



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

Dr. Santosh Kumar<sup>1</sup>, Dr. Rang Nath Singh<sup>2\*</sup>

<sup>1</sup>Department of Law, Dr. Rammanohar Lohiya Avadh University, Ayodhya, India

<sup>2</sup>Rayat Bahra College of Law, Hoshiarpur, Punjab, India

**Corresponding Author:** Rang Nath Singh [rangnathsingh2@gmail.com](mailto:rangnathsingh2@gmail.com)

---

### ARTICLE INFO

*Keywords:* Consultation, Appointment Process, Constitutional Trust, Ethical

*Received :* 09 October

*Revised :* 27 October

*Accepted:* 28 November

©2023 Kumar, Singh: This is an open-access article distributed under the terms of the [Creative Commons Attribution 4.0 International](https://creativecommons.org/licenses/by/4.0/).



### 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.

---

## 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 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* 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.

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.

### LITERATURE REVIEW

In the case of *Supreme Court on Record Association v. Union of India* (1993), 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), 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*.

124-A was added through the 99th Constitutional Amendment Act, 2014 in which this provision was made. (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) Adjacent to the Chief Justice of India are two additional distinguished Supreme Court judges --Members, ex officio,
- c) The Union Minister in charge of Law and Justice--Member, ex officio,
- d) The Prime Minister, the Chief Justice of India, and the Leader of the Opposition in the House of People, or, in the absence of such a Leader of the Opposition, the Leader of the Single Largest Opposition Party in the House of People, shall nominate two distinguished individuals. - Members,

With the understanding that a distinguished individual will be chosen from among those who belong to the Scheduled Tribes, Scheduled Castes, and Other Backward Classes, Minorities or Women. With the additional caveat that a distinguished individual may only be nominated once every three years and cannot be renominated.

No action or decision made by the National Judicial Appointments Commission may be contested or declared invalid only because there is a gap or other flaw in the Commission's organizational structure..

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
- b) of the Supreme Court, Chief Justices of High Courts and other Judges of High
- c) Courts
- d) recommend transfer of Chief Justices and other Judges of High Courts
- e) from one High Court to any other High Court; and
- f) ensure that the person recommended is of ability and integrity.

Similarly, this arrangement was made through NJAC Act, 2014

## **METHODOLOGY**

The research methodology used in the preparation of this article is doctrinal research methodology. Material related to this paper is available in our constitutional assembly debates ,case laws, literature and religious scriptures. Primary and secondary sources have been used in collecting facts.

## **RESEARCH RESULT AND DISCUSSION**

### **Procedure for selection of Judge of Supreme Court**

- 1) The Commission shall recommend for
- 2) 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.
- 3) 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: With the understanding that the ability and merit of the proposed High Court judge will be taken into account in addition to seniority: With the additional caveat that if two Commission members disagree, the Commission will not recommend someone for an appointment.
- 4) The Commission may deem it necessary to establish additional protocols and requirements for the selection and appointment of Supreme Court judges through regulations.

### **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) In order to recommend someone for appointment as a judge, the Commission will look to the Chief Justice of the relevant High Court for nomination. of that.
- 3) The Commission shall also nominate names for appointment as judges of a High Court from among those who may be appointed as such under clause (2) of article 217 of the Constitution, taking into account ability, merit, and any other suitability criteria that may be specified by regulations. The Chief Justice of the relevant High Court shall be consulted regarding the nominations.
- 4) Prior to proposing a nomination under subsection (2) or expressing opinions under subsection (3), the Chief Justice of the relevant High Court will confer with two of the court's most senior judges as well as any additional judges and distinguished advocates that may be designated by regulations.
- 5) Following receipt of opinions and nominations under subsections (2) and (3), the Commission may suggest for appointment the individual deemed qualified based on ability, merit, and any additional qualifying factors as may be stipulated by regulations.
- 6) If two members of the Commission disagree, the Commission will not recommend someone for an appointment under this section.
- 7) Before recommending anything, the Commission will first get the opinions of the state's governor and chief minister in writing, following any guidelines that may be necessary.
- 8) The Commission has the authority to establish additional guidelines and requirements for the selection and appointment of a High Court Judge and Chief Justice through regulations, if deemed necessary.

### **Power of President to Require Reconsideration**

The Chief Justice of India, a judge of the Supreme Court, or, in certain situations, a judge of a high court shall be appointed by the President based on the Commission's recommendations: With the understanding that the President may, if deemed necessary, order the Commission to reevaluate the recommendation it made, either broadly or otherwise: With the additional caveat that the President will appoint someone in line with the Commission's recommendation if it is made following reconsideration in compliance with section 5 or section 6.

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 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."

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". 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 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.

## CONCLUSIONS AND RECOMMENDATIONS

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*.

## ADVANCED RESEARCH

In writing this article the researcher realizes that there are still many shortcomings in terms of language, writing, and form of presentation considering the limited knowledge and abilities of the researchers themselves. Therefore, for the perfection of the article, the researcher expects constructive criticism and suggestions from various parties.

**REFERENCES**

AIR 1999 SC 1.

AIR 2015 SC 5457.

2.109.13 Ayodhya Kanda ,Valmiki Ramayana.

1.11 Taittiriya Upnishad.

(1993)4 SCC 441.

The National Judicial Appointments Commission Act ,2014

ILR 1974 DELHI 253.

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

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

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