

Inauguration of National Seminar on
National Judicial Appointments Commission Bill, 2014

Hon'ble Chief Minister's Speech

28-8-2014/ 10-00 A M / Yavanika, Nrupathunga Road, Bangalore

Mr Justice V S Malimath,
former Chief Justice of the High Courts of Karnataka and Kerala

Mr Justice M Ramajois,
former Governor of Bihar and Jharkhand, and,
former Chief Justice of the High Court of Punjab and Haryana

Mr Justice M N Rao,
former Chief Justice of the High Court of Himachal Pradesh and
former Chairman of the National Backward Classes Commission

Mr S S Naganand,
Senior Advocate and Karnataka Section of International Commission of Jurists

Prof Ravivarma Kumar,
Advocate General for Karnataka,

Respected Members from the Judiciary and the Bar,

Media Friends,

Ladies and Gentlemen,

1. It's my pleasure and privilege to inaugurate this National Seminar on National Judicial Appointments Bill – 2014.
2. Let me congratulate Lawyers Forum for Social Justice and the Centre for the Study of Social Exclusion and Inclusive Policy for their initiative for organising this Seminar, which is relevant and timely.

3. The power to select and appoint Judges to the Supreme Court and the High Court is vested with the Executive under Articles 124 and 217 of the Constitution of India.
4. However, there is one requirement, which needs to be met. It is prescribed that the President shall appoint the Judges to the Supreme Court, 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. So far, as appointment of a Judge other than the Chief Justice of India, it was required to be done in consultation with the Chief Justice of India.
5. As far as the High Courts are concerned, the President shall appoint Judges to the High Court after consultation with the Chief Justice of India, the Governor of the State and in case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court concerned.
6. The machinery so created for appointment of the Judges to the higher judiciary had been in operation and had also received the approval of the Supreme Court in the case of ***Union of India vs Sankal Chand Himatlal Sheth (1977)***, where it was firmly held that "consultation" did not mean "concurrence". This view was also approved in ***S.P. Gupta vs Union of India (1981)***.
7. Article 368 of the Constitution empowers the Parliament to amend the Constitution and lays down the procedure there for.

8. Of the three modes by which the constitution may be amended, the most onerous method is prescribed for amending the provisions relating to appointments to the higher judiciary.
9. The one and only method by which it may be amended is by introducing a Bill for the purpose in either house of Parliament and passing the same by a majority of the total membership of that house and by a majority of not less than two-third members of that House present and voting, together with ratification by the legislatures of not less than one-half of the States by a resolution to that effect passed by those Legislatures and thereafter securing the assent of the President.
10. Notwithstanding the same, in the second Judges' case {Supreme Court Advocates-on-Record Association vs Union of India (1993)}, the Supreme Court ruled that the word "consultation" in Articles 124 and 217 denoted "concurrence", and that primacy in making judicial appointments vested with the Chief Justice. The said view was also affirmed by the third Judges' case [In re: Presidential Reference (1998)].
11. By these two judgments, the procedure to select and appoint Judges to the higher judiciary was amended and the power wrested by the Judiciary from the Executive by interpreting the word **"consultation"** as **"concurrence"**.
12. A Collegium was constituted in the second Judges' case and the composition of the Collegium was modified in the third Judges case.

13. The said interpretation itself came to be made, when it was noticed that no progress had been made to appoint a National Judicial Commission in order to ensure that the appointments were transparent and that such appointments contributed to upholding the independence of the Judiciary.
14. The Collegium system has worked for over twenty years. The present Judges are all appointed, both in the Supreme Court as well as in the High Courts, through this Collegium system.
15. There has been debate on the existing Collegium system and there appears to be agreement in its failure.
16. In the circumstances, efforts have been made in the past to replace the Collegium system by constituting the National Judicial Commission.
17. Though, the earlier attempts to constitute the Commission did not succeed, the newly constituted Union Government has succeeded in getting the Constitution (121st Amendment) Bill 2014 and the National Judicial Appointments Commission Bill 2014 passed by the Parliament in quick succession in August 2014.
18. The Constitution Amendment Bill awaits the ratification by the Legislatures of not less than one half of the States. I have received communication from Union Law Minister in this regard, two-days ago.

19. The proposed measure, while putting an end to the Collegium system, seeks Constitution of a Six-Member National Judicial Appointments Commission to handle all matters relating to appointment of Judges to the Higher Judiciary.
20. Our Constitution has broadly accepted the doctrine of suppression of power. However, a continuous chain of coalition Governments has substantially damaged the delicate balance between the three organs of the State, namely, the Legislature, the Executive and the Judiciary.
21. The doctrine of the checks and balances could not operate effectively as the Executive, for various reasons, has not been in a position to assert itself to discharge it's constitutional functions. Over this period, there is a steady ascendancy of the Judiciary making it the most powerful Judiciary in the World.
22. As the Supreme Court itself has declared “ This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of the determining of what is the power conferred on each branch of the Government, whether it is limited and if so, what are the limits and whether any action of that branch transgress such limits” [State of Rajasthan vs Union of India – AIR 1977 SC 1361].
23. The nature of power that our Supreme Court has come to enjoy has been described by a famous jurist, I quote :

“ In no other Country in the World has the Judiciary has assumed such ascendancy as in India.....

..... **The Indian Supreme Court is today the most powerful of all Apex Courts in the World. It has surpassed in its power even the United States' Supreme Court, which Lord Bryce and Tocqueville thought in their time was most powerful of all Courts in the World."**
unquote.

[See T. R. Andhyarujina, The Judicial Activism and Constitutional Democracy in India].

24. Today, the Indian Supreme Court has regulated a wide range of aspects governing human life. To name a few, it has regulated admissions to the Professional Colleges, has framed law to rescue women, banned strikes, processions and bundhs, directed Municipalities to provide drainages, directed framing a Scheme to increase the pension of retired Central Government employees, directed the revival of industries, so on. Telecasting of cricket matches has also been regulated. Every order made by the Executive and every Law made by the Legislature is subject to the power of Judicial Review.
25. It is significant to note that the Parliament's exercise of the constituent power to amend the Constitution has to pass the judicially invented touch stone of basic structure.
26. In this backdrop, the Indian Judiciary has grown beyond the position assigned to in the Constitution of India resulting in its emergence as the most powerful organ.

27. The Doctrine of Checks and Balances itself will be seriously jeopardized if the delicate balance struck between the three organs through the Doctrine of Suppression of Power is altered.
28. Thus, appointment to the Higher Judiciary assumes great importance. Unless right men are appointed to the Constitutional Courts, we cannot expect an independent judiciary discharging its function without fear or favour and affection or ill-will.
29. As to who appoints the Judges, on what criteria and following what procedure also assumes great importance.
30. As Dr B. R. Ambedkar had declared on the Floor of the Constituent Assembly, I quote :
- “However good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a constitution may be, it may turn out to be good, if those who are called to work it happened to be a good lot.**
31. **The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of the State such as the Legislature, the Executive and the Judiciary.**
32. **The factors, on which the working of those organs of the State depend on the people and the political parties. They will set up as their instrument to carry out their wishes and their politics.**

33. **Who can say how the people of India and their parties will behave ? Will they uphold the constitutional methods of achieving their purposes or will they prefer revolutionary method of achieving them ? If they adopt the revolutionary methods, however good a Constitution may be, it requires no profit to say that it will fail...” [C.A.D-volume XI, Page : 975,25th November 1949] unquote.**
34. One of the most depressing features about the composition of the Judiciary today is the absence of a single Judge from among the Scheduled Castes and Scheduled Tribes on the Supreme Court Bench.
35. Thus, a significant portion of India’s population has no representation on the Supreme Court Bench. The position of women and backward Classes is no different. It is woefully inadequate.
36. Even in the High Courts, the position is no better. Above all, there is no information available as to whether candidates belonging to these Sections were duly considered in making such appointments and if so why they were not appointed in adequate numbers. It is also not known if any attempts have been made to give adequate representation to these classes and reasons, if any for not providing representation.
37. This is mainly on account of the fact that the existing system does not provide any information on these aspects and there is not enough transparency in the procedure relating to the appointments of Judges to the Constitutional Courts.

38. More importantly, if a Section of the Society is persistently neglected in providing representation on the Bench, the system is not accountable either to the Parliament or to any other Constitutional Body.
39. It is an effort to find a solution to these problems that has necessitated the constitution of the National Judicial Commission. Once that Commission is constituted and transparency and accountability is assured, the other details about the composition of the Commission and the procedure to be adopted by the Commission needs to be addressed.
40. Under a Federal Constitution, the Governor has to act on the aid and advice of the Council of Ministers. In the matter of appointment of Judges also. This is the Constitutional position.
41. Once the views of the State Government and of the Chief Minister are ascertained, consulting the Governor there after can become counter productive, especially when a situation can be there when the Governor gives his opinion ignoring the aid and advice of the Council of Ministers. Therefore, seeking the views of the Governor after consulting the Chief Minister is also a matter which needs to be specifically addressed.
42. This National Seminar organized by the Lawyer's Forum for Social Justice and the Centre for Study of Social Exclusion and Inclusive Policy (CSSEIP), National Law School of India University, Bangalore, is a welcome step to find solutions to the important problems facing the appointments of Judges to the Constitutional Courts in India.

43. I ***congratulate*** the Lawyer's Forum for Social Justice as well as the National Law School of India University getting this important seminar to take the debate on Judicial Appointments forward.
44. I am ***confident*** that the Speakers at the Seminar will be able to throw sufficient light on the constitutional Amendment as well as the National Judicial Appointments Commission Bill so as to find a solution to make the Judiciary truly independent, while also ensuring that it becomes more broad-based and representative by upholding social justice in making its appointments by providing adequate representation to the Scheduled Castes, Scheduled Tribes, Backward Classes, Minorities and Women. I declare this Seminar inaugurated and ***wish*** the Seminar a ***great success***.

Thank you one and all !
