



NATIONAL JUDICIAL COMMISSION IN INDIA: THE NEW CHALLENGE

Dr. Ganesh Dubey

Associate Professor

Institute of Law, Jiwaji University, Gwalior, Madhya Pradesh, India

&

Dheerendra Singh

LLM, Ph.D. (Contd)

Research Scholar, Jiwaji University Gwalior, Madhya Pradesh, India

ABSTRACT

Art. 50 of our constitution provide - separation of powers and independent judiciary (under directive principles) and Art. 13 of the Indian constitution provide vital power to amend any new statute and empowered to Supreme Court to check the constitutional validity of particular act/statute. For much of its history the Indian judiciary has been regarded as largely fair and incorruptible. No action was taken on the bill but the system of Supreme Court appointments that it envisaged was mandated three years later by the Supreme Court itself. In Supreme Court Advocates-on-Record Association vs. Union of India (1993 (4) SCC. 441) the Court ruled that the Constitution's provision that the President appoint Supreme Court judges in "consultation with such Judges of the Supreme Courts...as the President may deem necessary" (Article 124(2)) meant that the advice of the Supreme Court judges was binding upon the President. It also resolved that the judges involved in this 'consultation' would be the Chief Justice of India and the two judges next in seniority. This decision was upheld in 1998 in the Third Judges case, only slightly modified to involve the Chief Justice of India and the four judges – rather than two – next in seniority as well as all Supreme Court judges from the candidate's High Court. The Supreme Court of India and the High Court's set the standard for judicial conduct and competence in the country. It is vital that we create a National Judicial Commission, combining input from the elected branches of government and the judiciary, to appoint and over see the judges of the Supreme Court and High Court.

INTRODUCTION:-

This issue had been discussed by Justice J.S. Verma committee before last years and he suggested his views in these lines, he argued that judicial Accountability Bill must be cleared in



which the independency of Judiciary could be sustained in society. But in Higher Judiciary, the appointment of Judges challenged many times due to process of collegiums method for appointment of judges in Higher Judiciary like High Court, Supreme Court in this context. The present NDA Govt. announced new system to control and make more effective to Indian Judiciary and it is proposed new system i.e. National Judiciary Commission by the Modi Government. But many Senior Jurists discuss this issue, the new statute for appointment of judges in Higher Judiciary which has been passed by the parliament recently. It may be interrupt the Judicial Matters in which the independence of Judiciary (Art. 50) of the Indian constitution may be damaged and influenced and perhaps behind this law, political parties may submit their right in the appointment of judges in higher judiciary and they would play political role in Independence Judiciary and in such manner judiciary may be caused influenced.

Art. 50 of our constitution provide - separation of powers and independent judiciary (under directive principles) and Art. 13 of the Indian constitution provide vital power to amend any new statute and empowered to Supreme Court to check the constitutional validity of particular act/statute. For much of its history the Indian judiciary has been regarded as largely fair and incorruptible.

Over the ensuing decades, there were frequent allegations that the executive exerted too much control over judicial appointments. In 1974, in *Shamsher Singh V. State of Punjab*, The Supreme Court observed, appointments to the Supreme Court or High Court must have the approval of the Chief Justice of India. There was a brief with drawl from this sentence in S.P. Gupta in 1981 where the Supreme Court gave the President the option to disregard the C.J.I recommendation. Since then, however, the March towards Judicial Control over judicial appointment has continued.

Till this time, collegiums of Supreme Court consist 5 judges, appointed new judges in Higher Judiciary and 8 in previous time Govt. had no empower to deny the recommendations of collegiums to the appointment of judges in Higher Judiciary. But at this time present law allows these things:

1. A committee of NJC (consisting six members) will recommend the name of those person new have been experience and qualified according constitutional norms.



2. In this committee, there will be three judges of Supreme Court and in another members there will be one member control law minister and two person who have specific popularity in this tree and these members will be elected by C.J.I, P.M and opposition leader with common consent of this process.

It is issue of discussion that law ministry having one member with same opinion claim his veto power during the process of appointment of judges in which the law minister would be stronger than the previous approval of collegiums system.

It seems, there is some reduction in the power of Supreme Court Judges with connection of appointment of Judges in higher judiciary and promotion in the power of executive to the process appointment.

IN RECENT YEARS

In 1990, the then Union Minister for Law and Justice introduced the 67th Constitutional (Amendment) Bill in Parliament. The Bill provided for the creation of a National Judicial Commission for the appointment of Supreme Court and High Court Judges. The composition of the Commission was to be different for Supreme Court and High Court appointments. For appointments to the Supreme Court it would comprise the Chief Justice of India and the two Supreme Court judges next in seniority. For appointments to the High Court it would comprise the Chief Justice of India, the Supreme Court judge next in seniority, the Chief Minister of the concerned State, the Chief Justice of the relevant High Court, and the High Court judge next in seniority.

No action was taken on the bill but the system of Supreme Court appointments that it envisaged was mandated three years later by the Supreme Court itself. In *Supreme Court Advocates-on-Record Association vs. Union of India* (1993 (4) SCC. 441) the Court ruled that the Constitution's provision that the President appoint Supreme Court judges in "consultation with such Judges of the Supreme Courts...as the President may deem necessary" (Article 124(2)) meant that the advice of the Supreme Court judges was binding upon the President. It also resolved that the judges involved in this 'consultation' would be the Chief Justice of India and the two judges next in seniority. This decision was upheld in 1998 in the Third Judges case, only slightly modified to involve the Chief



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Justice of India and the four judges – rather than two – next in seniority as well as all Supreme Court judges from the candidate's High Court.

The Court also laid down a system for appointments to the High Court. The Constitution requires the President to consider the opinion of the Chief Justice of the High Court in question, the relevant Governor, and the Chief Justice of India. The Court ruled that the Chief Justice of the High Court and the Governor must make their recommendations but that the advice of the Chief Justice of India, delivered in consultation with the two judges next in seniority, would prevail.

The system of appointment to the higher courts, as stipulated by the Constitution and as interpreted by the Supreme Court, has always placed the highest premium on judicial independence. India is unique in the degree of judicial control over judicial appointments. In no other country in the world, does the judiciary appoint itself.

Unfortunately, the strong insistence on judicial independence in the appointments process has had its attendant problems.

Unaccountability: Neither the executive nor the legislature has much say in who is appointed to the Supreme Court. In the case of the High Courts, the Chief Minister (via the Governor) has a say but the final word rests with the Supreme Court. It is accepted that the judiciary must not be directly vulnerable to public approval or disapproval of its actions. We have successfully avoided this evil in our system of appointments but have invited in another whereby people are left with no say, however indirect, in the composition of the judiciary. As Thomas Jefferson said, "A judiciary independent of a king or executive alone is a good thing; but independence of the will of the nation is a solecism, at least in a republican government".

Political, caste, and communal considerations: Appointments to the High Court have been unable to keep pace with the vacancies, stalled by the haggling over political, caste, and communal considerations at every step, as they pass from the Chief Justice of the High Court to the Chief Minister to the Supreme Court and the Law Minister. According to the 2004 year-end review of the Ministry of Law and Justice there were 143 vacancies in the 21 High Courts out of a sanctioned strength of 719 judges leaving almost 20% of the judges' posts vacant.



Questions of merit: The current system of appointments is not open to public scrutiny and it is therefore difficult to determine the criteria for appointments. In many cases it seems that seniority is used as a proxy for merit.

Thus, our chief concerns with the current system of appointment are the lack of accountability and transparency, the difficulty in getting people of adequate ability onto the bench, and the significant delays in appointing judges to the High Courts.

Around the world, appointment or selection commissions are being chosen as an integral part of an effective, open system of judicial appointments. These commissions bear little resemblance to that featured in the 67th Amendment Bill. The proposed National Judicial Commission was dominated by members of the judiciary whereas most functioning commissions in other parts of the world are dominated by members or appointees of the legislative and executive branches.

Such commissions continue to gain traction around the world, in civil law and common law jurisdictions (in March 2005, a Judicial Appointments Commission was passed into law for England and Wales). The effectiveness of such commissions depends, not surprisingly, on how closely their structure and role is tailored to the goals of the appointment process. The main questions to be answered with regards to such a commission are the following:

1. How will the composition of the commission represent the executive, legislature, and judiciary, and who will nominate the individuals appointed?
2. Will the commission supply recommendations or issue binding advice?
3. Will the commission also be responsible for the oversight of the judiciary?

In this paper we look at five countries and two states that use judicial appointment or selection commissions. Due to the diversity of their missions we will refer to such commissions as 'nominating commissions'. In some of the countries whose appointment process is discussed, historical forces have determined that the prime concern is insulating the judiciary from the other branches of government. In others, it is placing judges above the machinations of political parties and the election process. And in others, it is ensuring that the judiciary, though not elected by the people, is fairly drawn from the people and sufficiently representative of them. In all these cases, nominating



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commissions, assembled through input from different branches of government, to screen candidates and make recommendations or appointments, have been the solution.

The commissions used in these jurisdictions represent a range of answers to the above questions. The mix of judicial, legislative, and executive representatives varies, though nearly all include some mix; in some cases the commission creates a list of candidates from which the executive must make his or her choice, in others the commission merely recommends candidates, and in still others the commission's recommendations are binding upon the executive; finally, in some of these jurisdictions the appointment or selection commission also oversees judicial conduct though in most there is another body responsible for this.

If we surveyed to the process of appointment, asked the people whether they believe more the system of Supreme Court or politician. Definitely people will be favor in the process of Supreme Court of India. Really, it is matter of discussion, there may be some lack ness or shortcomings in the process of appointment of judges by the collegiums. But comparatively that process was as good as new modern concept i.e. judicial accountability or National Judicial Commission.

Generally observation says that NDA Govt. has started new plan for betterment of processing of appointment of judges in Higher Judiciary and launched new Act for reframing of process between collegiums and executive control.

Undoubtedly, it will be clear; this stature would infringe the absolute power of judiciary and maintain check and balance in the process of selection to appointed judges in Higher Judiciary.

At present, Modi Govt. has challenged the appointment of Gopal Subramanhayam as Justice before Supreme Court and created psychological process towards the Judiciary as well as society.

And In the mean time, Ex-justice of Supreme Court, Markendya Katzoo, disclosed draw backs/pit and falls of collegiums system of Supreme Court.

But how for it will be reasonable, where in the process of appointment of judges in Higher Judiciary whether Politician will play their vital role to make the process more effective and transparent.



Fali S. Nariman Eminent Jurist challenged this stature one behalf of its constitutional validity before Supreme Court.

Nariman, who suggested some policy for making this law to the union law minister Ravishankar Prasad but he is not in favour of present stature at this time. Nariman, dissatisfied to the composition of such committee which will be monitoring body of the commission because selection committee consists six members and only three members were nominated by the Supreme Court to this Committee.

He argues with this statement that two members of this committee has empowered to show their veto power and strongly they may interference in the process of appointment of judges directly or indirectly and the soul power of Supreme Court will reduce and Nariman wants transparency in the system of collegium's not in favour of modification to Supreme Court collegium's system and if committee consisted, it must be sure, number of members of this committee should be nominated more than Executive, Legislature in which independence of Judiciary could be maintain accordingly the object of preamble of the constitution. So it is subject of debate and issue for challenging in modern context of India.

Supreme Court may check the constitutional validity of said act and maintain the protection of basic features of the constitution and no one can imagine this statute, however it be practical in implementation or challenging to the executive because Supreme Court has vast power of Art. 13 to Examine of statute and its constitutional validity and Supreme Court is safeguard to the provisions of constitution as well as preamble with objective of present constitutional law.

A national Judicial Commission for India

The Supreme Court of India and the High Court's set the standard for judicial conduct and competence in the country. It is vital that we create a National Judicial Commission, combining input from the elected branches of government and the judiciary, to appoint and over see the judges of the Supreme Court and High Court.



The best solution is a National Judicial Commission (NJC) drawn from the executive, legislature and judiciary. The most practical and acceptable composition would be seven member NJC with the following members and it been proposed by Vidya Gullapalli and Jaya Prakash Narayan Member, of Loksatta Newspaper and Researchers following them under following heads:

- The Vice President as Chair of the Commission.
- The Prime Minister or Prime Minister's Nominee
- The speaker of the Lok Sabha
- The Law Minister
- The Leader of the opposition in the Lok Sabha
- The leader of the opposition in the Rajya Sabha
- The Chief Justice of India.

In matters relating to the appointment of High Court Judges the commission will also include the following members:

- The Chief Minister of the concerned state.
- The Chief Justice of the concerned High Court.

The NJC can be authorized the solicit views of jurists representatives of the Bar and the public in any manner the commission deems fit. Also, NJC can have the option of inviting two jurists to be now voting members.

Really, it is a new challenge before the Modi Govt. to frame National Judicial Commission in India which committee has been consisted in NJC be reviewed under these condition which has been given under the following points by the Researchers i.e.

There should be 11 members in appointment committee of National Judicial Commission:

- | | | | |
|----|--------------------------------------|---|----------|
| 1. | Vice President/Chairman, Rajya Sabha | - | 1 Member |
| 2. | Chief Justice of India | - | 1 Member |
| 3. | 2 Senior Most Judge of Supreme Court | - | 2 Member |
| 4. | Law Minister, Union Govt. of India | - | 1 Member |



5. One member Opposition leader of Lok Sabha - 1 Member
6. President, Law Commission of India - 1 Member
7. President, Bar Council of India - 1 Member
8. Three Members, Renowned Jurist/Professor nominated by the President of India for Committee.

One Member, Renowned/Socialist or President of Press Council of India nominated by C.J.I. of Supreme Court

One member, Renowned/Senior advocate of Supreme Court nominated by the C.J.I. of Supreme Court.

As we know, in Democracy, there are four pillars i.e. Executive, Legislature, Judiciary, Press and Media. So Researcher is in favour of contributory participation in process of appointment of judges in Higher Judiciary. In fact, the collegiums' system of Supreme Court is not as effective and transparent as demand of time of society At latest dispute arose for appointment of Gopal Subrahmanayam in Supreme Court, indicate the some technical violation in this collegium's system.

P.M. Narendra Modi's outlook indicates proper participations as transparent method in the process of appointment of judges in Higher Judiciary and it is being admirable by the lawyers/jurist/eminant persons as well as common people of India. But the selection committee of this commission has been challenged by someone due to lack participation of legislature and press media as well as social phenomenon/activist, so researcher developed new idea to review this committee.

Actually Rajya Sabha indicates/represents whole India and if the one member belongs to the Rajya Sabha who is a chairman i.e. step going on legislature for appointment of judges where two members are being suggested from the academic and legal practice side by the researcher i.e. well participation among the all members in this committee and the procedure could be transparent and effective for coming days in our country.

Comments: Many countries do not support collegiums' system in higher judiciary. They support judicial commission and committee for appointing process in their countries like England and Wales



where the Judicial Appointment Commission of England and Wales was established primarily to increase diversity on the branch and bring transparency to the appointment process. The new commission includes lawyers and non-lawyers in England and south for appointment of judges and in Germany, the federal constitutional court, federal court of justice.

APPENDIX A

Text of Articles 124 and 217 of the Constitution of India

124. Establishment and constitution of Supreme Court. – (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than twenty-five other Judges.

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

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

Provided further that –

- (a) A Judge may, by writing under his hand addressed to the President, resign his office:
- (b) A Judge may be removed from his office in the manner provided in clause (4).

(2-A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and –

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



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

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

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

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviors or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any Court or before any authority within the territory of India.

217. Appointment and conditions of the office of a Judge of a High Court. – (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years :

Provided that –

(a) A Judge may, by writing under his hand addressed to the President, resign his office;



(b) A Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of Judge of the Supreme Court;

(c) The office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and –

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

or

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

(3) If any such question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

APPENDIX - B

THE JUDGES (INQUIRY) ACT, 1968

[Act No. 51 of 1968 dated 5th. December, 1968]

An Act to regulate the procedure for the investigation and proof of the misbehavior or incapacity of a Judge of the Supreme Court or of a High Court and for the presentation of an address by Parliament to the President and for matters connected therewith.

BE it enacted by Parliament in the Nineteenth Year of the Republic of India as follows: -

1. Short title and commencement

(1) This Act may be called the Judges (Inquiry) Act, 1968.



(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions

In this Act, unless the context otherwise requires,-

- (a) "Chairman" means the Chairman of the Council of States;
- (b) "Committee" means a Committee constituted under section 3;
- (c) "Judge" means a Judge of the Supreme Court or of a High Court and includes the Chief Justice of India and the Chief Justice of a High Court;
- (d) "Prescribed" means prescribed by rules made under this Act;
- (e) "Speaker" means the Speaker of the House of the People.

3. Investigation into misbehavior or incapacity of Judge by Committee

(1) If notice is given of a motion for presenting an address to the President praying for the removal of a Judge signed,-

- (a) in the case of a notice given in the House of the People, by not less than one hundred members of that House;
- (b) in the case of a notice given in the Council of States, by not less than fifty members of that Council;

then, the Speaker or, as the case may be, the Chairman may, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him, either admit the motion or refuse to admit the same.

(2) If the motion referred to in sub-section (1) is admitted, the Speaker or, as the case may be, the Chairman shall keep the motion pending and constitute, as soon as may be, for the purpose of making



an investigation into the grounds on which the removal of a Judge is prayed for, a Committee consisting of three members of whom-

- (a) One shall be chosen from among the Chief Justice and other Judges of the Supreme Court;
- (b) One shall be chosen from among the Chief Justices of the High Courts; and
- (c) One shall be a person who is, in the opinion of the Speaker or, as the case may be, the Chairman, a distinguished jurist;

Provided that where notices of a motion referred to in sub-section (1) are given on the same day in both Houses of Parliament, no Committee shall be constituted unless the motion has been admitted in both Houses and where such motion has been admitted in both Houses, the Committee shall be constituted jointly by the Speaker and the Chairman:

Provided further that where notices of a motion as aforesaid are given in the Houses of Parliament on different dates, the notice which is given later shall stand rejected.

Comments: -By all means, we hope new plans for betterment of our judicial system and the new statute of parliament for appointment of judges and accountability for judges is being discussed by the legislature and apex court of India, really it is a time of revolution for the people of India because our country is facing transform period in legislation, executive as well as judiciary. Thus, the national judicial commission for India could be more effective than traditional way of judiciary involving collegiums' system in appointment of judges. According to researchers views, the present scenario of administration in higher judiciary is quiet good but not practically accepted in the involvement for all categories people of legal education besides advocates/judges and it shows monopoly/ privileges of the union judiciary but these privileges have been guaranteed to the judiciary by the our constitution under basic structure of the constitution which has been laid down in case of **Keshvanand bharti v. state of Kerla**, Supreme court observed that parliament cannot amend the basic structure of the constitution under article 368 and not make such legislation under this article which are not just and constitutional under art. 13 of the constitution because the constitutional validity of the any statute is subject to refined by the supreme court as constitutional safe guards in India so it is subject of debate



whether national judicial commission is reasonable , constitutional , ethical ,logical for independence judiciary in India.

Relevant Statutes

- The Constitution of India, Articles 124 and 217
- Judges' (Inquiry) Act, 1968
- Constitutional Reform Act 2005 (establishing a Judicial Appointments Commission for England and Wales and a Judicial Appointments and Conduct Ombudsman)
- Canada Constitution Act
- Canada Judicial Act, Part 2
- Constitution of the State of New York
- Judiciary Law of the State of New York
- The French Constitution
- The German Basic Law
- The German Judicial Selection Act
- South African Constitution

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