution which will preserve those rights and secure to every citizen the right[s] that have been given to him under the Constitution. **Therefore naturally this must be above all interference by the Executive.** The Supreme Court is the watchdog of democracy. It is the eye and the guardian of the citizen's rights. **Therefore at every stage, from the stage of appointment of the judges, their salaries and tenure of office, all these have to be regulated now so that the executive may have little or nothing to do with their functioning.** The provisions, that have been made, have been made with any eye towards that. If amendments are moved now each amendment must be judged by the test whether it secures the independence of the judiciary which this Chapter attempts to provide for.⁷⁷

Ayyangar's speech very clearly brings to the fore the absolute necessity of having totally independent and impartial judges. The point made by Ayyangar, if read with the concern expressed by other members who spoke before him, very clearly reveals that ensuring the independence of the judiciary was the principle objective that was intended to be achieved. Independence of the judiciary would be jeopardized if the political considerations started playing any role in the working of the judiciary. Political considerations could come in to influence the judiciary, first, at the stage of appointment (thus ensuring the appointment of judge(s) sympathetic to the political considerations of those appointing him); second, post-appointment but pre-retirement (by ensuring the compliance of the judges by regulating the age of retirement and the process of removal); and third, post-retirement (by regulating post-retirement prohibitions and entitlements). Ensuring that the first step, i.e. appointments, is totally insulated from any political consideration whatsoever was the principle objective that the Constituent Assembly was attempting to achieve. In fact Chief Justice of the Bombay High Court M. C. Chagla was able to secure a convention in Bombay that in matters of judicial appointment, "... initiative should come from the Chief Justice and not from the Government."⁷⁸ This objective behind securing this convention was exactly the same as the concerns expressed by the founding fathers, and as we would shortly note, by the first Chief Justice of India –

I told the Government that I knew that under the Constitution the only right that the Chief Justice of a High Court had was to be consulted with regard to the appointment of a judge, but **for the purpose of establishing a strong, independent-minded judiciary, it was necessary to ensure that there was no scope for the exercise of pressure or influence in the choice of candidates for a High Court judgeship.** I told them frankly that the Chief Justice was in a

⁷⁷ *Id.* at 252-53. Ayyangar opposed the participation of the Council of States in this process as well as the consultative involvement of the Chief Justice. *See also* KAMATH, *supra* note 39 at 321 where Kamath notes that Nani A. Palkhiwala had expressed a similar concern when he said that, "In the last analysis, the final guarantee of the citizen's rights is not the Constitution but the personality and intellectual integrity of the Supreme Court judges."

⁷⁸ M. C. CHAGLA, *ROSES IN DECEMBER* (hereinafter "CHAGLA") at 149. Chagla reports, "Another important convention I succeeded in persuading the Government to accept was that in the appointment of High Court Judges the initiative should come from the Chief Justice and not from the Government."

better position to resist and withstand pressures than was the Government. I agreed that Government was not bound to accept the recommendation of the Chief Justice. It could reject it, but in such cases it should ask the Chief Justice again to suggest other names.⁷⁹

This convention sometimes resulted in ‘serious confrontations’ between the Chief Justice (of the Bombay High Court) and the Chief Minister.⁸⁰ Interestingly it was Morarji Desai (a prominent politician who later became the Prime Minister of India) who raised an objection on the appointment of a lawyer as an Assistant Judge on the grounds of the ‘political complexion’ of the candidate.⁸¹ Though it does not take much imagination to understand why Desai objected to this particular candidate’s appointment on grounds of his ‘political complexion’.⁸² Chagla responded by stating that the only thing that mattered was the ‘ability and efficiency’ of the candidate to function as a judge. Appointment of judges having only a particular ‘political complexion’ was bound to seriously undermine the independence of the judiciary.⁸³ Eventually Desai yielded and the candidate was appointed who ‘turned out to be a very good judge’.⁸⁴

As said by Nehru, and several others that day, a judge has to be able to stand up the executive branch and the legislative branch. Declaring executive and legislative acts to be unconstitutional requires not only great learning and study but also requires courage and moral conviction. As founding fathers understood it, the moment any political considerations seep into the working of the judiciary this principle concern that they wished to address would be defeated. In fact, it might not be out of place to refer to the speech of the first Chief Justice of India, as made in the inaugural sitting of the Supreme Court on January 28th, 1950 where he ‘envisaged the Court playing an independent and impartial role in the life of the country and said –

The Supreme Court, an all-India Court will stand firm and aloof from party politics and political theories. It is unconcerned with the changes in the government. The Court stands to administer the law for the time being in force, has goodwill and sympathy for all, but is allied to none. Occupying that position, we hope and trust it will play a great part in the building up of the nation, and in stabilizing the roots of civilization which have twice been threatened and

⁷⁹ CHAGLA, *supra* note 78 at 149.

⁸⁰ *Id.* (“The acceptance of this convention sometimes led to serious confrontations between myself and Morarji Desai.”)

⁸¹ *Id.* at 150. (“I also had difficulty about the appointment of an Assistant Judge whom we wanted to recruit directly from the Bar. He was a member of the Hindu Mahasabha. Morarji wrote to me and said that he was surprised that I should recommend a man with such political complexion. I told him that I was not concerned with the politics of a member of the Bar. I was only concerned with his ability and efficiency to function as a judge.”)

⁸² ‘Hindu Mahasabha’ being a right leaning political organization and Desai being a Congressman was naturally opposed to this appointment of this particular candidate. It stands to reason that Desai might not have objected to the appointment of this candidate if the person would have been a Congressman like himself.

⁸³ CHAGLA, *supra* note 78 at 150-51. (“Further, it would seriously undermine the independence of the Bar if I were to insist that only those who belonged to a particular party or believed in a particular ideology could aspire to become judges. I said that every member of the Bar had every right to hold any political views he thought proper, provided they were not seditious or subversive. So long as I was satisfied that a judge did not carry his politics to the Bench, I should consider his political views as utterly irrelevant to his fitness as a judge.”)

⁸⁴ *Id.* at 151. (“After some correspondence, Morarji ultimately yielded, and appointed the man I had recommended who, I am very happy say, turned out to be a very good judge.”)

shaken by two world wars, and maintain the fundamental principles of justice which are the emblem of God.⁸⁵

As it would happen, their principle concern would be proved to be correct in a less than three decades where Prime Minister Indira Gandhi would have three senior judges (Justices Grover, Shelat and Hegde) of the Supreme Court superseded in order to appoint Justice Ray as Chief Justice of India only because the opinions delivered by these rulings of these judges ‘displeased the government’.⁸⁶ Chagla has also reported an incident that tends to give the impression that Nehru himself was not beyond the idea of interfering with the inner workings of the judiciary but backed off after a failed attempt.⁸⁷

In his long speech that was the last one made that day, Dr. Ambedkar rejected the idea of a ‘Concurrence Clause’ and some other suggestions and amendments that were made to ensure that the process of appointments is completely insulated from any political pressures and considerations.⁸⁸ However, before he rejected the idea of ‘Concurrence Clause’ he did in fact mention that, “There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself”⁸⁹ thus sharing in the concerns that were expressed

⁸⁵ See MOTILAL C. SETALVAD, MY LIFE – LAW AND OTHER THINGS (hereinafter “SETALVAD”) at 151. Setalvad was the first Attorney General for India appointed by the first Prime Minister Nehru but in his autobiography he observed (*id.* at 147) that in case of his appointment, “The final choice must have been that of Nehru and Patel.” He also reports and quotes extensively from his speech that he delivered in the inaugural sitting of the Supreme Court on January 28th, 1950 and the ‘learned reply’ of the Chief Justice of India.

⁸⁶ See *eg.* KAMATH, *supra* note 39 at 329. After the supersession of Justices Grover, Shelat and Hegde for delivering opinions in *Kesavananda Bharti v. State of Kerala*, (1973) 4 S.C.C. 225 (India) because their opinions were not in accordance with Prime Minister Indira Gandhi’s idea of a ‘committed judiciary’, Kamath notes, “... six leading jurists in Bombay, including former chief justice of India J. C. Shah, former attorney general M. C. Setalvad, former chief justice of Bombay M. C. Chagla, and [Nani A. Palkhiwala] issued a statement condemning the government. They said: “*It cannot be denied that the three judges were passed over only because their rulings displeased the government ... Thus, for the first time in court’s history, a Supreme Court judge’s rulings against the state are regarded as disqualifying him from the high office of the chief justice of India. This cannot but after judicial independence right from the Supreme Court to the high courts and the lower judiciary.*”” (Emphasis Added)

⁸⁷ CHAGLA, *supra* note 78 at 171. Chagla reports that Justice Kania (of the Federal Court, later Supreme Court, later Chief Justice of India), “... offered me a judgeship of the Federal Court before the Constitution came into force. He assured me that in the ordinary course I should succeed him as Chief Justice when he retired.” Chagla declined the offer because he thought he was ‘doing more useful work as Chief Justice of Bombay’. But later, after the untimely death of Justice Kania, the first Attorney General for India M. C. Setalvad ‘strongly pressed’ his claim with Prime Minister Nehru. Nothing became of this strongly pressed claim because, “It transpire[d] that the judges of the Supreme Court threatened to resign if the seniority rule was not followed, and the Government yielded to the threat. *Looking back, I am not sorry that this happened.*” (Emphasis Added)

⁸⁸ CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 37 at 258-260. Dr. Ambedkar divided the several ideas and concerns raised into three issues, “... [1] first proposal is that the Judges of the Supreme Court should be appointed with the concurrence of the Chief Justice ... [2] The other view is that appointments made by the President should be subject to the confirmation of two-thirds vote by Parliament; and [3] the third suggestion is that they should be appointed in consultation with the Council of States.”

⁸⁹ *Id.* at 258

by almost everyone who had spoken before him. Ambedkar was completely against vesting in the executive any absolute authority to appoint the judges and he gave the following reason to reject that position –

It seems to me in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the [United States], it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day.⁹⁰

He also rejected the idea of a ‘Concurrence Clause’ because that would result in the, “... possibility of the appointment being influenced by political pressures and political considerations.”⁹¹ However, in supporting the process that he had provided for in draft article 103, he gave a very strange explanation –

The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are *ex hypothesi*, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment.⁹²

The draft article that eventually became article 124 actually provided that the President would appoint the judges of the Supreme Court in, “... 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 ...”.⁹³ The above two quotes from Dr. Ambedkar’s speech present a very conflicting picture. If the President is required to act on the aid & advice of his Council in matters regarding appointment of judges⁹⁴ then it cannot be maintained that the process of appointments has been insulated from the potential interference of the executive branch, which everyone (and including Dr. Ambedkar) wants to avoid. If the President, considered above party politics (being the occupant of the high constitutional office), is required to act independent of his Council and in consultation with such judges of the Supreme Court and the High Courts as he thinks necessary, then the contemporary understanding of the Presidential Aid & Advice Clause (which maintains that Indian Presidency is a figurehead presidency with the real power being vested with the Council of Ministers and the Prime Ministers) is incorrect.⁹⁵ This is first logical error in Dr. Ambedkar’s

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ INDIA CONST. art. 124, § 2

⁹⁴ INDIA CONST. art. 74, § 1. (“There shall be a Council of Ministers with the Prime Minister at the head to aid and advice the President who shall, in the exercise of his functions, act in accordance with such advice...”)

⁹⁵ *See Id.* and *Shamsher Singh v. State of Punjab*, (1974) 2 S.C.C. 831 at 841. Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring) held (a separate concurring opinion was delivered by Justice Krishna Iyer (for himself, Justice Bhagwati concurring)), “It is a fundamental principle of English Constitutional Law that Ministers must accept responsibility for every executive act. In England the Sovereign never acts on his own responsibility. The power of the Sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. **This rule of English Constitutional law is incorporated in our Constitution.** The Indian Constitution envisages a Parliamentary and

long speech that rejected the idea of a ‘Concurrence Clause’ suggestion. The second quote from Dr. Ambedkar’s speech offers an inadequate explanation of the system that was put in place for appointment of judges of the Supreme Court.

ORIGINALIST CONCERNS ABOUT EXECUTIVE INTERFERENCE BY USING POST RETIREMENT ENTITLEMENTS AND RESTRICTIONS APPOINTMENT

The founding fathers were also aware that post-retirement benefits and entitlements of the judges could potentially be used as a carrot and a stick to influence the judicial behavior of the judges while they are on the bench. To provide a check against this, Prof. K. T. Shah had suggested that the pension of the judges should be similar to their salary while they are in office.⁹⁶ Furthering his principle concern (i.e. ensuring the independence of the judiciary) Prof. Shah also moved an amendment provided a post-retirement prohibition on a retired Supreme Court or High Court judge against holding ‘any executive office’.⁹⁷ The remarks made by Prof. Shah after introducing this amendment are helpful in determining what he meant by ‘independence of judiciary’ –

This follows the general principle I have been trying to lay down before the House, viz., ... **keeping the Judiciary completely out of any temptation, and contact with the executive or the legislative side.** Whether during his tenure of office, or in the ordinary course of judgeship or even on retirement, I would suggest that there should be a constitutional prohibition against his employment in any executive office, so that no temptation should be available to a judge for greater emoluments, or greater prestige which would in any way affect his independence as a judge.⁹⁸

The fact that post-retirement financial incentives could potentially be used to influence judicial behavior of a judge was also weighing on the mind of Dr. P. K. Sen who suggested that all the judges should be entitled to their pension notwithstanding when they leave the bench.⁹⁹ The principle concern expressed by Dr. Sen was remarkably similar to the concerns expressed by the members who were advocating for insulating the process of appointment from political influences. Sample Dr. Sen’s own words –

... I desire that the Judge who has retired will not be able to engage himself in any office of emolument under the Government in any other field of activity, and that is exceedingly

responsible form of Government at the Centre and in the States and not a Presidential form of Government.” (Emphasis Added)

⁹⁶ CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 37 at 236. (“... I would suggest that the pension for the judges should be not less than their own salary while in office, so that there is no temptation left to them either to seek any other employment, or carry on any other occupation or profession by which they eke out their existence. If the salary was sufficient to maintain them in a given standard of life, the pension also should be of a similar nature.”)

⁹⁷ *Id.* at 239. Prof. Shah’s amendment read – “Any person who has once been appointed as Judge of any High Court or Supreme Court shall be debarred from any executive office under the Government of India or under that of any unit, or, unless he has resigned in writing from his office as a judge, from being elected to either seat in either House of Parliament, or in any State Legislature.”

⁹⁸ *Id.* at 240.

⁹⁹ *Id.* at 238. Dr. Sen moved an amendment that called for the insertion of the following clause – “Provided further that where a Judge resigns his office on grounds of ill-health, he shall be entitled to pension as if he has continued in service until the age of sixty-five years.”

necessary, because **otherwise there is always the phenomenon of the Judge while in office aligning himself with a political party or with commercial caucuses, which is a very undesirable thing.** If all those safeguards are to be adopted, one of the most essential things to be done is also to give him the pension as if he had served up to the age of sixty-five, the utmost limit provided for by the Constitution.¹⁰⁰

A very similar concern was also expressed by K. Santhanam when he moved his amendment providing for certain post-retirement prohibitions.¹⁰¹ By giving the authority to check the kind of post-retirement assignments the judges could accept or not, Santhanam wanted to ensure that judges don't accept such assignments as might, "... militate against the independence of the Judge. Particularly, I want to prevent the Supreme Court Judges from taking office in private companies such as Chairman of the Board of Directors, etc. This is absolutely essential if we want to keep our judiciary **beyond all possibility of temptation.**"¹⁰²

Note that while suggesting measures to protect the integrity of the process of appointment (by keeping the process insulated from political considerations) and while suggesting measures to ensure independence of functioning of the judges while at the Bench (by keeping away the temptation of a post-retirement benefit), Prof. Shah is driven by only one concern. He wants to completely insulate the Supreme Court from the political pressures of the day so as to ensure complete independence to the judges of the Court. This is a concern that was completely shared by another member Jaspal Roy Kapoor, who expressed support from Prof. Shah's amendment providing for post-retirement prohibitions.¹⁰³ This concern was also shared by M. Ananthasayanam Ayyangar.¹⁰⁴ Naziruddin Ahmed, in his speech also voiced similar concerns –

To ask a Supreme Court Judge to take up any position of profit under the Government with the consent of the President would be to introduce a pernicious principle. **Judicial officers, especially of the highest rank should never be induced to accept any Government job.** When they retire, they should never like up Government for some sort of job after their judicial career is ended.¹⁰⁵

¹⁰⁰ *Id.* at 239.

¹⁰¹ *Id.* at 244. Santhanam suggested that, "... in clause (7) of article 103, after the words 'any authority' the words 'or shall hold any office of profit without the previous permission of the President' be inserted." Santhanam wanted the President to exercise a strong check on what kind of post-retirement assignments the judges could accept.

¹⁰² *Id.* at 244-25

¹⁰³ *Id.* at 240. Kapoor moved an amendment whereby – "No judge of Supreme Court shall be eligible for further office of profit either under the Government of India or under the Government of any State after he has ceased to hold his office." Kapoor was also in, "... agreement both with the principle and with the substance of Professor Shah's amendment..." but he found Shah's amendment to be a bit too harsh thus moved his own milder amendment. The principle concern expressed by Kapoor was, "Sir, the Professor has rightly said that in order to maintain the independence of the judiciary there should be no temptation before any Supreme Court Judge of the possibility of his being offered any office of profit after retirement."

¹⁰⁴ *Id.* at 253. ("I have seen and we have seen a number of cases where important Secretaries who were drawing Rs. 3000 to 4,000 while in office have helped some person in some industries and immediately they retired, they become Managers of this Institute or that Institute. I want to avoid this kind of selling away. *Particularly a judge cannot decide in favour of a particular person and then join his service.*") (Emphasis Added)

¹⁰⁵ *Id.* at 256.

The first Attorney General for India, Motilal C. Setalvad shared an exactly similar concern. In his autobiography he discusses the incident of post-retirement appointment of Justice Fazl Ali (who retired in May, 1952) as Governor of Assam.¹⁰⁶ Nobody was questioning the appointment of the recently retired judge as Governor of Assam but the question that was raised was one of ‘constitutional propriety’ i.e., “... whether a Judge of the Supreme Court should be appointed the executive head of a State. The separation of the judiciary and the executive at all levels was an old and healthy demand which had been widely accepted and given effect to in many parts of the country. Was not the appointment of a Supreme Court Judge to a Governorship a clear negation of that principle?”¹⁰⁷ Reflecting on this general principled objection and not on the specific merits of the Justice Fazl Ali’s post-retirement appointment (that was announced before the judge had even officially retired), Setalvad said –

I thought that there could be only one answer. Such appointments were also bound to impair the independence of the highest judiciary. Judges of the Supreme Court had from day to day to deal with the correctness and validity of the executive and legislative acts of the Union and State Governments and they would clearly be subject to executive influence if they looked forward after retirement to preferment as Governors or any other executive office. What, however, accentuated the impropriety of the action was the announcement of the appointment while Fazl Ali was still ... a judge.”¹⁰⁸

In his long concluding speech Dr. Ambedkar rejected most of the suggestions and amendments concerning post-retirement prohibitions and restrictions.¹⁰⁹ One the, “... question of acceptance of office by members of judiciary after retirement ...”¹¹⁰, Dr. Ambedkar used the analogy of the Federal Public Service Commission to make his point.¹¹¹ The members of judiciary, said Dr. Ambedkar, were not similar to the

¹⁰⁶ SETALVAD, *supra* note 85 at 190-91

¹⁰⁷ *Id.* at 190. It is important, even crucial, to note that Setalvad was raising a principled objection to Justice Fazl Ali’s post-retirement appointment. Examine his own words, “Justice Fazl Ali retired in May, 1952. He had made his mark as a very able Judge of the Federal and the Supreme Courts. He had a wonderful command over the English language. He had a deep knowledge of the fundamentals of the common law and equity, and the principal Indian Statutes. What really contributed to his success on the Bench was his unusually strong common sense which helped him to unravel legal problems with ease. His urbanity of manner and gentleness on the Bench made him a popular Judge. *Just before he retired, however, it was announced that he was to be appointed Governor of Assam. The appointment rightly invited considerable comment.* Fazl Ali was a very able man and quite worthy of a Governorship. But a question of constitutional propriety was raised: whether a Judge of the Supreme Court should be appointed the executive head of a State.”

¹⁰⁸ *Id.* at 190-91, 261. Later Setalvad would have the Law Commission of India examine the matter and would come up with a report addressing the question of post-retirement prohibitions. The report would opine that, “... the practice of Judges looking forward to or accepting employment under the Government after retirement was undesirable as it could affect the independence of the Judiciary.”

¹⁰⁹ CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 37 at 259-60

¹¹⁰ *Id.* at 259

¹¹¹ *Id.* (“There are two amendments on the point, one by Prof. Shah and the other by Shri Jaspat Roy Kapoor. ... I personally think that none of these amendments could be accepted. These amendments have been moved more or less on the basis of the provision that have been made in Draft Constitutions relating to the Public Service Commission.”)

members of the Federal Public Service Commission.¹¹² However, said Dr. Ambedkar, –

... the Public Service Commission is at all times engaged in deciding upon matters in which the Executive is vitally interested. **The judiciary decides cases in which the Government has, if at all, the remotest interest, in fact no interest at all. The judiciary is engaged in deciding the issue between citizens and very rarely between citizens and the Government.** Consequently the chances of influencing the conduct of a member of the judiciary by the Government are very remote, and my personal view, therefore, is that the provisions which are applied to the Federal Public Services Commission have no place so far as the judiciary is concerned.¹¹³

This again is a demonstrably flawed logic. During the debate, M. Ananthasayanam Ayyangar very clearly said that a completely independent judiciary was absolutely necessary if the protection of fundamental rights was to have any substance.¹¹⁴ He especially said that the judiciary must be insulated from ‘all interference by the Executive’.¹¹⁵ This view was shared by several members including Jawaharlal Nehru himself.¹¹⁶ The Fundamental Rights are enforceable against the State the definition of which includes both the Executive and Legislative branches of the government.¹¹⁷ Dr. Ambedkar’s insistence, especially the emphasised part in the quote above, is clearly based on flawed logic. If the Constitution is putting in place a system that provides for a machinery of constitutional courts for enforcement of Fundamental Rights against the State itself, it cannot be maintained that the judiciary would be engaged ‘very rarely’ in deciding cases between the citizens and the State. As it turned out, and when providing for a constitutional machinery for enforcement of constitutional rights against the State is fairly to be expected, the government is the biggest litigant in India.¹¹⁸ Dr. Ambedkar’s insistence, therefore, that there is no need to provide for adequate and suitable post-retirement prohibitions and entitlements to insulate the working of the judiciary from potential political influences that might jeopardize independence of the judiciary through the executive is incorrect.

¹¹² *Id.* (“But it seems to me that there is a fundamental difference between the members of the judiciary and the members of the Federal Public Service Commission”)

¹¹³ *Id.* (Emphasis Added)

¹¹⁴ *Id.* at 252-53

¹¹⁵ *Id.* at 253

¹¹⁶ *Id.* at 247

¹¹⁷ INDIA CONST. art. 12. (“In this part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”)

¹¹⁸ See eg. Dhananjay Mahapatra, *New Policy to halve the 2.1 crore govt. cases*, THE TIMES OF INDIA (June 23, 2010), <http://timesofindia.indiatimes.com/india/New-policy-to-halve-2-1-crore-govt-cases/articleshow/6080284.cms> (last visited May 12, 2015), Mahapatra reports that, “The Centre and states together account for 70% of the 3 crore cases pending in various courts in India – or over 2.1 crore cases, making the government the largest litigant in India”; *Government is the biggest litigant in the country: SC Judge*, INDIAN EXPRESS (February 12, 2015), <http://indianexpress.com/article/india/india-others/government-is-the-biggest-litigant-in-the-country-sc-judge/> (last visited May 12, 2015); *I-T department, biggest litigant in Govt: FM*, INDIA TODAY (July 24, 2010), <http://indiatoday.intoday.in/story/it-department,-biggest-litigant-in-govt-fm/1/106570.html> (last visited May 12, 2015);

Before moving on it is important to note the serious concern expressed by the Supreme Court over the independence of judicial tribunals on account of these tribunals being ‘susceptible to Government influences’.¹¹⁹ In *Madras Bar Association-I*¹²⁰ a unanimous 5 judge constitution bench of the Supreme Court declared Parts I-B and I-C of the Companies Act, 1956 as unconstitutional on the ground that the packing of the judicial tribunals with members of the civil service effectively amounts to transferring judicial functions to executive which goes against the doctrine of separation of powers.¹²¹ If the appointment of a civil servant to judicial tribunals is unacceptable because it gives the litigant public a legitimate cause to think that the members would not be independent and impartial because a civil servant will continue to act and behave like a civil servant while he is required to act and behave like a judge¹²² then any attempt by the executive branch to influence the judiciary by attempting to control either the process of appointments or through the carrot and stick of post-retirement prohibitions and entitlement is equally unacceptable.

ORIGINALIST CONCERNS ABOUT EXECUTIVE INTERFERENCE BY MANIPULATING TENURE AND REMOVAL PROCEDURES

Prof. K. T. Shah was of the view that in order to secure ‘absolute independence’ for the judges ‘any apprehension of being thrown out of their work by official or executive displeasure’ must be completely removed¹²³, a concern that turned out to be accurate very soon.¹²⁴ Accordingly he suggested that the judges should be given life tenure, like American and English judges.¹²⁵ Tajamul Hussain moved an amendment suggesting changes in the impeachment procedure.¹²⁶ While explaining the reasons for moving his amendment, Hussain expressed a concern remarkably similar to those expressed while suggesting methods to insulate the process of appointment from political influence and post-retirement prohibitions and entitlements –

In my opinion, Sir, to remove a judge on the recommendation of the Parliament would be wrong in principle. If the majority party in the parliament is not in favour of a particular judge, then removal will become very easy, and the **judge should always be above party**

¹¹⁹ See Khagesh Gautam, *The Curious Case of Tribunalization*, 47 VST (JOURNAL) 17 (2012) at 33.

¹²⁰ *Madras Bar Association v. Union of India*, (2010) 11 S.C.C. 1 (hereinafter “*Madras Bar Association*”)

¹²¹ *Id.* at 58. See also Gautam, *supra* note 119 at 36.

¹²² *Madras Bar Association*, *supra* note 120 at 62; Gautam, *supra* note 119 at 36

¹²³ CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 37 at 235. (“They should not, in any way be exposed to any apprehension of being thrown out of their work by official or executive displeasure.”).

¹²⁴ KAMATH, *supra* note 39 at 325-44.

¹²⁵ *Id.* (“I suggest, therefore, that the practice which exists in England, and which existed quite recently in U.S.A. of allowing judges to continue in their office during good behaviour, that is, practically for the rest of their lives, should be accepted.”)

¹²⁶ CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 37 at 243. Hussain proposed that the following clause be inserted – “A judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address supported by not less than two-thirds of the members present and voting has been presented to the President by both Houses of Parliament in the same session for such removal on the ground of proved misbehavior or incapacity.”

politics. He should be impartial and he should never look up to the Government of the day and he must carry on his work. It does not matter who is in power.¹²⁷

CONCLUSION

The phrase ‘independence of judiciary’ has meant different things to different people across different time zones. On May 24th, 1949, when the Constituent Assembly was discussing the Judges Appointment Clause, and attempting to put in place a method of appointing judges to the higher judiciary that was suitable to our conditions, the phrase ‘independence of judiciary’ was used to convey a very particular idea. An overwhelming majority of members who spoke that day used the phrase to convey the same idea – the judiciary had to be insulated from the political pressures and considerations. The process of appointment of judges had to be insulated from political considerations for otherwise it would amount to jeopardizing the independence of judiciary. Since the higher judiciary would be involved in enforcement of fundamental rights and therefore inevitably be involved in adjudicating disputes of a public nature where the State would be the respondent, it was deemed necessary that the judiciary be insulated from any political pressures it might be subjected to. Three modalities were suggested for the purpose – (a) a Concurrence Clause (making the advice of the Chief Justice of India binding); (b) a Confirmation Clause (appointment being subject to confirmation by Parliament); and (c) a Consultation Clause (making the appointing body consult the Chief Justice and other senior judges but not making their advice binding). The second solution, on lines with the American system, was rejected because it amounted to putting in place a judicial elections. The first solution, very strongly advocated by several key members was not accepted. Dr. Ambedkar, in his concluding speech gave two reasons for rejecting a Concurrence Clause solution (both of which, as this article has argued, were based on flawed logic). The third solution was therefore put in place. Contemporary practice after the Constitution came into force suggests that even though a Concurrence Clause was textually adopted, the practice always was to give strong weight to the judiciary’s views (as represented by the Chief Justice of India) on appointments. Contemporary practice also shows that attempts to ensure a compliant judiciary by ensuring the appointment of committed judiciary have been time and again made by the political class. This was exactly what the founding fathers had warned against and they explicitly articulated their reasons on May 24th, 1949. Our experience has shown that their concerns apprehended a situation that came true.

The NJAC system gives the political class full control over the process of appointments. Such a system of judicial appoints has been tried in the past and it failed to worked. Upstanding judges had to pay a huge price and the country as a whole suffered a huge loss by losing judicial talent on the bench of the Supreme Court. Not only does the NJAC system goes against the wishes of the founding fathers, it also fails to learn the very important lesson from the apprehensions that the founding fathers had expressed, more than six decades earlier. As it was said on May 24th, 1949, and again and again by men of highest legal learning and character such as Justice H. R. Khanna, Justice M. C. Chagla and Nani A. Palkhiwala, a system of appointments of judges that gives the political class complete control of the appointments process is not suitable for Indian conditions. To borrow from Dr.

¹²⁷ *Id.* at 243. (Emphasis Added)

Ambedkar, the sense of responsibility has not grown to the extent in our country so as to completely trust the political class with an issue as sensitive as appointment of judges to the higher judiciary. May be in future a day will come when such a system will work. But that day has not come yet.