Constitutional Morality and Judicial Appointments in the Higher Judiciary

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Abstract

The constitutional structure of this great country is sui generis and the tool to meet the ends of, values and rights cherished in the preamble. It has stood the test of time and has been very capable and reaffirming in achieving the ends to a great extent. But we still have miles to go. The constitution makers believed that what is sine qua non for the subsistence of the system is independent judiciary. Ergo, greater the stress on its need less it is. The central edifice of the concept of judicial independence is the appointments to the higher judiciary.

Keywords: *Constitutional Morality, Judicial Pronouncements, Judicial Appointments*

I. Introduction

Constitutional morality primarily means utmost loyalty and commitment to the fundamental principles of constitution.[2] One must understand, it is not following the black letter of law blindly but achieving the utilitarian motives by perfect harmony between individual and societal interests.[3]

The usage of word morality has been seldom in our constitution. In fact it has been used only on four occasions; two times in article 19, one time in article 25 and once in article 26. The phrase has become common as of late especially in judgement of surrogacy, speech, sexual orientation etc. Still it was not a common term in constituent assembly debates and discussions. Of the few mentions of it, one reference appears more important than others; it was made

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[2] Constituent Assembly Debates – *Vol. VIII*, THE LOK SABHA OF INDIA (05/07/2021 01:38 PM), http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C25051949.html.

[3] UPENDRA BAXI & N.M. TRIPATHI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES; (1st ed. 1985).

by Dr. Ambedkar in his speech on 4th November, 1948. Dr. Bhimrao Ambedkar's assessment of this topic was that constitutional morality exists when there is perfect harmony between the government institutions and the people of India; as well as when there is non-violent resolution of disputes between the institutions and the people. Dr. Ambedkar was of the view that constitutional morality is necessary to exist universally because even a powerful minority can upset the established order.

According to Grote as quoted by Dr. Ambedkar, constitutional morality means respect for authority and at the same time people must be conferred rights, such as right of free speech and actions, shielded from non-arbitrary, unjust and vague decisions. Grote further went on to elaborate the concept of constitutional morality in the terms that constitutional morality is of 2 types. Firstly where the constitutional morality is confined to the black letter of constitution and hence the rights and values not mentioned in constitution did not find place, in this form of constitutional morality. He put up an example for the same in the form of right of non-discrimination which if not mentioned in some constitution it was not supposed to be part of the constitutional morality of the country.

The second form of constitutional morality is where there is prominence given to the conventions and protocols by black letter of law conferred discretionary powers or remained silent thus laying the scope variations in black letter of law. The purpose of Grote's History of Greece was to protect the democracy of Greece from the strong criticism of the critiques of highest repute including Plato and Thucydides. He wanted to explain why the constitutional morality has found strong basis of existence in Greek's democracy. Furthermore, he said that the constitutional morality was met with some success on two occasions firstly in aristocratic combination of liberty and self-restraint practiced in the British regime in 1688 and second in American Constitution. This was sure to worry the geniuses of Dr. Ambedkar stature who felt that the experiment of constitutional morality in India could fail because it was a new concept and it may take some time to absorb in country with such wide diversity.[4]

[4] Archit Shukla, *Doctrine of Constitutional Morality*, PRO BONO INDIA (15/06/2022 08:38 AM),

These fears of the Dr. Ambedkar proved to be real and tangible. The concept of constitutional morality was doomed to fail, the same moment when the second judges case, over ruled the verdict given by Hon'ble Justice P. N. Bhagwati in first judges case[5], if it was not for the resilience of Indian democracy. The first judge's case lay unequivocally and clearly manifested the intention of constitution makers in following words: "All the organs of government have equal say in the judicial appointments to higher judiciary. There is no question of primacy of one over the other. Had the constitution makers intended primacy to Chief Justice of India in judicial appointments they would have used the word concurrence and not consultation."

He further elaborated and said "though there might be instances where bending the constitution might seem justified, but that would be rewriting the constitution in the garb of interpretation." One thing is for sure from this, what can be impeccable process of appointment, is debatable? But the constitution makers did not intend the power to be vested in any one organ.

II. Historical Background of Judicial System and Judicial Appointments in India

The Indian Judicial system is one of the oldest judicial systems. There is no other judiciary which can claim to be structured and ancient than Indian one. The Indian judicial systems and mechanism of appointments can broadly be divided into 3 periods, chronologically divided as follows:

A. The Ancient Period

In ancient India the rule of law was implemented with full force and vigour. No one was above the law. Even the king was considered subject to the principles of law. Violations of which even by the king were grounds of removal. The highest standards of integrity, honesty, independence were maintained which are not sidelined, hitherto.

The Indian judiciary was subject to hierarchical divisions with the chief justice (Praadvivakka) at the top of affairs. The appointments were made by the King. The decrees and orders made by junior courts were subject to appeal before courts

https://www.probonoindia.in/IndianSociety/Paper/136_ARCHIT%20Doctrine%20of%20Constitutional%20Morality.pdf.

[5] S.P. Gupta v. Union of India, AIR 1982, SC 149.

placed higher in hierarchy. Moreover the disputes were settled in accordance with the principles of natural justice similar to the principles governing court proceedings today.[6]

B. The Medieval Period

After the end of the rule of King Harsha, there is period of enigma of which not much is known, mainly because of the fact that the empire after King Harsha disintegrated into many small kingdoms. But there is substantial evidence to corroborate the fact that the judicial system which existed for thousands of years and had rooted itself in the Indian sub-continent, continued to exist. This is all the more evident from the fact that commentaries like Mitakshara and Shukraneeti Sar had P.A.N. India presence and authority. Then came the Mughal regime, which brought with it new system of judicial administration and traditions which were implemented uniformly throughout the kingdom.

The values, rights and principles including that of justice that we so much cherish today reached its epitome during Mughal Empire. The standards were set high by none other than Prophet Mohammad himself. No one was above law, it is proved by the fact Qadi was subject to law and not the King. The traditions that we cherish reached the high during the first four Caliphs. The Qadi was appointed by the Caliph Umar. It is reported of him that caliph had a personal case against a Jewish national. The case was reported to Qadi appointed as aforesaid, which when turned up for hearing the caliph appeared. On seeing Caliph the Qadi stood up out of sheer respect and honour. This act of Qadi was considered unpardonable and was considered sufficient of his unbecoming to hold that post. Such was the standard of integrity and honesty maintained at that time.

C. The Present Period

At the top of the present day judicial system is the Supreme Court and the state judiciary is headed by High Court which administers both the state law and union law within the local territory of the state.[7] Like during Maurya Empire there is

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[6] Justice S.S.Dhavan, The *Indian Judicial System: A Historical Survey*, ALLAHABAD HIGH COURT (13/06/2022 04:03 PM), http://www.allahabadhighcourt.in/event/TheIndianJudicialSystem_SSDhavan.pdf

[7] M.P.Singh, *Securing The Independence Of The Judiciary-The Indian Experience*, MCKINNEY LAW (21/05/2022 12:08 PM), https://Mckinneylaw.Iu.Edu/Iiclr/Pdf/Vol10p245.Pdf.

hierarchical arrangement of Courts in every district in the order starting with Judicial Magistrate Second class, Judicial Magistrate First class, Chief Judicial Magistrate, Assistant District and Sessions Judge, Additional District and Sessions Judge and District and Sessions Judge as its head, which works under superintendence and control of the respective High Court.

Now coming on to the appointment of judges in present time with sharp focus on historical development of the judicial appointment process in India. One of the most discussed, debated and analyzed topic of judicial system in India is the judicial appointments to the higher judiciary. The judicial appointments to higher judiciary were in nascent stage but the ground work was laid down in Government of India Act, 1915. The provisions regarding appointment of judges in higher judiciary were laid down in the chapter IX of the Act. The power to appointment was conferred solely on Her Majesty. The willingness of the Secretary of State in Council was required to set, amend or vary the salary, allowance, pensions etc. of the Judges. The eligibility conditions for the appointment of judges to the high court were set out as follows:

1. Lawyer of England or Ireland or a Member of the Faculty of Advocates in Scotland of not less than five years' experience, or
2. An Indian Civil Servant of not less than ten years' experience and having for at least three years served as, or exercised the power of, a District Judge, or
3. A person having held judicial office not inferior to that of a Subordinate Judge, or a Judge of a Small Cause Court, for a period of not less than five years, or
4. A person who has been an advocate of a High Court for a period of not less than ten years.

The eligibility conditions set out in the Act paved the way for the appointment of judges from Indian origin; particularly the last two conditions. Further the Act established a quota for the appointment to take place form bar and the appointment to take place from the Indian Civil Service was set out at two third and one third, respectively. The tenure of the Judges was for term of Her Majesty's pleasure. The high praises through the self-proclamations by British jurist for having implemented a judiciary in its colony on terms of British

judiciary was subjected to strong condemnation on the grounds such as the tenure was for Her Majesty's pleasure, the pays and perks decided by executive and even on the ground that executive had a quota in appointments.

The faults of the Government of India Act, 1915 were sought to be rectified by the Government of India Act, 1935. First of all it proposed to establish Federal Courts in Addition to the High Court. The eligibility for the post judge in these courts was that the Advocates practicing in England, India, Ireland and Scotland including Indian Civil Servants and the judicial officers in British India were eligible and given the opportunity of being appointed in one these courts. Also it changed the tenure from being during His Majesty's Pleasure to 60 years and moreover it changed the functionary who could change the pays and perks from Secretary to State in Council to His Majesty himself.

III. Constitutional Morality in Judicial Appointments as Envisioned by Constituent Assembly

Coming over to the constitutional morality in judicial appointment process to higher judiciary as viewed by the constitution makers, the underlining feature of pre independence period was that the appointment should have been made by the executive and there was no checks and balance. We needed a process which incorporated checks and balance. With this in mind Sapru Committee was established in 1945 which recommended that, "the appointments of Justices to the Supreme Court and High Court should be done by the President in consultation with the Chief Justice of India and in appointment to the High Court in consultation with the Chief Justice of that High Court and the head of the state concerned."

Once the framing of constitution started in the constituent assembly the Union Constitution Committee established an *ad hoc* committee to consider the issue. The adhoc committee recommended that, "the power judicial appointments to the supreme court should not be vested with any one organ of government." For the aforementioned purpose the committee recommended two ways for the appointment. One, that the President must in consultation with the Chief Justice of India, except in case of appointment to the office of chief justice nominate the name to, seven to eleven member committee consisting Chief Justices of High Court, Members of Parliament and Law officers of the Union. The other method

was that the committee will recommend three names to the President who in consultation with the Chief Justice appoints one of them.

Sir B. N. Rau, the constitutional advisor to the constituent assembly submitted the memorandum of Union Constitution partly agreeing with the recommendation of the ad hoc committee that the appointment to the post of Supreme Court Judge must be made by the President which must be approved by not less than two thirds of the majority of Council of State. Moving ahead on the similar line the Union Constitution Committee also departed from the recommendations of the *ad hoc* committee established for the same purpose and held that the appointment to the office of Supreme Court Judge must be made by the President in consultation with Chief Justice of India and such other judges of Supreme Court and High Court as may be required for the purpose. [8]

The Provincial Constitution Committee which made recommendations for the appointments to the post of High Court Judge recommended that the appointments should be made by the President in consultation with the Chief Justice of that high court and Governor of the respective state. The recommendations by the Union Constitution committee and provincial constitution committee were accepted by the drafting committee and were incorporated in draft constitution.

It was Justice H. J. Kania, Chief Justice of Federal Court among others who expressed and gave first opinion on the provisions of the judicial appointments to the higher judiciary in draft constitution. He expressed reservations about the draft that there are some strong chances of interference of the provincial politics in the appointment process. He further made recommendation the appointments made to the high court must be made in direct consultation of the Chief Justice and Governor thus narrowing the chances of involvement of state home ministry in the entire process and thus excluding the interference of domestic politics.

Soon after that there was a meeting held between the Chief Justices of the Federal Court and High Court which thoroughly examined the process of appointments to the judiciary and prepared a memorandum suggesting changes to the above mentioned provisions. They suggested that such appointments should be made after consultation with the Chief Justice of that High Court and the Governor of

[8] Constituent Assembly Debates - *Volume VIII*, THE LOK SABHA OF INDIA (18/04/2022 3:24 PM), http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C26051949.html.

respective state which must be subjected to the concurrence of the Chief Justice of India before the appointment by the President. This according to them was important to exclude local politics in judicial appointments and ensure judicial independence.

They further went on to recommend that the appointments to the judgeship must be barred for the persons having held the post of cabinet minister in state government. But all in vain as nothing received the approval of the draft constitution committee despite similar recommendations from other places of high repute as well. But this like every other decision of draft committee was reasoned out before rejection on the grounds that the judicial appointments must be subject to wider consultations and the once merit has been recognized nothing should stand in way to ensure predominance of merit in such appointments. Moreover the recommendations of the memorandum were rejected as they failed to provide contingency plan in case of difference in opinion between Chief Justice of High Court and Chief Justice of India.

There were some last minutes changes proposed by drafting committee which suggested that the appointments to the office of Supreme Court Judge should be made in accordance with the Instrument of Instruction. The Instructions mandated that the appointment must be made after and upon the advice of the Advisory board which shall consider the names given to it by President after consultation with all the judges of Supreme Court and all Chief Justices of High Court. The board then shall discuss the names proposed by the President in consultation with the Chiefs of High Court and Supreme Court Judges. The advice of Board will partially be bounding as President should make the appointments in accordance with the advice. However, the President to strike out certain names as well but in that case the President needed to file a memorandum in Parliament stating the grounds taken into consideration rejecting the candidature. As far as regards the constitution of the board is concerned it will consist of not less than 15 members of Parliament. However, the idea never fructify as the last minute recommendation were dropped before being finalized by the draft committee itself.

All the debates, discussions and deliberations which were made in the constituent assembly regarding the process of appointment either directly or through the various committees could be subsumed into 3 to 4 broad ideas. First and foremost idea considered was that judicial appointment to higher judiciary should be made

by the President without any restrictions and limitations to such power. The second procedure considered was that can the appointments be made by the President subject to the approval of Council of state? There was another question, which rose in the assembly that, should the appointments made by President be subjected to be made after having concurrence with the Chief Justice of India? Yet one other proposition was that whether the mode of appointment should be made subject to recommendations of the Judicial Appointment Commission. The recommendations by the commission may be made to president either on the names suggested to it by President in consultation with Chief Justice of India or the it may propose the names to President who would make the appointments subsequently.

Coming on to the grounds of decision, which guided the final accepted set of procedure to be followed or raison d'etre of the process adopted. All these modes of selection were rejected on one ground or other. Taking them one by one;

1. The first process of appointment discussed was conferring all powers on the President similar to that of U.K. This was rejected on grounds that the Indian democracy is not as mature as U.K.'s and such experiment is most likely to fail.

2. The next idea which was considered is the idea of approval by the legislature. It was considered to be too cumbersome and likely to bring in political considerations and politics in the appointment process. This could seriously damage the independence of judiciary and ergo liable to be rejected.

3. Subsequently the use of word concurrence was put on the table. The opinion of the Chairman of the drafting committee Dr. B. R. Ambedkar was that there is no question that the Chief Justice of India is man of highest repute and status but he is a human being with all the prejudices, biases and may also err. Moreover it was said that by using the word concurrence we will give the power to Chief Justice of India which we are not willing to give to the President or the Government of the day.

4. Yet another point to be considered was that whether the appointments should be made in accordance of recommendation of the Judicial Appointment Commission. This was rejected on the grounds that it will make the process cumbersome and bring in immature politics.

So the Constitution adopted a middle way by selecting the Judges in a way that there was no legislative interference and no supremacy to anyone organ and at the same time the process was not cumbersome and there was little to no politics involved.

IV. Essentials of Constitutional Morality and the Collegium System

As we all know that the concept of Constitutional Morality was propounded by the British Classist George Grote in nineteenth century in his book titled as "A history of Greece".[9] In the words of Grote there are two essentials of the concept, without which it cannot exist and the entire concept of constitutional morality in that jurisdiction can be considered to be a sham or hoax.

Such is the importance of these concepts that nothing even close to constitutional morality in real sense can exist without the two. One might be curious what they may be? They are: Plurality and Self-restraint. The next part of this research paper will primarily focus on these two concepts and how they relate, affect and change the entire paradigm of the judicial appointments to higher judiciary and how the absence of these two nullify the presence of constitutional morality in judicial appointments. Explaining the concept of constitutional morality, I will also touch up upon the constitutional roots of the judicial appointments when I talk about right to equality as a fundamental right and judicial activism.

A. Plurality and Judicial Appointments

Once the collegium system was established there were high hopes and equally high anticipation that how will this experiment never heard or practiced off before will turn out to be? Nevertheless I don't think that anyone disputes that this system is not impeccable but at the same time it is also true that to a great extend the system has ensured judicial independence (beside other positive attributes) though coupled with other independent factors the state of affairs such as pendency of cases alone is pitiful. The later point has been reiterated in the famous case of Lok Prahari v/s Union of India. In this case the Supreme Court went one

[9] Nusrat, *Constitution, Constitutionalism and Constitutional Morality*, THE LEGAL SERVICE INDIA (07/06/2022 01:18 PM), http://www.legalserviceindia.com/legal/article-4939-constitution-constitutionalism-and-constitutional-morality-in-india.html.

step ahead and held that *ad hoc* judges should be appointed to deal with the high pendency of cases.

Another such major lacuna, shortcoming or pitfall whatever one may call, of the present system applicable in the judicial appointments to the

Higher judiciary is that the there is a lack of plurality and the right equality is not applicable is strict sense of the term. Right to equality, as guaranteed by part III of Indian Constitution, from article 14 to 18 and even finding its place in preamble in form "Equality of status and Opportunity" is missing in the present system of appointments.

First things first, talking about plurality. As talked about earlier the judicial appointments were not really able to keep up high hopes. [10]This is all the more evident and relevant in the present context of Plurality. Plurality refers to the multifarious nature of the masses, especially in India, which must find a role in judicial appointments. To begin with the His Excellency Hon'ble President of India Mr. K. R. Narayanan while signing the warrant of appointment in November 1998, felt it important that the certain sections of society are underrepresented in some similar words such as: "The Collegium system must ensure representation of under or unprivileged sections of the society as the S.C.'s and S.T.'s in particular constitute about 25% of the population and are grossly under represented. Vacancies and under-representation of the feeble sections of society is not unison with constitutional mandate especially in light of humongous pendency of cases."

After the views were conveyed to the Chief Justice of India through proper channel and it saw the light of day it was defended by the hon'ble C.J.I. on similar terms as follows:

"The constitutional mandate warrants the requirement of merit to be predominant consideration in respect of all the other formalities and concepts and we have strictly and sincerely adhered to the principle enshrined in our constitution. An

[10] Dr. Anurag deep, Sambhavi Mishra, *Judicial appointments in India and the NJAC Judgement: Formal Victory or Real Defeat*, MANUPATRA (05/06/2022 11:35 AM), http://Docs.Manupatra.In/Newsline/Articles/Upload/88BE1E36-4D87-4B24-9C29D565D0D368A0.%20 Judicial%20Appointment%20in%20India%20_Civil.Pdf.

error in appointment will be more dangerous than vacancy as such". The Chief Justice of India said that they choose quality over quantity for more reasons than one.

The recommendations of the President were taken positively, by and large. Some claimed that President, wanted reservation for S.C. and S.T. community, in garb of under representation, in appointments of judges to courts of record. All such claims were strongly rebutted and didn't find any ground amongst Indian critiques. However nobody spoke of against merit but some spoke that the under-representation must be tackled with, immediately.

Alongside the comments and national sentiment, theory of judicial appointment to higher judiciary also supported the remarks of President for plurality and diversity of India as it must find proportionate maybe not exact but somewhat adequate representations to the S.C., S.T. and women to begin with.

The fact of the matter is that in democracy such as Indian one, has three organs broadly speaking and each organ must have representations from all corners of our great country. The executive and legislature follows the principle of plurality leaving a question mark for the same, when it comes to the Judiciary. The idea that judiciary only adjudicates the dispute between two parties and does not litigate is not well founded in present days where it not only adjudicates but also litigates both law and policy. Such decisions when made by the judiciary it must also be subjected to same democratic norms as the other two organs of the government are made bound to follow. The democracy mandates and manifest on several occasions that if not same but similar principles must be made applicable to judiciary. For this underlying purpose it is necessary that the judiciary should follow them but must be elected similarly. But what is important is representation. One of the brightest scholars covering the domain of representation of diversity in judiciary, Shetreet's reference and his perception on this is of utmost importance. He said:

"The judicial appointments must be reflective of the social, geographical, communal and other diversity to ensure that various sections of the society find fair and adequate representation. The idea of fair representation is not something vague and finds rationality in existence on more than one ground as judiciary is also an organ of the government and not merely an adjudicatory body. The fair reflection must also be ensured for the purpose of upholding and maintaining the

somewhat fragile public confidence and moreover on the basis of requirement of balanced panel for socially sensitive issue. Furthermore he said that the judges represent their culture, value system and background inter alia. This becomes crucial when the panel decides an issue and thus the judiciary reflects narrower set of fundamental principles and values, if it is not diverse."

There is legitimate basis for the inclusion of the diversity or fair reflection principle as it is also required for the non-violent settlement of issues or one the ideals of constitutional morality as reflected by the Dr. Ambedkar as well.[11] These are not just views of a person but reflection of broad ideas of number of scholars and the international bodies.

One such reference can be taken of the Singhvi and Montreal declarations on independence of judiciary as the same held that judiciary must be reflective of the society it represents and thus the diversity in judicial appointments is a must.

The right to equality is provided in part-III of the constitution from article 14 to 18 have an underlying purpose as provided in preamble, also is to ensure that, equality of status and opportunity is guaranteed to one and all. With this aim in mind the article 14 lays down that there will be equality before law and there shall be equal protection of laws. Equality before law is negative in essence as it means that everyone will be treated equally and no one is above the law. On the other hand the concept of equal protection of the law, provided equals will be treated equally and unequals will be treated unequally and thus the state is enabled to make laws for special treatment of unequals to make the disadvantaged equal to the advantaged lot.

It is in the later part of article 14 it is said that the equality before the laws enables for reservation and the other provisions for upliftment of the poor and weak, though it is directly provided in article 15(4) and article 16(4).[12] These provisions envision and enable a judiciary that is reflective of the plurality of the nation. Ergo

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[11] Hrishika Jain, *Towards A Model Of Judicial Review For Collegium Appointments: The Need For A Fourth Judges' Case?*, MANUPATRA (8/06/2022 02:28 PM) , http://docs.manupatra.in/newsline/articles/Upload/5A8B9F32-62A5-4CF1-B663-AFBAF25D7CCB.pdf.

[12] K. V. Vishwanathan, *Judicial Review: Activism and over reach*, NATIONAL JUDICIAL ACADEMY INDIA (15/06/2022 10:58 AM), https://nja.gov.in/Concluded_Programmes/2021-22/P-1287_PPTs/1.Judicial%20review%20-%20Activism%20and%20Overreach.pdf.

it is the interface between judiciary and constitutional guarantee of equality and thus the judicial appointment process is deep rooted in our constitutional framework. The right to equality from article 14 to 18 provided, for representation of masses and plurality and at the same time does not affect independence of judiciary. Such is the geniuses of our constitutional law maker.

Moreover, there is a heavy responsibility upon the judiciary to ensue inter-alia that it is inclusive and even though they may be self-appointed it represents masses and is not a closed group of people appointing and delegating their duties arbitrarily and on vague principles. If it can take the burden of appointing, it must take responsibility and act with highest standards of conduct and behavior. It should also envision and plan for the achievement of the social revolution as envisioned by the constitution makers through task of appointment at hand.

B. Interface of Self-restraint and Judicial Activism

Recent times have seen a tremendous increase of demand at the hands of judiciary to protect and provide human rights to the poor, deprived, exploited and weaker sections of society. Such demand when met, by the judiciary is termed by those who criticize it, as judicial activism. The heart of the matter underlying criticism is that the function assigned to legislature and power given to the executive is exercised by the judiciary and is thus running the nation.[13]

But this argument does not have a strong basis because we must understand when it is that the judiciary performs such function or exercises such power? When does, the need to perform such duties arise? It is when the legislature fails to meet the constitutional goals within such time which will be considered reasonable by any standards or when the need is so grave and requiring dire action on the part of legislature that overlooking it would mean loss of life or property of temporal nature which cannot be suitably compensated or made good the loss suffered.

Moreover, such power is also exercised when the executive performs its duty callously or with indifference towards consequence or when the executive is insensitive to the needs of the society at large or even of one individual.

In such circumstances, can we expect the judiciary to be mute spectator or let me put it in another way, suppose a hypothetical situation, were a person is missing

[13] S. Sahay, *Judicial accountability: Issues*, SAGE PUBLICATION (20/05/2022 1:15 PM), https://journals.sagepub.com/doi/abs/10.1177/0019556119990311.

for last seven years and no one, who would have heard from him had he been alive has not heard from him. His wife is in a destitute state, lacking means of subsistence and she needs death certificate for various reasons to name one let's say to receive pension of his husband. The district authorities are denying issuing the certificate in absence of proof of death or directing it to issued by other districts authority. What can a person in such circumstance do, besides approaching the court? And if court in such situation issues the direction to provide the petitioner with certificate of death, is it activism or just exercising the power conferred on it by the constitution. There can be far graver the circumstance and greater the needs of society. In the above example the power is exercised by the judiciary which was in essence to be exercised by the executive. But executive failed to do the same and thus violated the constitutional mandate and judiciary as a watchful guardian of constitution made the executive of day to do only what they are supposed to do. Needless to say that such exercise of power would not have arisen, had the executive had not acted indifferently to the needs of the victim.

This is not only morally and legally correct on the part of the judiciary to do so but also required and need of the hour to avoid and prevent despotism on one hand and violent uprising on the other. Need not to mention that such state of affairs will uproot the constitutionalism and the rule of law itself. Thus Judicial Activism is both justified and required for our existence, as one nation.

However this is also equally true that if judicial activism is one side of the coin and we flip it, the other side bears the name of judicial restraint upon it. The judge while performing his functions should not delve upon the goals enshrined in preamble to such an extent that he goes on to achieve them on his own with no bounds whatsoever. What I mean to say is that it should not be judicial adventurism which it court pursue. There is an invisible line which shall not be crossed as there is always possibility of judiciary creating rights which cannot be enforced i.e. without remedy for them. There are limits to what judiciary can achieve and judicial process must act within bounds and exercise self-restraint.

The doctrine of separation of power is also important to mention here. It is part of the basic structure of constitution and need be arise it can rescue from the maize of judicial activism and judicial restraint. Reference of Montesquieu is worth mentioning here he said that, "The separation of power is important as without it there can be no liberty. The division of powers between legislature and judiciary

is of utmost importance because if power is given to the judge to legislate then he can be an oppressor and there will be rule of arbitrariness".

On the basis of these arguments it can be said that judicial restraint is very much required. Though it can be justified at the time of second judge's case but it will not be right to say that it will always be right to have of judicial appointments through collegium system only. No doubt independence of judiciary is important it can be secured through other ways as well. After all it is not India alone which can boast of independent judiciary. In fact when independent and strong judicial system are talked about the names that pop up are U.S., U.K., Germany etc and none of them have collegium system to ensure independence.

C. Access to Justice

Justice and law are closely related to one other. Such is the co-relation between them that one cannot exist without other. According to some scholars the relation between the two is that of a pen and ink. One won't work without other. They went one step ahead and said that the law without justice is blind and justice without law is lame. Law, justice and judicial appointments are intrinsically related to each other.

Having said that, time and context is right to mention the maxim of Ubi jus ibi remedium which means "where there is a right, there is a remedy". This maxim is the foundation of the entire procedural law and justice delivery system let alone the concept of access to justice. With access to justice the first thing that crops in mind is the means to avail justice. But it not such a limited concept, it is much more than that. It include the number of courts, quality of lawyers, independent judiciary, public interest litigation, factors affecting access and list goes on.

According to Prof. Upendra Baxi access to justice signifies ability to participate in judicial proceeding. Such ability may be restricted by any means or hurdles. This is if we touch the subject superficially, but when we go in depth we realize that the concept is broader and even brushes upon the distinction between absolute justice and ideal justice. What they mean is justice for one may be its denial to

another. This is corroborated by almost universally accepted claim, that no right is absolute.[14]

Having applied and provided absolute justice for everyone would mean giving equal treatment to everyone even the unequals or where the freedom of speech and expression is put to no limits even where it injures others. But that can't be done. Every wish of everyone cannot be fulfilled. Every right of each individual cannot be guaranteed fully. There has to be restriction which are just, fair and reasonable. This is the difference between absolute and ideal justice.

The process of judicial appointment and concept of access to justice are connected to one other from different viewpoints, perspectives and inter-linkages. Firstly talking about access to justice in traditional sense the access to justice is linked with judicial appointments as the process of appointment of judges will provide both quality and quantity of judges which is first thing when someone wants access to justice or start of for the relief through the justice delivery system.[15] Then it is linked to judicial appointments intrinsically as the judicial appointments are a means and ends to ensure judicial independence. If the selections are made on merit, they are representative of diversity in society, constitutes impartial and unbiased minds with impeccable character then the access to justice will be easy, less cumbersome, cost effective, speedier among other things and moreover it will increase the faith of masses in judicial system.

Furthermore the concept of access to justice is linked with the judicial appointment mechanism in this way as well; absolute justice is an illusion and unachievable as there might be restrictions which cannot overlooked and no matter how much development has taken place and whatever maybe standard of living and what may be level of value system prevalent we can have ideal justice were rights are conferred but with restrictions.

On similar if not on same grounds we can have judicial appointment process which provides for access to justice in ideal sense of the term both by providing

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[14] Domenico Francavilla, *Diversity and the Judiciary in India: Supreme Court judges in Indian society*, THE OPEN UNIVERSITY (28/05/2022 11:58 AM), https://core.ac.uk/download/pdf/302353916.pdf.

[15] Justice N. Jagannadha Rao, *Access to Justice*, DELHI HIGH COURT (10/06/2022 12:16 PM), http://www.delhihighcourt.nic.in/library/articles/Access%20to%20justice.pdf.

equality of opportunity in appointment to all sections and dispensing justice to most, ideally.[16] For this, we cannot overlook merit. But we can ensure diversity. We cannot overlook integrity and honesty. But we can provide for central secretariat to ensure well-functioning democratic process and avoid delay in appointments. We cannot overlook professionalism. But we can provide transparency. We cannot overlook communication skill. But can provide for accountability. We cannot overlook administrative capacity. But we can provide for checks and balances in process. While including all these, we can exclude nepotism, dysfunctional consequences and purposeful delay in appointments.

V. Conclusion

This topic of "Constitutional morality and judicial appointments in higher judiciary" is such that the legal scholars, lawyers and judges can discuss the topic ad infinitum and still discover new dimensions.[17] The preambular glory given by the people of India to themselves aimed for a robust, liberal and adaptive constitution, which was the means for the ends of Justice, Equality, liberty and fraternity. The Constitutionalism provided gave us a system with constitutional morality being an inseparable part of the system. There is hardly any area left untouched by it, especially the mechanism for judicial appointment were consultation left the door wide open for constitutional morality to play its part with full force.

Whenever in doubt the intent of constitution makers can guide and provide us the direction for correct interpretation. The constitution makers aimed for a participative consultation process. So, why not provide mechanism for it? Lay down the ground work for it by constituting an office, well defined criteria, advanced data gathering etc in essence institutionalizing the entire process.

What comes next is the representation of marginalized, weak and women for the office of the Judge in Supreme Court and High Court. There is strong basis and demand for it as broader the diversity in the Supreme Court and High Court for

[16] Akhil, *Access to justice*, THE LEGAL SERVICE INDIA (01/06/2022 01:13 PM), http://www.legalserviceindia.com/legal/article-4069-access-to-justice.html.
[17] Archit Shukla, *Doctrine of Constitutional Morality*, PRO BONO INDIA (03/06/2022 11:09 AM), https://probono-india.in/research-paper-detail.php?id=136.

that matter wider the perspective and value system of the Bench ensuring (without insinuating anything on the present quality) better quality of judgments.

I would like to conclude with words of Justice Brennan of US Supreme Court in following sense that, "The most adverse effect caused on the human heart is not by illness or any other adversity but the injustice which makes us bring down things. But unfortunately justice along with other values is served quickly and easily to the rich, and poor who need it are left begging at the mercy of rich and powerful. This must be avoided by providing access to justice in letter and spirit."[18]

The aim of all the high ideals and structure besides the goals enshrined in the preamble is to uphold the faith of the masses in justice delivery system, which must remain intact. Let heavens fall, but justice shall Triumph!

[18] Justice N. Jagannadha Rao, *Access to Justice*, DELHI HIGH COURT (10/06/2022 12:16 PM), http://www.delhihighcourt.nic.in/library/articles/Access%20to%20justice.pdf.