

NATIONAL JUDICIAL APPOINTMENTS COMMISSION: AN IMPERIUM IN IMPERIO?

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ABSTRACT

“India is the only country where judges select themselves, determine their own transfers and also discipline themselves”- K.P.S Gill, former DGP

The National Judicial Appointments Commission is a constitutional body established to ensure transparency in the procedure of appointments of the judges of the Supreme Court and the High Courts. This was struck down by the Supreme Court in 2015, saying that it challenged the independence of judiciary. The judgement brought back the collegium system which indeed has no constitutional provision. The objective of this research is to analyse the importance of a separate body for appointments of judges in our country and why our judicial fraternity is still uncertain on the procedure of appointment of the judges. The research is based on secondary sources which included online data, books, articles and journals. The researchers have focused on the ongoing vociferous debate on NJAC and the Collegium System and the benefits of having a separate body for the judicial appointments.

Keywords: Collegium System, Judges, Judicial Appointments, NJAC, Supreme Court

1. INTRODUCTION

The Collegium System which is followed in our country for the appointments of the judges of Supreme Court and the High Courts came into existence in 1993 after the judgement of the ¹*Supreme Court Advocates-on Record Association vs Union of India – 1993*. In this system, the Chief Justice of India, along with four other judges of the Supreme Court, decide the judicial appointments, their transfers etc. The system has no provision in our Constitution or successive

¹ (1993) 4 SCC 441 www.heinonline.org

amendments and is often pointed for favouritism, nepotism and corruption. It has no process to deal with a complaint against a particular judge involved in corruption and bias. The National Judicial Appointments Commission is established to make this process of appointment of judges more transparent and accountable. The judges will be selected by the commission members drawn from the judiciary, legislature and civil society.

With the establishment of the country's earliest courts in 1861, the judges were appointed by British monarch and held office at her Majesty's pleasure. They were given certain guidelines to follow and professional qualification was set to qualify as a judge. Passing of the Government of India Act, 1935 gave powers to the judiciary which stated that the judges were to retire at the age of 65 but the queen could dismiss any judge if found involved in unacceptable practices. However, after independence, articles 124 and 217 of the constitution of India dealt with the appointment of judges of the higher judiciary.

Debate around The National Judicial Appointments Commission has been quite vociferous. There is huge discussion going on both in the favour and against this topic and outside these black and white arguments, the complex reality is that it has been one of the most difficult tasks the supreme court has faced in recent years. The researchers have selected this topic for her research because the legal fraternity continues to be greatly divided over the matter of how to appoint nation's senior judges. Therefore, to understand and analyse the reasons behind the ongoing debate across the country on this issue, the researchers have decided to choose this topic for her research paper.

2. LITERATURE REVIEW

NJAC is now an important area of discussion as it has no particular solution satisfying all the sides. Also, it is an important part of our legal system which is supposed to enhance it but has equally been criticized for challenging the independence of judiciary which is a basic part of our constitution based on Montesquieu's theory. Several articles have been published on this topic by different scholars all over the world. Some focus on the merits and some on the demerits.

1. An ²article by Chintan Chandrachud (PhD candidate at the University of Cambridge) tries to provide us with a balanced solution. He considers a ‘middle path’ as the solution. There are many reasons for which the middle road - interpretation consistent with constitutional requirements — seems intuitively appealing in this case. It would probably enable all sides to claim victory. The government could claim that its amendment secured the Court’s stamp of endorsement; the petitioners could claim that they succeeded in having important safeguards infused into the appointments process, and the Court could send the message that it has effectively protected constitutional rights without thwarting the democratic will. A legislative sequel or push-back from Parliament would be much less likely in the event of an interpretive solution than if the constitutional amendment were struck down. After all, if the amendment is struck down, it is possible that the Court’s judgment will indicate the sort of Commission that would have passed constitutional muster, giving Parliament the opportunity to make a second attempt at amending the Constitution with greater information at its disposal. However, the author has failed to take in account the risks involved and the vast procedure to convince the important people associated with this to even consider this idea.
2. Another ³article by noted senior advocate and former Solicitor General of India, T.R. Andhyarujina basically favours the NJAC and argues against the notion that the independence of the judiciary system is being jeopardized by the creation of the committee. Critics have faulted the new JAC principally on the ground that the three judicial members of the commission will not have a predominant vote in the selection of a judge. They criticize the provision in the NJAC Act which states that the JAC cannot recommend a person for appointment as a judge if any two members of the commission do not agree for such a recommendation. It is suggested that this provision takes away the power of the three ex-officio judges of the Supreme Court to recommend a judge, and gives a veto to two non-judicial members. The author says that there is no basis for the theory that the

² Chintan Chandrachud, *Interpretive Remedies in NJAC case*, THE HINDU, <http://www.thehindu.com/opinion/lead/interpretive-remedies-in-njac-case/article7482864.ece> (last updated Jul 31, 2015).

³ T.R Andhyarujina, *Don’t close the door on NJAC yet*, THE HINDU, <http://www.thehindu.com/opinion/op-ed/dont-close-the-door-on-national-judicial-appointments-commission-as-yet/article6350842.ece> (last updated Aug 26, 2014).

judiciary must always have a controlling voice in judicial appointments. He cites that even during the Collegium System, there have been some outstanding judges appointed directly by the President. The researchers feels that this argument is a proper answer to the superficial assumption of loss of independence of the judiciary at present times. However, it is just a view on the same and the sides favoring the jeopardized situation of the judiciary might come up with arguments against this view like bringing in circumstantial measures taken at times during the collegium system.

3. Professor Sanjay Jain in his ⁴article on a blog on Indian Constitution Law tries to apply the doctrine of revival to deal with the unconstitutional constitutional amendments. He argues that the Article 31C, which is argued in this case, provides only with immunity and not special powers as such. It would be appropriate if judiciary and legislature collaborate in the deployment of rule of adjudication and rule of change respectively. It would lead to stability if the Supreme Court takes a call on doctrine of revival and parliament clarifies its position on article 31C by making appropriate amendments. Overuse of both, implication and the device of reasoning by analogy, would adversely affect the stability of the legal system and also create room for unwarranted speculations and conjectures. However, proper amendments which can actually fix it have not been deeply discussed which the Researchers feels should be a greater area to focus on.
4. Tarique Anwar wrote an ⁵article about what the former CJI, VN Khare said about the debate over collegium system and the NJAC. The author believes the collegium system is criticized because of being "unconstitutional and anti-democratic" where judges are appointed through "secret soundings and cronyism" Justice VN Khare says there is nothing bad with the existing system but accepts that there is scope for its improvement. *"There is nothing bad with the collegium system. It is, in fact, superior to the NJAC in many ways. It*

⁴ Professor Sanjay Jain, *Debating the NJAC: The Philosophy of Revival*, Indian Constitutional Law and Philosophy, <https://indconlawphil.wordpress.com/2015/07/27/debating-the-njac-the-philosophy-of-revival-guest-post/> (last updated Jul 27, 2015).

⁵ Tarique Anwar, *Collegium system not perfect, but superior to NJAC, says former CJI*, F. India, <http://www.firstpost.com/india/collegium-system-not-perfect-superior-njac-says-former-cji-2242812.html> (last updated Oct 16 2015)

will also be unfair to say that it is not transparent. But yes, it can be further improved by making it more transparent. One or two persons nominated by the President can be included in the selection committee.” He refused to accept the allegation of bias, favouritism and nepotism in the appointment of judges but accepted that there is corruption in judiciary. The researchers believes that the author has not mentioned in what ways is the collegium system superior to the NJAC and thus the statement remains vague and a topic of discussion.

5. Surya Prakash PS ⁶wrote in the column of THE HINDU. What merit is in the case of judges is a vexed question globally. In India, the current debate has been focusing on integrity, independence and other personal attributes. The author believes that certain quantitative metrics should act as the minimum threshold for candidates to become eligible for the appointment of a judgeship in the collegium system. The metrics could be as simple as ones that give an indication of what type of cases a judge has handled, how many adjournments have been granted by him on an average, the ratio of cases heard and disposed of, average duration of cases handled from filing to disposal and number of judgements that have been reversed in appeal. Such objective quantitative metrics being included in the candidate selection process would balance accountability with the independence of judiciary. Such objective quantitative metrics are in use in United States and the United Kingdom. The researchers supports the author’s view because seniority can not be the only criteria for the elevation of the judges and these metrics will result in a more transparent and trustworthy process.

3. RESEARCH OBJECTIVES

The National Judicial Appointments Commission Bill was passed in 2014 by both the houses of the parliament with the Constitutional (99th amendment) Bill 2014. The President gave his assent to the

⁶ SURYA PRAKASH B.S., *Quantitative Metrics in the ‘Collegium System’*, THE HINDU, <http://www.thehindu.com/webexclusives/quantitative-metrics-in-the-collegium-system/article7888463.ece>

bill on 31 December 2014 and the Act was notified by the government on 13 April 2015. The act has since then been challenged in various PILs in the Supreme Court. On 15 July 2015, both sides completed arguments in the NJAC matter and the Supreme Court has been working on writing its judgement since then. In this paper, the researchers will discuss the previous system of appointment of senior judges in the country and will lay importance on the NJAC. The researchers will discuss the reasons for its acceptance and refusal by various famous advocates and jurists. The researchers will analyse the reasons of why the act is not in action yet. The researchers will bring forward the arguments both in favour and against the act. The researchers will argue why the National Judicial Appointments Commission is a boon for a country like India where there have been cases in which the accountability of the judges have been questioned with proper evidence at times. Hence, the establishment of the National Judicial Appointments Commission is a benevolent step further in the direction of judicial reforms. Independence of the judiciary must remain intact along with accountability of the judges. Sanctity of the judiciary depends upon its fair and impartial conduct which should be free from arbitrary power.

The objective of the research extends to finding the actual solution, if any, to rest the argument. The Researchers will focus on the law and its application and implementation in this context. The Researchers will discuss how the judicial system of the country will enhance under this committee, all the aspects and areas where it will have an impact (positively or negatively), and the benefit that the nation will receive as a whole. The limiting factor as such is mainly the arbitration in the fact that it might violate certain laws of the constitution. Also, lack of collective data in the matter is a factor. Although the research indicates that this will turn out to be a boon, but due to other strong arguments, the final result might remain inconclusive.

4. RESEARCH QUESTIONS

The Researchers will focus on the following research questions:

1. Why should the existence of the National Judicial Appointments Commission be preferred over the collegium system?
2. Why is this dispute over NJAC and the Collegium so important as to have different views and opinions over the same?

5. RESEARCH METHODOLOGY

The Researchers will utilize both qualitative and quantitative data collection tools, focusing mainly on the qualitative part. She will adopt a doctrinal mode of research for this paper. The facts and laws relevant to this topic shall be acquired through different books and journals. The Researchers will mainly depend on these laws, arguments by different scholars and analysis of these together to arrive at conclusions. Apart from these, the other sources of data collection will be different articles on the newspapers and internet regarding this topic.

6. FINDINGS AND DISCUSSIONS

On October 16 2015, the Supreme Court of India with a constitutional bench headed by Justice JS Khehar struck down the National Judicial Appointments Commission Act declaring it to violate the basic structure of the constitution, i.e. the independence of judiciary. Other members of the bench included Justice MB Lokur, Justice Kurain Joseph, Justice Adarsh Kumar Goel and Justice Chelameswer who was the sole supporter of the act. The National Judicial Appointments Commission Bill was introduced on 11 August 2014 by the then Law Minister of India, Ravi Shankar Prasad and was passed by the Lok Sabha on August 13 2014 and by the Rajya Sabha on August 14 2014. It also received the president's assent on December 31 2014. It was ratified by 16 state legislatures and came into force on April 13 2015 following which; articles 124 A, B and C were added to the Constitution to make the NJAC valid. Articles 124 A and B define the NJAC, its members and their duties, while Article 124 C empowers Parliament to make laws in the future to regulate the procedure for the appointment of judges.

⁷Article 124, inter alia, says:

“Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the high courts in the states as the President may deem necessary for the purpose and shall hold office until he attains

⁷ R Jagannathan, *Judicial supremacy Vs Parliament: Why NJAC is better than the collegium system* <http://www.firstpost.com/politics/judicial-supremacy-versus-parliament-njac-clearly-better-collegium-system-1665749.html> Aug 16, 2014

the age of 65 years: Provided that in the case of appointment of a judge other than the chief Justice, the chief Justice of India shall always be consulted.”

Article 217 says, inter alia: “Every judge of a high court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the state, and, in the case of appointment of a judge other than the chief Justice, the chief Justice of the high court”

During the dispute that went on between the Judiciary and Executive between this, several arguments by esteemed advocates have been observed in favour of NJAC:

“The Constitution has devised a structure of power relationships with checks and balances wherein limits are placed on the power of every authority or instrumentality under the constitutional scheme,”⁸ -attorney general Mukul Rohatgi.

“The independence of the judiciary is protected under the basic structure through various facets and is not drawn from the appointment of judges alone.”

“In addition to the independence of the judiciary and separation of powers, public confidence stemming from democratic nature of our country also has to be kept in mind while making appointments.”

“One way to look at it is that such a person may not possess legal acumen, but is bound to have a deeper understanding of life beyond the courtroom. We have to look beyond and cannot be oblivious to the world outside. It would not be wise to continue on a path completely insulated from the world,” - attorney general, Mukul Rohatgi.

Also, during the SC verdict against NJAC, Justice Chelameshwar spoke against the verdict favouring NJAC. Here is an excerpt which favours the same:

⁸ The arguments that led to Supreme Court’s NJAC verdict, 2015, <http://www.livemint.com/Politics/The-arguments-that-led-to-Supreme-Courts-NJAC-verdict.html>

“Only an independent and efficient judicial system can create confidence in the society which it serves. The ever increasing pendency of matters before various Constitutional Courts of this country is clearly not a certificate of efficiency. The frequency with which the residuary jurisdiction of this Court under Article 136 is invoked seeking correction of errors committed by the High Courts, some of which are trivial and some profound coupled with bewildering number of conflicting decisions rendered by the various benches of this Court only indicate that a comprehensive reform of the system is overdue. Selection process of the Judges to the Constitutional Courts is only one of the aspects of such reforms. An attempt in that direction, unfortunately, failed to secure the approval of this Court leaving this Court with the sole responsibility and exclusive accountability of the efficiency of the legal system.”⁹

The arguments for NJAC can be several. A few of them have been discussed by the researchers here.

1. The basic structure of the constitution which was believed to be defeated by NJAC, remains intact because its chairman is the Chief Justice of India and this safeguards and upholds the independence of judiciary from executive and thus, separation of powers is maintained.
2. NJAC is good for a democratic country as in no other democratic country; the judges are allowed to appoint the judges. Their role is to ensure that peace and justice is maintained in the country. Democracy means law is made by elected representatives and not judges.
3. Appointment and transfer of judges requires a thorough personal and professional background check of the prospective appointees which can be burdensome for the judiciary without a secretariat or intelligence-gathering mechanism.
4. In the Collegium System, seniority of the HC judge for the post of SC judge is often placed above several talented junior judges and advocates.

⁹ <http://www.newindianexpress.com/nation/NJAC-Verdict-Excerpts-of-Justice-Chelameswars-Opinion-Against-SC-Judgement/2015/10/19/article3087047.ece>

¹⁰The constitution of NJAC:

- *The Chief Justice of India (ex-officio)*
- *2 senior most Supreme Court judges*
- *Union Minister of Law and Justice*
- *2 eminent persons selected by CJI, PM and L/O. (1 should be OBC/SC/ST/minority/woman)*

¹¹The procedure of NJAC:

CJI	The NJAC shall recommend the senior most judge of the SC, provided he is fit to hold the office.
SC Judges	The NJAC shall recommend names of persons on the basis of their ability, merit and other criteria specified in the regulations.
HC Chief Justice	The NJAC is to recommend a Judge of a High Court on the basis of seniority of High Court judges. The ability, merit and other criteria of suitability as specified in the regulations would also be considered.

Veto power of members: The NJAC shall not recommend a person for appointment if any two of its members do not agree to such recommendation.

The NJAC, though proposed to attend to the failures of the Collegium System, comes with limitations of its own.

Arguments against NJAC include:

1. **Constitution:** Half the members of NJAC will be judges, which does not diminish the role of judiciary but only counter balances it by giving power to the executive and politicians.

¹⁰ The National Judicial Appointments Commission Bill, 2014, <http://www.prindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014-3359/>

¹¹ *Supra*. See 8

2. **Equal Balance Of Power:** The judicial members of the Commission have been placed on an equal platform with the other three members, giving the judiciary an equal and not a majority say, despite the obvious inference that regarding appointment of members of the Judiciary, the opinion of the members of the judiciary must attach with it higher significance than that of non-members.

3. **CJI Only A Nominal Head:** The Chief Justice of India, despite being the Chief Justice and head of the commission, has no casting vote in case of a tie, nor a supreme veto power, while a veto by any two members of the commission including the CJI nullifies any recommendation put before the panel.

7. CONCLUSION

The National Judicial Appointments Commission, though being condemned by a number of leading advocates, for example, Ad. Ram Jethmalani and many others, still remains the expression of people who demand transparency in the procedure of appointment of the judges who are the justice providers of the country.

The Collegium System which is followed in India, though showcases full independence of the judiciary, is an opaque system of appointment of the judges. Only those conferred with the power know the grounds of promotion and appointment, and merit and ability is often sidestepped for seniority and sometimes for kith and kin.

The current composition of the NJAC Act will result in the subservience of the judiciary to the executive, thus undermining the long term judicial independence and autonomy in the country, because:

1. 3 members of the commission will be from judiciary and other 3 from executive and civil society. This does not give judiciary any supremacy over the executive.
2. The term “2 eminent persons” does not describe their field of expertise. They can be from law or from any other field. This can result in giving the power to a non-qualified person for the same and result in wrong appointments.
3. The CJI though being the chairperson of the commission has not been given any extra power (like, veto). This places all the members on an equal line and the CJI becomes only a nominal head.

4. A recommendation which has been rejected by any 2 members of the commission will stand cancelled. This can again become a closed door system of appointments in the long run as it may be affected by personal bias of the members.

Despite these limitations, the NJAC does not violate the Judicial Independence as such and a few changes in the proposed bill will definitely prove beneficial for the country.

The middle path for the appointment of judges can be giving the power to judiciary but making them accountable for their work. Also, a separate supervisor from other field should be appointed to administer transparency in the procedure. The trust of the people of India can be won only if they know the working of the system and also by keeping them at a level from where they can see the required insides of the system.

At the end of everything, looking through the perspective of the well-being of the people of the country, people should have the knowledge or at least the right towards the selection and appointment of the judges. Be it the Supreme Court or the High Court or any court for that matter, the judges have the authority to give decisions on the cases which finally affect the common people. And not only the common people in the country, any citizen, rich or poor, middle classed or upper classed, pursue justice through judiciary only. So, the system has to be transparent and the judiciary needs to be more and more efficient. India, as a country consisting of a huge population needs a proper organized system of judiciary and everything under it for this to happen. The idea of NJAC, if implemented correctly, will bring about a change in the topmost positions of law in the country. Also, the loopholes in the Collegium System have to be addressed properly as the nation has been following the same for a long period now.

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