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Collegium vs NJAC: Renewed Debate over Appointment of Judges

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ABSTRACT

In India, judicial nominations first surfaced as a contentious issue in 1973, after more than 20 years of very harmonious ties between the executive branch and the judiciary. The appointment and selection of judges for India's higher courts has long been a sensitive, important, and divisive topic both within and beyond the legal profession. A collegium system was implemented to choose justices for the higher court, but it was criticized for being oppressive and confusing. The NJAC, which was established by the parliament to replace the collegium system, came under fire for allowing executive interference and interfering with the judiciary's complete independence, which led to the Act's repeal and the re-instatement of the collegium system. As the arguments dragged on for years, numerous problems emerged, including delays in the appointment of judges, an increase in the number of openings on the supreme court and in high courts, issues with the promotion and the rise of judges, a rift between the bar and the bench as well as within the bench itself, among other problems. By doing doctrinal research, we were able to pinpoint the shortcomings in the NJAC's and the existing collegium system's methods and make it clear why neither of the two systems should be allowed to choose, relocate, endorse, and appoint judges.

Keywords: NJAC, Judge, Judiciary, Collegium System

I. INTRODUCTION

Enacted to replace the two-decade-old collegium system of judge nomination, the 99th Constitutional Amendment Act and the National Judicial Appointments Commission (NJAC) Act, 2014 were deemed "unconstitutional and null" by a five-judge constitution bench of the Supreme Court. The government requested that the case be transferred to a bigger bench, but the court refused, opting instead to reinstate the collegium system, which has permitted judges to choose new judges since 1993. The Supreme Court requested suggestions to enhance the collegiate system at the same time. In fact, the NJAC was established after the emergence of a wide political agreement following the identification of college shortcomings by many commissions and legislative committees. system was approved by the legislatures of 20 states

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as well as the federal government throughout time. A moment ago, Dr. B.R. Ambedkar also said, "There can be no difference of opinion on this matter House; our judiciary has to be competent in and of itself and independent of the executive." So how may these two objectives be achieved? The maintenance of the democratic system's foundations and the subsequent protection of a free society need the independence of the judiciary, even in nations like India. This is so that a free and just rule of law may be guaranteed, as is well recognized to need the independence of the judiciary. The person in charge of maintaining good governance, which may be accomplished via an unbiased legal system. The concept of the separation of powers addresses the management of authority and the establishment of boundaries for the activities of the three branches of government: the legislative, executive, and judiciary. As a result, judges are able to perform the role of police inspectors and serve as a body that monitors that the legislative and executive branches stay within their bounds and do not impede on one another's work or the judiciary's tasks. Without the independence of the judiciary, it is impossible to implement the separation of powers theory in its whole. The formulation of the theory of separation of powers is firmly supported by an independent judiciary. The NJAC claims that since judges and non-judges make up the same percentage of the judicial selection committee, judges' or the political class's exclusive authority should not be included.

(A) Literature Review

A. National Judicial Appointments Commission: A Critique³

According to an analysis of the new legislation that was passed to nominate judges, it would subordinate the judiciary to the government and so pose a serious threat to the Constitution and Indian democracy. In these new laws, the long-overdue requests for more judicial representation, accountability, and openness have been overlooked.

B. Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment⁴

The Supreme Court's ruling in the matter involving the nomination of judges has been subject to a legal examination by the author via the writing of this article. It makes the case that, contrary to what is often believed, the majority of judges did not see judicial supremacy as being an essential component of the fundamental structure. Additionally, they used an erroneous interpretation of judicial primacy to invalidate the Union Law Minister and other notable

³ JAISING, I. (2014). National Judicial Appointments Commission: A Critique. *Economic and Political Weekly*, 49(35), 16–19. <http://www.jstor.org/stable/24480485>

⁴ SENGUPTA, A. (2015). Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment. *Economic and Political Weekly*, 50(48), 27–30. <http://www.jstor.org/stable/44002894>

individuals' membership on the National Judicial Appointments Commission. In light of this, even if Parliament attempts further change to increase openness in judicial selections, the judgement would not be considered precedent-setting.

C. Country's uppermost judicial authority lacks professional diversity. It's now a monopoly of lawyer-judges by Rangin Pallav Tripathy, The Print, 11 June 2021

A lack of professional diversity, a short tenure, and professional uniformity are just a few of the significant underappreciated issues the author focuses on here. In addition to discussing factors that should be taken into account when nominating judges to the higher judiciary, the author explains how all of this has resulted in a lack of Supreme Court justices with prior experience in lower courts.

II. EXISTING LEGAL SITUATION

The present collegium structure originated with the third judges case, not with any specific constitutional provision. The nomination of judges to higher courts was covered by Articles 124(2) and 217 of the Indian Constitution, which were in force prior to the implementation of the collegium system. Under these rules, the President of India had the majority of the executive branch's power, with the judiciary's role being limited to consultation. Before the NJAC Act could even go into effect, it was ruled unlawful. The act restored the existing collegium structure by adding two extra judges to the system. By doing this, it was hoped to show that the collegium as a whole would take precedence and that the Chief Justice of India's authority would be weakened. Since the collegium system is now being revised, the NJAC and any other future systems designed to nominate judges to the higher courts must be properly constructed, taking into account all relevant factors.

III. JUDICIAL PRECEDENTS

1. **S.P GUPTA v Union Of India**⁵ - The decision not to extend the tenure of an additional judge, Judge S.N, was made by the majority in this particular case by a vote of 5:2. Kumar was right. Justice Bhagwati suggested, among other things, creating a collegium to suggest qualified applicants for appointment to the Supreme Court and High Courts as judges. Justices Pathak and Tulzapukar, on the other hand, believed that the Chief Justice of India's counsel and judgment should be given the highest weight and precedence over those of any other person. Everyone in attendance agreed that the term "consultation" meant full and

⁵ S.P GUPTA v Union Of India, AIR 1982 SC 149

effective consultation, and emphasis was placed on the need for constitutional officials' decisions to be grounded in a careful analysis of all pertinent and identical facts.

2. **S.C. Advocates –on-record Association v. Union of India⁶**- The Supreme Court's panel of nine judges reversed its prior decision in the *S.P Gupta v. Union of India* by the majority of 7:2. The Chief Justice of India will now be chosen based on seniority, with the most senior Supreme Court judge who is deemed qualified for the position being named as the Chief Justice of India. This rule has been established by the Supreme Court. The Court has further ruled that the departing Chief Justice of India should start the process for this appointment as soon as possible. The Court has made it clear that the provision in Article 124(2), which permits consultation with other Judges, is meant to address any questions about whether the most senior Judges are qualified to hold their positions, and only in such circumstances may a departure from the long-standing custom be justified. According to a ruling by the court, the executive must abide by the recommendations made in this case.
3. **Re Presidential Reference Case, AIR 1999 SC 1⁷**- The Chief Justice of India's recommendations for the appointment of judges to the Supreme Court and High Court are not legally binding on the government if the consultation process is not followed, according to a unanimous ruling by a panel of nine Supreme Court judges. Moreover, the court has confirmed the government's stance by extending the Chief Justice's consultation process.

IV. CRITICAL ANALYSIS

All that the administration could do was ask the judges' collegium to reevaluate their recommendations in light of the evidence at its disposal that the collegium was mandated to examine. The collegium was allowed to revise or reiterate its recommendations. Justice Khehar's assessment that the NJAC's introduction had seriously undermined and exposed the judiciary's supremacy was supported by Justices Madan B. Lokur, Kurian Joseph, and Adarsh K. Goel in their respective opinions. They continued by saying that it was improper to use any alternative procedure that did not ensure the supremacy of the judiciary in selecting and appointing judges to the higher court. On the other hand, in a dissenting judgment, Justice J. Chelameswar upheld the constitutional amendment's constitutionality, arguing that a comprehensive revamp of the system was necessary due to the increasing backlog of cases. Contrary to the majority, he maintained that the judiciary's control over nominations was not the sole means of establishing an independent and efficient judiciary, and that the Chief Justice

⁶ *S.C. Advocates –on-record Association v. Union of India*, AIR 1994 SC 268

⁷ *Re Presidential Reference Case*, AIR 1999 SC 1

of India's (CJI) supremacy was not a fundamental aspect of the Constitution. Apart from occasional disclosures, Justice Chelameswar expressed disapproval of the collegium system, contending that its deliberations were completely secret and not accessible to the public or history. Some judges acknowledged that there would need to be some revisions, but they nevertheless voiced partial agreement for his views on the collegium system.

V. SUGGESTIONS

1. The process for appointing judges need to be well-defined, with precise standards.
2. A system for evaluating the collegium ought to exist.
3. Permit the public to have input on the selection of judges; this will assist in pointing out any bias in the candidate.
4. To make judicial nominations to the higher courts, a completely new mechanism should be created.
5. Since judicial appointments have the potential to provide a whole new degree of openness, RTI ought to be applied to them.
6. In addition to other items like the transfer and raising method, etc., the appointment criteria must be reviewed. It is also necessary to mention the process for appointing ad hoc judges, as well as for adding new judges and making them permanent.
7. It is necessary to establish a grievance cell that will solely hear complaints regarding judicial appointments and handle such matters. Judges from both the Supreme Court and the High Court have voiced numerous grievances, most of which have been disregarded or ignored. Because judges are aware of the volume of cases that are pending, they often choose not to pursue the matter in court.
8. Records of the factors that led to a judge's promotion or transfer must be properly and strictly maintained. The Chief Justice and President must determine whether information related to national security should be published or withheld.
9. In the meantime, the appointments that will be handled via the current process and the new appointment system must be completed quickly to avoid needless delays.

VI. CONCLUSION

This research indicates that there are many shortcomings in the current system, and that significant efforts by the government, court, and other academics and scholars would be necessary to correct it. If the memorandum of procedure is to be modified, there will be

significant changes that will require a lengthy process to develop the entire system. It has been observed that the process has been delayed, involving numerous consultations and constant file exchanges between the judiciary and the executive branch, with little to no progress made. An attempt to create a legislative substitute for its own collegium system of judge nominations has been declared invalid by the Supreme Court. With the Collegium System back in place, improvements must be conceived of that would increase appointment openness and provide fair qualifying standards for potential judges. The Supreme Court recognized serious shortcomings in the system it has been enforcing for more than 20 years and declared the National Judicial Appointments Commission's constitutional amendment to be unlawful. Thus, it is necessary for the court to proceed logically and modify the current system.
