ABSTRACT

The study of the present research work is focused on a particular aspect of judicial reform i.e. appointment and accountability of the judges of higher judiciary in India. The Indian Constitution has made elaborate provisions for the establishment of an independent, authoritative and impartial judiciary. When the Constituent Assembly started its work, the most difficult and daunting task that fell on its shoulder was to make provisions for an independent and impartial judiciary in India. In Constituent Assembly Debate (hereinafter CAD) Art. 124 (Art. 103 of the draft Constitution) was very much discussed. Hon’ble Dr. Ambedkar said that there is a question that how are the judges of the Supreme Court to be appointed? He finds three different proposals. The First proposal is that the judges of the S.C. should be appointed with the concurrence of the Chief Justice. The other view is that the appointments made by the President should be subject to the confirmation of two thirds vote by Parliament; and the third suggestion is that they should be appointed in consultation with the Council of States. In this regard, the observations of the Hon’ble Dr. B. R. Ambedkar, assume significance. “The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex hypothesi, well qualified to give proper advice in matters of this sort and my judgment is that this sort of provision may be regarded as sufficient for the moment.”

1 Excerpts from the Constituent Assembly of India Debates, Vol. VIII, Book No. 3. Date: 24 may 1949, Tuesday.
Then, in 1981, a bench of seven judges of Supreme Court of India said in *S.P. Gupta’s case*\(^2\) that the Central Government is not bound to act in accordance with the opinion of the Chief Justice of India. The opinion is merely consultative and “the power of appointment resides solely and exclusively in the Central Government”. Then in *Subhash Sharma v. Union of India*\(^3\) a three judge bench held that as regards the word “consultation” in Art. 124(2), the Constitutional phraseology would require to be read and expounded in the context of the Constitutional philosophy of separation of power.

In 1987, the Law Commission headed by Justice D.A. Desai in its 121\(^{st}\) report, suggested the setting up of a National Judicial Commission. The recommendations of the report of Justice D.A. Desai Commission found express in the Constitution (67\(^{th}\) Amendment) bill, 1990.

At the heels of this controversy, another issue erupted which further dented the credibility of the appointments made by the executive. Audit reports implicated Mr. Justice V. Ramaswami, a sitting judge of Supreme Court for having used public funds for personal gains when he presided as Chief Justice of Punjab and Haryana High Court. On a petition made by 108 members of the Lok Sabha, the Speaker appointed a committee of three judges under the Judges Inquiry Act, 1968. The Committee found him guilty on 11 out of 14 charges. The enquiry finally resulted in an impeachment motion. The impeachment motion failed. In a House of 401 members, there were only 196 votes for the impeachment and 205 abstentions; it fell short of two-thirds majority of those present and voting required for carrying the motion through. The Executive’s role in the impeachment process created a trust deficit.

---


\(^3\) *AIR 1991 SC 631,641.*
On October 6, 1993 when S.C. delivered its verdict in *SCAORA*, in one stroke, the Supreme Court of India, became the most powerful Supreme Court in the world. Subsequent to *Shubhash Sharma*, the question of the process of appointing the Supreme Court Judges came to be considered by a nine Judges bench of the Supreme Court in *S.C. Advocates on Record Association v. Union of India*. Referring to the ‘consultative’ process envisaged in Art. 124(2) for appointment of the Supreme Court Judges, the Court emphasized that this procedure indicates that the Government does not enjoy ‘primacy’ or “absolute discretion” in the matter of appointment of the Supreme Court Judges.

On a reference made by the Union Government, in *Special Reference Number 1 of 1998* Justice S.P. Bharucha wrote the unanimous opinion of the nine judges holding as follows:

“The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four senior most puisne Judges of the Supreme Court. In so far as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two senior most puisne Judges of the Supreme Court...The views of the other Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.”

Much of the criticism of the Collegium system of appointments was that nobody really never knew how these appointments came to be.

---

6 Ibid, at 429.
8 Ibid.
made, what considerations were taken into account, how the talent was identified, who constituted the talent pool, how character, integrity and performance were assessed and determined, how and which agencies were involved in the decision-making process.

Here some recent cases of corruption and the process of removal of judges are proper to describe. The Case of Justice Ashok Kumar, The Case of Justice Soumitra Sen, Case of Justice Ashwini Kumar Mata, J. P.D. Dinakaran case, documentary evidences against Justice Sabharwal, the Ghaziabad Provident Fund Scam case, cash at judges door scandal etc.


*National Judicial Appointment Commission Act, 2014*

National Judicial Appointment Commission Bill and Constitutional Amendment Bill, was ratified by 16 of the state legislatures in India, and subsequently assented by the President of India on 31st December 2014. It has come into force on April 13, 20159 and the Constitution (Ninety-ninth Amendment) Act, 2014 has come in to force on same day.

Section 2 of the Constitution (Ninety-ninth Amendment) Act, 2014 says that under clause 2 of Article 124 of the Constitution, for the words

---

9 Notification No. So 1001(E) [F. NO-K-11016/17/2015-US(11)].
“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”, the words, figures and letters “on the recommendation of the National Judicial Appointments Commission referred to in article 124A” shall be substituted. The first proviso, which said that “in the case of appointment of a Judge other than the chief justice, the chief Justice of India shall always be consulted”, is omitted.10

The Constitution (Ninety-ninth Amendment) Act, 2014 has inserted three new Articles in the constitution of India viz. Art.124A, 124B, and 124C after the Art. 124.11

A Clutch of petitions were heard before a five-judge bench led by Justice J.S. Khehar. This five judges Supreme Court Bench headed by Justice J.S. Khehar on 16th Oct. 2015 by a majority of 4:1 struck down the Constitution 99th Amendment Act and National Judicial Appointments Commission (NJAC) Act, 2014 as unconstitutional.

In the name of ‘Collegium System’ the Supreme Court succeeded to retain all powers to itself regarding appointment of judges at Higher Judiciary by violating constitutional mandate under Art. 124. However, it has taken 22 years to realize that the ‘Collegium System’ was not a creative interpretation of the Constitution rather it was clearly judicial overreach. Therefore, it is pertinent to note that the Bench admitted that all is not well even with the ‘Collegium System’ of “judges appointing judges” and that the time is ripe to improve the 22-year-old system of judicial appointments. Therefore, on 16th December 2015 S.C. has sought suggestions from the Centre and interested persons to improve the working of the ‘Collegium System’. So department of Justice, Ministry of  

Law and Justice had requested through a public notice to send valuable suggestions in the following four categories: Transparency, A Secretariat for the Collegium, Minimum eligibility criteria and dealing with the complaints against the prospective appointments. After S.C. quashed the NJAC Act, left it to the Centre to consult the CJI for drafting the MOP (Memorandum of Procedure) for appointments to the higher judiciary. The Centre seeks to introduce Performance Appraisal as a standard for appointment.

The researcher views that the present deliberations and decision thereof is based on wrong question, whether a national judicial commission will be a better alternative to the Collegium System’ or not? The researcher views that while asking such question it is not realised whether the creation of such a system is constitutionally permissible or not? It is sad to say that the ‘Collegium System’ came into existence out of conflict of superiority complex among the Legislative, Judicial and Executive branch of the State. This conflict ultimately result into disturbance of balance which was established by the constitution-makers between those organs of the state.

J. Verma had also emphasized the need for strict scrutiny at the entry point of the judges that will avoid the need for later removal of a bad appointment. Today’s issues are accountability, accessibility, a more democratic process to the appointment process and a wider representation.