NATIONAL JUDICIAL APPOINTMENTS COMMISSION: A COMPREHENSIVE REVIEW

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"We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution."[902]

Ours is the largest democracy of the world. On the 26th of November, 1949 when we the people of India adopted and enacted the Constitution[903], we resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC[904]. One of the three pillars that Democracy stands on is Judiciary, which performs the function of a watchdog- when there are violations of law of the land, it creates new laws when it overrules or reverses previous decisions or clarifies ambiguous laws by *'reading down'* the law. While its primary function is adjudication, it also performs the function of interpretation of the Constitution. The Constitution is made dynamic due to the various interpretations given by the Apex Court time and again. It is the keeper of the citizens' rights. By filing writ petitions, any move of the State can be challenged if it violates the Fundamental Rights of the people. That is how essential the role of Judiciary is in our country. Judiciary is formed by judges, who are given the responsibility of enabling social change and of safeguarding the sanctity of the Constitution. Therefore, who is chosen for this task becomes important. In fact, the method of selection also becomes important. The latter has been the subject of debate for decades now, whose conclusion was given in the judgement of *Supreme Court Advocates-on-record Association v. Union of India* [905]

The independence of Judiciary is of vital importance as Judiciary performs the unique function of upholding constitutionalism- rule of law, separation of powers, etc. and at the same time enforces the laws made by the legislature and the executive (in the form of 'delegated legislation'). Here, Independence means to function without fear or favor, and without committing allegiance to any internal or external power or influence. Therefore, who chooses the judge becomes a highly debated question, and one which has been a hot topic for decades. While

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[902] CHARLES EVANS HUGHES, speech before the Chamber of Commerce, Elmira, New York, May 3, 1907.—*Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908*, p. 139 (1908).

[903] Preamble, CONSTITUTION OF INDIA, 1950
[904] Words SOCIALIST SECULAR were added subsequently by the Constitution (Forty-second Amendment) Act, 1976.
[905] WRIT PETITION (CIVIL) NO. 13 OF 2015

on one hand, we must allow an independent judiciary to function, on the other complete autonomy may not be desirable.

To quote BR Ambedhkar, he sought to strike a balance between the power given to the executive, and judiciary while appointing judges to the Supreme Court and respective High Courts at the time to drafting the Constitution.

> *The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex hypothesis, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment. … With regard to the question of concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent, person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that is also a dangerous proposition.*[906]

The same can be witnessed in the Constitution (before NJAC was introduced through Article 124A) which allowed appointment of Judges after consultation with such judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose.[907] This system worked well for a long time, until the 1970s. The situation during National Emergency, the prologue and epilogue witnessed a heavy tussle between the Judiciary and the Political-Executive. One instance is when Justice M.H. Beg was appointed the Chief Justice of India in supersession of Justice Khanna who is celebrated for his dissent in *ADM Jabalpur v. Shivkant Shukla.* [908] Another instance is during 1975-77 when a number of Judges were transferred from one High Court to another for the mere reason that they had decided against the Government in certain cases that had 'political' aspect to them.[909] In this particular case, Justice Sakalchand Sheth, a Judge in Gujarat High Court was transferred to Andhra Pradesh High Court. He challenged this transfer at the Gujarat HC through a writ, which the Gujarat HC allowed as the transfer had taken place without any 'consultation' of the CJI. Union of India

[906] Constituent Assembly Debates, Vol. VIII dated 24 May 1949.
[907] Constitution of India Art 124
[908] 1976 AIR 1207
[909] Extracted from the autobiography of F S Nariman 'Before Memory Fades: An Autobiography' Chapter 16, Hay House, 2010, *Union of India v. Sankalchand Himatlal Sheth, AIR 1977 SC 2328.*

appealed to the Supreme Court, which ensured independence of Judiciary when it disposed the case off and assured the Justices' transfer back to Gujarat HC. This ping-pong battle for power between the Political-Executive and the Judiciary can be witnessed further in numerous judgements such as the *Habeous Corpus Case*[910], *Shankari Prasad*[911]*-GolakNath*[912]*-Kesavanand Bharti*[913]. In *Kesavananda Bharti* the Supreme Court laid down the 'Basic Structure Doctrine' (BSD) and thus gave a conclusion that no law can alter the basic structure of the Constitution. This doctrine is the unique brainchild of the Supreme Court of India, which is not present in any other democracy.

THREE JUDGES CASES

The Supreme Court of India's collegium system, which appoints judges to the nation's constitutional courts, has its genesis in, and continued basis resting on, three of its own judgments which are collectively known as the Three Judges Cases.

1. S.P. Gupta case or the First Judges Case (December 30, 1981)[914]

This case is also known as the Judges Transfer Case.

The relevant portion of this case concerns the disclosure of certain correspondence between the Law Minister, Chief Justice of Delhi and Chief Justice of India, and the relevant notes made by them in regard to the non-appointment of a judge for a further term and the transfer of a High Court Judge. Petitioners, and one of the judges in question, sought the disclosure of these documents. It gave the executive powers to manipulate appointments. As a result, the appointments and transfers were done in arbitrary and selective manner.

The government argued that the documents were privileged from disclosure on two grounds:

First, as advice from the Council of Ministers to the President, relying on Article 74(2) of the Constitution.

Second, on the ground that their disclosure would "injure public interest," according to Section 123 of the Indian Evidence Act.

The Court identified the issue as "an extremely important question in the area of public law particularly in the context of the open society" as it "involved a clash between two competing aspects of public interest"—public access to documents and the need for protection of certain confidential documents.

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[910] 1976 AIR 1207
[911] AIR 1951 SC 455
[912] 1967 AIR 1643
[913] 1973 4 SCC 225
[914] AIR 1982 SC 149

The judgement given by the court was that – The Court rejected the government's assertion that the documents were protected from disclosure on the grounds that they were advice from the Council of Ministers to the President. Non-disclosure of information is justifiable only if disclosure would be injurious to the public interest, and injury to the reputation of a public official should not be a consideration. The Court recognized that a democratic society cannot keep the activities of the government hidden from the public in order to avoid accountability and criticism.

It declared that the "primacy" of the CJI's recommendation to the President can be refused for "cogent reasons". This brought a paradigm shift in favour of the executive having primacy over the judiciary in judicial appointments for the next 12 years.

2. **Supreme Court Advocates on Record Association vs Union of India or the Second Judges Case (October 6, 1993)** [915]

The case came about as a public interest writ petition filed in the Supreme Court by the Lawyers Association questioning several debatable and grave matters concerning the judges of the Supreme Court and the High Courts.

This case was directed to be placed before the learned Chief Justice of India for constituting a Bench of nine Judges to examine the two question referred therein,

First, the position of the Chief Justice of India with reference to primacy

Second, justiciability of fixation of Judge strength.

The court's decision in this case was what ushered in the collegium system. The majority verdict written by Justice J S Verma said "justiciability" and "primacy" required that the CJI be given the "primal" role in such appointments. It overturned the S P Gupta judgment, saying "the role of the CJI is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter. Here the word 'consultation' would shrink in a mini form. Should the executive have an equal role and be in divergence of many a proposal, germs of indiscipline would grow in the judiciary." The judiciary got primacy. The majority verdict gave back CJI's power over judicial appointments and transfers.

Since the judgment in the Second Judges Case was issued in 1993 the collegium system created by the court has been in use. There is no mention of the collegium either in the original Constitution of India or in successive

[915] AIR 1994 SC 268

amendments. Although the creation of the collegium system was viewed as controversial by legal scholars and jurists outside India, her citizens, and notably, Parliament and the executive, have done little to replace it.

Justice Verma's majority judgment saw dissent within the bench itself on the individual role of the CJI. For the next five years, there was confusion on the roles of the CJI and the two judges in judicial appointments and transfers. In many cases, CJIs took unilateral decisions without consulting two colleagues. Besides, the President became only an approver.

The collegium system has been criticized for its impracticality, lack of transparency and improper implementation.[916]

3. In Special Reference case of 1998 or the Three Judges Case (October 28,1998)

Nothing great came about from this case. In the third judges' case the composition of the collegium was enlarged to address the concerns about 'error and disagreement' elements within collegium consultation and grave allegations of arbitrariness on the part of CJI, the concept of "primacy" of the collegium over the executive was strongly reinforced.[917]

The Third Judges Case of 1998 is not a case but an opinion delivered by the Supreme Court of India responding to a question of law regarding the collegium system, raised by then President of India K. R. Narayanan, in July 1998 under his constitutional powers.

In 1998, President K.R. Narayanan issued a presidential reference to the Supreme Court as to what the term "consultation" really means in Articles 124, 217 and 222 (transfer of HC judges) of the Constitution. The question was if the term "consultation" requires consultation with a number of judges in forming the CJI's opinion, or whether the sole opinion of the CJI constituted the meaning of the articles. In reply, the Supreme Court laid down nine guidelines for appointments/transfers; this came to be the present form of the collegium. On a reference from former president K.R. Narayan, the Supreme Court lays down that the CJI's should consult with a plurality of four senior- most SC judges to form his opinion on judicial appointments and transfers.

The criticisms of the third judges case is that seniority of supreme court judges doesn't always imply superiority of wisdom and also, what is the harm in consulting all the Supreme Court judges for appointing a High Court

[916] N H Hingorani, Collegium System of Judicial Appointments : Constitutionally Invalid, (Oct. 28, 2014), http://www.lawyersupdate.co.in/LU/1/1591.asp

[917] Purushothaman, Purush, Higher Judicial Appointments in India – The Dilemma and the Hope: Trusting the Wisdom of the Generations (September 10, 2012). NUALS L.J. Vol. 8, 2014

judge to be a Supreme Court judge. The process was not open to scrutiny by public and seniority had become the criteria for judging merit.

Over the course of the three cases, the court evolved the principle of judicial independence to mean that no other branch of the state - including the legislature and the executive - would have any say in the appointment of judges.

NJAC- A CRITIQUE.

In a democratic system like India, the role played by the judiciary is of utmost importance. The judiciary, through its impeccable reasoning ability helps to keep a democracy efficiently running, and this is perhaps one of the reasons why the Independence of the judiciary is the cornerstone of India's democracy[918]. Transparency and accountability- these are two key words which help in establishing a system of good governance in any country. Statistics and studies have shown that where there exists a veil of secrecy, there exists corruption. And as depressing as it is, the one body which adjudicates on corruption and lays down guidelines to prevent such corrupt activities has been affected by corruption itself. The reason why the collegium system was criticized and the government wanted to remove it was this very reason; it was injected and filled with corruption. The collegium system had no room for transparency, thus it eventually led to activities of corruption and nepotism taking place. Such acts of corruption, nepotism etc. would in the long run affect the judiciary and the stability of the government. The NJAC Act was introduced in the light of these events to overcome these issues and to provide a more reliable and stable mechanism to the appointment of judges to the High court and the Supreme Court of India. After the National Judicial Commission Bill was introduced in the Lok Sabha on August 11, 2014 by Law minister Mr. Ravi Shankar Prasad in conjunction with the Constitutional (99th Amendment) Bill, it was readily passed by both the houses without much opposition. The power to establish the NJAC was granted through the Constitutional (99th Amendment) Bill.

Why the government saw the need to replace the collegium system.

The collegium system was established based on the three Judges case and under the collegium system the appointments of judges to the High Court and Supreme Court are made by the Chief Justice of India and four most Senior Supreme Court Judges. The main reasons for the Government wanting to replace the Collegium system was twofold. One, the system had no Constitutional backing and two, it was opaque. There was no amount of disclosure regarding the candidates who would be selected for appointment of judges, the reasons for

[918] Extracted from the speech of Pranab Mukherjee during centenary celebrations of Patna High Court

candidates being rejected etc. Even though there was a lot of hue and cry to bring the Collegium system under the purview of the Right to Information Act, 2005, it did not happen. By bringing the collegium under the RTI act, it would have ensured transparency and accountability. With these issues at hand, the proposal for a constitutionally backed body was proposed in the Lok Sabha. It was accepted by every member. After the acceptance of the bill in the Lok Sabha it was placed before the Rajya Sabha the very next day where again there was almost a hundred percent acceptance. It was the eminent lawyer Ram Jethmalani who abstained from voting for the Bill[919]. With this in place, the NJAC act was passed in 2014.

How was the NJAC better than the collegium system?

The National Judicial Appointments Commission was passed to replace the collegium system. It sought to effectively remove the issues and make better the procedure of appointment of judges to the High Court and Supreme Court of India. While the main issues with the collegium system included transparency and the power of appointing judges remained with the judges, the NJAC took a more practical approach. The act promoted the relationship between the executive and the judiciary. It provided the President the power to reconsider the recommendations made by the commission. So essentially, two wings of the Indian democracy was included in the appointment of judges. The commission ensured more transparency and accountability, this was one of the major changes to be included with respect to the collegium system which was opaque and provided no amount of transparency or accountability. This would ensure that the executive would also be kept in loop regarding the appointments. Another major benefit the NJAC sought to provide was that it would remove the elements of nepotism and favouritism and appoint candidates based on merit and experience. This was a major step in the interest of justice when we consider the fact that the collegium system did not always appoint judges based on merit, but certain appointments were based on factors such as nepotism, favouritism, bribery etc. The benefits of the NJAC act were many, including a check on corruption and non-arbitrary appointment of judges to the High court and Supreme Court of India. The non-arbitrary selection was ensured because of the implementation of the power to veto by the members. The act provides that if any two members of the commission do not accept a proposal or a recommendation then that person shall not be recommended for appointment. These were among the most prominent advantages of the NJAC over the collegium system.

Criticisms on the National Judicial Appointments Commission.

[919] Article by Jai Shankarala, *National Judicial Appointments commission: A critique*.

The National Judicial appointments commission, unfortunately faced a lot of criticisms from several groups, politicians and lawyers. The biggest criticism about the NJAC was in regard to the Independence of Judiciary. Critiques argued that the implementation of the act destroyed the doctrine of the Separation of Powers. It is an established fact that for the stability of country there needs to exist independence between the three wings i.e. the Judiciary, the executive and the legislature. Federalist James Madison describes separation of powers as such "The accumulation of all powers, legislative, executive and judicial, in the same hands whether of one, a few, or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny." From the perspective of the National Judicial Appointments Commission, the criticism was that the Independence of the Judiciary was destroyed when the executive was included in the selection of judges. It was opined that since the judges will need help or recommendation from the executive, it curtails the independence of the Judiciary and provides only a restricted freedom as opposed to the doctrine of Separation of Powers[920]. This was one of the main criticisms about the commission. It was said that the NJAC was directed more towards the executive rather than the judiciary, with the executive being granted powers of veto and recommendation. Another criticism regarding the NJAC was that it did not establish laid out objective procedures for the appointment of Judges to the High court and Supreme Court of India[921].

Supreme Court Verdict on the NJAC- Declaring it unconstitutional.

With widespread criticisms and difference of opinions, the NJAC act came before the Supreme Court of India to determine whether it was constitutionally valid or not. Creating another landmark judgement in the history of the Republic of India, the Supreme Court recently declared the National Judicial Appointments Commission to be Unconstitutional and void. This verdict came as surprise and caught many politicians, lawyer's etc. off-guard. The Supreme Court, in its 1030 page judgement critically analyzed the NJAC act and declared it unconstitutional. In addition to declaring the Commission void, the Supreme Court went on to declare the 99th amendment unconstitutional and void. Further establishing that the collegium system will continue to be in operation. The reasons for declaring the NJAC act void and unconstitutional by the Supreme Court were many. The primary reason being the Independence of the Judiciary. The majority opinion of the court was that the Independence of the Judiciary will come to an end. Laced with this fact, another reason for striking down the NJAC act was because of the veto power it granted to even non- judicial members. Essentially, the Supreme Court's decision sends to the people of the country the message that they devise their own rules and they are an independent body operating

[920] Article posted in Times of India.
[921] http://www.careerride.com/view.aspx?id=22170

in complete isolation. Though it is true that there should be Independence of Judiciary and separation of powers, it cannot be to such a great extent that it leads to invalid and erroneous law making. There should exist certain amount of harmony between the powers for the country to run smoothly. The Supreme Courts view on 'Judges-appoint-Judges' was surprising to the entire nation. The important point to be noticed here is that the judiciary, through its decision is merely establishing its territory and displaying its strength.

CONCLUSION

Now that the Supreme Court has struck down the 99th Amendment Act, 2014 and the National Judicial Appointments Commission Act, 2014[922], the only option at hand is to come up with methods and ways of improvising the existing collegium system. One can brood and criticize this move made by the Supreme Court, but the need of the hour is to propel thinking so that such methods evolve that counter the drawbacks of the existing Collegium system which have been discussed at length in the October 10th Judgement while retaining the essence of Judicial Independence and Judicial Integrity. One way can be by laying down pre-requisites in addition to those given under Article 124 (2A) of the Constitution. The collegium must be guided by a policy while making the appointments. These qualifications could be the number cases decided by the particular prospective-appointee, or something as subjective as the level of integrity and juristocracy shown by the prospective-appointee. This 'guide-for-action' should be published and be made known to the people of the country. It is submitted that Judiciary is the one that possesses the power to appoint higher Judiciary and rightfully so, provided such appointments are made responsibly. The problem arises when personal and vested interests come into play. In the light of past events and the recent striking down of the NJAC, the Judiciary faces an appeal by the people of the nation, from whom they derive their powers of adjudication. The appeal is for the Judiciary to assume responsibility and rightfully discharge its functions keeping in mind the oath to function 'without fear or favor'.

[922] In WRIT PETITION (CIVIL) NO. 13 OF 2015