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Appointment of Judges: A Legal Analysis of NJAC

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ABSTRACT

The current article is limited to the analysis of the appointment of Judges of the Supreme Court and high courts, with a legal overview of NJAC. Appointment of SC Judges is done by the President, and the Chief Justice is appointed by the President on the consultation of such Judges of the Supreme Court and the High Court, if necessary. It is governed by Article 124(2) of the Constitution. What do we mean by the word consultation? The word has been widely debated on major issues when deciding on the constitutionality of the appointment process of Judges. Whether it is mandatory or not is a real question. And, whether the President of India has the absolute discretion in the appointment. Article 217 of the Constitution of India mentions that the high court Judges are appointed by the president in consultation with the chief justice of India and the government of the state. The supremacy of the executive was first discussed in the Judges Transfer case 1. S. P Gupta's case, also known as the Judges' transfer case 1, mentioned that Article 124(2) has the same meaning under Articles 212 and 222 of the Constitution of India. Judicial supremacy was discussed in S.C.R.A. v Union of India. The memorandum of procedure for appointment of permanent Judges in the High Court is - The Chief Justice of the High Court consults the senior-most Judges and refers the names to the Chief Minister. Then, the Chief Minister forwards the names to the governor. Then, the governor sends the names to the Union Minister of Law, Justice and Company Affairs. Then, the union minister forwards the names to the collegium of the Supreme Court. Then the collegium, consisting of the CJI and two senior-most Judges of the Supreme Court, sends the recommendations back to the Union Minister. Then, the union minister places the names of the Judges before the prime minister. Then the prime minister submits the proposal to the resident. Then, finally, the President's approval of the Department of Justice secretary to the government will send the approval to the chief minister and the Chief Justice. She/he will then issue a notification in the Gazette of India.

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I. INTRODUCTION

Judicial appointments from 1950 to 1970 were between the time of Justice mania and the *Sarkaria Commission*.[3] The Indira Gandhi and judicial appointment had seen the days of A.N ray's[4] unconstitutional appointment to the chief justiceship, skipping the collegium seniority rule[5] that had led to the ADM Jabalpur case. [6] In the 1980s, the 1st Judges case there has been a solitary departure of the rule. The basic structure has not been explicitly mentioned and due to this further cases had led to a series of progressive interpretations.[7] Then the collegium system has been vastly interpreted in 2nd and 3rd Judges case. The case led by Justice JS Verma, with a 7-judge majority, has interpreted the system. The NJAC[8] constitutionalism was seen as dialogic constitutionalism and institutional design.[9] This further led to mining that in the 4th Judges case, the 99th amendment has been held unconstitutional. e Appointment of Judges of the Supreme Court and the High Court and the transfer of Judges from one High Court to another had to be made in accordance with Articles 124, 217 and 222 of the Constitution of India. Prior to the NJAC, the appointment of Judges was made by the President in consultation with the Chief Justice and other Judges. Similarly, the transfers were made by the President in consultation with the Chief Justice.

Although it was not specifically provided for anywhere, the norm of seniority has always been followed in the appointment of Judges. In August, 1969, however, the elevation of Justice A.N. Ray to the post of Chief Justice of India created heated controversy when he was appointed as the Chief Justice of India superseding three senior Judges. The provisions of the Constitution dealing with appointment and transfer of Judges again came up for review in *S.P. Gupta Vs. Union of India* (First Judges Case).[10] In the said case, it was held by the Apex Court that the opinion of the Chief Justice did not have primacy and the Union Government was not bound to act in accordance with the opinion of the constitutional functionaries as the Executive was accountable, and the Judiciary had no accountability. However, the First

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[3] S. Saraswathi, "*Participative Centralization: Sarkaria Commission's Prescription for Union-State Relations in India"*, *T*he Indian Journal of Political Science 50, 191-208, no. 2 (1989), http://www.jstor.org/stable/41855905, last accessed 5 July 2025, 18:17 pm
Dr. Anurag Deep, Shambhavi Mishra, "*Judicial Appointments in India and the NJAC Judgement: Formal Victory or real defeat",* Jamia Law Journal, 49-76 , Vol. 3, 2018
[5] Indira Gandhi v Raj narain (1975) Supp SCC 1 (664)
[6] Samsher singh v State of Punk. (1974) 2 SCC 831 [149] ; Union of India v Sakal Chand Himatlal Sheth [1977] 4 SCC 193 (87)
[7] AKM hassan uzzman v union of India [1982] (1) CLJ 291
[8] Pradeep Mehta, *"Reforming judicial Appointments"*, The Hindu, https://www.thehindu.com/opinion/op-ed/reforming-judicial-appointments/artiacle68593248.ece , Last seen 5th July 2025, 18:27pm
[9] Suhash Sharma v union of India (1992) Supp (1) sec 574 (44) {[udiciary is principle of independence and primacy]
[10] [10] AIR 1982 SC 149

Judges Case was overruled by the Second Judges Case[3], by a nine judge bench which held that in the event of disagreement in the process of consultation, the view point of judiciary was primal and the executive could appoint Judges only if that was in conformity with the opinion of the Chief Justice. The Collegium system,[11] now about 21 years old, was not only recognized in the Second Judges Case but also in the Third Judges Case[4]. Thus the Collegium system of appointment[12] become the law of the land and has been followed ever since. The Collegium system was sought to be done away right from 1990 with the 67th Constitutional Amendment Bill. Thereafter it was followed by three more attempts5. Thereafter discussions took place and several recommendations were made by various committees emphasising the need for changing the collegium system. Finally on 31st December, 2014 the NJAC Act[13] and the 121st constitutional Amendment Bill received the presidential assent.

II. WHY IS IT NECESSARY TO SEE THE IMPORTANCE OF NJAC?

The Collegium system[14] of appointment, which professed to keep the judiciary absolutely independent from the executive suffered from several defects. The drawbacks of the Collegium system had been highlighted by eminent personalities, commissions and committees their objections maybe summarised as follows:-

1. The Appointment of Judges by the Collegium system was completely opaque and there was no procedure for checking the reasonableness of appointment.
2. There was a complete lack of accountability on the part of Judiciary. The Second Administrative Reforms Commission, under the Chairmanship of Mr. Verappa Moily, had also noted that, "Perhaps in no other country in the world does the judiciary have a final say in its own appointments. In India, neither the executive nor the legislature has much say in who is appointed to the Supreme Court or the High Courts."
3. There was a lack of implementation, which was attributed as the major reason for the vacancy in the courts and in turn pendency of cases.

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[11] C Raj Kumar, *"The Future of Collegium System*", Economic and Political Weekly, Vol. 20, Issue 48, https://www.epw.in/journal/2015/48/appointments-Judges/future-collegium-system.html , last accessed 5 July 2025, 18:29pm

[12] Mohammad Hesham Atik, "*Unpacking the Collegium System: The Debate over Judicial Appointments in India*," *Jamia Rev.* (Dec. 8, 2024) (noting that the collegium has no constitutional basis but emerged from court rulings)

[13] Atul Dev, ""*Barter System of Appointments": The Debate Over The Collegium System And The NJAC"*, Caravan Magazine, https://caravanmagazine.in/vantage/jayant-patel-collegium-system-njac, last accessed 5th July 2025, 18:22 pm

[14] Anujay Shrivastava, Abhijit Shrivastava, "*Judicial Appointments, Collegium System, and Unresolved Constitutional Enigmas in India: Proposing an 'Emergency Collegium 'and the 'Automatic Elevation Alternative"*, JCLJ (2021), 1(4), 290-304, SSRN Publications

4. The executive is thought to perform the function of knowing and informing about the antecedents of the candidates, which the Judiciary was thought incapable of doing as even the senior most Judges constituting the collegium would be from outside the state.
5. The collegium system was widely considered to be unconstitutional as the Constitution provided for the appointment by the President in consultation with the judiciary and not vice versa.[15]

Apart from these drawbacks of the collegium system which the NJAC[16] Act fails to overcome, it has several loopholes and infirmities of its own.[17] The constitutionality of the NJAC Act and the 121st constitutional amendment is a subject of concern. The NJAC Act and the amendment leave the power of judicial appointments in the hands of the executive almost in its entirety. Judicial appointments have always been associated with the independence of Judiciary, which has time and again been recognized to be part of the basic structure of the Constitution. To give such major primacy to the executive in the appointment process dilutes the independence and can be said to shake the basic structure of the constitution.[18] Another perceived lacuna in the formation of the NJAC is the inclusion of "eminent persons" without any criteria of special knowledge. In other acts, such as the Consumer Protection Act, 1986 the criteria of "*eminent persons"* is laid down as having some special knowledge, background and standing. In absence of such a criteria being laid down the committee consisting of the Prime Minister, the Leader of Opposition and the Chief Justice shall be free to appoint persons without accountability of merits and other factors which will, in effect, lead to abuse of the provision. Most importantly, there is no provision for stating the reasons for selection of either "eminent persons" mentioned in the act. Further there is no provision for stating reasons for recommendation of candidates. This can lead abuse of powers by the members. Answers to questions such as the efficacy of the implementation, and whether the Right to Information Act, 2005 would be applicable to the NJAC, could be revealed after the NJAC Act comes into full effect and the regulations and rules thereunder are formulated. As of now, no certain answer to these queries can be found.

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[15] Chandralekha K.M., *"Collegium System in India – Need for Judicial Independence",* 3802-3808, Int'l J. L. Mgmt. & Humanities Vol. 6, (2023)

[16] Arghya Sengupta, "*Judicial Primacy and Basic Structure"*, Economic and Political weekly, Vol. 50, Issue No. 48, https://www.epw.in/journal/2015/48/appointments-Judges/future-collegium-system.html Last accessed 3 Jul 2025, 10:40pm

[17] "*Cash discovery row brings into limelight NJAC which sought to replace collegium system"*, The economic Times, https://economictimes.indiatimes.com/news/india/cash-discovery-row-brings-into-limelight-njac-which-sought-to-replace-collegium-system/articleshow/119435696.cms?from=mdr , last seen 3 July 2025, 13:45pm

[18] Atul Pal, *"The Contest Over the Collegium System in India*", LSE South Asia Blog, https://blogs.lse.ac.uk/southasia/2023/06/05/the-contest-over-the-collegium-system-in-india/ , last accessed 5 July 2025, 18:53 pm

Section 5 of the NJAC Act mentions, "*procedure for selection of Judge of Supreme Court"*. And Section 6 mentions, "procedure for selection of Judge of the High Court". The resolution to establish IJS in the High Courts is bound to fail, unless the Chief Justice pushes it, and he seldom does, as he does not want to antagonise brother Judges.[19] Under the amended provision (Article 312 of the Constitution), the only requirement is that Rajya Sabha should pass a resolution by two-third members present and voting. This empowers the Parliament to enact a law to establish IJS. Under the Constitution, there is no necessity to obtain consent or the views of the Judiciary. Yet, on the pretext of obtaining the views and consent of the Judiciary, IJS is being unnecessarily postponed. The Collegium system has failed. It has turned out to be more of networking, promoting each other's candidates, personal likes and dislikes, rather than selection on merit. In appointing a Chief Justice, merit, rather than seniority, should be the criterion. He should have administrative and leadership qualities. The resolution to establish IJS in the High Courts is bound to fail unless the Chief Justice pushes it, and he seldom does, as he does not want to antagonise brother Judges. Justice Chelameswar's dissent remains legally profound, kicking off essential reforms.

His argument: constitutional space existed for a more transparent system like NJAC, with proper checks. The judiciary is now evolving internally; AIJS offers another path, albeit with challenges. Justice Jasti Chelameswar emerged as the lone dissenter in the Supreme Court's 2015 NJAC verdict, vehemently critiquing the opaque and unaccountable nature of the collegium system. He asserted that "transparency is a vital factor in constitutional governance" and criticized the collegium's decision-making as "absolutely opaque and inaccessible both to public and history, barring occasional leaks" Rejecting the notion that judicial primacy in appointments was an untouchable constitutional norm, he warned that excluding all external input was "wholly illogical and inconsistent with the foundations of the theory of democracy". Chelameswar contended that the NJAC with its inclusion of the executive and eminent persons alongside strong veto mechanisms could have rectified collegium failures without compromising judicial independence. His dissent, delivered with considerable moral force, emphasised that reforms like NJAC even with its imperfections represented necessary measures to inject accountability and public confidence into the higher judiciary's appointment process.

[19] 214th report of the law commission of India.

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III. COMPARISON AMONG DIFFERENT COUNTRIES

IN USA, Justices are nominated by the President and confirmed by the US Senate. [20]Senate. Judiciary Committee holds hearings and votes on whether nominations should go to the full Senate. In Germany, It is unique as the country has an election process to appoint Judges. Half the member of Federal Constitutional Court are elected by the executive and half by the legislature. In Africa, The South African Judicial Services Commission recommends the list of candidates to be appointed as Supreme Court Judges. In UK, Judges (other than of the Supreme Court Judges) are appointed on the recommendation of the Judicial Appointments Commission (JAC). It recommends names on merit by open competition and also has a specific statutory duty to 'encourage diversity in the range of persons available for selection for appointment. All other Judges are appointed on its advice. The constitution bench proved Kurt Gödel right. In 1931, he wrote a paper, 'On Formally Undecidable Proposition of Principia Mathematica and Related Systems'. It established that 'Proof of Arithmetic consistency is not possible and every system is incomplete'. It is also known as the 'Theory of Incompleteness'. His paper has wide implications. One of them is that: every system is incomplete; and one cannot understand a system from inside; one has to be outside to understand it. Judges, being part of the system, are often neither able to understand nor fathom it. The Constitutional Bench in SCRA case —without any logic or legal basis—held it falling foul of the basic structure doctrine.[21]

IV. CONCLUSION

To conclude, it may be said, that the NJAC, may be a step ahead of the collegium system in terms of judicial accountability, but the fact remains that there is a very thin line between judicial accountability and dilution of the Independence of the Judiciary. Although no other country in the world leaves judicial appointment solely to the judiciary, there are several methods and balances to protect the Independence of the Judiciary. In France, a constitutional body of Conseil Supérieur de la Magistrature makes recommendations to the President on the basis of which the appointments are made. However the body consists of the President, Minister of Justice, and 16 members out of which only four are prominent public figures. Out of the remaining twelve, half deal with recommendations of sitting Judges and half deal with recommendations for public prosecutors. The first half is composed of 5 sitting Judges and

[20] Michael J. Broyde Hayden Hall, "*Recusal Reform: Treating a Justice's Disqualification as a Legal Issue"*, Univ. of Penn. Journal of Law & Public Affairs, 81-149, Emory Law Scholarly Commons, Emory University School of Law, Vol 10, Issue 2

[21] Rangin Tripathy Soumendra Dhanee, *"An Empirical Assessment of the Collegium's Impact on Composition of the Indian Supreme Court",*119-135 National Law School of India Review, Vol 32, Issue 1 (2020)

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one public prosecutor. In Australia, judicial commissions invites the *"expression of interest*" from the members of the Bar through public advertisements to enable the appointment of Judges in a transparent manner. In the United States as well, the President's nominees go through confirmation hearings in the Senate and are subjected to public scrutiny in relation to their professional lives and political views. These processes encourage transparency in the procedure for appointment. The Indian NJAC Act can also take inspiration from these processes abroad. A good way forward could be to continue with the collegium system, make it more transparent by call for expressions of interest and publications of reasons including the criteria as well as executive inputs regarding antecedents etc. There is a provision for formulation of various regulations by the NJAC. One can only hope that the regulations made finally provide for these contingencies and bring in more transparency. More recently, the Chief Justice of India, Hon'ble Justice H.L. Dattu has also refused to be a part of the NJAC till a verdict of the Supreme Court is arrived on the issue. His refusal to follow a statute fully in force is a discussion for another day. It seems that at least the present mechanism endeavoured to be set into motion, forgets the humiliation which the judiciary has faced at the hands of the executive. It appears that the toying of Mrs. Indira Gandhi in the emergency period has been wiped away as a distant past, which is surely no way of moving to the future.

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