



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Judicial Appointments, Collegium System, and Unresolved Constitutional Enigmas in India: Proposing an ‘Emergency Collegium’ and the ‘Automatic Elevation Alternative’

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Received 27 June 2021; Accepted 16 July 2021; Published 20 July 2021

From the constitutional history of Judicial Appointments in India, it is well-known that the manner and procedure in which Judicial Appointments happen today, is starkly different from the original Judicial Appointments procedure contemplated under the Indian Constitution. Originally, Judicial Appointments to the Higher Judiciary (including appointments to the Supreme Court of India under Article 124 of the Constitution) were primarily the task of the Executive, where the Judiciary had no real say in the appointments to Higher Judiciary. This dynamic saw a stark shift after the Second Judges’ Case and subsequent precedents, which tilted the power dynamics around Judicial Appointments to Higher Judiciary (i.e. Supreme Court and various High Courts) in favour of the Supreme Court, and also established a ‘Collegium System’ to govern such Judicial Appointments. However, a Constitutional Enigma revolving around Judicial Appointments still persists. Should the Supreme Court be bereaved of most of its sitting Judges and the total strength of the court reduce to less than five sitting Judges, the Collegium propounded by the Third Judges’ Case would come to a collapse. If such a scenario arises in wake of calamities such as the devastating effects of the ongoing COVID-19 pandemic, how would Judicial Appointments to the Higher Judiciary be made? In this article, we seek to address this Constitutional Enigma, which is an unlikely but not an impossible or too remote a reality. We highlight the lacunae in the present judicially created law concerning Judicial Appointments. Moving forward, we propose the idea of an “Emergency Collegium” and lay out its modalities. Subsequently, we highlight an alternative of ‘automatic elevation’ of pan-India senior-most High Court Judges and also forward criticisms against such an alternative.

Finally, we conclude by highlighting the necessity for a constitutional amendment or a 'Fifth Judges' Case' to address this unresolved Constitutional Enigma.

Keywords: *automatic elevation, appointment, collegium, constitution.*

INTRODUCTION

The present times which are enveloped by the COVID-19 pandemic have been grim. The administration of justice in India has been continuously disrupted by the devastating impact of the pandemic.¹ Especially, during the second wave of COVID-19 in India,² fresh news kept emerging as to India's loss of the members of its honourable judiciary.³ We pray for the well-being of the Judges who are giving their fullest efforts to sustain India's backlogged legal system, despite the pandemic's impact on their mental and physical health.⁴

We do not wish to act as doomsayers, in the already dystopian circumstances we find ourselves in. However, an important constitutional question comes to the mind of lawyers: What would happen if the present Collegium System for judicial appointments (as created and outlined by various judicial precedents laid down by Constitutional Benches of the Supreme Court of India), ceases to exist? The hypothetical posed in the foregoing question is not too remote from the current circumstances, especially given that many Judges of the Supreme

¹ Pradeep Thakur, 'Covid hits justice delivery: Backlog of cases rises 19% in a year, crosses 4.4 crore' (*Times of India*, 16 April 2021) <<https://timesofindia.indiatimes.com/india/covid-hits-justice-delivery-backlog-of-cases-rises-19-in-a-year-crosses-4-4-crore/articleshow/82094172.cms>> accessed 10 June 2021

² Shruti Menon, 'India Covid: How bad is the second wave?' (*BBC News*, 7 May 2021) <<https://www.bbc.com/news/56987209>> accessed 10 June 2021

³ Anand Mohan J, 'NGT Registrar General Ashu Garg, who fought for cause of young lawyers, dies of Covid' (*Indian Express*, 7 May 2021) <<https://indianexpress.com/article/cities/delhi/ngt-registrar-general-ashu-garg-dies-of-covid-19-7305436/>> accessed 10 June 2021; Press Trust of India, 'Allahabad High Court Judge dies of COVID-19' (*India TV*, 28 April 2021) <<https://www.indiatvnews.com/news/india/allahabad-high-court-judge-dies-covid-19-701231>> accessed 10 June 2021; 'Anantapur judge dies of COVID at 51' (*The Hindu*, 5 May 2021) <<https://www.thehindu.com/news/national/andhra-pradesh/anantapur-judge-dies-of-covid-at-51/article34486275.ece>> accessed 10 June 2021; 'Supreme Court judge, Justice Mohan M Shantanagoudar passes away' (*Bar & Bench*, 25 April 2021) <<https://www.barandbench.com/news/litigation/supreme-court-judge-justice-mohan-m-shantanagoudar-passes-away>> accessed 10 June 2021

⁴ 'Addressing the Mental Health and Well-Being of Judges and Court Employees' (*National Center for State Courts*, 16 January 2021) <https://www.ncsc.org/_data/assets/pdf_file/0023/59603/Addressing-the-Mental-Health-and-Well-being-of-Judges-and-Court-Employees-Final.pdf> accessed 10 June 2021

Court of India have recently tested COVID-19 positive. The age groups in which Judges of Higher Judiciary (i.e. the Supreme Court and various High Courts) belong to has been characterized as more prone to the virus' harms.⁵ COVID-19 has proven that our constitutional arrangements must be prepared for a contingency where the Supreme Court's Collegium System ceases to exist and in extremely rare scenarios, a possibility of there being no sitting Supreme Court Judge.

Specifically, we seek to address how, in such a contingency, the vacancies to the Supreme Court would be filled. Since there would be no existing Collegium at that juncture, how will the process for judicial appointments be adapted? Our Constitution⁶ has not envisaged such an exigency, and in our view, a constitutional amendment is vital to redressing this lacuna.

In this article, we undertake our analysis in two parts. First, we consider how the initial judicial appointments may realistically occur to form a Collegium at the Supreme Court, in the lack of a provision that addresses this contingency. We highlight the institutional problems that may arise in this scenario. Second, we propose what we believe should become the contents of a constitutional amendment in this regard, while leaving the exact modalities open for conversation. In this segment, we shall discuss our idea of an 'Emergency Collegium'. Lastly, we shall briefly analyse whether the automatic elevation of pan-India senior-most High Court Judges (as per the All India High Court Judges Seniority List) to fill the vacancies in the Supreme Court could alternatively address the lacuna in the law governing judicial appointments.

THE LAW GOVERNING JUDICIAL APPOINTMENTS

The Indian Constitution in both its original text and as modified subsequently by various constitutional amendments itself does not provide for a 'Collegium System'. The Collegium is the creation of the judiciary through various precedents by Constitutional Benches of the

⁵ National Center for Immunization and Respiratory Diseases, Division of Viral Diseases (USA), 'Older Adults' (Center for Disease Control and Prevention, 9 June 2021) <<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>> accessed 11 June 2021

⁶ Constitution of India

Supreme Court.⁷ The four primary precedents which are relevant for understanding the judicial evolution of the Collegium System are *S.P. Gupta v Union of India* (hereinafter 'First Judges' Case),⁸ *Supreme Court Advocates-on-Record Association v Union of India* (1993) (hereinafter 'Second Judges' Case),⁹ *Re: Special Reference 1 of 1998* (hereinafter 'Third Judges' Case),¹⁰ and *Supreme Court Advocates-on-Record Association and Anr v Union of India* (2016) (hereinafter 'Fourth Judges' Case' or 'NJAC Case'),¹¹ respectively.

The current constitutional position and history of the Collegium System has been previously covered extensively by various authors.¹² Therefore, it is not necessary to discuss an extensive account of the Collegium's history and working. However, a few crucial points on the current position of law following the Nine-Judge Constitutional Bench decision in the Second Judges' Case¹³ (which gave the Supreme Court superiority over the Executive in judicial appointments) and the Nine-Judge Constitution Bench decision in the Third Judges' Case¹⁴ (which outlined and created the Collegium System), merit mention. There are three constitutional requirements to be met in order to make a judicial appointment at the Supreme Court:

- A. First, the 'Collegium' of the Supreme Court headed by the Chief Justice of India (hereinafter 'CJI') has to make a *recommendation* of candidates suitable for elevation to the President of India. In practice, the Supreme Court Collegium consults the Collegiums of the High Courts (composed of the three senior-most

⁷ *Lok Prahari through its General Secretary SN Shukla IAS (Retd) v Union of India and Others* 2021 SCC OnLine 333 [44]

⁸ *SP Gupta v Union of India* (1982) 2 SCR 365 [31] (P N Bhagwati, J)

⁹ *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441

¹⁰ *Re: Special Reference 1 of 1998* (1998) 7 SCC 739

¹¹ *Supreme Court Advocates-on-Record Association & Anr v Union of India* (2016) 5 SCC 1

¹² Arghya Sengupta and Ritwika Sharma, *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018); Nick Robinson, 'The Structure and Functioning of the Supreme Court of India' in Gerald Rosenberg, Sudhir Krishnaswamy and Shishir Bail (eds), *Qualified Hope: The Indian Supreme Court and Progressive Social Change* (Cambridge University Press 2019); Eishan Mehta, 'Rethinking the Collegium's Working Procedure for An Independent Judiciary' (*Law School Policy Review & Kautilya Society*, 14 March 2021) <<https://lawschoolpolicyreview.com/2021/03/14/rethinking-the-collegiums-working-procedure-for-a-truly-independent-judiciary/>> accessed 11 June 2021

¹³ *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441

¹⁴ *Re: Special Reference 1 of 1998* (1998) 7 SCC 739

- Judges) before recommending these names.¹⁵ This Collegium of the Supreme Court of India shall comprise the CJI and four senior-most sitting Supreme Court Judges. It must also include a successor CJI (i.e., the CJI Designate)¹⁶, if their appointment is confirmed by the President and should the outgoing CJI later call for a Collegium meeting prior to their retirement.¹⁷
- B. Second, the President has to give their assent, sign and issue a notification confirming the appointment of the candidates recommended by the Supreme Court Collegium.
- C. Third, in exceptional cases, the President can return the recommendations for reconsideration by the Collegium stating cogent reasons for the rejection of the recommended candidate. However, when there is a *unanimous* reiteration of the recommended candidate's appointment by the CJI and the Collegium, the President shall be bound by the Collegium's decision and give effect to the recommendation.¹⁸

As noted by Satish¹⁹, the judiciary has consistently held that the President is a figurehead, who is actually bound by the aid and advice of the Council of Ministers of the Union Government. Thus, any actions taken by the President with regard to judicial appointments will presumably be both based on and reflective of the opinion formed by the Council of Ministers about the name of candidates for judicial appointments (which is forwarded to the President by the Supreme Court Collegium).

The reason why the above-mentioned requirements have been judicially read into Article 124 by the Supreme Court, is to uphold the principles of 'rule of law', 'separation of powers' and 'independence of the judiciary', which are all interlinked and form a part of the Constitution's basic structure. As stated by S.R. Pandian, J. in the Second Judges' Case, the principle of

¹⁵ *Lok Prahari through its General Secretary S.N. Shukla IAS (Retd) v Union of India & Others* 2021 SCC OnLine 333 [21]

¹⁶ *Re: Special Reference 1 of 1998* (1998) 7 SCC 739

¹⁷ V Venkatesan, 'What Ails the Supreme Court's Collegium?' (*The Wire*, 12 April 2021)

<<https://thewire.in/law/what-ails-the-supreme-courts-collegium>> accessed 12 June 2021.

¹⁸ *Re: Special Reference 1 of 1998* (1998) 7 SCC 739

¹⁹ Mrinal Satish, 'Discretionary Powers of the President under the Indian Constitution' (2000) 12 NLSI Rev 49, 59

independence of the judiciary must be kept in mind while interpreting the relevant provisions of the Constitution.²⁰ Pandian, J. further states that independence of the judiciary is “*vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community.*”²¹ The Second Judges’ Case has been subject to extreme scholarly criticism,²² with some authors remarking that it “*virtually rewrote the constitution*” by substituting ‘consultation’ of the CJI to mean ‘concurrence’ for the purposes of judicial appointments to the Higher Judiciary (i.e. the Supreme Court and the High Courts) and amounted to a form of “*judicial legislation*”.²³ Consequently, a significant segment of the Indian legal community believes that the position on judicial appointments taken by the Supreme Court in its Seven-Judge Bench Constitution Bench decision in the First Judges’ Case was the correct position and true to the procedure of judicial appointments provided under the Indian Constitution (irrespective of being viewed from a textualist, originalist, or purposive lens of interpretation).

Notably, the principles of the independence of the judiciary had been reiterated in the Fourth Judges’ Case, where by a 4:1 majority (with the dissent of Jasti Chelameswar, J.), the Supreme Court had struck down the Ninety-Ninth Constitutional Amendment (2014) to the Indian Constitution which introduced the National Judicial Appointments Commission as unconstitutional.²⁴ This continued the judicially created governing law which brought the Collegium System into existence. Importantly, the majority of the Supreme Court’s Constitution Bench in the Fourth Judges’ Case had held that ‘primacy of judiciary in judicial appointments’ is also a part of the ‘basic structure’ of the Indian Constitution,²⁵ which has been

²⁰ *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441 (S.R. Pandian, J.)

²¹ *Ibid*

²² Arghya Sengupta, ‘Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry’ (2011-2012) 5 NALSAR Indian J Const L 99, 123-126; Abhishek Mishra, ‘Collegium and Appointment of Judges at SC: Has SC become Imperium in Imperio’ (2017) 6(2) WBNUJS International Journal of Law and Policy Review 177; Prannv Dhawan, ‘“Reform That You May Preserve”: Rethinking the Judicial Appointments Conundrum’ (2020) 9 NALSAR Indian J Const L 186

²³ Dipen Sabharwal & Pranav Sharma, ‘Special Reference Regarding Appointment of Judges: An Exercise in Futility?’ (1999) 11 NLSI Rev 138, 143

²⁴ *Supreme Court* (n 20)

²⁵ *Supreme Court Advocates-on-Record Association & Anr v Union of India* (2016) 5 SCC 1; Rehan Abeyratne, ‘Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective’ (2017) 49 George Washington International Law Review 569, 570

critiqued by Chelameswar, J. in his dissenting opinion²⁶ and later, by scholars such as Abeyratne²⁷ and Parthasarthy²⁸ to be an incorrect position of law (especially, on the ground of lacking any precedential support from the Second Judges' Case). Contrarily, Sengupta argues that the Fourth Judges' Case did not hold judicial primacy to be a part of the Indian Constitution's basic structure.²⁹ Much like the Second Judges' Case and the Third Judges' Case, the succeeding Fourth Judges' Case too, has been subject to further heavy criticism by scholars.³⁰

THE CONSTITUTIONAL ENIGMA: UNRESOLVED LACUNAS IN THE JUDICIAL APPOINTMENTS SYSTEM

The total strength of the sitting judges at the Supreme Court can decline over time due to superannuation (retirement), voluntary resignation, removal by impeachment procedure provided under the Constitution or death in office of a judge. Yet, this has never resulted in a situation where not even five sitting judges remain at the Supreme Court. Thus, the above-mentioned constitutional pre-requisites which make the current governing law on judicial appointments to the Supreme Court do not consider a calamitous scenario where the number of sitting Supreme Court Judges decreases below five judges, and consequently, the Collegium itself ceases to exist. This is a crucial constitutional enigma.

²⁶ *Supreme Court Advocates-on-Record Association and Anr v Union of India* (2016) 5 SCC 1 (Jasti Chelameswar, J. dissenting)

²⁷ Rehan Abeyratne, 'Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective' (2017) 49 *George Washington International Law Review* 569, 612

²⁸ Suhrit Parthasarthy, 'Debating the NJAC: Why Judicial Primacy in Appointments is Not Part of the Basic Structure' (*Indian Constitutional Law and Philosophy*, 20 July 2015)

<<https://indconlawphil.wordpress.com/2015/07/20/debating-the-njac-why-judicial-primacy-in-appointments-is-not-part-of-the-basic-structure-guest-post/>> 13 June 2021

²⁹ Arghya Sengupta, 'Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment' (2015) 50(48) *Economic and Political Weekly* <<https://www.epw.in/journal/2015/48/appointments-judges/judicial-primacy-and-basic-structure.html>> accessed 13 June 2021

³⁰ Dhruva Gandhi, 'Fourth Judges' Case A Structure Without A Foundation' (2016) 5(1) *WBNUJS International Journal of Law and Policy Review* 83; Arghya Sengupta, 'Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment' (2015) 50(48) *Economic and Political Weekly* <<https://www.epw.in/journal/2015/48/appointments-judges/judicial-primacy-and-basic-structure.html>> accessed 13 June 2021; Rehan Abeyratne, 'Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective' (2017) 49 *George Washington International Law Review* 569; Surabhi Vats, 'The NJAC Judgment: Establishing Judicial Supremacy', (2018) 4(5) *International Journal of Legal Developments and Allied Issues* 382

If, hypothetically, such a contingency transpired now, the President would be left with two alternatives. First, to appoint new Judges of the Supreme Court themselves, without being able to consult the Collegium, which ceases to exist in such a scenario. In such a case, only the CJI and three senior-most judges would be consulted. Here, the President would still have failed to consult the *Supreme Court* Collegium of five senior-most judges, which the text of Article 124 of the Constitution *mandatorily* requires (especially as it has been read in the above decisions). Second, if due to these provisions, appointing Judges in this manner is not allowed, then the only option which remains is that Supreme Court remains empty, and the administration of justice comes to a halt. That is, unless the Constitution is amended by the Parliament expeditiously to respond to such a crisis at that juncture, but we will come to this later.

However, we think that it is unsound that the process of judicial appointments would come to a halt in the absence of a constitutional amendment. In administrative law, the idea of 'necessity' has been well-settled, which states that if there are two alternatives: one where there is impropriety in decision-making processes, and one where the process itself becomes halted, then the first outcome *must* be preferred.³¹ Even other natural justice principles, such as the right to be heard, have been read flexibly to accommodate emergency situations where heeding them becomes impossible.³²

Though we do not claim that administrative law governs judicial appointments (that is beyond the scope of this article), the point we are trying to make is that this general regard for exigent situations or necessities would likely guide the permissibility of executive discretion in judicial appointments. A process where the President (under whom executive power of the Union vests)³³ appoints judges without consulting the Supreme Court certainly shows impropriety. Yet, it is better than having *no process* at all. To be clear, once even a single Supreme Court Judge is appointed, this Judge (who would automatically become the CJI as the senior-most Judge), would have to be consulted for all subsequent appointments to the Supreme Court.

³¹ Prithviraj Senthil Nathan, 'India: MHA Order Dated March 29, 2020: Proportionality and Necessity Arguments' (Mondaq, 11 May 2020) <<https://www.mondaq.com/india/constitutional-administrative-law/932272/mha-order-dated-march-29-2020-proportionality-and-necessity-arguments>> accessed 14 June 2021

³² *Swadeshi Cotton Mills v Union of India* AIR 1981 SC 818

³³ Constitution of India, art 53(1)

Nonetheless, such a response is hardly ideal, given that after all, it would give a *carte blanche* to the executive for appointing a CJI. If such a CJI is amenable³⁴ to executive's wishes, then subsequent appointments favourable to the executive would not be surprising. Thus, we will now proceed to our proposals for addressing these lacunas.

EMERGENCY COLLEGIUM: A PATH TOWARDS AVOIDING IMPROPRIETY

As discussed, there need to be at least five Judges for a functional Collegium. In this section, we propose certain ways in which five Judges could be appointed to constitute the Collegium, in a contingency where there is no sitting Supreme Court Judge. Needless to say, these ideas would require reform, as they are not permitted by any existing law. What we propose here need not necessarily fruition into a constitutional amendment. Instead, akin to most of the Collegium's modalities, it may very well emerge from a judgement of the Supreme Court, a potential *Fifth Judges' Case* (though it is unclear whether if and when such an occasion would arrive). That apart, the following are the main candidates that we think would have unique contributions to offer in an 'Emergency' Collegium: a retired CJI and recently retired Supreme Court Judges.

A former CJI would have valuable inputs to offer in terms of judicial appointments, since they would have accumulated administrative experience from the highest judicial post in the country and would have participated in previous Collegium sittings. The former CJI's learnings from these processes would be of immense use in guiding evaluations of candidates for the highest court's judgeship at a time of exigency. At the same time, it may be prudent to require the participation of the four most recently retired Supreme Court Judges (in reverse chronological order). This is since the most recently retired Judges would be the most familiar and well-versed with the *current* circumstances and happenstances at the higher judiciary. In other words, in practice, these Judges would know more as to the workings of the bar and bench as it would be then, compared to a retired CJI.

³⁴ 'Supersede controversy: Appointment of Chief Justice of India' (*India Today*, 1 May 2015) <<https://www.indiatoday.in/magazine/indiascope/story/19770228-supersede-controversy-appointment-of-chief-justice-of-india-818734-2015-03-09>> accessed 15 June 2021

For the same reason, it could be best to approach retired CJIs in terms of the recency of their retirements, especially since this would create objectivity as to who holds the post. Yet, it might be wise to remove from this list those Judges who, for instance, accepted a Rajya Sabha seat after demitting their judicial office,³⁵ since that would result in a clear breach of separation of powers. In any case, now, a Five-Judge Emergency Collegium would have been constituted.

MODALITIES OF THE EMERGENCY COLLEGIUM

In all of this, two questions naturally arise. First, should the retired CJI and the retired Supreme Court Judges perform any 'judicial' functions, apart from the administrative duty to appoint judges at the court? Second, should the tenure of these retired Judges automatically expire once at least five new Judges have been appointed? For both these questions, we think what is of essence is *urgency*. Let us start with the second question. We think it would be prudent for the Emergency Collegium to continue its tenure not only until at least five new judges are appointed, but rather until at least *seventeen* new judges have been appointed (at least half of the court's 34 vacancies have been filled). The reason for this is simple: our hypothetical imagines a time of extreme distress and exigency. At such a juncture, it may be in public interest to ensure that the composition of the Collegium, and consequently, its dynamic and working, remains stable, until the court is in a position where it can bear its most urgent or core functions satisfactorily (hence our cap of seventeen Judges). On an average, the tenure of the Supreme Court Judges tends to be for a period of three to five years.³⁶ Thus, once seventeen Judges are appointed, the court will secure the capacity to sustain both its work and future appointments satisfactorily. Additionally, it has been recently empirically established that the Supreme Court is overloaded with work, creating time deficiency for its Judges.³⁷

³⁵ Arvind Kurian Abraham, 'Sealed Cover MP: The Silence of Parliamentarian Ranjan Gogoi' (*The Wire*, 20 March 2021) <<https://thewire.in/law/sealed-cover-mp-the-silence-of-parliamentarian-ranjan-gogoi>> accessed 17 June 2021

³⁶ Shruti Rajagopalan, 'The elephant in the courtroom' (*Live Mint*, 23 January 2018) <<https://www.livemint.com/Opinion/tWZ7dVM2608hVfdOyvjP0J/The-elephant-in-the-courtroom.html>> accessed 17 June 2021; Ragin Pallav Tripathy and Gaurav Rai, 'Judicial Tenure: An Empirical Appraisal of Incumbency of Supreme Court Judges' in Shruti Vidyasagar, Harish Narasappa and Ramya Sridhar Tirumalai (eds), *Approaches to Justice in India: A Report by DAKSH* (Eastern Book Publishing 2017) 209

³⁷ Rahul Hemrajani and Himanshu Agarwal, 'A temporal analysis of the Supreme Court of India's workload' (2019) 3(2) *Indian Law Review* 125

Therefore, given the fact that vacancies greatly increase pending cases and administrative work for the Supreme Court, appointment of Judges to fill vacancies amounting to at least fifty-percent of its capacity is necessary.

As for the first question, the answer would depend on how expeditiously the appointment of new Judges can be ensured. If enough appointments can be secured promptly, there may not be a need for the retired Judges to fill in. Further, the priority for these Judges ought to be filling in the court's vacancies on an urgent basis, a task which they could not fully devote themselves to if judicial work is also imposed upon them. Instead, as explored by Shrivastava and Shrivastava³⁸ (albeit, in context of 'Ad-Hoc' Judge appointments to the High Courts), the appointment of 'Ad-Hoc' Judges to the Supreme Court may be considered by the Emergency Collegium, specifically in order to address the *judicial backlog* of the court for a certain period. Even now, the CJI is empowered to appoint Ad-Hoc Judges to the Supreme Court under Article 127 of the Constitution, which is a power that may fall to the head of this Emergency Collegium in the interim (in the manner that we have proposed, the head would be a former CJI).

In the context of ensuring this process is prompt, given the exigent nature of the appointments to the Supreme Court, it would certainly help to create a requirement for the President to give effect to the Emergency Collegium's recommendations promptly. By 'prompt', we imagine not the period of two or three months that the process may take in ordinary times³⁹ (in the best-case scenario). Instead, the Emergency Collegium could be required to send its recommendations for the first seven or more Judges within the first three weeks of its constitution. The Emergency Collegium could send numerous names, so that even in case the President objects, it would be likely that at least seven names are accepted immediately. Then, in case the President objects, an additional week could be set as the limit for the Emergency

³⁸ Anujay Shrivastava and Abhijeet Shrivastava, 'The Peculiar Introduction of 'Collegium Approvals' in 'Ad-Hoc' High Court Judge Appointments' (*Law School Policy Review & Kautilya Law Society*, 27 April 2021) <<https://lawschoolpolicyreview.com/2021/04/27/the-peculiar-introduction-of-collegium-approvals-in-ad-hoc-high-court-judge-appointments/>> accessed 18 June 2021

³⁹ *Lok Prahari Through its General Secretary S.N. Shukla IAS (Retd.) v Union of India and Others* 2021 SCC OnLine 333

Collegium to (unanimously) reiterate the same names if it deems this fit, to which the President would then immediately give effect.

A similar timeline could be followed for each cycle of further appointments (including the appointment of Ad-Hoc Judges, if needed). The tenure of the Emergency Collegium could be set as 6 months, or due for expiration when at least seventeen Judges have been appointed, whichever is earlier. This is also with the assumption that at least five Judges would have been appointed when six (6) months have passed (it would be a truly horrendous feat if this does not happen, perhaps hinting at the collapse of Indian democracy), since there would otherwise be no Five-Judge Collegium to substitute the Emergency Collegium's working. To clarify, this would mean that there would be no concurrent Collegium at the Supreme Court as is formed in ordinary times, and consequently, that the new five senior-most Judges of the court would not constitute a Collegium until the Emergency Collegium dissolves.

Finally, in terms of who decides the composition of the Emergency Collegium, there are two possibilities. First, as we have indicated, if the reverse chronological order of the Judges' retirement results in their candidature to this Collegium, then determining its names will not be difficult. Only the consent of these Judges, once asked to join the Emergency Collegium, would be a precondition to their candidature. Second, at the same time, it might help to have a few requirements for an individual to be eligible to join the Emergency Collegium. For instance, those individuals with post-retirement jobs that place them in executive biases, or those who cross a certain age gap (say, seventy-five (75) years) may be automatically removed from this list. In this way, an objective metric (recency of retirement) for their candidature would be retained, while also maintaining some minimum standards.

IS 'AUTOMATIC ELEVATION' OF SITTING HIGH COURT JUDGES A VIABLE ALTERNATIVE?

Another alternative, or an addition to these proposals could be that the senior-most Judges of the High Courts across India automatically become elevated to the Supreme Court in the event of such an exigency, based on the "all India High Court Judges' seniority list". We define this

as the ‘Automatic Elevation Alternative’ (*hereinafter* AEA).⁴⁰ The all India High Court Judges’ seniority list is, as evident from its title, a list maintained by the Supreme Court and the Union Government, which sequentially mentions the pan-India seniority of all High Court Judges in the order of seniority. While this list is updated every month owing to vacancies created at High Court due to reasons such as superannuation (retirement) of High Court Judges, the public can access the all India High Court Judges’ list and keep a track of the senior-most judges of various High Courts (which is provided in the Indian Union Law Ministry’s monthly released list of all High Court Judges in India).⁴¹ The AEA alternative completely restricts the discretion of the Executive in judicial appointments at the top Indian Court and may be seen as a good reform in times of exigencies. However, the AEA is subject to two major criticisms.

First, a fair criticism against AEA which may arise is that an automatic elevation based on the All India High Court Judges’ seniority list could create disproportionate representations at the top court. One, given the fact that many senior Judges are often elevated together to the same principal High Court, their seniorities would be adjacent to each another, and if both such Judges are amongst the senior-most judges in this list, certain High Courts are bound to have greater representation than other High Courts, merely because two or more of a High Court’s judges share adjacent seniority. Two, most High Courts are equally lacking in a proportionate representation of various members of the legal community,⁴² especially in terms of gender representation.⁴³ Moreover, given the fact that majority of the senior-most High Court Judges

⁴⁰ Pallavi Saluja, ‘The next judges of the Supreme Court: Which High Court Chief Justices are most likely to be elevated? Will we see a woman CJI this decade?’ (*Bar & Bench*, 18 July 2020)

<<https://www.barandbench.com/columns/the-next-judges-of-the-supreme-court-which-high-court-chief-justices-are-most-likely-to-be-elevated-will-we-see-a-woman-cji-this-decade>> accessed 19 June 2021

⁴¹ Government of India, Ministry of Law and Justice, ‘List of High Court Judges’ (*National Portal of India*, 27 June 2021) <<https://doj.gov.in/appointment-of-judges/list-high-court-judges>> accessed 19 June 2021

⁴² Avani Bansal, ‘Millions are waiting for a foot in the door: A case for a representative Judiciary in India’ (*Bar & Bench*, 16 May 2021) <<https://www.barandbench.com/columns/millions-are-waiting-for-a-foot-in-the-door-a-case-for-a-representative-judiciary-in-india>> accessed 19 June 2021

⁴³ Aparna Chandra and others, ‘From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court’ (2018) 51 *Verfassung und Recht in Übersee* 273; Aishwarya Chouhan, ‘Structural and Discretionary Bias: Appointment of Female Judges in India’ (2020) 21 *Georgetown Journal of Gender and the Law* 725; Shruti Sundar Ray, ‘The Higher Judiciary’s Gender Representation Problem’ (*Article 14*, 31 August 2020) <<https://www.article-14.com/post/the-higher-judiciary-s-gender-representation-problem>> accessed 19 June 2021; Kanu Sarda, ‘Gender skew back as High Courts across India are led by male judges’ (*The New Indian Express*, 14 December 2020) <<https://www.newindianexpress.com/nation/2020/dec/14/gender-skew-back-as-high-courts-across-india-are-led-by-male-judges-2235875.html>> accessed 19 June 2021; Anujay Shrivastava, ‘On Senior

are male, AEA has potential to not only broaden the disproportionate representation of women and LGBTQIA+ individuals, it also has a potential to result in perpetuating “male dominant collegiums”.⁴⁴ Three, it has been empirically established that professional diversity in judicial appointments has consistently deteriorated, since the early days of the Supreme Court during the newly established independent India to today.⁴⁵

Second, as held in the Fourth Judges’ Case, involvement of the Executive in judicial appointments is also a basic feature of our Constitution.⁴⁶ Consequently, while some individuals may prefer the AEA as a better alternative owing to the curtailment of Executive’s involvement in judicial appointments (especially in such exigencies which have never been faced by India), such a process (when incorporated through a constitutional amendment) could face challenge in writ litigation on grounds of violating the well-established basic structure doctrine (ignoring the principles such as of ‘rule of law’, ‘separation of powers’ and ‘democracy’). Importantly, the strongest ground in a basic structure doctrine challenge to this alternative of making judicial appointments in such exigencies, would be ignorance of the mandatory constitutional ‘role of executive in judicial appointments’ as reflected from the procedure enshrined under Article 124 of the Constitution.⁴⁷

CONCLUDING REMARKS

Which alternatives amongst an Emergency Collegium, AEA or a new unexplored alternative would be better to address this constitutional enigma, would be a matter of personal opinion for members of the legal community and members of the elected legislature, governance or public policy. This is going to be a herculean task, where a great amount of disagreement is very likely to be expected amongst Indian citizens. At the end of the day, we leave this

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⁴⁴ Aishwarya Chouhan, ‘Structural and Discretionary Bias: Appointment of Female Judges in India’ (2020) 21 *Georgetown Journal of Gender and the Law* 725, 752-53

⁴⁵ Rangin Tripathy and Soumendhra Dhane, ‘An Empirical Assessment of the Collegium’s Impact on Composition of the Indian Supreme Court’ 32 *NLSI Rev* (2020) 118, 134

⁴⁶ *Supreme Court Advocates-on-Record Association & Anr v Union of India* (2016) 5 SCC 1 (AK Goel, J)

⁴⁷ Aparna Chandra, William H J Hubbard and Sital Kalantri, ‘From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court’ (2018) 51 *Verfassung und Recht in Übersee* 273

conversation open to various members of both the legal community and members of the elected legislature, governance or public policy, to discuss and take it further from here. We truly hope that the day never comes where the need for such modifications ever arises. Nonetheless, one can't help but consider it wise to be prepared.

The state of constitutionalism in India has already been in a steep decline in the past decade, and such an exigency would hold immense potential for exploitation by an Executive which has a history of being known to abuse (un)constitutional loopholes for its interests.⁴⁸ That coupled with COVID-19, justice administration in India has suffered many blows in recent times. Our thoughts and prayers remain with the Judges, the Bar, and all the members of the Indian legal fraternity, that are relenting to sustain the system, notwithstanding the crisis. We hope that the Parliament takes cognizance of the constitutional enigma highlighted in this article and devises the best constitutional amendment necessary to resolve the existing lacunae in law governing judicial appointments. In this regard, a careful study of comparative jurisprudence on judicial appointments from other countries could be beneficial to devising an ideal solution.⁴⁹ Alternatively, we hope that the Supreme Court takes the initiative to deliberate on this constitutional enigma and devise a way forward, culminating in a potential *Fifth Judges' Case*.

⁴⁸ Gautam Bhatia, 'A Constitutionalism without the Court' (*Indian Constitutional Law and Philosophy*, 1 August 2020) <<https://indconlawphil.wordpress.com/2020/08/01/iclp-turns-7-a-constitutionalism-without-the-court/>> accessed 21 June 2021; 'Supersede controversy: Appointment of Chief Justice of India' (*India Today*, 1 May 2015) <<https://www.indiatoday.in/magazine/indiascope/story/19770228-supersede-controversy-appointment-of-chief-justice-of-india-818734-2015-03-09>> accessed 21 June 2021

⁴⁹ Nick Robinson, 'Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts' [2013] 61(1) *the American Journal of Comparative Law* 173-208; Ran Hirschl, 'The Rise of Comparative Constitutional Law: Thoughts on Substance and Method' (2008) 2 *NALSAR Indian J Const L* 12