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## SCHEME FOR JUDICIAL APPOINTMENTS IN INDIA AND COLLEGIUM SYSTEM: A CONSTITUTIONAL APPRAISAL

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### **Abstract**

*The Constitutional obligations of the judiciary place it on the most respectable and dignified position under the Indian Legal system, that has to be maintained at any cost, in order to uphold the faith and confidence of We the people. For that it has to consistently act in fair, equitable and transparent manner, at each and every stages of functioning in judicial as well as administrative capacity. In any system the output results depend upon the quality and nature of inputs given therein. The judicial system is not immune from such saying. Judicial appointments in India have been subjected to severe criticism on various occasions at various forums. It has been a matter of great concerns among legal and judicial fraternity as well as public at large, due to the existing system of appointments and manner of its functioning. Several legislative as well as judicial attempts have been made towards this aspect of judicial reform, but this continuous process continues till the existence of the institution, with a view to improve and strengthen it. In this backdrop the paper examines the Scheme for judicial appointments in various courts in India and relevancy, efficacy and efficiency of the collegium system*

*in the light of constitutional vision and relevant provisions.*

**Keywords:** Judicial Appointment, Collegium System, Judicial Independence, NJAC

### **I. INTRODUCTION**

*"It is not given to any generation of men to complete the task of restructuring the legal system to make it effective, easily accessible, de-professionalised and, cheap, but no generation is free either to desist from it".*

----- Julius Stone

### **A. Background of the Study**

To begin with the discussion, abovementioned statement is noteworthy to quote here, due to its relevance in the present context. Many criticisms are voiced on several occasions from various platforms against the present judicial system and the personnel working thereunder. System is variously described as colonial, unsuited to our need, contrary to our culture and foreign in origin, imposed by the foreign rulers to serve their imperial ends.<sup>1817</sup>

Human resource constitutes amongst other things a crucial element of any organisation, therefore selection and appointment of the personnel or manpower in any system is one of the vital aspects in the effective functioning of any system including the judicial system. Meaning thereby any steps in the direction of judicial reforms must involve the issue of judicial appointments also.<sup>1818</sup> Indian Judicial system is pyramidal in structure and different from American and Australian models. In our judicial system the Supreme Court of India is at the apex, High courts in states level, District judge at the middle and, the subordinate judiciary at grass root level. Our constitution contains separate provisions relating to the scheme for selection, appointment, induction and,

<sup>1817</sup> Law commission of India, "121<sup>st</sup> Report on "A New Forum for Judicial Appointments" (July, 1987) p. 1, para 1.1, available at: <https://www.lawcommissionofindia.nic.in> (last visited on Sep. 20, 2021).

<sup>1818</sup> *Ibid.*, para 1.2.

manpower planning in different layers of judicial system.

Over a last four decades judicial appointments to the constitutional courts and subordinate courts were made in accordance with the provisions of article 124, 217 and 233 & 234 of the constitution. Dissatisfaction and criticisms were expressed with respect to the methods and procedures of judicial appointments to the constitutional courts, which prompted the Supreme Court to give its sincere attention to the issues in order to resolve the controversies on the point. In *Second Judges case*<sup>1819</sup> this led to the creation of a new system for the appointment and transfer of judges to the Constitutional Courts namely “Collegium of a number of senior most Judges” and down of procedures in relation thereto. Further in due course of legal development both the composition and procedures relating to the appointments and transfers were slightly modified and comprehensively laid down in *Third Judges Case*<sup>1820</sup>.

Criticism about the system did not stop even thereafter and continued to be voiced on various for and on several occasions. Considering the importance attached to the issue, serious of the matter and intensity thereof parliament amended the Constitution<sup>1821</sup> and in pursuance thereof enacted the National Judicial Appointment Commission Act, 2014. Thereby a new forum namely NJAC<sup>1822</sup> was created for appointments and transfer of judges of the constitutional courts. The composition of the commission and procedures involved in the processes of appointments and transfers were also laid down under the Act. The amendment Act was challenged<sup>1823</sup> before the Supreme Court of India, which declared it as unconstitutional being in violation of

Independence of judiciary<sup>1824</sup> i.e. basic structure<sup>1825</sup> of the constitution.

The issue relating to the methods, procedures and system of judicial appointments to the constitutional courts has always been debated and discussed on various occasions, but the issue of disparity in representation in the appointments to Constitutional courts between the members of bar and member of the subordinate judicial service, and also the disparities or inconsistencies and variations judicial appointments to subordinate judiciary have rarely been a subject matter of discussion and debate in public forums.

Therefore present study is intended to deal with issue of lack or inadequacy of representation of the members of subordinate and superior judicial service in the matters of appointment of judges to the Supreme Court and High Courts in India. It also deals with the disparity in the matters of the appointment to the cadre of District judge (entry level). It also deals with the issue of huge variations and inconsistency in the eligibility criteria and syllabus of examination of different states, delay in completion of such appointments, huge vacancies, and disparity in the age of retirement of judges. It also throws light on the tissue of minimum age of eligibility for such judicial appointments, and their inconsistency with the constitutional vision.

## B. Objectives of The Study

The present study has been conducted with the following Objectives:

- To discuss and explain the Scheme for the judicial appointments to the Supreme Court, High Courts and Subordinate Courts in India.
- To examine and deliberate upon the existing practices in the matters of judicial appointments in the various Courts at each level of the Indian Judicial System.

<sup>1819</sup> *Supreme Court Advocate on Record Association v. Union of India*, 1993 (4) SCC 441.

<sup>1820</sup> *In re presidential Reference*, (1998) 7 SCC 739.

<sup>1821</sup> The Constitution (Ninety-ninth amendment) Act, 2014.

<sup>1822</sup> National Judicial Appointment Commission

<sup>1823</sup> *Supreme Court Advocate on Record Association v. Union of India*, AIR 2016 SC 217.

<sup>1824</sup> *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299.

<sup>1825</sup> *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC.



- To point out, highlight and analyse the contemporary issue of disparity in the matter of judicial appointments in India.
- To discuss other pertinent and contentious issues related to judicial appointments in India, which requires adequate attention and prompt action.
- To make an appraisal of the existing practices in India relating to the judicial appointments, in the light of constitutional scheme.
- To find out the grey areas where disparity or inconsistency or variations exist in the matters of judicial appointments and their causes and effects.
- To suggest some effective measures in order to bring uniformity, consistency, transparency in the in the matters of judicial appointments in India.

### C. Statement of Problems

- In the matter of appointment of judges to High Courts, the members of subordinate and superior judicial service are inadequately represented.<sup>1826</sup> And consequently in the matter of appointment of the Supreme Court judges, there is lack of representation of member of subordinate judiciary.<sup>1827</sup>
- The process of judicial appointments takes considerable period of time and in most of the cases it takes a year or two in order to complete the process.<sup>1828</sup>
- At any point of time, huge number of judicial vacancies exists, which has adverse impact on the efficient performance of the entire judicial system.
- Lack of uniformity in the age of retirement of judges of the Constitutional Courts and,

<sup>1826</sup> As per the scheme in accordance with the provisions of the constitution, there are two sources of Appointment of Judges i.e. Bar and Service, meaning thereby there should have been equal representation from both the sources but the statistics shows the inadequacy of representation from the judicial service cadre.

<sup>1827</sup> As per the present data there is single representation from subordinate judiciary and that also from the cadre of Superior Judicial service, none from subordinate judicial service, these data are reflective of the fact of lack of representation of member of subordinate judiciary.

<sup>1828</sup> It points towards the delay in the completion of appointment process of the Judges of Constitutional Courts as well as initiation of recruitment process by notification of vacancy through advertisement, conduct of selection process (Examination & Interview) and, appointment of Judicial officers of the Subordinate Courts.

subordinate courts, prevents from their experiences<sup>1829</sup> and legal acumen being utilised to further the cause of justice, reducing pendency and delay.

- In the matters of the appointment to the cadre of superior judicial service (District judge entry level), there is disparity between “direct appointment from bar” and “appointment from amongst the members of subordinate judicial service”.
- The minimum age criteria of thirty five years for appointment to superior judicial service in addition to at least seven years of practice as an advocate and, impliedly minimum age for High Courts judges seem to be irrational, unreasonable and superficial limitation, inconsistent with the constitutional provisions.<sup>1830</sup>
- There are huge variations in the eligibility criteria and syllabus of examination for the appointment to subordinate and superior judicial services of different states,<sup>1831</sup> which do not seem to in consonance with the idea of “unified judiciary”.

### D. Significance of the Study

The significance of the issue lies in the fact that it affects the functioning, efficiency and performance of the entire judicial system. It also affects or has tendency to infringe the constitutional right to equality in the matter of public appointments and other matters connected therewith. The problem is inconsistent with the mandate of fair, just and reasonable law<sup>1832</sup>. The issue of judicial appointments is of very much importance because it is directly connected with the problem of huge pendency of cases in courts and inordinate delay in the administration of justice, which is in contravention of the

<sup>1829</sup> The years of service put in the judicial service provides them enormous experience to deal with the matters more efficiently and to administer justice effectively. Lack of uniformity in the age of retirement of judges in absence of any reliable evidence to support the early retirement, with a great deal of experience in discharge of judicial function, is a kind of loss to judicial system and one of the important factors contributing towards the huge pendency and inordinate delay in disposal of cases.

<sup>1830</sup> Neither article 217 (2) nor article 233 (2) of The Constitution provides for minimum age of eligibility, rather it only prescribes minimum years of practice as an advocate or service, as the case may be.

<sup>1831</sup> These factors vary from one to another state for example in Bihar, Jharkhand, UP, MP, Delhi, Andhra, Kerala, Karnataka and TN etc.

<sup>1832</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

constitutional mandate of right to fair and speedy trial<sup>1833</sup>. Recent news and media reports<sup>1834</sup> are also the evidence of the gravity of problem and significance attached to the issue under the discussion, wherein the CJI and the Union minister of Law and Justice expressed their sincere concerns over those issues of judicial appointments, pendency and delay.

### E. Need of the Study

The present study is extremely necessary to bring uniformity and remove disparity, inconsistency or variations in the matter of judicial appointments in India, in order to strengthen the judicial system. In view of the constitutional ideals, it is also necessary to ensure equality of opportunity to the potential and competent members of subordinate judiciary in judicial appointments to the Constitutional Courts. Therefore it is the need of the hour to bring transparency in judicial system by expressly laying down the uniform criteria, standard procedure for judicial appointment, for maintaining the dignity of the institution of judiciary in order to uphold and embolden the faith and confidence of we the people reposed in the legal and judicial system.

### F. Research Methodology

The present study is a qualitative research on the topic, wherein data have been collected from both the primary and secondary sources. In course of the research, primarily doctrinal method has been followed for the analytical study of the constitutional provisions and judicial interpretations thereof relating to the scheme for judicial appointments in India. However to a certain limited extent non-

doctrinal or empirical method of research has also been followed for the purpose of analytical interpretation of the statistical data collected through the websites of the Department of Justice, Ministry of Law & Justice, Govt. of India, Supreme Court of India, High Courts, District Courts and other relevant websites and other authoritative sources and relevant news reports, in order to find out and highlight the disparity in the matters of judicial appointments to the Constitutional Courts, inconsistency and variations in eligibility criteria, syllabus, selection processes and appointments to the subordinate courts in various states, and age of retirement of judges of every level of courts across the Country.

## II. AN OVERVIEW POST-INDEPENDENCE

### A. Constituent Assembly Debates (1946-1949)

There debated and discussed in detail the provisions relating to appointment of judges, qualifications and other connected issues on the subject matters corresponding to the existing provisions of articles 124<sup>1835</sup>, 217<sup>1836</sup>, 233 & 234<sup>1837</sup> of the constitution of India. Wherein some of the eminent members also suggested for increasing the age of retirement of judges, with a view to secure the independence of judiciary. However on the issue of the minimum age for the eligibility of appointment of judges to the Supreme Court, High court, Subordinate Court the texts of the debate are silent, except with respect to minimum years of practice as an advocate or holding judicial office. Moreover the issue of representation of members of subordinate judicial service in the matters of appointment of judges to the Constitutional Courts do not find any place in the Constituent assembly debates.

### B. The Constitution of India (1950)

It is the fundamental law of our country which is the foundation of the entire legal and judicial system. The appointments of judges of the

<sup>1833</sup> *Hussainara Khatoon and others (1) v. Home Secretary, State of Bihar* (1980) 1 SCC 81; *Hussainara Khatoon v. State of Bihar* AIR 1979 SC 1364.

<sup>1834</sup> Sukirti Dwivedi, and Swati Bhasin, "Justice Delayed Is Justice Denied: Law Minister On Pending Court Cases" *NDTV*, Sep. 5, 2021, available at: <https://www.ndtv.com/india-news/union-law-minister-kiren-rijiju-on-pending-court-cases-in-india-at-chief-justice-of-india-felicitation-event-justice-delayed-is-justice-denied-2529612> (last visited on Sep. 5, 2021); See, Prakhar Misra and Shreyas Narla, "Revise judges' appointment process to build judicial capacity" *Apr.* 20, 2021, available at: <https://indianexpress.com/article/opinion/web-edits/revise-judges-appointment-process-to-build-judicial-capacity-7281976/> (last visited on Sep. 24, 2021); Rekha Sharma, "Why the collegium system, while the best for judicial appointments, needs course corrections" *Aug.* 12, 2021, available at: <https://indianexpress.com/article/opinion/columns/why-the-collegium-system-while-the-best-for-judicial-appointments-needs-course-corrections-7447904/> (last visited on Sep. 24, 2021).

<sup>1835</sup> Constituent Assembly Debates on May 23 & 24, 1949, available at: <http://parliamentofindia.nic.in/ls/debates/vol3p2.html> (last visited on Sep 20, 2021).

<sup>1836</sup> *Id.* on 6<sup>th</sup> June 1949 and, 7<sup>th</sup> June 1949.

<sup>1837</sup> *Id.* on 16<sup>th</sup> Sep. 1949.

Constitutional and Subordinate Courts are made in accordance with the relevant constitutional provisions in this behalf. The provision relating to the appointment of the Supreme Court judges<sup>1838</sup> is contained in article 124, for the judges of High Courts<sup>1839</sup> in article 217 and, for the judges and judicial officers of the Subordinate Courts<sup>1840</sup> in article 233 & 234. However some laws,<sup>1841</sup> rules<sup>1842</sup> and other norms<sup>1843</sup> made pursuant the constitutional provisions by the competent authority empowered in this behalf, actually govern the process and manner of those judicial appointments. The Collegium system was introduced by virtue of judgment in *Second Judge's case*<sup>1844</sup> which is still being followed. The National Judicial Appointment Commission was brought into existence by virtue of the Constitution (Ninety-ninth amendment) Act, 2014, which was declared unconstitutional by the Supreme Court in *Fourth Judge's Case*<sup>1845</sup> and as a consequence thereof the previously existing collegium system revived.

### C. Union of India v. Himmatlal Sankalchand Seth (1977)

In this case the meaning of the term "Consultation" brought for the consideration before the Supreme Court. Although that was related to consultation under article 222, however it was held that consultation means full and effective consultation. And for that the three constitutional functionaries must have for its consideration full and identical facts, on the basis thereof, they would be able to take a decision. However the president has a right to differ therefrom and take a contrary view. Meaning thereby consultation does not mean

concurrence and the president is not bound by it.<sup>1846</sup>

### D. S.P. Gupta v. The President of India (1981)

It is also known as *Judges transfer case* or *First Judges case*<sup>1847</sup> wherein the Supreme Court unanimously agreed with the meaning of the term "consultation" as explained by majority in *Sakanchand Seth case*<sup>1848</sup> and held that the aforesaid term in article 124 has same meaning as under article 222 of the Constitution. It means that decision of the government in this regard can only be challenged on the ground of *mala fide* or *irrelevant considerations*.<sup>1849</sup> Thereby the ultimate power to appoint Judges vested in the Executive.

### E. All India Judges' Association v. Union of India (1991)

Association<sup>1850</sup> filed an application under Article 32 of the Constitution of India for directions of this Court for setting up of an All India Judicial Service, for bringing about uniform conditions of service for members of the subordinate judiciary, provision of residential accommodation, transport facility, library and in service training for judicial officers.<sup>1851</sup> Appropriate directions were passed accordingly.

### F. All India Judges' Association v. Union of India (1993)

This case arise out of review petitions have been filed by the Union of India and various states raising general objections as well as objections to the specific directions given by this Court vide our judgment dated 13th November, 1991. In this decision the some of the directions were suitably modified as per requirement and the deadlines to comply with some of the specific directions were extended.

<sup>1852</sup>

<sup>1838</sup> The Constitution of India, art. 124 relates to appointment of judges to the Supreme Court of India.

<sup>1839</sup> *Id.* at art. 217 relates to appointment of judges to the High Courts of various states in India.

<sup>1840</sup> *Id.* at art. 233, 234 relates to appointment of judicial officers in the Subordinate Courts.

<sup>1841</sup> Made by Parliament or State legislatures as the case may be.

<sup>1842</sup> The Governor of a state in consultation with the Chief Justice of the High Court under arts. 233-234.

<sup>1843</sup> Such as Memorandum of Procedure (MoP).

<sup>1844</sup> *Supreme Court Advocate on Record Association v. Union of India*, 1993 (4) SCC 441.

<sup>1845</sup> *Supreme Court Advocate on Record Association v. Union of India*, AIR 2016 SC 217.

<sup>1846</sup> AIR 1977 SC 2328

<sup>1847</sup> AIR 1982 SC 149

<sup>1848</sup> *Union of India v. Himmatlal Sankalchand Seth*, AIR 1977 SC 2328

<sup>1849</sup> *S. P. Gupta v. Union of India*, AIR 1982 SC 149.

<sup>1850</sup> All India Judges' Association

<sup>1851</sup> AIR 1992 SC 165

<sup>1852</sup> AIR 1993 SC 2493

### G. Supreme Court Advocates on Record Association v. Union Of India (1993)

It is popularly known as *Second Judge's Case*<sup>1853</sup> is a landmark judgment in the history of the Indian Judicial System, in which the foundation of present Collegium System was laid down. According to this judgment the collegium in body of judges constituted for the purpose of recommending the candidates for appointments and transfers of the judges of the Constitutional Courts. In this judgment the discussion mainly focused on composition, function, and manner of working of Collegium, and the processes involved therein. In this judgment the term "consultation" was interpreted to mean as "Concurrence" but that was merely for indicating that the absolute discretion has not been given to any one, not even to the CJI in individual capacity, much less to the executive.

### H. State of U.P v. Rafiquddin (1988)

It was held that selection for appointment to Judicial Service shall be made by the Commission on the expert advice of a sitting judge of the High Court nominated by the Chief Justice.<sup>1854</sup> This direction is based on the direction given in *Ashok Kumar Yadav*<sup>1855</sup> that while making selections to the judicial service, a sitting judge of the High Court to be nominated by the Chief Justice of the State should be invited to participate in the interview as an expert and since such sitting judge comes as an expert who, by reason of the fact that he is a sitting High Court Judge, knows the quality and character of the candidates appearing for the interview, the advice given by him should ordinarily be accepted, unless there are strong and cogent reasons for not accepting such advice and such strong and cogent reasons must be recorded in writing by the Chairman and members of the Public Service Commission.<sup>1856</sup>

<sup>1853</sup> *Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4 SCC 441.

<sup>1854</sup> *State of U.P v. Rafiquddin*, AIR 1988 SC 162

<sup>1855</sup> *Ashok Kumar Yadav v. State of Haryana*, AIR 1987 SC 454

<sup>1856</sup> *Id.* at 477

### I. In Re Presidential Reference (1998)

It is popularly known as *Third Judge's Case*, a landmark in the development of constitutional jurisprudence of judicial appointments to the Constitutional Courts in India. It was held that recommendation made by the chief justice of India on the appointment of judges of Supreme Court and high court without the process of consultation would not bind the government. The word "consultation" means *consultation with the plurality of judges* including the chief justice, the only opinion of CJI not to be understood as "consultation" under the said article. In this case some modification was made with respect to the composition of the collegium and other issues related to the appointments to the Supreme Court and High Courts.<sup>1857</sup>

### J. State of Bihar v. Bal Mukund Sah, 2000 (4) SCC 640

It was held that rules made by the Government cannot be brought into or forced upon the recruitment of persons in the judicial services. The rules framed under Article 309 by the State Government should be treated as general rules, whereas those under Article 233 to 235 should be treated as special rules applicable for the High Court.<sup>1858</sup>

### K. All India Judges Association v. Union Of India (2001)

A number of directions which were given in a case<sup>1859</sup> have been implemented. The Union of India, however, filed a review petition seeking certain modifications/clarifications. This review petition was disposed of by this judgment. The relevant findings in the said decision are as follows: (i) each of the general and special objections was dealt with and rejected. The distinction between judicial and other services specifically emphasized.<sup>1860</sup>(ii) The service conditions of judicial officers should be laid down and reviewed from time to time by an

<sup>1857</sup> *In re presidential Reference*, (1998) 7 SCC 739; AIR 1999 SC 1.

<sup>1858</sup> *State of Bihar v. Bal Mukund Sah*, AIR 2000 SC 1296; 2000 (4) SCC 640

<sup>1859</sup> AIR 2002 SC 1752

<sup>1860</sup> para 7 to 10.



independent commission exclusively constituted for the purpose, and it should reflect adequate representation on behalf of the judiciary. (iii) Court has only called upon the Executive and the Legislature to implement their imperative duties.<sup>1861</sup> The directions are essential for the evolvement of an appropriate national policy by the Government in regard to the judiciary's conditions. The directions issued are mere aids and incidental to and supplemental of the main direction and intended as a transitional measure till a comprehensive national policy is evolved. (iv) the question of financial burden likely to be imposed is misconceived and not tenable to discharge mandatory duties.<sup>1862</sup>

#### **L. Malik Mazhar Sultan (3) v. U.P. Public Service Commission (2007)**

The existence of unfilled vacancies in posts falling within the district judiciary across the country has been considered by this Court. In the judgment, comprehensive directions were issued in regard to the mode of determining vacancies and the manner in which the selection would have to be conducted every year. This judgment envisages an annual exercise for selection to posts in the judicial service of each state.<sup>1863</sup> It was also noted that nearly five years had elapsed since the decision of this Court in *All India Judges' Association v. Union of India*<sup>1864</sup>. In the earlier decision, the Court had envisaged that existing vacancies at all levels in the district judiciary should be filled, if possible, by 31 March 2003. Despite this direction, the backlog of judicial vacancies remained unfilled.

#### **M. Sasidhar Reddy Sura v. State of Andhra Pradesh (2014)**

<sup>1861</sup> The Courts do issue directions to the authorities to perform their obligatory duties whenever there is a failure on their part to discharge them. Further directions given, therefore, should not be looked upon as an encroachment on the powers of the Executive and the Legislature to determine the service conditions of the judiciary. They are directions to perform the long overdue obligatory duties. (para 14)

<sup>1862</sup> AIR 2002 SC 1752

<sup>1863</sup> (2008) 17 SCC 703

<sup>1864</sup> (2002) 4 SCC 247

The Supreme Court observed that it is not necessary for a candidate to complete the age of thirty five years for the post of District and Sessions Judge (Entry Level) in the Andhra Pradesh Higher Judicial Service because Recruitment Rules do not provide so. Shetty Commission's recommendation for the minimum age of Thirty five years for the appointment could not be the reason for not appointing a candidate otherwise eligible.

#### **N. Supreme Court Advocate on Record Association v. Union of India (2015)**

It is also known as *Fouth Juges Case*<sup>1865</sup> wherein the Supreme Court of India struck down the Constitution (Ninety-ninth amendment) Act, 2014 and the National Judicial Appointment Commission Act, 2014 as unconstitutional on the ground of violation of independence of judiciary being part of basic structure<sup>1866</sup> or one of the basic features<sup>1867</sup> of the Constitution. The main issue involved in the case was the challenge to the constitutional validity of the aforesaid Constitutional amendment and the Act which introduced a new system of appointment of judges replacing the existing collegium system<sup>1868</sup>. The central point of the discussion was mechanism of the appointment of judges of the Supreme Court and High Courts. It does not deal with the entire scheme for every judicial appointment in all courts. In fact the aforesaid decision not directly and substantially, rather partially dealt with the issue involved in the present study to the extent of the validity Collegium system of appointment.

#### **O. Reports of The Law Commission of India**

The commission in 14<sup>th</sup> Report (1958) is a comprehensive report in terms of the fact that it covered all the issues related to administration of the entire judicial system and recommended

<sup>1865</sup> *Supreme Court Advocate on Record Association v. Union of India*, AIR 2016 SC 217

<sup>1866</sup> It is a constitutional doctrine evolved in case of *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC1461.

<sup>1867</sup> *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Minerva Mills Ltd. v. Union of India*, AIR1980SC1789.

<sup>1868</sup> Introduced in case of *Supreme Court Advocate on Record Association v. Union of India*, 1993 (4) SCC 441 and composition was further modified *In re Presidential reference Case* (1998).

detailed suggestions with respect to reform necessary to be carried regarding each and every stages of judicial process and in relation to the stakeholders involved therein.<sup>1869</sup>

The commission, in 80<sup>th</sup> Report (1979) discusses the method of appointment of Supreme Court and High Court judges, historical background, constitutional provisions and present practice, position in various countries. It made some suggestions for expediting the process of appointment, and other related issues.<sup>1870</sup>

The commission, in 116<sup>th</sup> Report (1986) considered the various aspects of introducing Indian judicial service and recruitment thereto through various modes such as direct recruitment, through promotion and directly from bar, scale of pay, probation and other related issues, to bring the judicial service at par with the other all India services.<sup>1871</sup> The commission in 118<sup>th</sup> Report (1986) considered the role of the state public service commission in the matters of recruitment to subordinate judiciary. Taking into consideration the views and comments expressed by the stakeholders the commission concluded that intervention of a new agency in this recruitment at any level has not only been criticised and debated, but also has been considered as a threat to the judicial independence. It also considered the issue of eligibility, experience at bar and scheme of examination as well as the uniformity in designation of judicial officer across the country.<sup>1872</sup>

The commission in 121<sup>st</sup> Report (1987) suggested that judicial appointment should be made in consultation with an institution namely *National Judicial Service Commission*.<sup>1873</sup> The power of appointment to continue to vests in the President and Governor as the case may be

and for that the provision of articles 124, 217, 233 & 234 will have to be accordingly amended. It suggested two ways of going by the recommendation, one is the binding nature of consultation with the NJSC and the other is informal consultation and doing away with the advice of the political executives.<sup>1874</sup>

The commission, in 214<sup>th</sup> Report (2008) examined the law on the subject, various recommendations of Parliamentary Standing Committees and law of foreign jurisdiction like America, Australia, Canada and Kenya, where the executive is the sole authority to appoint Judges or the executive appoints in consultation with the Chief Justice of the Country have also been considered.<sup>1875</sup> Finally it concluded with the observation that two alternatives are available to the Government of the day. One seeks a reconsideration of the three judgments aforesaid before the Hon'ble Supreme Court. Otherwise a law may be passed restoring the primacy of the CJI and the power of the executive to make the appointments.<sup>1876</sup>

In 230<sup>th</sup> Report (2009), it made some recommendations relevant to the present study to some extent. Among the other things relating to judicial reform, it also dealt with the issues of Selection and appointment of High Court Judges, Age of retirement, Increase in number of judges and creation of new Benches, Integrity, virtue and ethics, etc. and some suggestions thereon.<sup>1877</sup>

### III. ANALYSIS AND FINDINGS

#### A. Representation of Members of Subordinate Judiciary

It is one of most pertinent issue as pointed out above in the "Statement of problem" paragraph of this paper that in the matter of appointment of judges to High Courts, the members of

<sup>1869</sup> Law commission of India "14<sup>th</sup> Report on Reform in Judicial Administration" (Sep., 1958).

<sup>1870</sup> Law commission of India, "80<sup>th</sup> Report on the Method of Appointment of Judges" (Aug. 1979).

<sup>1871</sup> Law commission of India, "116<sup>th</sup> Report on Formation of All India Judicial Service" (Nov., 1986).

<sup>1872</sup> Law commission of India, "118<sup>th</sup> Report on Method of Appointment to Subordinate Courts/Judiciary" (Dec. 1986).

<sup>1873</sup> NJSC for Short.

<sup>1874</sup> Law commission of India, "121<sup>st</sup> Report on "A New Forum for Judicial Appointments" (July, 1987)

<sup>1875</sup> Law commission of India, "214<sup>th</sup> Report on Proposal for Reconsideration of Judges cases I, II and III" (Nov. 2008), p. 6, available at: <https://www.lawcommissionofindia.nic.in>

<sup>1876</sup> *Id.* at p. 60.

<sup>1877</sup> Law commission of India, "230<sup>th</sup> Report on Reforms in the Judiciary – Some Suggestions" (Aug., 2009) available at: <https://www.lawcommissionofindia.nic.in>

subordinate and superior judicial service are inadequately represented. This problem comes to the consciousness of the researcher, in view of the fact that as per the scheme for appointment of Judges to the High Courts as laid down under the provisions of the Constitution<sup>1878</sup> there are two sources namely Bar<sup>1879</sup> and Service<sup>1880</sup> therefrom such appointments have to be made. In absence of any specific legislations, rules or guidelines or mandates in this behalf, on the harmonious interpretation and beneficial construction of such provisions in the interest of both the stakeholders, it implies that there should be equal representation from amongst the members of both the institution constituting the integral part of Indian Judicial system. At present total sanctioned strength of the Supreme Court is 34 (including the CJI) and working strength is 27. Out of that 26 Judges (constituting 79% of the sanctioned strength and 96% of working strength) have their source of appointment is bar, whereas only 1 Judge (constituting 3% of the sanctioned strength and 3.7% of working strength) has been appointed from Service, that also from Superior Judicial service.<sup>1881</sup> In High Courts, out of the total working strength<sup>1882</sup> 70% Judges have been appointed directly from the Bar<sup>1883</sup> and only 30% Judges are from the Judicial Service and most of them are from the Superior Judicial Service.<sup>1884</sup>

Consequently, it appears that in the matter of appointment of the Supreme Court judges, there is lack of representation from amongst the members of subordinate judiciary. This issue

comes to the mind of the researcher in view of the fact that as per the scheme for the appointment of judges of Supreme Court as laid down under the Constitutional provisions under article 124<sup>1885</sup> there are three sources<sup>1886</sup> from which such appointments have to be made. However out of the three sources only two sources<sup>1887</sup> are utilised, but hitherto, the third source has never been utilised. It is also in view of the above discussion it is implicit that members of subordinate judiciary have inadequate representation in the appointment of judges in High Courts, therefore by no stretch of imagination it can be inferred that they can be adequately represented in the matters of appointment to the Supreme Court. So far, Justice Prafulla Chand Pant<sup>1888</sup> was the only officer of the subordinate judicial service who could make it up to the Supreme Court and even as per the present data there is single representation<sup>1889</sup> from subordinate judiciary that also from the cadre of Superior Judicial service and, none from subordinate judicial service.

Analysis of these data<sup>1890</sup> shows the inadequacy of representation from amongst the members of subordinate judiciary as a whole and officers from subordinate judicial service in particular, in the matters of appointments of judges of High Courts and also suggests the fact of lack of representation of member of subordinate judiciary in the matter of appointment of judges of the Supreme Court.

## B. Delay in Judicial Appointments

An another matter of grave concern is that the process of judicial appointments takes considerable period of time and in most of the

<sup>1878</sup> The Constitution of India, art. 217, clause (2) states that a person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and (a) has for at least ten years held a judicial office in the territory of India; or (b) has for at least ten years been an advocate of a High Court or of two or more such courts in succession.

<sup>1879</sup> It refers to group or association of advocates practicing before any court within territory of India.

<sup>1880</sup> Here the term "Service" implies judicial service consisting of judicial officers of the cadres of subordinate Judicial Service and Superior Judicial Service forming part of Subordinate Judiciary as a whole.

<sup>1881</sup> As on 30.01.2023, available at: <https://main.sci.gov.in/chief-justice-judges>

<sup>1882</sup> Total working strength is 778 (as on 01.12.2022) as available at: <https://cdnbbsr.s3waas.gov.in/s35d6646aad9bcc0be55b2c82f69750387/uplo ads/2022/12/2022120524.pdf> (last visited on Jan 30, 2023)

<sup>1883</sup> approx. 500

<sup>1884</sup> As on 02.01.2023, available at: <https://cdnbbsr.s3waas.gov.in/s35d6646aad9bcc0be55b2c82f69750387/uplo ads/2023/01/2023010318.pdf>

<sup>1885</sup> The Constitution of India, art. 124, clause (3)

<sup>1886</sup> Such as at least ten years as an advocate or five years as a Judge of High Court or Eminent Jurists.

<sup>1887</sup> Bar and Judges of High Court

<sup>1888</sup> Now Retired, details available at: <https://main.sci.gov.in/chief-justice-judges> (last visited on May 31, 2022)

<sup>1889</sup> Hon'ble Ms. Justice Bela M Trivedi, *Ibid*.

<sup>1890</sup> These data are available at: <https://doj.gov.in/list-of-high-court-judges/> (last visited on June 3, 2022); and also available on the websites of all the High Courts in India. One can visit the website of High Courts where the list of sitting judges and details about them are available, after clicking on the name or photograph of individual judges available there, the short details about the career and source of their appointments are also shown.

cases it takes a year or two in order to complete the process. It points towards the delay in the completion of appointment process of the Judges of Constitutional Courts and initiation of recruitment process by notification of vacancy through advertisement, conduct of selection process (Examination & Interview) for the appointment of Judicial officers of the Subordinate Courts.

So far as the appointment of judges of the Supreme Court and High Courts is concerned, it done by the President<sup>1891</sup> on the recommendation of Collegium in accordance with the procedure laid down in the Memorandum of Procedure.<sup>1892</sup> The procedures to be followed in such appointments have been comprehensive prescribed as well as suggestive timelines<sup>1893</sup> have also been provided for every stage of the process, but such timeline are rarely adhered<sup>1894</sup> to, as a result thereof excessive delay occurs.<sup>1895</sup> There are many factors which causes delay<sup>1896</sup> in the appointment process, sometimes the process is

not initiated by the collegium well within the prescribed timeline before the actual date of occurrence of vacancy, sometime government delays in processing and forwarding the files and even goes on to seat over and the files in some cases on account of several undisclosed reasons, despite of the recommendation being reiterated by the Supreme Court collegium. By and large in these ways the process of appointment of judges of the Supreme Court and High Courts is delayed.

As regard the judicial appointments to district Courts in the cadre of Superior and Subordinate judicial services, are made in accordance with the rules made by the Governor.<sup>1897</sup> The problem of delay is not unknown to the system in respect of these appointments also. Some examples of delay are noticeable in the recruitment of Civil Judge (Jr. Division).<sup>1898</sup> No one can be lonely held responsible for such enormous delay adding to the increase in judicial vacancy and consequent rise of pendency in such vacant courts, and thereby overburdening of the judicial system.

### C. Huge Vacancies of Judges and Judicial Officers

Another issue of grave concern is huge vacancy of Judges and judicial officers<sup>1899</sup> is being faced by the judicial system and by the ultimate sufferer we the people. Vacancies in courts keep on arising periodically due to retirement, resignation, demise, or elevation of judges to the higher Courts. Over the years, the sanctioned strength of judges in both High Courts and subordinate courts has also been increased gradually. However, vacancies persist

<sup>1891</sup> In exercise of the power conferred upon him/her under article 124 (2) & 217 (1) of the Constitution of India

<sup>1892</sup> Memorandum of Procedure (MoP) of appointment of Supreme Court judges, available at: <https://doj.gov.in/memorandum-of-procedure-of-appointment-of-supreme-court-judges/>; MoP of appointment of High Court judges, available at: <https://doj.gov.in/memorandum-of-procedure-of-appointment-of-high-court-judges/> (last visited on May 31, 2022).

<sup>1893</sup> Initiation of the proposal for the appointment of Chief Justice of a High Court would be by the Chief Justice of India. The process of appointment must be initiated well in time to ensure the completion at least *one month* prior to the date of anticipated vacancy. When a permanent vacancy is expected to arise in any year in the office of a Judge, the Chief Justice will as early as possible but at least *6 months* before the date of occurrence of the vacancy, communicate to the Chief Minister of the State. The Governor as advised by the Chief Minister should forward his recommendation along with the entire set of papers to the Union Minister of Law, Justice and Company Affairs as early as possible, but not later than *six weeks* from the date of receipt of the proposal from the Chief Justice of the High Court. After their consultations, the Chief Justice of India will in course of *4 weeks* send his recommendation to the Union Minister of Law. However, where it is considered expedient to refer back the names, the opinion or Chief Justice of India should be obtained. The Union Minister of Law, Justice and Company Affairs would then put up as early as possible, preferably, within *3 weeks*, the recommendation or the Chief Justice of India to the Prime Minister who will advise the President in the matter of appointment.

<sup>1894</sup> Arunav Kaul, "Pendency begins here: Centre defies the prescribed timelines for judges' appointments, SC collegium also falters" *Times of India*, 18 April, 2022, available at: <https://timesofindia.indiatimes.com/blogs/toi-edit-page/pendency-begins-here-centre-defies-the-prescribed-timelines-for-judges-appointments-sc-collegium-also-falters/> (last visited on May 31, 2022)

<sup>1895</sup> Lokendra Malik, "Putting the brakes on delay" *THE STATESMAN*, 29 April, 2021, available at: <https://www.thestatesman.com/supplements/law/putting-brakes-delay-1502965256.html> (last visited on May 31, 2022)

<sup>1896</sup> Kaushik Deka, "Why judicial appointments are delayed" *INDIA TODAY*, 20 May, 2022, available at: <https://www.indiatoday.in/magazine/nation/story/20220530-why-judicial-appointments-are-delayed-1951521-2022-05-20> (last visited on May 31, 2022)

<sup>1897</sup> In consultation with the High Court under article 233 in case of district judge, and after consultation with the High Court and State Public Service Commission under article 234 in case of other officers.

<sup>1898</sup> Some examples are noticeable such as the recruitment of Civil Judge (Jr. Division) in Bihar vide Advt. No. 04/2020 dated 09-03-2020 issued by Bihar Public Service Commission, which has not been completed, pending the joining of selected candidates till date instead of final result being declared on 10-10-2022. From the date of advertisement of aforesaid vacancy more than two years and ten months have passed, but the completion of the recruitment process is still awaited.

<sup>1899</sup> The statements of vacancy of judicial officers in the subordinate courts are available on the websites of respective High Courts to which such courts are subordinate.



due to insufficient appointments.<sup>1900</sup> At present the Supreme Court has seven vacancies, one judge retired recently<sup>1901</sup> and eight more judges will retire in 2023.<sup>1902</sup> In the High Courts about 30% of total sanctioned strength of judges is vacant.<sup>1903</sup> Mainly three factors contributed to the rampant increase in vacancy, one is excessive delay in processing judicial appointments,<sup>1904</sup> insufficient number of appointments<sup>1905</sup> and, other is the early age of retirement. With respect to the delay in processing the appointments, the Supreme Court has time and again reminded the union government to complete the process at the earliest. The third issue is being recently debated and discussed by the various stakeholders<sup>1906</sup> of the legal and judicial system, including the CJI and Law minister themselves but being overlooked by the government.<sup>1907</sup> Which has consequently given rise to another major problem of pendency, if not dealt with effectively, would ultimately lead to a grave crisis before the entire legal system, undermining the dignity of the institution and loss of public faith therein.

#### D. Variations in Schemes for Judicial Appointments

Another an important issue is that there are huge variations in Scheme of recruitment including the eligibility criteria, scheme, syllabus and pattern of examination forming

part of recruitment rules<sup>1908</sup> for the cadre of subordinate and superior judicial services of different states, which seem to be inconsistent with the idea of “unified judiciary”. This issue came to the cognizance of the researcher in form of a problem before the judicial system which is obstructing the system from getting the best and bright legal talent available and also preventing the talent mobility throughout the country.<sup>1909</sup> To support this assertion or hunch of the researcher, one state from each corner of the country and one state from the middle have been taken as sample for the purpose of comparing and analyzing such schemes, in order to ascertain and point out variations therein on those aspects.<sup>1910</sup> On the comparative analysis of the scheme of these states, it has been found that in terms of eligibility criteria, having Degree of Bachelor of Law is common to every state, but in addition to that some of states such as WB,<sup>1911</sup> Punjab,<sup>1912</sup> Gujarat<sup>1913</sup> and Andhra Pradesh<sup>1914</sup> and, Tamil

<sup>1908</sup> Made by the Governor under articles 233 and 234 of the Constitution of India

<sup>1909</sup> It is in view of the well-known fact that each state through the Governor is free to make rules regulating the recruitment and conditions of service of judicial officers in the cadre of superior and subordinate judicial service. These rules contain provisions regarding the eligibility criteria, scheme, syllabus and pattern of examination. As these rules are made by the state independently on their own without consultation or coordination with each other, variations or inconsistency or contradictions are bound to occur therein.

<sup>1910</sup> Such sample states are Andhra Pradesh, Assam, Bihar, Punjab, Gujarat and, Tamil Nadu, WB.

<sup>1911</sup> WB prescribes additional criteria of enrolment as an advocate in the roll of Bar Council of any State or Union Territory in India on the date of advertisement and ability to read, write and speak in Bengali. Age not less than 23 years and not more than 35 years for unreserved, and in any case not more than 45 years for others, See Notification, available at: [https://wbpsc.gov.in/Download?param1=An\\_20210709121138\\_wbjs2021.pdf&param2=advertisement](https://wbpsc.gov.in/Download?param1=An_20210709121138_wbjs2021.pdf&param2=advertisement)

<sup>1912</sup> Punjab prescribes Punjabi of Matric or its equivalent Standard. Age not below 21 years and above 37 years for UR and in any case not more than 47 years for reserved, See Notification, available at: <https://allgovernmentjobs.in/public/static/PPSC-Civil-Judge-Recruitment-Notification-2019.pdf> (last visited on June 3, 2022)

<sup>1913</sup> Gujarat prescribes that must be practicing as an Advocate, who have passed the Degree in Law from the academic year 2009-2010 and onwards, must have also passed the All India Bar Examination. UR candidate not have crossed the age of 35 years, and in any case not more than 40 years for reserved candidate, See, Notification, available at: [https://gujarathighcourt.nic.in/hcems/sites/default/files/Recruitment\\_files/94\\_202122\\_2022\\_2\\_1\\_586.pdf](https://gujarathighcourt.nic.in/hcems/sites/default/files/Recruitment_files/94_202122_2022_2_1_586.pdf) (last visited on June 3, 2022)

<sup>1914</sup> Andhra Pradesh prescribes for two modes of recruitment and different eligibility criteria for them. For the direct recruitment only degree of LLB, and for recruitment by transfer the candidates must possess degree of Law and must be confirmed member or approved probationer in the list of services of the state. For direct recruitment UR candidate not completed age of 35 years, relaxed up to 5 years for reserved. By transfer not completed 45 yrs See, Notification, available at: [https://hc.ap.nic.in/docs/Civil\\_Judge\\_notification\\_9\\_2020.pdf](https://hc.ap.nic.in/docs/Civil_Judge_notification_9_2020.pdf) (last visited on June 3, 2022)

<sup>1900</sup> Omir Kumar, Shubham Dutt, “Understanding vacancies in the Indian judiciary” *PRS BLOG*, November 18, 2021, available at: <https://prsindia.org/theprsblog/understanding-vacancies-in-the-indian-judiciary> (last visited on June 1, 2022)

<sup>1901</sup> Justice S. Abdul Nazeer retired on 04.01.2023.

<sup>1902</sup> See the details, available at, <https://main.sci.gov.in/chief-justice-judges> (last visited on June 1, 2022)

<sup>1903</sup> The statement of vacancy of Judges in the Supreme Court and High Courts (as on 01.12.2022) available at: <https://cdnbbsr.s3waas.gov.in/s35d6646aad9bcc0be55b2c82f69750387/uploads/2022/12/2022120524.pdf> (last visited on Jan 30, 2023)

<sup>1904</sup> Refer to the discussion under the preceding sub-headings of this paper, i.e. para IX (2).

<sup>1905</sup> It implies less number of judicial appointments in comparison to huge number of vacancies.

<sup>1906</sup> By the CJI and Other Judges of the SC, Attorney General, Solicitor General, and other Senior Advocates.

<sup>1907</sup> Express News Service, “Delhi Confidential: AG Venugopal makes another pitch for increasing retirement age for judges” *The Indian Express*, 14 January 2022, available at: <https://indianexpress.com/article/delhi-confidential/judges-retirement-age-k-k-venugopal-delhi-confidential-7706711/> (last visited on June 1, 2022).

Nadu<sup>1915</sup> prescribes additional criteria also, there are variations in terms of scheme, syllabus and pattern of examination also.

### E. Disparity Between Judicial Officers from Bar and Service

It would also be important to draw the attention towards the other problem in relation to the matters of appointments to the cadre of Superior judicial service<sup>1916</sup> where there is disparity between “direct appointment from bar” and “appointment from amongst the members of subordinate judicial service”. There is disparity in the sense that a person with not less than seven years of practice as an advocate having not less than 35 years of age become eligible for the Superior Judicial Service, whereas a judicial officer of subordinate judicial service becomes eligible at least after twelve years<sup>1917</sup> of service through departmental exam and, moreover through time scale promotion it takes almost more than two decades. Even after their appointment to the cadre of district judge (entry level), judicial officer coming directly from bar get promoted to the rank of district judge/ Principal Judge of the Family Court, ordinarily after five years of

service as Additional district judge or equivalent, whereas officers of Superior judicial service coming through departmental exam or time scale rarely get promoted to next level after five years of service. These facts and prevailing trends supported by the authentic data are suggestive of the existing disparity between them.

### F. Inconsistency of Scheme with Constitutional Provisions

In the humble opinion of the researcher another problem is that the minimum age criteria of thirty five years for the appointment of judicial officer in the cadre of superior judicial service, in addition to at least seven years of practice as an advocate and, impliedly unwritten minimum age criteria for the appointment of Judges of High Courts or the Supreme Court, seem to be irrational and unreasonable condition in the form of superficial limitation, which appears inconsistent with the constitutional provisions.

The above stated problem came in the mind of the researcher in the light of the fact that for the appointment of a judicial officer in the Superior Judicial service as in the cadre of district judge (entry level), the eligibility criteria as prescribed<sup>1918</sup> in most of states are at least seven years of practice as an advocate and minimum thirty five years of age. Whereas in some of the states such as Bihar and now UP<sup>1919</sup> also, prescribe the requirement of a declaration of appearance in at least 24 cases per year in the last 3 years preceding the year of advertisement as an additional condition of eligibility.<sup>1920</sup> However article 233 (2) only

<sup>1915</sup> Tamil Nadu provides for the eligibility for two classes of applicant, For Practising Advocates/ Pleaders and Assistant Public Prosecutors: (i) Must possess a Degree in Law of a University in India established or incorporated by or under a Central Act or a State Act or an Institution recognised by the University Grants Commission, or recognized by Bar Council of India or any other equivalent qualification and enrolled in the Bar Council of Tamil Nadu or in the Bar Council of any other State in India and (ii) (a) Must be practising as an Advocate or Pleader in any Court on the date of Notification for recruitment to the post and must have so practiced for a period of not less than 3 years on such date. (or) (b) Must be an Assistant Public Prosecutor having not less than 3 years of experience as an Advocate and / or Assistant Public Prosecutor. For Fresh Law Graduates (i) Must be a fresh Law Graduate possessing a degree in Law from a recognized University as mentioned in Clause-I (i) above, (ii) Must be eligible to be enrolled as an advocate. (iii) Must have secured an overall percentage of marks in acquiring the Bachelor's Degree of Law as below:- (a) 45% Marks in case of Reserved Categories (i.e SCs, SC(A)s, STs, MBCs/DCs, BCs(OBCMs) and BCMs). (b) 50% Marks in case of Open Category (i.e Others). (iv) Must have obtained the Bachelor's Degree of Law within a period of three years prior to the date of notification. For fresh law graduates of all category age should not be less than 22 years and not more than 27 years, for advocates not less 25 years and not more than 35 years for UR and 40 years for other reserved category, See Notification, available at: [https://www.tnpsc.gov.in/Document/tamil/2019\\_25\\_CIVIL\\_JUGDE.pdf](https://www.tnpsc.gov.in/Document/tamil/2019_25_CIVIL_JUGDE.pdf) (last visited on June 3, 2022)

<sup>1916</sup> It refers to the cadre of judicial officers of subordinate court not below the rank of District Judges or equivalent as referred to under article 236 of the Constitution of India. Appointments in this cadre are made from three sources i.e. directly from bar, departmental examination and, time scale promotion, in accordance with rules made by the Governor under article 233 of the Constitution, referred as “district Judge (entry level)”.

<sup>1917</sup> As a matter of general practice, according to the trends prevailing in relation to their promotion

<sup>1918</sup> Superior/Higher Judicial Service rules made by the Governor under article 233 of the Constitution of India.

<sup>1919</sup> As amended up to 2022

<sup>1920</sup> The terms and conditions of District Judge (Entry Level), Direct from Bar Exam-2021, vide Advertisement No. BSJS/1/2021, point 2 states as, “Any applicant who has not completed 7 years of practice on the last date of receipt of Application as specified in the advertisement and who does not give declaration of appearance in at least 24 cases per year in the last 3 years, shall not be eligible for consideration for such appointment. The candidates qualifying in the Written Test shall be required to give declaration of appearance in at least 24 cases per year in the last 3 years preceding the year of advertisement which is 2020-21. point 3 states as, “The candidates, who have not completed the age of 35 years and those who have already completed the age of 50 years, shall not be eligible for consideration for such appointment.” available at: <http://patnahighcourt.gov.in/getfile/NTYyMA==1LJdkXuGTcg=> (last visited on June 22, 2022).

prescribe not less than seven years of practice as an advocate.<sup>1921</sup>

With respect to the appointment of the Judges of the Supreme Court and High Courts neither the provisions of article 124 (3), nor article 217 (2) provides for minimum age of eligibility, rather it only prescribes minimum years of practice as an advocate or of Judgeship of High Court, as the case may be.

In view of the above discussion, the additional conditions of eligibility either in terms of minimum age or otherwise than as provided under the Constitution, seem to be irrational and unreasonable in the form of superficial limitations, which appear to be inconsistent with the constitutional provisions.

### **G. Need of Transparency in Appointments Process**

Judicial appointment is one of the processes of vital importance in any of the legal and judicial system. It has to be given due regard, particularly in terms of ensuring transparency in the process of such appointments in order to maintain the faith and trust of public in the judicial institution, which is the ultimate resort for the aggrieved common man. Because there has been and there would be a lot of criticism time and again, concerning the lack of transparency especially in the appointment process of Supreme Court and High Court judges, because such appointments usually attract the attention of public at large. Although there is no doubt about the need of transparency in the appointments of judges of the Subordinate Courts, but very few people or particularly the candidates themselves or person participating in such appointment process take keen interest therein, therefore issue of transparency in such judicial appointments is very rarely raised. Such criticism and public vigil over the significant process of judicial appointments is necessary and inevitable, so as to ensure the efficient

functioning of judicial institution in independent, impartial and effective manner. In absence of transparency the institution would usually have to face the allegations of bias, prejudice, corruption and nepotism, which not unknown to the Indian Judicial system. It is necessary for allowing society to better understand its operation, challenges, and limitations of the institution. Thus, it can also be said that transparency in judicial appointments assures the existence of justice at the input and, functioning of such institution in transparent manner reassures at the output also. Therefore maintaining transparency in judicial institution in both substantive as well as procedural aspects would certify the famous saying that *Justice should not only be done, but also manifestly and undoubtedly it should seem to be done.*

### **H. Lack of uniformity in the age of retirement of Judges**

At the last but not least, another problem is the lack of uniformity in the age of retirement of judges of the Constitutional Courts and, Subordinate Courts, prevents from their experiences and legal acumen being utilised in furtherance of the cause of justice, reducing huge pendency and minimising inordinate delay.

As per the present scheme, the age of retirement of judge of the Supreme Court is sixty five years<sup>1922</sup> of the High Court is sixty two years<sup>1923</sup> and, of the District & Subordinate Court is sixty years. The years of service they put in the judiciary, provide them vast experiences to deal with the variety of matters more efficiently and to administer justice in expeditious manner more effectively. Lack of uniformity in retirement age of judges, in absence of any scientific reason and rational basis to support the existing age of early retirement, with a great deal of experience in discharging judicial function, is a kind of loss to the judicial system, which can be one of the important factors contributing

<sup>1921</sup> He must not be already in the service of the Union or of the state, and recommended by the High Court.

<sup>1922</sup> The Constitution of India, art. 124

<sup>1923</sup> *Id.*, art. 217

towards the huge pendency and inordinate delay in disposal of cases.

#### IV. CONCLUSIVE REMARKS

In view of the above discussion on the various aspects of existing scheme for judicial appointments it may be concluded that there is urgent need of structural as well as procedural changes therein. In the light of constitutional vision and the socio-economic and political condition of our country, the existing scheme and system for judicial appointments seem unable to meet the need of we the people in the manner and intensity as contemplated under the constitution. On analysis of the available data it appears true that very few judicial officers of district judiciary are appointed as judges of the High courts and out of that only one appointed to the Supreme Court at any given time. On the aspect of delay it is clearly evident from the above discussion as well as data available on the website of the Supreme Court, and department of law and justice, High Court and Public Service Commission that enormous delay occurs in the completion of the process of judicial appointments, having regard to the huge vacancies in the courts at each level of our judicial system. Thereafter variations in the scheme of appointments in terms of eligibility, syllabus, pattern of examination, reflect from the analysis of advertisement for recruitment of judicial officers in various states. Current trends of judicial appointments reflect disparity between members of subordinate judicial service and of Bar in the appointment to the cadre of Superior/Higher judicial service as well as inconsistency of existing Scheme with Constitutional Provisions in the matters of appointment of ADJ(entry level) and of judges of Constitutional Courts. Moreover the recent debates and News reports emphasize on the issue of transparency the appointment process. And it is clearly established existing age of retirement of judges is lack uniformity without any rational basis.

#### V. SUGGESTIONS

Considering the various perspectives of the finding and gravity of the problems faced by Indian judicial system badly affecting the larger interest of we the people, to effectively address the aforesaid issues, I would like to suggest the following measures:

- In the appointment of judges of constitutional courts the members of judicial service should also be given equal opportunity, duly considered and adequately represented.
- Specific timelines should be prescribed for the completion of each and every stage of the process of judicial appointments to Courts at each level, as well as consequences should also follow in case of non-adherence to that timeline.
- The process of appointment should be initiated well with time before the actual occurrence of vacancies, so as to ensure timely completion of the process.
- The Judicial Service rules should be suitably amended to bring uniformity in eligibility criteria, syllabus, pattern of examination, throughout the country.
- In order to remove the inconsistency of existing scheme and trends there should be parity between the experience at bar and experience in judicial service.
- Reasonable minimum age of eligibility should be prescribed for the judicial appointments to Constitutional Courts.

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