

## ROLE OF SUPREME COURT AND JUDICIAL ACCOUNTABILITY

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*The Supreme Court of India and its role to upgrading the concept of judicial accountability is weak as compared to the foreign legal system. In the behind of judicial independence veil the judicial system of India moving towards the gross failure. Inordinate delay, corruption, deviant behavior of the higher judiciary, power despotism with the help of contempt proceeding becomes modern phenomenon of judiciary of India. There is having room for development in the procedure of appointment of higher judiciary, their removal and transfer.*

*Judicial Independence and Judicial Accountability are the two side of a same coin. Do we really think that judges of the Superior Court shall be accountable to the people for their functioning? Do we really think that regular assessment of judicial functionary is important? And do we really have to think that their promotion shall be based on their performance. If we think answer possibly shall be affirmative then what type of development evolved by the higher judiciary since the independence of India, be reviewed.*

**Key Words: Judicial Accountability, Power despotism, assessment of functions, Justice delay & denied, right to justice, Impeachment, Contempt of Court.**

If I will introduced this topic with quote of Attorney General of India, Mr. Soli Sorabjee, “Criminal Justice system in India is on the verge of collapse owing to inordinate delay in getting judicial verdict and many a potential litigant seem to take recourse to a parallel mafia dominated system of ‘justice’ that has sprung up in metros like Mumbai, Delhi etc.”, then it would appropriate preliminary remark relating to the present topic.

With this quote several questions arouse before us who makes question marks on administrative justice delivery system, adjudicatory bodies, on government and also on the statutes which clarify the power and procedure of these bodies, as well as the right to justice of the litigants. One of the most important question emerged in today that does Supreme Court of India shared the responsibility for arrival of these kind of situation in Indian legal system? Soli Sorabjee said that, “criminal justice is on the verge of collapse. Because Justice is not dispensed speedily, people have come to believe that

there is no such thing as justice in courts”. This is the indispensable fact of Indian justice delivery system, being silent to create enhancement of judicial reform might have Supreme Court of India and Higher Courts cover their responsibility.

**Appointment of judiciary and Judicial Accountability:** Appointment of judges to the Supreme Court of India and the High Court’s is provided for in Article 124(2) and Article 217(1) of the Constitution respectively.[1] These constitutional provisions have been inserted after significant debate on basic issue of judicial independence that took place in constituent assembly on 24th and 27th of May, 1949. The constituent assembly after long debate approved the system which the president would appoint judges, after compulsorily consulting with the Chief Justice of India. This assignment of the constitutional role to the Chief Justice of India was given with intent to create a check on politically provoked selection in appointment.

In *S.P. Gupta vs. Union of India*[2], the majority held that ‘consultation’ does not mean ‘concurrence’ and ruled further that the concept of primacy of the Chief Justice of India is not really to be found in the Constitution. It was held that proposal for appointment to High Court can emanate from any of the four constitutional functionaries mentioned in Article 217 – and not necessarily from the Chief Justice of the High Court. The process of making accountability and independence of judiciary start from this era but due to non positive approach of the Indian legal system we are here in this situation.

**Present Appointment of judges in Superior Court:** Present appointment of Supreme and High Court judges base on ‘Collegium System’ which evolved through ‘Three Judges Cases’ in Indian Judicial system. In the First Judges Case[3] which is popularly known as *S.P. Gupta vs. President of India and Ors.* Supreme Court held that Supreme Court and High Court judges appointed by President and Chief Justice of India recommendation to the President can be refused for strong reasons. So in the first judge case gave the supremacy of executive over the judiciary in the appointment and transfer of the judges.

Under Article 222 of the Constitution the Chief Justice of India has to be consulted on the question whether a particular Judge should be transferred and

where he should be transferred while implementing the said policy. If the Government requests the Chief Justice of India to give his opinion on a transfer to implement the said policy which is really in the public interest he cannot decline to do so. Even though the Chief Justice was opposed to the 'wholesale transfers' of Judges there is no bar for the Government treating the recommendation for transfers made by the Chief Justice of India as a part of the implementation of its policy.[4]

### 121<sup>st</sup> Report of Law Commission of India

The Law Commission of India recommended for constitution of National Judicial service Commission. The report of law commission recommends NJSC shall have eleven members, namely,

- the chief justice of India and three senior most judges of Supreme Court,
- three senior most chief justice
- Minister of Law and Justice,
- Attorney General of India
- Immediate retiring officer of the Chief Justice of India
- An outstanding law academic

Law commission also recommends that Commission will also have its own procedure for suggesting persons for selection. Commission recommendation would bind on President but President may refer the recommendation back to Commission on the basis suitability of the candidate.

### The Constitution (67<sup>th</sup> Amendment) Bill:

In 1990 the Constitution 67<sup>th</sup> Amendment Bill was introduced for National Judicial Commission, but it has being lapsed since then. In *Supreme Court Advocates-on Record Association v. Union of India*[5], also commonly known as Second Judges Case, Article 124(2) was broadly interpreted. In this case opinion and satisfaction of Chief Justice of India shall have primacy in all types of judicial appointments. It means that in the appointments of judicial posts consultation with CJI is compulsory. In Addition Supreme Court held that only CJI views is not required but also two of the senior most judges of the Supreme Court is essential. In this way Collegium system of appointment started with second judge case. Still uncertainty regarding judicial appointments was not totally cleared. Justice A.M.

Ahmadi took the dissenting opinion, Hon'ble Justice Verma wrote the majority opinion on behalf of four judges.

The uncertainty regarding judicial appointment was not cleared, the uncertainty arise the then president K.R. Naryanan to consign this affair for Presidential reference. In 1998, in *Re Presidential Reference* which is also known as the third judges case, in this case Supreme Court held that The Chief Justice of India shall make a approval to appoint a Judge of the Supreme Court and to transfer a Chief Justice or Judge of a High Court in consultation with the four senior-most Judges of the Supreme Court. At the time of Appointing High Court judges, the recommendation must be made in consultation with the two senior-most Judges of the Supreme Court. So in this way Collegium system of appointment of judges start where consultation with four senior judges becomes compulsory. Apex court cleverly declared the supremacy of executive but kept the control under hand in appointing the judges.

But this system also was not complete, it has also many loopholes, so the colloquium system was criticised on the ground of lack of judicial accountability, lacking transparency, being biased and corruptions. New scamp of the judiciary were being disclosed by the media, people of India roared the voice of judicial accountability and justice. For that purpose appointment of judge's issue again came on the top for the government. Example like Chief Justice of Gujarat High Court, Justice Bhaskar Bhattacharya, and allegation was framed that Justice Bhattacharya was not selected to Supreme Court because he was opposed to the selection of then Chief Justice Atmas Kabir sister to become Calcutta High Court Judge.

### EVOLUTION OF NATIONAL JUDICIAL APPOINTMENT COMMISSION

THE CONSTITUTION (NINETY-NINTH AMENDMENT) ACT, 2014 was passed by the Lok Sabha on 13th August, 2014 and the Rajya Sabha on 14th August, 2014. President gave the assent to the Act on 31st December 2014 and it came into force from 13<sup>th</sup> April, 2015.

The Constitution Ninety Ninth Amendment Act provides for the composition and the functions of the NJAC. The members of NJAC will be consisting of according to

Article 124A[6]. Through this Act the Constitution of India was amended and Article 124A, 124B, 124C was added to Article 124.

The **NATIONAL JUDICIAL APPOINTMENT COMMISSION Act** also passed on 31 December 2014. The preamble[7] of the Act define its purpose which having relating to appointment and transfer of the judges.

Section 5 of **National Judicial Appointment Commission Act**; specify the procedure to selection of the Supreme Court judges whereas sections 6 will specify procedure to select High Court judges. The selection will do by commission on the basis of seniority and on merit and ability wise. Section 11of the Act specify the rule making power of the Commission. So that's why this Act being criticised and challenged on the aspect that it violating the basic structure Doctrine which was evolved by the Supreme Court in Kesavananda Bharti case and also intervention of executive and political parties in the appointment of judges which is being seemed against independence of Judiciary.

Serious criticism rose among the judiciary that Law Minister may interfere in to the functioning of NJAC and he can send the detail of the vacancies in the higher judiciary. This is against the Theory of separation of power and if Law minister exercised both power like Executive and Judicial, then there will be chances of misusing the power because absolute power corrupts absolutely. Article 124A (1) (d) also criticised on the basis that introduction of reservation in NJAC which will result that particular member of the Commission will try to cherish the cause of the community and class where he belongs. Up till now the judiciary was immune from any type of government reservation but through NJAC will introduce reservation in the judiciary.

Section 13[8] of National Judicial Appointment Commission Act also objected on the basis that Article 145 and 229 of the Constitution of India empowered the rule making power to judiciary. It means that Sub-ordinate legislation drafted by judicial bodies shall lie before the parliament which is against the Constitution. Sub-ordinate legislations framed by judiciary under the Indian constitution are class wise different, and are not subject to similar treatment.

“It is difficult to hold that the wisdom of appointment of judges can be shared with the political-executive. In

India, the organic development of civil society has not as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the other organs of governance.”[9] Supreme Court rejected the NJAC Act and 99<sup>th</sup> amendment to the Constitution also declared unconstitutional and void and collegium system would be operative relating appointment of the higher judiciary.

Learned Senior Counsel appearing before the Constitution bench under this case made contention that impugned act infringe the basic structure of the Constitution as the same demoralizes the independence of judiciary as the very act itself challenge the role of the Hon'ble Chief Justice in selection of the judges to the Higher Judiciary and therefore, the act must be declared as ultra vires.

**National Judicial Commission to be with the concept of independence of judiciary:**

Since the independence of judiciary constitutes a basic feature it cannot be taken away or curtailed in any manner by an amendment to the Constitution, it can neither be done directly nor can it be done indirectly. In other words, the independence of the judiciary cannot be affected or curtailed by so changing the method of appointment of judges of the Supreme Court and High Court as to impinge upon their independence.

For example, if Article 124 and 217 are amended to take away the consultation with the Chief Justice of India, it would vitally affect the independence of the judiciary. In such a case the appointment would in fact be made by the executive acting alone in the case of Supreme Court and in the case of the High Court the element of executive would predominate and the concept of primacy of Chief Justice of India would disappear. The convention that the proposal should emanate from the Chief Justice of India (in the case of Supreme Court) would also come to naught. Similarly, if tomorrow a National Judicial Commission is created and it is so constituted that the executive dominates it, it would equally be volatile of the basic structure of independence of the judiciary of our Constitution. It is equally essential that the Commission be presided over by the Chief Justice of Indian and by none else. The composition of the Commission should not also be such that the predominance of judiciary is

diluted. Any such measure would be violative of the principle of independence of judiciary which has been accepted and affirmed as a basic feature of the Constitution. Rightly, therefore, the Constitution 67th Amendment Bill provided for a National Judicial Commission, which in the case of appointment to the Supreme Court, consisted exclusively of the Judges (Chief Justice of India and two senior most judges of the Supreme Court) and in the case of appointment to the High Court, the Chief Justice of India, the next senior most judge of the Supreme Court, Chief Justice of the High Court and the Chief Minister of the concerned State. It must also be remembered that the inclusion of the Chief Minister in the National Judicial Commission in so far as the appointment to the High Court was criticized by the Arrears Committee constituted by the Government of India on the recommendation of the Chief Justices' Conference. By introducing a proviso and an Explanation in Article 124(2), pointed out hereinabove, the role of the executive in the matter of appointment was substantially diluted. Not only was the President precluded from appointing any person not recommended by NJC, the President (Council of Ministers) has to record reasons in writing for not accepting a recommendation made by the NJC.

### Why imposition on Judicial Discipline

The judges shall be disciplined for the three reasons. The first is for democratic public accountability- so that the governed may safely relinquish control to those who hold authority.[10] The second is to 'enforce adherence to law itself- so that neutral principle rather than his own personal preferences motivate in his decision in each and every case. The third is to ensure that judges will follow to professional standards of behaviour and conduct so that they will not lose their respect of those who are subjected to it while exercising their authority.

While justifying first reason, in democracy, citizen must exercise their control over their government. Without this control, the exchange of power from citizens to government cannot be legitimate. It does strictly apply to political leaders so it applies to judges as well. Adherence to legal norms is important because a judicial decision shall be reliable and accurate.

### Code of Conduct for Judges

Hon'ble Mr. Justice S. H. Kapadia, chief justice of India said, "When we talk about ethics, the judges normally comment upon ethics among politicians, students and professors and others. But I would say that for judge too, ethics, not only constitutional morality but even ethical morality, should be the base...."

"These days we (judges) are telling everyone what they should do but who is to tell us? We have talk of enforcing the rule of law, but does not exempt and even exonerate us from following it"[11].

### Code of Ethics of a Judge

1. **Judicial decision to be honest:** the judge's life is full of public confidence in their role in society; the judicial decision is to be honest and fair. No judicial decision is honest unless it is decided in response to an honest opinion formed in the matrix of the judge's proficient of law and fact. Nevertheless the perception of a judge may be wrong. But a wrong decision honestly made does not make that decision dishonest. A decision becomes dishonest if not decided on judicial conviction of fairness, honest and neutrality.
2. **No man can be judge in his own cause:** The principle not applies only to the cause where the judge is an actual party to a case, but also applies to a case in which he has interest. A judge should not adjudicate in a case if he has got interest therein. Judges must remain impartial and should be also known by all people to be impartial.
3. **Administer Justice:** Judges must not fear to administer justice. "*flat justitia, ruat caelum*" that is "let justice be done though heaven fall" should be followed as motto by a judge. To have justice and access to justice is the right of every individual residing in a country so justice is the ultimate objective of an individual and if suppose bench of justice not providing ideal justice then it would be negation of each and every individuality or it may violation of possession inviolability of individual conceptualised by theory of justice.
4. **Equal opportunity:** Parties to the dispute be treated equally and accordance with the principles of law and equity. A judge does not belong to any person or section or division or



group. A judge should not have any concern with personalities who are parties to the case but only with merits. "it is essential to the proper administration of justice that every party should have equal opportunity of being heard, so that he may put forward his own views and support them by argument and answer the views put forward by his opponents".[12]

5. **Maintenance of distance from relatives:** Since judging is not a profession but a way of life, the judge must keep distance himself from the parties to the dispute and their lawyers during the conduct of trial. Now a days the growth of a new caste in legal profession who thrive not by intellectuals or professional capabilities but by utilising their close connection with the judges. The growth of this suspicious trend can be checked if practicing lawyers and sitting judges avoid meeting frequently in private.
6. **Too much of activity and participation in social functions be avoided:** The Supreme Court in *Ram pratap Sharma v. Dayanand* issued a note of caution to the effect that it is proper for a judge not to accept any invitation and hospitality of any business or commercial organization or of any political party or of any club or organisation run on sectarian, communal or parochial line. As a considerable amount of ordinary social activity, a judge may become identified with people and points of view, and litigants may think they may not get fair trial.
7. **Media Publicity shall be avoided:** As far as possible a Judge should keep off the media. Lord Widgery, Lord Chief justice of England since 1971 to England since 1971 to 1980, said that "the best judge is the man who should not court publicity and should work in such a way that they don't catch the eyes of the newsmen". Most of the problem of judicial stagnation stems from inadequate incentives and overly complicated procedures[13]. This is thought of around the world that judicial inefficiency is not only bad for litigants, legal system; it is also bad for economic prosperity, undercutting a national wealth and economic growth.
8. **Appointment of judges:**

In European Union, judges are elevated to the higher judiciary on pure concrete basis of merit, not on political

or judicial consideration. They look to the quality of decision rendered and past records of the judge. In India appointment and rejection should be made public. Constitutional provision should be amended for attainment of democratic, transparent and foolproof method of appointment, removal and transfer of judges.

#### 9. Judges should brought under Right to Information Act:

#### 10. Contempt of Court Act :

One and foremost task should be to amend the contempt of Court Act, 1971. Because wide powers are being conferred upon the courts vide contempt of court Act. Even today we are following the age old colonial system of deciding contemptuous act. The law of contempt in India has deviated from its very object. So definition of 'contempt' shall confine within the four corners of statutory definition.

### CONCLUSION

Instead of invalidity of NJAC Act declared by the Supreme Court, one thing is clear that there has been a detrimental tradition followed under the Collegium system of appointment. Some judges were not appointed only because they had issues with Hon'ble chief justice of India. The collegium system was noted for its very essential characteristic that there was no role of executive or there was no political interference in the composition of the Collegium as no one from the ruling party or the opposition was associated in any manner in the appointment of judges.

When there is any move of political interference in the Judiciary and judicial appointments, the sufferer is none but the common litigants who seeks justice till the Hon'ble Apex Court. It is perceived that the Hon'ble Apex Court will pronounce the judgment keeping the essence of basic structure of the Constitution into consideration as well as taking into accounts the flaws which the Collegium had in its functioning.

As things stand, the judiciary has used its power only to insulate itself both from criticisms and accountability. It has failed to evolve any internal system of intellectual growth of its Honourable members. Although some of the finest brains can be found in the legal fraternity, there is no systematic mechanism to either attract high quality talent to the legal profession or

to nurture the legal profession in India. Its distance from the academia only compounds the problem further.

Repeatedly voices have been raised from various quarters of society that the appointment of judges should be vested with an independent authority that has representation not only from judiciary but also from other segments of the society.

[1] 124. *Establishment and constitution of Supreme Court (1) There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.*

*Article 124 (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:*

*217(1) reads: '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 in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court...'*

[2] (AIR 1982 SC 149)

[3] (1981) Supp (1) SCC 87; AIR 1982 SC 149

[4] Ibid

[5] (1993)4 SCC441

[6] 124A. (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:—

(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 re-nomination.

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

[8] Section 13. Rules and regulations to be laid before Parliament :

Every rule and regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

[9] Supreme Court Advocates-on-Record -Association and another V. Union of India, MANU/SC/1183/2015, Justice J.S. Khehar, the presiding judge on the five-judge Constitution Bench, explained in his individual judgment.

[10] Sankar, S. N. (2000). Disciplining the Professional Judge. *California Law Review*, 88:1233, 1233-1278.

[11] Former chief justice, Verma delivered Speech; Prof. Dr. K.C. Jena, *Judicial Independence and Accountability: a Critique*, Indian Bar Review, Vol. XXXIX (4) 2012.

[12] Hon. Lord Hewart of Bury, Lord Chief Justice of England; Supra note 1

[13] Judicial Reform; Juan Carlos Batero, Rafael La Porta, florrencio Lopez-de-Silanes, Andrei Shleifer, Alexander Volokh; *The world Bank Research Observer*, vol. 18, no. 1(Spring 2003), pp.61-88