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# Case Commentary on the National Judicial Appointments Commission (NJAC) Judgment<sup>1</sup>

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## ABSTRACT

*In 2014, the NJAC was held responsible for the appointment of judges to the higher judiciary in India whereas the collegium system which was prevalent from at least two decades was declared null and void. The whole discussion revolved around the independence of the judiciary and shifting of power from the executive to the judiciary. Although theoretically, the process of appointment seems just and fair, one can't neglect the fact that nepotism still subsists in the process. Collegium system suffered from opaqueness and lack of transparency. Further, in 2015 the NJAC got struck down as it seemed to affect the independence of judiciary. Instead of focusing on the independence of judiciary, a judiciary must be independent of the practice of favoritism and vested interests. In the present commentary on NJAC, both the collegium system and NJAC have been critically examined. Further, the emphasis is given on appointment procedure in other jurisdictions along with relevant precedents. Indians to keep the procedure transparent can also take motivation from the processes of other countries. The authors are of the view that the formation of NJAC doesn't cure the ailments suffered by the collegium system. Neither collegium system serves the purpose. There is a need for efficient judiciary instead of an independent judiciary. The apex court should have looked into the NJAC process thoroughly and only the unconstitutional provisions are removed by applying the doctrine of eclipse instead of reviving the whole collegium system. Also, the expression of citizens should be taken into consideration to make the procedure more transparent and to retain the people's faith in the system.*

**Keywords:** Collegium System, Independence of Judiciary, Nepotism, NJAC

## I. BACKGROUND OF THE CASE

Earlier, for the appointment of Supreme Court and High Court judges and transfer of High Court judges, the recommendation of the collegium consisting of the Chief Justice of India and four senior-most judges of the Supreme Court was considered. Articles 124<sup>4</sup> and 217<sup>5</sup> of

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<sup>1</sup>Supreme Court Advocate on Record Association Vs. Union of India 2015 SCC Online SC 964

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<sup>4</sup> Article 124, The Constitution of India, "Establishment and Constitution of Supreme Court"

the Constitution deal with the appointment of judges of the higher judiciary. The National Judicial Appointments Commission Act, 2013, introduced in the Lok Sabha on August 11, 2014 by the Minister of Law and Justice, Mr. Ravi Shankar Prasad, in conjunction with the Constitution as 121<sup>st</sup> Amendment Bill, 2014, established the National Judicial Appointments Commission (NJAC).<sup>6</sup> To regulate the functions of NJAC, the NJAC Act came into force. NJAC replaced the collegium system and is responsible for appointment of judges to the higher judiciary in India. Article 124A was added in the Indian Constitution stating that NJAC is a six member constitutional body through the Constitution (Ninety-ninth) Amendment Act, 2014.

The Parliament sought to bring greater transparency and accountability to the process of judicial selection by the inclusion of civil society representatives.<sup>7</sup> Subsequently, on 16<sup>th</sup> October 2015, the Supreme Court held the NJAC Act and the 99<sup>th</sup> amendment, 2014 as unconstitutional and void by 4:1 majority. After the ‘three judges cases’ that comprised the first, second and third judge’s cases, the collegium system emerged.

## II. PRECEDENTS REFERRED TO IN THE CASE

The interpretation of provisions relating to appointment and transfer of judges were considered in the following cases:

In *Samsher Singh v. State of Punjab*,<sup>8</sup> it was held by 5:2 majority that the decisions regarding matters in Part V and VI of the Constitution should be in consultation with the Chief Justice of India (CJI) and must be accepted by the Government of India. The “Last word” must belong to the highest dignitary of Indian Judiciary, CJI. Similarly, in *Union of India v. Sankalchand Himatlal Sheth Case*,<sup>9</sup> primacy to the view of CJI was conferred by the term “consultation” under Article 124(2) and 217(1) for the appointment of judges.

In *S.P Gupta v. Union of India (first judge’s case)*<sup>10</sup> decided on 30<sup>th</sup> December 1981 by a seven- judge Bench, the Apex court held that the opinion of the CJI doesn’t have primacy and the word “consultation” doesn’t mean “concurrence”. The president decision would prevail. Executive is accountable and the judiciary has no accountability.<sup>11</sup>

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<sup>5</sup> Article 217, The Constitution of India, “ Appointment and Conditions of the Office of a Judge of a High Court”

<sup>6</sup> Battle between NJAC and Collegium, available at <https://blog.ipleaders.in/battle-between-njac-and-collegium/>  
<sup>7</sup>Rehan Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective*, Vol-49.3, Wordpress

<sup>8</sup> (1974) 2 SCC 831

<sup>9</sup> (1977) 4 SCC 193

<sup>10</sup> 1981 Supp SCC 87

<sup>11</sup> The National Judicial Appointment Commission- A Critique, available at

In *Supreme Court Advocates on Record Association v. Union of India (second judges' case)*<sup>12</sup> decided on October 6, 1993 by a nine- judge Bench, overruled the earlier judgment given in the first judges' case by a nine- judge bench. This is when collegium system was emerged in which the senior Supreme Court Justices had the final word on appointments to the higher judiciary.

The final judgment in the series, *third judges' case*<sup>13</sup> decided on 28<sup>th</sup> October, 1998 by a nine- judge Bench, the decision of the judiciary was considered primal.

Subsequently, the collegium system was replaced with the National Judicial Appointment Commission (NJAC) by the Constitution (Ninety- Ninth Amendment) Act, 2014. Further, the NJAC and the 99<sup>th</sup> amendment was declared void and unconstitutional with a majority of 4:1. This has now been referred as *Fourth Judges' case*.

### III. “JUDICIAL SUPREMACY”- NJAC JUDGMENT

On October 16, 2015, the substantial question of law involving the constitutional validity of the 99<sup>th</sup> Amendment in the constitution i.e. the Constitution (99<sup>th</sup> Amendment) Act, 2014 and the National Judicial Appointment Commission Act, 2014 were dealt by a constitutional bench of five judges consisting of Justice Jagdish Singh Khehar, Justice Jasti Chelameshwar, Justice Madan B. Lokur, Justice Kurian Joseph and Justice Adarsh Kumar Goel. The judgment was delivered in a ratio of 4:1 declaring the amendment unconstitutional in which Justice J. Chelameshwar gave a dissenting opinion.

According to *Justice Jagdish S. Khehar*, ‘primacy of Judiciary’ in the Selection and Appointment of Judges is a core essential part of ‘Independency of Judiciary’ which is a constituent part of the basic structure of the constitution. According to *Justice Madan B. Lokur*, the 99<sup>th</sup> Amendment and the NJAC scheme are a ‘whole package’ which must be struck down as they are against the on-going nomenclature pre-independence and post-independence that primacy of CJI’s opinion was to be taken into account while appointing and selecting the judges of the upper Judiciary.. According to *Justice Kurian Joseph*, separation of powers is significant feature and encroachment by the legislature or the executive on the powers of judiciary through the 99<sup>th</sup> Amendment and the NJAC Act, 2014 are unconstitutional as it involved direct participation of an executive member or non-judicial members in the appointment process, which hampers the structural distribution of powers and

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<https://www.manupatrafast.in/NewsletterArchives/listing/ILU%20RSP/2015/Aug/The%20National%20Judicial%20Appointment%20Commission%20-.pdf>

<sup>12</sup> (1993) 4 SCC 441

<sup>13</sup> (1998) 7 SCC 739

hence, dilutes the basic structure of the constitution. According to *Justice Adarsh Kumar Goel*, appointment and selection of judges with a little involvement of executive wing along with the primacy of judiciary is the basic structure of the constitution. In the absence of the limited role of executive, checks and balances on the separation of powers, Rule of Law, Federalism and other parts of the basic structure will be hampered.

According to *Justice J. Chelameshwar*, (dissenting opinion) observed that although 'Independence of Judiciary' is the basic structure of the constitution but the 99<sup>th</sup> Amendment does not abrogate the basic structure of the Constitution as the primacy of opinion of the CJI is not the basic feature and claimed that no constitutional functionary should be vested with any absolute power be it the CJI or the President of India (executive) in appointing, choosing or transferring judge forms the basic structure of the constitution.

Going by the majority decision of 4:1 the Supreme Court of India declared<sup>14</sup>:

- 1) The constitution (99<sup>th</sup> Amendment), 2014 is unconstitutional and void.
- 2) The National Judicial Appointment Commission Act, 2014 is unconstitutional and void.
- 3) The 'Collegium system' for the selection and appointment of judges to the Supreme Court and Chief Justice/ Judges and transfer of Chief Justice/ Judges stands revived and is thus, operative.
- 4) Primacy of judiciary in the appointment of Judges under Article 124, 217 and 222 of the Indian Constitution forms part of the independence of judiciary which is the core part of the basic structure of the constitution of India.

#### IV. LAW IN OTHER COUNTRIES

In France, as per Article 34 of the French Constitution, appointment of judicial officers takes place on the basis of recommendations from Conseil Superieur de la Magistrature to the President. The body consists of 16 members, the President and the Minister of Justice and 16 other members that include four public prominent figures, six deals with the recommendation of public prosecutor and remaining six deals with the recommendation of sitting judges. Likewise, United Kingdom also follows the same procedure for appointment as per Constitutional Reform Act, 2005 (UK). In UK, Lord Chancellor, after consulting the commission, notifies the Prime Minister on the recommendation of the commission.

In United States, procedure regarding selection is more transparent. Here, hearings in the

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<sup>14</sup>Supreme Court Advocate on Record Association v. Union of India 2015 SCC Online SC 964

Senate are conducted for the persons selected by the President and further citizens are invited to give their opinion on their political and professional lives.

## V. CRITICAL ANALYSIS

India's collegium system emerged from a series of cases due to the hassle between the executive and judiciary for control over judicial appointments. The Second and Third Judges' Cases appeared to tip the balance decisively in the judiciary's favour by instituting the collegium and giving it primacy on appointments.<sup>15</sup> Though separation of powers is essential but constant checks and balances is required in order to maintain the equilibrium and prevent the arbitrary abuse of power of the different organs of the constitution. Thus, if the NJAC act was implemented it would have shifted the exclusive power of selection and appointment process from the judiciary to the executive as only three of its six members would be judges; the remaining members would be the union minister of law and justice and two "eminent persons" which would have diluted the primacy of judiciary and independence of judiciary and hence, would have shook the basic structure of the Indian constitution.

The Judgment has stressed on the point that '*Judicial Independence*' is a core element and part of the basic structure but did not lay down the rationale why it is necessary that the primacy of judiciary must be there in the selection and the appointment process. The question is that whether the selection process will not be influenced by any external pressure and will be unbiased and fair. This has stirred the debate over the definition of "independence of judiciary", taken by the court in the NJAC judgment.<sup>16</sup> The judgment pronounced the collegiums system to be revived and operative again. There are growing concerns over the unchallenged and unrivaled power of the judiciary in the appointment process as the '*collegium system*' was an opaque and secretive body post 1998. Thus, it needs to be made transparent and accountable body by releasing the criteria and the rationale behind the selection and appointment process of the judges which need to be made accessible to the public on the Supreme Court official website.<sup>17</sup>

The judgment must have also laid what is the dire need for the legal system in India the independence of judiciary or the qualified and eligible judges to maintain the legal sanctity and maintain people's faith in the Indian Judiciary. Instead of declaring the 99<sup>th</sup> Amendment

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<sup>15</sup>RehanAbeyratne, "Upholding Judicial Supremacy in India: The NJAC Judgment in comparative perspective", The Geo. Wash. Int'l L. Rev, Vol. 49 (2017), pg-613

<sup>16</sup>Rehan Abeyratne, "Judicial Supremacy, not Independence, Upheld in NJAC Judgment", Int'l J. Const. L. Blog, Oct. 23, 2015, at: <http://www.icconnectblog.com/2015/10/judicial-supremacy-not-independence-upheld-in-njac-judgment>

<sup>17</sup> \*Dr. Anurag Deep& Shambhavi Mishra, "JUDICIAL APPOINTMENTS IN INDIA AND THE NJAC JUDGEMENT: FORMAL VICTORY OR REAL DEFEAT", Jamia Law Journal, Vol. 3, (2018), pg-73-74

and NJAC Act, 2014 unconstitutional and directing the revival of collegium system, the Supreme Court should have opted for “Doctrine of Eclipse” by overshadowing the unconstitutional and preserving the constitutional part and should have instructed the legislature to amend or alter the NJAC Act.

The NJAC judgment has proved to be stepping stone for the “Independence of Judiciary” and provided an edge to the judicial system. The judgment can be perceived as the intention of the judiciary to maintain its autonomy and primacy from all sort of political encroachments and influences. The Supreme Court must filter its selection process by making it more transparent in nature and appoint qualified judges to higher judiciary who will give unbiased and impartial judgment irrespective of the selection process.

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