# THE NJAC JUDGMENT: ESTABLISHING JUDICIAL SUPREMACY

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## Introduction

This paper analyses the historical NJAC Judgment delivered by the Supreme Court. The paper focuses on the Judgment delivered by Justice Kehar, which forms part of the majority opinion. The jurisprudential qualities of the judgment are examined in the paper. It is argued that the Judgment has certain shortcomings. The judgment is not able to substantiate as to why Judicial primacy in appointments forms a part of the basic structure of the Constitution. It is also not explained as to how judicial primacy promotes judicial independence. This paper also analyses appointment of Judges in some other countries, it is pointed out that no other democracy provides only the sitting judges the sole power to make judicial appointments.

This paper is divided into three parts. The first part provides a brief overview of the judgment. The second part, analyses the basic structure doctrine through case laws laid down by the Supreme Court of India, it also analyses the Primacy of judiciary vis the basic structure doctrine. The third part, compares and analyses the appointment of Judges in various other democracies.

## Overview of the NJAC Judgment

In 2014 NJAC was established through the 99th Amendment Act and the National Judicial Appointments Commission Act. The amendment altered Article 124 and 127 of the Indian Constitution. It changed the word "consultation" to "on the recommendation of the National Judicial Appointments Commission". [1] It made the decision of the commission binding on the President of India. The composition of the commission was provided in Article 124A of the Constitution, it established that the Chief Justice of India along with the next two senior Judges

[1] The Constitution (Ninety-ninth Amendment) Act, 2014 (India).

of the Supreme Court, the Union Minister of Law and two eminent persons would comprise of the commission. An important point to be noted was that an individual could not be nominated as a Judge by the commission if two members did not agree for it. This in a way, gave any two members of the commission veto power, these two members could even be the "eminent persons". [2]

In 2015, the validity of the 99th Amendment and the NJAC Act was challenged in the Supreme Court of India. It was challenged by the Petitioners on the ground that the Act, violated the Basic Structure of the Constitution.[3] The petition was referred to a Constitutional bench as there were substantive questions of law involved in the same. The NJAC Judgment is the lengthiest Judgment in the history of India, it runs over one thousand pages. The Judgment was given by a bench of five judges, out of which one of the Judges gave a dissenting opinion. The court held that the Indian Constitution provided for the supremacy of judiciary in appointment of judges.[4] The court also pointed out that the primacy of the Judiciary was important for the independence of judiciary, which formed a part of the Basic Structure of the Constitution.[5] Thus, NJAC was held unconstitutional for violating the Basic Structure of the Constitution.[6]

Justice Kehar opined that the veto power could have a negative impact on the appointment of judges. As, if the Judges in commission deem an individual fit for appointment the "eminent persons" might not agree with the same and as a result, the individual shall not be appointed. This according to Justice Kehar is problematic as the "eminent persons" might not have any legal training, he held that the lack of qualification requirement for "eminent persons" in the Amendment Act rendered it "unconstitutionally vague".[7]

The court found the involvement of the Union law minister on the panel very problematic. The court was of the view that their presence could lead to a potential conflict of interest, as Government files most of the cases in Higher Courts.[8] The court considered that the Minister's

[2] Rehan Abeyratne, Upholding Judicial Supremacy in India: The NJAC Judgment in comparative perspective, The Geo. Wash. Int'l L. Rev. (Vol.49).
[3] Mohit Singh, NJAC Act and 99th Constitutional Amendment Faces Challenge at Supreme Court; Petitions by AoR Association and Senior Advocates, ONE L. ST. (Jan. 10, 2015).
[4] Supreme Court Advocates-on-Record Ass'n v. Union of India, (2016) 4 SCC 1 (India) [hereinafter NJAC Judgment].
[5] Arghya Sengupta, Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment, 48 ECON. & POL. WKLY. 27, 27 (2015).
[6] *Supra* note 4.
[7] *Id.* at 380.
[8] *Id*. at 369.

presence undermined the Separation of Powers and Independence of the Judiciary, which formed a part of the basic structure of the Constitution.[9]

## Judicial Primacy and Basic Structure

The NJAC Act was held unconstitutional on two major grounds- one, The Constitution mandates the primacy and supremacy of the Judiciary for appointment of Judges to Higher Courts and two, Judicial Primacy forms a part of the Basic Structure of the Constitution. This section, analyses the above two grounds.

### *Judicial Primacy in Constitution Assembly Debates*

To uphold the judicial primacy in appointments, the court looked into the Constituent Assembly debates. The constituent assembly discussed the draft of Article 103, which resembles the present article 124.[10] It provided that the President would appoint the Judges to the Supreme Court and High court in "consultation" with the Chief Justice. This provision however, was proposed to be amended by many members of the constituent assembly. Professor, Shiban Lal Saksena proposed that the two third majority from the Parliament should approve the appointment of Judges.[11] B. Pocker from Madras proposed the Chief Justice's concurrence in all the appointments.[12] Professor K.T Shah proposed that the Council of States i.e. the Parliament should be consulted instead of the Judges, he argued that a similar procedure was followed in the United States where the President appoints the Supreme Court Judge with the advice of the Senate.[13]

Dr. B.R Ambedkar, answered the proposals of the members regarding the matter of appointment of Judges. He believed that it was not right to give entire power to the executive and the legislature for appointment of judges as it would be against the independence of Judiciary. He also argued that giving the Chief Justice "veto power" would be a "dangerous proposition" as it would provide too much power to one individual.[14] The NJAC judgment heavily relies on Constituent assembly debates and Ambedkar's statements to provide the meaning of "consultation". However, their conclusion, is not supported by Ambedkar's

[9] *Ibid.*
[10] Constituent assembly debates Vol. VIII, at 230–31 (May 24, 1949).
[11] *Ibid*.
[12] *Id*. at 232.
[13] U.S. CONST. art. II, § 2, cl. 2.
[14] *Supra note* 10 at 258.

statements, as he never proposed the Chief Justice's advice to be binding.[15] In his dissent, Justice Chelameswar pointed out this defect, he mentioned that providing for concurrence would mean that the entire power for appointment of judges would shift to the Chief Justice, which was not intended by the Constituent Assembly.[16] In fact, it can be concluded that much of the constituent assembly debates were intended to involve many people from various branches to decide for judicial appointments.[17]

***Judicial primacy as part of the basic structure***

In the case of *Sajjan Singh v State of Rajasthan,* the Supreme Court pointed out for the first time that amendments to the Constitution can be ultra vires.[18] In the case of *Golaknath v State of Punjab*[19], the supreme court limited the Parliament's amending power. Austin, considered *Golaknath*[20] to be "starting of war between parliament and judicial supremacy"[21]. However, the case was overruled by *Kesavananda Bharati v. Union of India*[22], it was held in this case that constitutional amendments cannot violate the "basic structure" of the Constitution. It pointed out that Judicial Independence was a part of the basic structure of the Constitution.

*Shamsher Singh v State of Punjab*[23], was concerned with the discretionary powers of the Governor and did not involve any questions regarding the President's power to appoint the Judges, therefore any opinion given regarding the latter had no legal holding. The majority held that the "real executive powers" were with the council of ministers, and therefore the President and the Governor must accept their advice in all matters. Jutice Iyer, in his concurring opinion added a dictum, that the council of ministers should not have a final word on judicial appointments rather, it should be the Chief Justice of India who should have the final say.[24] Justice Kehar, in the NJAC judgement drew on the dictum of Justice Iyer and stated that the "seven judge bench held" that the "Chief Justice's counsel must be followed in all conceivable circumstances".[25] However, justice Kehar's finding seems to be flawed as the above statement

[15] *Ibid*.
[16] *Supra* note 4 at 497-500 (Chelameswar, J., dissenting).
[17] *Supra* note 10.
[18] AIR 1965 SC 845.
[19] (1967) 2 SCR 762.
[20] *Ibid*.
[21] Granville Austin, Working a democratic Constitution: A history of the Indian Experience 197 (2003), at 198.
[22] (1973) 4 SCC 225.
[23] (1974) 2 SCC 831.
[24] *Id.* at 873 (Iyer, J., concurring).
[25] *Supra* note 4, at 152.

appeared only in the concurring judgment and not in the majority opinion, also it formed a part of Judicial Dicta and had no legal holding.

The case of *S.P. Gupta v. Union of India*[26] also called as the "first judge case" raised questions regarding Judicial Independence. It was ruled in the case that the President is not bound to act in accordance with the advice of the Chief Justice.[27] The second judges case[28] reversed the ruling in the first judges case and established the "collegium system" where the Chief justice and other senior judges of the supreme court have the final say in the appointment of the judges.[29]

The Constitution does not bind the President to the advice of the Chief Justice regarding judicial appointments. There is no case which can be used as a precedent to hold that judicial primacy is necessary for appointment of Judges.[30] The Judicial dicta also do not in any way suggest that Judicial Primacy forms a part of the Basic Structure of the Constitution[31]. The majority opinion in the Third Judges case clearly pointed out that Judicial independence formed a part of the basic structure, but it remained unclear whether judicial primacy also formed part of the basic structure. The basic structure doctrine was evolved to prevent any fundamental changes to the core of the Constitution.[32] It cannot be argued that Judicial Primacy could form a part of the core of the Constitution[33], as it did not exist before the Second Judges case.[34] Justice Kehar and the majority judgment provides no conclusive evidence to prove that Judicial primacy forms a part of the basic structure of the Constitution.

## Comparative Analysis

This part examines the role of Executive in judicial appointments around the world.

Article II, Section 2 of the Constitution of the United Sates provides power to the President to nominate Judges to the Federal Judiciary, but these nominations have to be confirmed by the

[26] (1981) 1 SCC 87.
[27] *Id.* at 230.
[28] Advocates-on-Record Ass'n v. Union of India, AIR 1994 SC 268 (India) (Second Judges' Case).
[29] *Id*. at 68.
[30] *Supra* note 23.
[31] *Supra* note 2.
[32] *Supra* note 22.
[33] *Supra* note 5, at 28.
[34] *Supra* note 28.

U.S. Senate[35]. The American President is a political actor, and many scholars have often pointed out that the Presidents appoint Judges who they believe would favour them in various cases[36]. However, it is to be noted that the politicization of the appointment does not hinder the Judicial independence.[37]

In Australia, the governor-general appoints the Federal Judges.[38] The Governor General acts as the head of the executive, and he takes the decision in consultation with the attorney general.[39] However, this consultation is not required statutorily and on most occasion is not even practiced.[40] Canada also vests the power for Judicial appointments with the executive. The Governor General appoints the Judges to the Supreme Court and the Federal Court in consultation with the cabinet.[41]

There have been recent judicial reforms in several countries, to achieve more transparency in appointment of Judges. In 2005, the United Kingdom made significant changes in their procedure, two separate commissions have now been formulated for appointments. The main aim for this was to reduce political influence.[42] The Judicial appointment commission, comprises of fifteen people which includes five judges, one solicitor, one barrister, one magistrate, one tribunal judge and six "lay people".[43] South Africa, similarly reformed their appointment procedure. Their commission for appointment of Judges also comprises of judicial, political and lay members and consists of ten people in total[44]. Denmark, Slovakia and Belgium have also amended their procedures for Judicial Appointments and have instituted similar commissions, which include judicial, political and lay people[45].

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[35] *Supra* note 13.
[36] Mark Tushnet, Judicial Selection, Removal and Discipline in the United States, in Judiciaries in comparative perspective 134, 136 (H.P. Lee ed., 2011).
[37] David A. Yalof, Filling the Bench, in The oxford handbook of law and politics 469, 474 (Keith Whittington et al. eds., 2008).
[38] H.P. Lee, Appointment, Discipline and Removal of Judges in Australia, in Judiciaries in comparative perspective 27, 28 (H.P. Lee ed., 2011).
[39] *Ibid*.
[40] *Ibid*.
[41] F.L. Morton, Judicial Appointments in Post-Charter Canada: A System in Transition, in Appointing judges in an age of judicial power: critical perspectives from around the world 56, 57 (Kate Malleson & Peter H. Russell eds., 2006).
[42] Kate Malleson, The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles in Appointing judges in an age of judicial power: critical perspectives from around the world 40–45.
[43] *Id.* at 123.
[44] S. AFR. CONST., 1996, § 174. Cl.1.
[45]Belgium High council of Justice, http://www.hrj.be/en [https://perma.cc/ J7UD-U6VM]; Judicial Appointments Council, Denmark high council of justice,

A comparative analysis for the appointment of judges was drawn by the attorney general in the NJAC case. Justice Kehar, summarized the comparative evidence and accepted that "globally, there was an attempt to select judges on merit and reduce political influence in appointment of judges".[46] But, then said that global trends show the "exclusion of political actors and executives from the appointment of judges".[47] However, evidence shows quite contrary. In fact, it can be concluded that the major agenda globally has been to avoid monopoly of any one branch be it the judiciary or the executive. Therefore, many countries have reformed their appointment procedures and have established commissions for the same purpose, which includes people from varied backgrounds.

## Conclusion

The NJAC judgment cannot be sustained either constitutionally or empirically. The Constitution does not in any way provide for Judicial supremacy in appoint of Judges. Empirically, the comparative analysis of democracies around the world shows that the judiciary does not have final say in appointments. And, the Political actors often play a significant role in appointment of judges. The trends, globally have been in increasing transparency in system.

The Supreme Court has over time paid significant attention to comparative analysis for various issues. However, for this case Justice Kehar, did not pay much attention to the same. The inference drawn by him was quite contrary to the empirical evidence.

The Judgment claims that judicial primacy forms a part of the basic structure and the NJAC violates the same. However, there is no conclusive evidence provided by the judges to prove the same. The constitutional assembly debates also do not in any way support that the President has to abide by the word of the Chief Justice for appointment of Judges, as claimed by the Judgment.

The NJAC judgment can thus be seen as an attempt of the Judiciary to maintain its autonomy. The court has gone a step further by ignoring all the empirical evidences which prove to the

http://www.domstol.dk/om/otherlanguages/english/thedanishjudi cialsystem/judicialappointmentscouncil/Pages/default.aspx [https://perma.cc/AF49- ER9V]; Judicial council of the slovak republic, http://www. sudnarada.gov.sk/home-page/ [https://perma.cc/N9DW-FHSV].

[46] Supra note 4, at 366.

[47] Id. at 370.

contrary. It remains to be seen if the executive can reassert their authority on judicial appointments, and can bring about a change for a transparent system.