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## Reforms in the Collegium System: Less Legal, More Ethical.

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### Abstract

The matter of appointment of judges in the higher judiciary has again become a matter of discussion. Prior to the 99th Constitutional Amendment Act, 2014, under **Article 124, the President may after consulting such judges of the Supreme Court and the High Courts of the states, whom the President considers necessary to consult for this purpose, by warrant under his hand and seal, to every judge of the Supreme Court shall appoint.** In the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. Similarly, according to Article 217, the President, after consultation with the Chief Justice of India, the Governor of that State and in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court, by a warrant under his hand and seal, Every Judge shall be appointed.. In this sequentially in the presented article, an attempt has been made to reveal the intention of the constitution makers in relation to how the appointment process of judges in the higher judiciary should be. Although this article may have a reason to be pro-critic, the truth needs to be disclosed.

**Key Words:** consultation, appointment process, constitutional trust, ethical.

### Introduction-

*Mat kaho aakash me kuhra ghna hai.  
Yah kisi ki vyktigat aalochna hai.*

(Don't say the sky is foggy. It's someone's personal criticism).The above lines of Dushyant Kumar stop this type of truth disclosure whose propensity is critical or severely critical. But Maharishi Valmiki has written **Satmevoshvaro**<sup>1</sup> in Ramayana. According to him, the truth is the only god in the world. In the Taittiriya Upanishad it is said **Satym vad dharmam chara**<sup>2</sup> that means **speak the truth and be righteous do the work.** Therefore expression of truth is necessary. In this sequentially in the presented article, an attempt has been made to reveal the intention of the constitution makers in relation to how the appointment process of judges in the higher judiciary should be. Although this article may have a reason to be pro-critic, the truth needs to be disclosed.

<sup>1</sup>2.109.13 Ayodhya Kanda ,Valmiki Ramayana.

<sup>2</sup> 1.11 Taittiriya Upnishad.

The matter of appointment of judges in the higher judiciary has again become a matter of discussion. Prior to the 99th Constitutional Amendment Act, 2014, under **Article 124**, the President may after consulting such judges of the Supreme Court and the High Courts of the states, whom the President considers necessary to consult for this purpose, by warrant under his hand and seal, to every judge of the Supreme Court shall appoint. In the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. Similarly, according to Article 217, the President, after consultation with the Chief Justice of India, the Governor of that State and in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court, by a warrant under his hand and seal, Every Judge shall be appointed.

It is clear from the above provisions that the President is the appointing authority, but in the appointment process, the President is not sui juris in the decisive role, he has to follow the consultation process. Although consultation is not synonymous with order, the constitutional expectation of consultation cannot be undermined in matters related to the judges of the higher judiciary of the country. The consultation process is multitudinous to facilitate proper conclusion. In the Constituent Assembly on 23-24 May 1949, there was discussion on separation of power and judicial independence in which there was unanimous consent on judicial independence. For the sake of judicial independence, it was ensured that the consultation of the judges is necessary in the appointment of the judges of the higher judiciary. The President is not bound to accept the advice, but if the entire constitution is observed, then the President solitary does not decide anywhere, for his help and advice provisions have been made in the Constitution, sometimes the Council of Ministers, sometimes the judges and sometimes the President takes decisions after consulting the Election Commission, thus it is clear that the Constitution commits the President to take decisions through consultation and assistance instead of independent decision. Therefore, consultation as provided in the matter of appointment of judges cannot be disregarded with.

In the case of **Supreme Court on Record Association v. Union of India (1993)**<sup>3</sup>, the Supreme Court made consultation compulsive and determined and elaborated the consultation process. Instead of any judges of the Supreme and High Courts, arrangements were made to consult the Chief Justice of India and the two senior most judges of the Supreme Court and the consultation was declared binding on the President. The President has the right to prevent wrong appointments, he can resend the advice concerned for reconsideration, but if the same advice is sent again, the advice sent shall be binding on the President. In **Article 74**, a similar provision has been made regarding the advice of the Council of Ministers, in which the advice of the Council of Ministers is also binding on the President. In the case of **In Re. Presidential Reference (1999)**<sup>4</sup>, the consultation process was further elaborated by ordering the Chief Justice of India and four senior-most Supreme Court judges to be consulted, instead of the senior-most Supreme Court judge, when the appointment concerned the Supreme Court, in the appointment of high court judges in India. The Chief Justice of India and the two senior most judges of the Supreme Court have to be consulted. In case of transfer from one High Court to another High Court, the consultation process will be followed as per the Collegium for the appointment of Supreme Court Judges and the provisions of Article 222 will be followed. Describing the collegium system as inappropriate, the Parliament made a provision for the establishment of the **National Judicial Appointments Commission** through the **99th Constitutional Amendment Act 2014**, which was declared unconstitutional by the Supreme Court, calling it an attack on judicial independence in the case of **Supreme Court on Record Association v. Union of India.**<sup>5</sup>

**124-A** was added through the **99th Constitutional Amendment Act, 2014** in which this provision was made

**124A. (1)** There shall be a Commission to be known as the **National Judicial Appointments Commission** consisting of the following, namely:—

<sup>3</sup> (1993)4 SCC 441.

<sup>4</sup> AIR 1999 SC 1.

<sup>5</sup> AIR 2015 SC 5457.

- (a) The Chief Justice of India, Chairperson, ex officio;
- (b) Two other senior Judges of the Supreme Court next to the Chief Justice of India —Members, ex officio;
- (c) The Union Minister in charge of Law and Justice—Member, ex officio;
- (d) Two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the leader of single largest Opposition Party in the House of the People — Members:

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

**124(B)** . It shall be the duty of the National Judicial Appointments Commission to—

- (a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;
- (b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and
- (c) ensure that the person recommended is of ability and integrity.

Similarly, this arrangement was made through **NJAC Act, 2014**<sup>6</sup>

**Section 5-** Procedure for selection of Judge of Supreme Court.:—

(1) The Commission shall recommend for **Appointment** of the senior-most Judge of the Supreme Court as the **Chief Justice of India** if he is considered fit to hold the office:

Provided that a member of the Commission whose name is being considered for recommendation shall not participate in the meeting.

(2) The Commission shall, on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, recommend the name for appointment as a Judge of the Supreme Court from amongst persons who are eligible to be appointed as such under clause (3) of article 124 of the Constitution:

Provided that while making recommendation for appointment of a High Court Judge, apart from seniority, the ability and merit of such Judge shall be considered:

Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation.

<sup>6</sup> The National Judicial Appointments Commission Act ,2014.

(3) The Commission may, by regulations, specify such other procedures and conditions for selection and appointment of a Judge of the Supreme Court as it may consider necessary.

#### **Section 6- Procedure for selection of Judge of High Court.—**

(1) The Commission shall recommend for **appointment a Judge of a High Court** to be the **Chief Justice of a High Court** on the basis of inter se seniority of High Court Judges and ability, merit and any other criteria of suitability as may be specified by regulations.

(2) **The Commission shall seek nomination from the Chief Justice of the concerned High Court for the purpose of recommending for appointment a person to be a Judge** of that.

(3) The Commission shall also on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, nominate name for appointment as a Judge of a High Court from amongst persons who are eligible to be appointed as such under **clause (2) of article 217** of the Constitution and forward such names to the Chief Justice of the concerned High Court for its views.

(4) Before making any nomination under sub-section (2) or giving its views under sub-section (3), the Chief Justice of the concerned High Court shall consult two senior-most Judges of that High Court and such other Judges and eminent advocates of that High Court as may be specified by regulations.

(5) After receiving views and nomination under sub-sections (2) and (3), the Commission may **recommend** for **appointment** the person who is found suitable on the basis of ability, merit and any other criteria of suitability as may be specified by regulations.

(6) The Commission shall **not recommend** a person for appointment under this section **if any two members** of the Commission **do not agree for such recommendation**.

(7) The Commission shall elicit in writing the views of the **Governor** and the **Chief Minister** of the state concerned before making such recommendation in such manner as may be specified by regulations.

(8) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Chief Justice of a High Court and a Judge of a High Court as it may consider necessary.

#### **Section 7- Power of President to require reconsideration.—**

**The President** shall, on the recommendations made by the Commission, appoint the Chief Justice of India or a Judge of the Supreme Court or, as the case may be, the Chief Justice of a High Court or the Judge of a High Court:

Provided that the President may, if considers necessary, require the Commission to reconsider, either generally or otherwise, the recommendation made by it:

Provided further that if the Commission makes a recommendation after reconsideration in accordance with the provisions contained in **sections 5 or 6**, **the President shall make the appointment accordingly**.

In this context, according to the spirit of the makers of the Constitution, the following are suggestions regarding the consultation process in the higher judiciary, especially in relation to the appointment of judges of the Supreme Court:

According to Article 124, along with the Chief Justice and four other senior-most judges of the Supreme Court, the Chief Justice and senior-most judges of the High Courts should also be included in the collegium in the consultation process. In order to ensure regional representation in the Supreme Court, the Chief Justice and senior-most judges of various High Courts related to the above areas should also be included in the collegium, because Article 124 expects the role of the High Court. Along with this, keeping in view the concerns of the legislature and the executive, the Attorney General of India, the Law and Justice Minister of the Government of India will be ex-officio members of the collegiums without any veto. An eminent jurist qualified to be a Judge of the Supreme Court, nominated by the President, shall be its member. Whose term will be of one year and he will not be eligible for re-election. The above members will not play a decisive role in the collegium but will play an important role. They will not be able to hijack the recruitment process but their concerns will be of special importance, whenever the integrity of the judge will be questionable and related facts can be used. Judicial independence will be protected by this system and the collegium system can be made more relevant and responsible.

In the Constituent Assembly on 23 May 1949, **Shri.K.M. Munshi** had given importance to judicial independence instead of separation of judiciary from legislature and executive. Except in the case of lifetime tenure for judicial independence as in U.S.A. and U.K. All possible provisions have been made so that once appointed, the Judges may act fearlessly and without bias.

There will be no attack on judicial independence by the above arrangement. As far as the appointment of judges of the High Courts is concerned, appointments or transfers should be made following the procedure of Article 217 in consultation with the said collegium.

As far as the intervention of the government is concerned, in relation to the removal of the judges, the Parliament has got the power to investigate and to remove the judges through a process like impeachment. If they have to remove such a judge who is not according to them, then they can be removed by following the procedure like impeachment on the basis of misconduct and incapacity against him. Similarly, if a person has been appointed as a judge and it seems to the Supreme Court that there is an error in it, then by issuing writ Quo Warranto, it can check the legality of his holding the public office, thus judicial independence can be kept intact.

The question of authority against Justice Ajit Nath Ray in the case of **P. L. Lakhanpal v. Ajit Nath Ray**<sup>7</sup> of Quo Warranto against Justice Ajit Nath Ray was accepted by the Court in consideration.

**Dr. Ambedkar** in his first interview as law minister said **"I think that however good a constitution may be, it can prove to be bad if the people who follow it are bad. However bad a constitution is, it is good, can be proved if the people who follow it are good."**<sup>8</sup>

**Dr. Rajendra Prasad** had said that **"after all the constitution is inanimate like a machine, the life in it is communicated by the persons who control it. If the people who are elected are men of character and integrity, they will prove to be the best even in a defective constitution, if they are not, then the constitution will not help the nation"**<sup>9</sup>. Thus, the character, behavior of individuals in constitutional posts is more important than constitutional provisions. Corrupt and immoral people will try to shape their vicious trends by taking out a path. It is necessary that only loyal people should hold high positions, such an effort will be possible only in the conscious care of the Government and the general public.

**The House of Lords**, which is the upper house of the British Parliament, the House in which political discussions take place, many of the legal principles propounded by the same House of Lords still guide Indian law, similarly in **Privy Council or Federal Court constituted under the Government of India Act 1935**, the appointment process of the judges was directly in the hands of the Crown, yet the decision is still memorable as a mile stone. In this way, the multidimensionality of the appointment process alone cannot be

<sup>7</sup> ILR 1974 DELHI 253.

<sup>8</sup><https://www.barandbench.com/columns/dr-ambedkar-1949-constituent-assembly-speech> visited on 11-03-2023.

<sup>9</sup><https://indiankanoon.org/docfragment/753224/?big=3&formInput=discharge> visited on 11-03-2023.

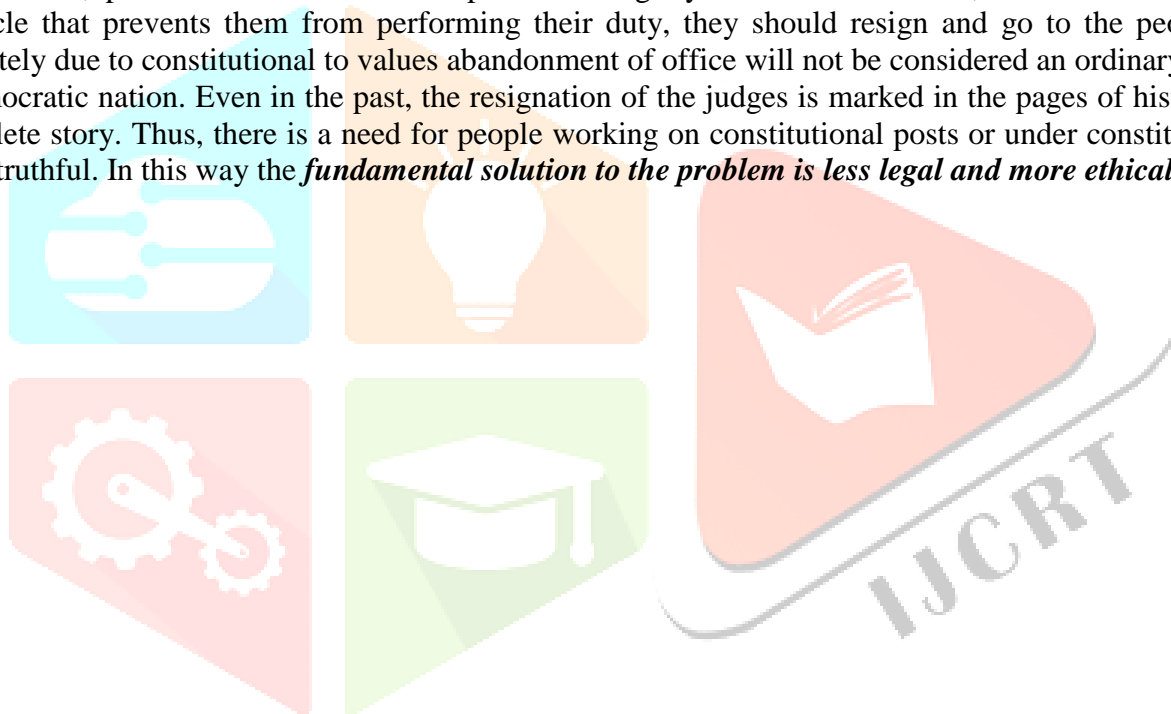
considered as the motivation point for the change of loyalty of the judges. History is replete with instances in which men of good faith never accepted unfair terms.

*Yogi Bhartrihari says -*

*Praise or censure by those who are well-versed in policy, may Lakshmi come or go as she pleases, may death happen today or after ages, men of patience do not deviate from the path of justice<sup>10</sup>.*

CONCLUSION-

In this way, the basic question is the establishment of moral values, the possibility of misuse can be regulated by amending the constitutional provisions as per the above discussion, but it cannot be eliminated. Yogi Bhartrihari has further written in Nitishatakam that Satyavarti Tejasvi people can sacrifice their lives happily but do not leave the vow of a very pure heart. In the story "*Panchpameshwar*" written by *Premchand*, it has been seen that leaving friendship, judges have done justice, it is mentioned in the story that *Panch is neither friend nor enemy of anyone, God resides in Panch, so the judge is the symbol of God*. His sense of justice is important. The judges of the higher judiciary take an oath to have true faith and loyalty towards the Constitution, perform their duties and uphold the dignity of the Constitution, if there is an irresistible obstacle that prevents them from performing their duty, they should resign and go to the people's court. definitely due to constitutional to values abandonment of office will not be considered an ordinary incident in a democratic nation. Even in the past, the resignation of the judges is marked in the pages of history with its complete story. Thus, there is a need for people working on constitutional posts or under constitutional trust to be truthful. In this way the *fundamental solution to the problem is less legal and more ethical*.



<sup>10</sup><https://www.aryasabha.com/latest-update/-/389> visited on 11-03-2023.