

# NATIONAL JUDICIAL APPOINTMENT COMMISSION

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## ABSTRACT

The Indian democracy cannot be a tyranny of the unelected and if the elected are undermined, democracy itself would be in danger,” said Mr. Arun Jaitley (former Minister in union government).<sup>i</sup>

The National Commission for the Appointment of Judges is a constitutional body created to ensure the transparency of the process of appointing judges of the Supreme Court and High Courts. This was overturned by the Supreme Court in 2015 as it challenged the independence of the judiciary. The ruling brought back the collegium system, which actually has no constitutional provision. India is the only Country of the world where judges are appointed by themselves. In Order to make the collegium System more transparent and democratic reforms are needed. The aim of this research is to analyze the importance of a separate body for the appointment of judges in our country and why our judiciary still has doubts about the judge appointment process.

The research is based on secondary sources, including online data, books, articles and journals.

**Keywords:** Judges, Collegium, Judicial appointments, NJAC, Supreme Court (SC)

## INTRODUCTION

- The NJAC proposes to make the appointment of High Court and Supreme Court judges and chief justices more transparent. They will be selected by the commission, whose members will be drawn from the judiciary, legislature, and civil society.
- The Constitution Bench of the Supreme Court declared National Judicial Commission (NJAC) Unconstitutional citing that it violates Basic Structure of Constitution of India.
- Until 1973, there existed a consensus between the Government of the day and the Chief Justice of India

### *First Judge Case:*

A petition was filed in 1982 in the Supreme Court of India. This case is known as the S.P.Gupta Case or First Judges case. The Supreme court said that Consultation does not mean concurrence. The President was not bound to make a decision based on the consultation of the Supreme Court.

Article 124(2) “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”

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### *Second Judge Case:*

Another petition was filed in 1993 by the Supreme Court Advocates on Record Association (SCARA). In this case, the Supreme court overruled its earlier verdict and changed the meaning of consultation to concurrence. Thus binding the President of India with the consultations of the Chief justice of India.

### *Third Judge Case:*

In the year 1998, the presidential reference to the Supreme court was issued questioning the meaning of the word consultation in articles 124, 217, and 222 of the Constitution.

The chief justice won't be the only one as a part of the consultation process. Consultation would include a collegium of 4 senior-most judges of the Supreme court. Even if 2 of the judges are against the opinion, the CJI will not recommend it to the government.<sup>iii</sup>

#### Collegium System

In this system of appointment of Judges, the collegium will recommend the names of the candidates to the Central Government.

Also, the central government will send the names of the proposed candidates for consultation.

The appointment process takes a long time since there isn't a fixed time limit for it. If the Collegium resends the same name again then the government has to give its assent to the names.

## REVIEW OF LITERATURE

- As article by Drishti “ Supreme Court could have amended the NJAC Act to have safeguards that would have made it constitutionally valid and reorganized the NJAC to ensure that the judiciary retained majority control in its decisions.”<sup>iv</sup>  
Also, until a better mechanism is evolved, the Supreme court can take steps to make collegium more transparent and accountable to make its functioning democratic.
- The CPM MP from Kerala, John Brittas, cited several instances where candidates recommended by the collegium belonged to a lineage of judges. This cannot be overlooked as mere coincidence. As Brittas mentioned in the House, out of 47 Chief Justices of India till date, at least 14 have been Brahmins. From 1950–1970, when the maximum strength of the SC was 14 judges, 11 of them were Brahmins. The number further increased to 18 during 1971–1989. In 1988, when there were 17 judges at the SC, nine of them were Brahmins, which accounts to more than 50% representation.<sup>v</sup>
- Justice Madan Lokur, Justice J.S. Khehar, Justice Adarsh Kumar Goel and Justice Kurian Joseph found the NJAC Act to be unconstitutional, Justice Jasti Chelameshwar

was extremely vocal in supporting the Act. He found the NJAC Act absolutely constitutional and meritorious. He deemed it to be a perfect substitution for the existing collegium system. In a strongly worded dissent order, Justice Chelameshwar explained the benefits of the NJAC Act. **Justice Chelameshwar** pointed out that transparency is an extremely vital factor in constitutional governance. He supported **Advocate General Mukul Rohtagi's** argument that the exclusion of checks and balances principle leads to the destruction of the basic structure of the Constitution. Justice Chelameshwar also supported the inclusion of the Law Minister in the commission, reasoning that the executive with a vast amount of administrative machinery is capable of making enormous and valuable contributions to the selection process<sup>vi</sup>.

- **Justice Kurian Joseph**, a former Supreme Court judge, has expressed 'regret' for his view on the National Judicial Appointments Commission, which he and three other judges struck down in 2015 as unconstitutional.<sup>vii</sup>
- **Union Law Minister Kiren Rijju** said there was a growing voice in favour of the National Judicial Appointments Commission (NJAC) Act, "It (collegium system) does not even justify the slightest intent with which the provision was made in the Constitution," the minister said in response to suggestions made by House members that the NJAC should be brought back, with changes, if any".<sup>viii</sup>
- Another retired SC judge, Justice Deepak Gupta, agreed that the judicial appointment system requires more transparency. "The collegium system has not worked very well," he told The Print. According to Justice Gupta, the government should not get a complete say in the selection process as was set out in the NJAC. But the body entrusted with the selection of the right candidates could include retired senior civil servants such as the cabinet secretary or the chief vigilance commissioner (CVC), he said.<sup>ix</sup>
- "These eminent persons should be those who have been a part of public life and have no axe to grind," the retired judge added. The 2015 NJAC verdict, said Gupta, left many questions unanswered. He noted that even the top court had not yet followed the directions mentioned in that verdict. One such direction required the apex court to constitute a secretariat to assist the collegium in the appointment mechanism. The secretariat is yet to be formed, said Gupta.
- Supreme Court lawyer Vijay Hansaria, a senior advocate, said the appointment system under the Constitution is "purely an executive" role, which the judges have taken over.

Hansaria, too, felt that there should be a body, with representation from all organs of the State to select judges. “Let there be a debate on the composition of this body so that there is no overreach by any particular organ of the State,” Hansaria said.<sup>x</sup>

## **RESEARCH METHODOLOGY**

The author of the research paper has resorted to doctrinal method of research as the topic of research relates to analysis of a prevalent law or legal issue. The facts and laws relevant to this subject are acquired through various books and magazines. Researchers will primarily rely on these laws, the arguments of various scholars, and their collective analysis to reach conclusions. In addition, the other data collection sources will be differentiated articles in newspapers and on the web on the subject.

## **OBJECTIVE OF RESEARCH**

The aim of the research is to present such observations that may be of fundamental importance for understanding the dispute between executive and judiciary over the appointment of judges in the light of the separation of powers. The author wanted to make all aspects of separation of powers and judicial independence crystal clear. Researcher will present arguments both for and against the law. The researchers will argue why the National Judicial Appointments Commission is a boon to a country like India, where there have been cases where judges’ accountability has occasionally been challenged with sufficient evidence. Therefore, the establishment of the National Judicial Appointments Commission is another benevolent step toward judicial reform.

## **RESEARCH QUESTIONS**

- 1) Why was it struck down? How it affected judicial supremacy? What’s the way out to fill the vacancies?

- 2) To what limit is the executive's role is constitutional in the matter of judicial appointments permissible in as per principles of separation of powers enshrined under Indian constitution?
- 3) Is the present system in consonance with the constitutional mandate and provisions?
- 4) What systems of judicial appointments are followed in other democratic country?

## **HYPOTHESIS**

It has been assumed hereby that Indian judiciary is well within its rights to check and review any law that questions the basic structure of the Constitution and if not in its consonance, is well within its rights to struck it down.

It has been assumed hereby that the judiciary in India is independent in nature and bereft of any influence from executive and from external factors like political conditions, personal bias and ideologies, etc.

## **SCOPE AND LIMITATIONS**

This research paper does not discuss in detail the contents of the various reports presented by each and every analysis, reports, judgement, reviews and journals etc.

## **SOURCE OF DATA (PRIMARY AND SECONDARY DATA)**

Primary Data-

- Nil

Secondary Data

- Newspaper/Blog articles (Bar and bench, the print, The Hindu, blog ipleader, Indian express etc.)
- Constitution law of India by Dr.J.N. Pandey, 58<sup>th</sup> edition, Published by Central law agency

- Indian kanoon legal research engine
- Manupatra, taxman etc.
- Bluebook for citations
- And any other

## **SUBSEQUENT HEADINGS**

### ***The Constitution of NJAC:*<sup>xi</sup>**

- 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)

### ***<sup>xii</sup>The 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.

***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.

***Arguments against NJAC:***

1. Non-definition of “eminent persons”
2. Against constitutional mandate of separation of judiciary from executive and legislature.
3. Possibility of a caucus of non-judge members rendered the law defective.
4. At the same time, the argument that the presence of the Law Minister or two eminent persons in the NJAC vitiated the system is hopelessly flawed.

***Mode of Judicial Appointments in the United States of America<sup>xiii</sup>***

India has adopted the concept of judicial independence and judicial review from the US Constitution. Judicial independence has been a core political value in the United States since the founding of the Republic. The United States was the birthplace of judicial independence and has actively promoted judicial empowerment through the development of the concept of judicial review. The uniqueness of the US Constitution lies in the fact that it combines in a



single document the two theories of separation of powers and checks and balances of 1. The judiciary also has a mechanism built into its democratic framework that makes it accountable to the law.’, wrote James Madison <sup>xiv</sup> during the ratification debate, must derive all its power, directly or indirectly, from the great mass of the people. Judicial accountability is much stricter in the United States than in India. In the United States, the appointment of judges is a much more political matter and the exclusive preserve of the executive branch. The President reserves the exclusive power to appoint the judges of the higher courts, Federal courts. The Constitution provides that the President appoints ambassadors, other public ministers and consuls, Supreme Court justices, and all other officials of the United States with the advice and approval of the Senate. Political preferences play a key role in the appointment of Supreme Court justices in the United States. Most Senate nomination recommendations reflect the will of the political party in power. There were Separate instances in which members of the President’s political party were appointed to the bench.

The United States judicial mechanism also includes direct elections for appointments to the offices of the state supreme courts. As many as 22 states in the United States use competitive elections, at least some of the time, to fill seats on the state Supreme Court. Judicial Appointment Commission for the Appointment of Judges in India, one can undoubtedly conclude in That the NJAC gives the judiciary a much greater voice in the process of appointing judges. Therefore, the arguments claiming that the role of the National Commission for the Appointment of Judges in the appointment and transfer of judges can affect judicial independence, since it has a role for the executive and the legislature, are not sufficiently substantiated.

#### ***What is Critical about the Collegium System?***

- Opaqueness and a lack of transparency.
- Scope for nepotism. There are several allegations that to be a judge in India you must not be a first-generation lawyer.
- Embroilment in public controversies as it is the only public institutions where judges appoint judges.
- Overlooks several talented junior judges and advocates.

The present collegium system is nowhere in consonance with the constitutional provisions. It does not represent even slightest intent of the “CONSTITUTIONAL MAKERS”.

***Related Constitutional Provisions:***

<sup>xv</sup>Article 124(2) of the Indian Constitution provides that the Judges of the Supreme Court are appointed by the President after consultation with such a number of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose.

<sup>xvi</sup>Article 217 of the Indian Constitution states that the Judge of a High Court shall be appointed by the President 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.

**CONCLUSION**

Hence, the status quo of the National Judicial Appointment Commission is a benevolent step in addition with inside the route of judicial reforms. Independence of the judiciary ought to remain intact at the side of responsibility of the judges. Sanctity of the judiciary relies upon its fair and independent behaviour which have to be unfastened from arbitrary powers. The supremacy of the Constitution may be maintained most effective if at the side of separation of powers, the gadget of assessments and balances is likewise implemented. In a democratic society, wherein legislature is responsible to the humans and the government has a responsibility in the direction of the legislature, Judiciary too ought to be responsible to the humans in a constitutional way which doesn't results its capacity of presenting unfastened and non-partisan justice. As its miles said, absolute energy corrupts absolutely; we the residents of this staggering us of a have to ensure that each one the 3 organs of the statework in a harmonious manner abiding through the charter and having assessments and balances over every other. Hence status quo of the NJAC now no longer most effective makes the judiciary responsible, but additionally strengthens its independence from any form of malafide sports and partisan character, through making it greater transparent, democratic according with the intentions of our founding fathers.

## SUGGESTIONS

- 1) Maintaining the independence of the judiciary: Filling vacancies is an ongoing and collaborative process involving both the executive and the judiciary. However, it is time to think of a permanent and independent body to institutionalize the process with adequate guarantees to preserve the independence of the judiciary, which guarantees the primacy of the judiciary but not the exclusivity of the judiciary. You must ensure independence, reflect diversity, demonstrate professional competence and integrity.
- 2) Changing the Procedure of Recommendation: Instead of selecting the number of judges required against a certain number of vacancies, the collegium must provide a panel of possible names to the President to appoint in order of preference and other valid criteria.
- 3) Review of the Establishment of the NJAC: The Supreme Court may amend the NJAC statute to obtain guarantees making it constitutionally valid and reorganize the NJAC to ensure the judiciary retains majority control of its decisions.
- 4) Ensure transparency: College members need to start from scratch and engage with each other. A transparent process adds much-needed accountability to break the deadlock. Individual disagreements over particular names will persist, but care must be taken not to affect the institutional imperative of the administration of justice.

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**ENDNOTES**

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<sup>xiii</sup> Mira Gur-Arie, Judicial Independence in the United States: Current Issues and Relevant Background Information, , [http://www.fjc.gov/public/pdf.nsf/lookup/JudIndep.pdf/\\$file/JudIndep.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/JudIndep.pdf/$file/JudIndep.pdf) (Feb. 2, 2015)

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<sup>xv</sup> Supra 2

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