DOI: *https://doij.org/10.10000/IJLMH.115777*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 5

2023

© 2023 International Journal of Law Management & Humanities

Follow this and additional works at: https://www.ijlmh.com/

Under the aegis of VidhiAagaz – Inking Your Brain (https://www.vidhiaagaz.com/)

This article is brought to you for "free" and "open access" by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact **Gyan@vidhiaagaz.com**.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to **submission@ijlmh.com.**

Nullification of NJAC: Upholding the Independence of Judiciary or an Attempt to Insulate the Collegium from Democratic Accountability

SNEGAPRIYA V.S.[1] AND DR. P.R.L. RAJAVENKATESAN[2]

ABSTRACT

Democracy has a wider meaning rather be merely comprehended in relation to periodic elections. The nexus between Democracy, Federalism, and Secularism are apparent, which forms the Basic Structure of the Indian Constitution as held in the case of S.R Bommai v. Union of India, regardless of being nowhere mentioned in the Constitution. Federalism is the cornerstone principle upon which the Constitution is built, it backs democracy and avert despotism. Democracy and Federalism are complementary in nature, in the renowned democratic country of India; the intervention of one governmental organ in the working sphere of another is proscribed. The nullification of the National Judicial Appointments Commission (NJAC) Act, 2014, and the 99th Amendment of the Indian Constitution is based on the majority rule that the NJAC Act weakens the power of courts i.e. judicial review vested with the judiciary, which forms the Basic Structure of the Indian Constitution, therefore, null and void. Nevertheless, the wording of Justice Jasti Chelameswar depicts his strong averse to the Collegium System gains its prominence and can never be overlooked as it was in line with the reports of various commissions including the Law Commission of India Report (2008), the collective opinion was that 'the judges cannot be their own appointees.' This paper addresses the reasons as to why nullification of the NJAC Act is perceived to be the verge of judicial despotism in India, as the Collegium system itself finds no mention in the Constitution and is brought forth by the judiciary through precedents and protected by the same, which is contrary to the principle of checks and balances. This paper is an attempts to scrutinize whether the Collegium system is absolutely opaque, which challenges one of the vital factors of Constitutional Governance i.e. transparency. With the help of existing secondary sources, this paper attempts to impart the nature, object, and conceptualization of the NJAC Act, its potential outcome, shortcomings, and legal validity by analyzing the NJAC dissent in detail.

Keywords: *Collegium System, Judicial Despotism, Federalism and Indian Constitution.*

---

[1] Author is a student at VIT School of Law, India.
[2] Author is an Associate Professor at VIT School of Law, India.

I. Introduction

Indian federalism is the flexible model of federalism, where the federal principles are not absolutely followed in a strict sense. The federalism gains prominences as it is the fusion of self-governance and shared government, which ensures that the federal units are working on their sphere of operation at their full efficiency without being meddled in by other constitutional bodies. The framers of the constitution found that the federalism is a desideratum to establish democratic form of government. The democracy, which empowers citizens and bestows them with a sovereign authority, is globally accepted system as it fosters development without costing human rights and establishes peace and security. It is a renowned fact that democracy flourishes only in nations which are federal or quasi federal. The nexus between democracy, federalism and secularism are apparent as they closely cooperate with one another in upholding the common cause. The essence of federalism relies on obviating a government from holding a central authority. As held in the cases of ***S .R. Bommai v. Union of India,***[3] and ***Kesavananda Bharati v. State of Kerala***,[4] the federalism, Democracy and Secularism are Basic features of Indian Constitution, which implies that those principles can never be abrogated at any cost as it falls under the ambit of the Doctrine of Basic Structure.

It is also to be noted that one of the crucial functions of judiciary is to interpret and uphold the constitution. The underlying reason behind equipping judiciary with the power to review the actions of legislative and executive is to ensure that no governmental organ is violating the proviso of the Indian constitution. The power of judicial review of all legislations in India has been vested upon higher judiciary by Article 13 of Indian constitution to thwart infringement of its Part III qua Fundamental Rights as held in the case of ***Renu v. District and Session Judge, Tis Hazari***[5]. The ***Kesavananda Bharati v. State of Kerala***[6] is an exemplar case where the court elaborately discussed about the Basic Structure Doctrine in pursuance to Article 368 of the Indian constitution. As though the case has not enumerated the principles that forms the Basic Structure of India Constitution instead elucidated the elements of the doctrine; hence to preclude the abstruseness a fuller interpretation was made by the Apex Court in the case of ***Indra Nehru Gandhi v. Raj Narain***[7], where Judicial Review was held to form the Basic Structure of Indian Constitution in addition to Democracy, Secularism, Federalism and Rule of Law. Through catena of judgments, the Supreme Court has avowed the significance of the judicial review in

[3] 1994 AIR 1918.
[4] AIR 1973 SC 1461.
[5] AIR 2014 SC 2175.
[6] *Id*. at 3.
[7] AIR 1975 SC 2299.

© 2023. International Journal of Law Management & Humanities [ISSN 2581-5369]

averting the tyranny of executive and in fortifying the independence of judiciary[8]. As judiciary is playing the crucial role in updating the law in par with changing societal needs, the subordination of the same is controvertible since it encumbrance the judicial activism. Therefore, judicial review bring forth judicial activism, which eventuate in exerting accountability on the executive and legislative as judiciary is no more confined to fill the gaps but to direct remedial actions.

II. Judicial activism: judicial craftsmanship or a path to judicial despotism

Though the principles of separation of power, and checks and balances underpin federalism, which strives to obviate despotism, the status quo in India is that layman thinks the judiciary is over shadowing the executive and legislative. But, it is irrefutable that the judiciary is the protector of Indian constitution and bestowed upon with the reviewing power to monitor the state's actions. The reason for such an authorization is to limit the state from carrying out arbitrary actions, which would ultimately divert it from discharging its duty of upholding the constitutionally conferred fundamental rights qua affirmed basic human rights. The judiciary has always performed its creative role of filling the gap between enactments and its implementation; it has also widened the scope of provisions of statutes and elucidated its legislative intent. For instance, the ***Maneka Gandhi v. Union of India,***[9] ***Francis Corali v. Union Territory of Delhi,***[10] and ***Mohini Jain v. State of Karnataka***[11] are some of the quintessence of judicial activism limited to Article 21 of Indian Constitution. In pursuance of Black Law Dictionary, the practice of Judicial Activism is defined as "*a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent*". To the common knowledge, the judicial activism is practice where the judicial officer applies his mind, analyzing the fact in issue and examines its constitutionality while deciding the case at hand, whereby sets precedents. Substantially, through judicial activism court nullifies the unjust legislative and executive actions. The power for the same has been rendered by Article 13, 32 and 226 of Indian Constitution. The emphasis shall also be placed on ratio decidendi of the case

[8] Dr P.Mohana Rao, *Judicial Review as an Inviolable Part of Basic Structure of Constitution - A Critical Study*, International Journal of Law Management and Humanities, 2019, https://www.ijlmh.com/wp-content/uploads/2019/10/Judicial-Review-is-an-inviolable-part-of-the-basic-structure-of-Constitution-a-critical-study.pdf.
[9] 1978 AIR 597.
[10] 1981 AIR 746.
[11] 1992 AIR 1858.

L. Chandra Kumar v. Union of India,[12] which provides that judicial review is the part of basic structure doctrine, hence can never be altered. Regardless, as how there are two sides to every coin, judiciary empowered with judicial review entailed judicial activism is perceived to be ***Imperium in Imperio*** by the critics. The same was exacerbated with the struck down of National Judicial Appointment Commission Act, 2014. The bone of contention is that the judiciary is duty bound to protect the constitution from unjustified usurpation by the state, but conferring ultimate power on one governmental organ is against one of the kernel principles of federalism, which may turn judiciary to be a despotic organ. As rightly stated in the case of ***P. Ramachandran Rao v. State of Karnataka***[13] though the Indian constitution has not mandated the rigid separation of power between the three governmental bodies, the judiciary has to maintain checks on itself. Indisputably, the judiciary has always on point while dealing with the question on Doctrine of Separation of Power and its status quo in India, the ***Ram Jawaya & Ors v. State of Punjab***[14] is one of the crucial cases, where the court dealt with the question of demarcation of power between the three branches of the government, where the Apex court reaffirmed that Indian constitution has not recognized the Doctrine in absolute rigidity yet succinctly differentiated the working sphere of such organs. Despite justification provided by the judiciary on nullification of NJAC Act was an attempt to shield its independence from further erosion, such an act is at loggerheads as it does not seems to be prudent from the layman's point of view, where he thinks restoration of Collegium System is impliedly conveying the judicial autocracy in the wake of judicial independence.

III. NJAC ACT V. COLLEGIUM SYSTEM

In India, Articles 124(2), 217 (1), 127(1), 128, 224, 231 and 222(1) underpins the appointment and transfer of judges of higher judiciary. With the proper analysis of the mentioned provisions, it can be deduced that the constitution of India does not attempted to envisage any procedure, thus the Memorandum of Procedure (MoP), a jointly framed document by the government and judiciary which lays down the procedures governing the appointment of higher judicial officers gains its prominence. The MoP for Supreme Court, which was first introduced in 1947 and has been refined frequently, provides that all appointments shall be recommended by the Collegium. In pursuance of the MoP, presently, the Collegium for Supreme Court shall consist of Chief Justice of India and four most senior judges of the Supreme Court/ High court depending on the case. The inception of Collegium system shunned executive dominance in judicial

[12] 1995 AIR 1151.
[13] JT 2002 (4) SC 92.
[14] AIR 1955 SC 549.

© 2023. International Journal of Law Management & Humanities

appointments, and remarkably evolved across decades through judicial pronouncements viz. S.P. Gupta v. Union of India (First Judge Case, 1981); Supreme Court Advocates on-record Association v. Union of India (Second Judge Case, 1993) and the Third Judge Case, 1998. Though the first judge case was overruled and the Second Judge Case has led to the birth of Collegium system, it's imperative to make note of the former case as where it was held that the primacy of CJI is not really found on constitution, thus the ultimate decision making power in regard of appointment of judges rests with the government, through holding that the word 'consultation' in the proviso of Article 124(2) and 217 (1) of the constitution does not mean 'concurrence'. However, the latter revised the former, where the primacy of CJI over government in matter of appointment of judges was upheld by the apex court, withal, it was added that in case of disagreement between the president and CJI, the words of CJI not only has primacy, but it would be determinative as well. Though Article 124 (2) of the Indian Constitution imposes no ceiling on the number of judges other than CJI to be consulted by the president, the second and third judge case determined the composition of Collegium to be 1+2 or 4. Nevertheless, the Collegium System was questioned by multiple commissions, some of the notables were the National Commission to Review the working of Constitution (2002), The Administrative Reforms Commission (2007), and the Law Commission of India (2008). The collective criticism on impugned system was that there is no country in the world with similar legal and political framework has such system where judges appoints themselves and enjoys supreme primacy over other governmental organs. As a response, the Ministry of Law and Justice came up a new bill named NJAC in tandem with the 99th constitutional amendment to replace the presiding system. The 99th constitutional amendment added new Articles namely 124A, 124B and 124C to make provision for constituting NJAC, empowering the commission to appoint higher judicial officers and bestowing the parliament with the ultimate power to make laws regulating the commission's functioning. In pursuance of the Act, the constituents of NJAC were CJI of India, two senior most SC judges, union minister of law & justice, 2 eminent members jointly nominated by CJI of India, Prime Minister of India and the leader of opposition party in Lok Sabha. Despite being passed in both the houses and becoming an Act with president's consent, the Act was abruptly rejected by the Apex court, hence the Constitutional Amendment was held null and void.

IV. Nullification of NJAC Act: A Severe Compromise on Democracy?

It is appropriate to take account of the case of ***Supreme Court Advocates on Record Association***

© 2023. International Journal of Law Management & Humanities [ISSN 2581-5369]

(SCAORA) V. Union of India,[15] as in where the Hon'ble Supreme Court of India struck down the NJAC Act, 2014 and the 99th Amendment of Indian Constitution and restored the Collegium system for appointment of higher judicial officers. But before accentuating the nexus between quashing of NJAC Act and Judicial despotism, it is imperative to comprehend the Act and its provisions. The NJAC Act was enacted with an object of revisiting the system of appointment of higher judicial officers as a flat response to the prolonged sharp disagreement on the Collegium system which is way more opaque, where the judges appoints themselves and empowered to determine their own transfers. It is pertinent to note that India is the only country which authorizes judges to be their own appointees by disregarding the principles of federalism. Though it is justifiable to argue that India is a quasi federal country with no rigid separation of power embedded in the constitution, yet it is worth noting the fact that Collegium system either has no mention in the constitution. The prime cause of the backlash on the judicial decision of resurrection of Collegium system poses more questions, firstly, if the NJAC Act, an effective alternative to the Collegium system and the constitutional amendment was been rundown by the judiciary as it was ruled to be overriding the primacy of judiciary, the words of Justice Chellameswar gains prominence, is the judiciary only constitutional organ, which is capable of protecting the liberties of the people? Secondly, in the wake of safeguard the primacy of judiciary, the court has overlooked the supremacy of parliament, whereby disregarded the *mandate of people.*[16] Thirdly, was the case decided by the judges based on their own *will* or after scrutinizing the *will* of the constitutional framers?[17] All the aforementioned questions are not res integra as verdict of the ***SCAORA V. UoI***[18] is self-explanatory. The critical analysis of the judgment highlights that the bench feared the future scope of reciprocity of the favours between the executive and judiciary, which would culminate in severe compromise of independence of judiciary and disastrous to the notion of constitutional sovereignty. The another underlying rationale behind restoration of Collegium system was stated by Justice Khehar that the independence of the judiciary would be at stake as Union Law Minister would be one of the six members of the committee appointing the higher judicial officers, where executive influence judicial decisions. The emphasis was placed on the possible repercussion of the *executive-judiciary reciprocity* and its anticipated consequences. Regardless, though the

---

[15] AIR 2015 SC 5457.

[16] Dushyant Dave, *Why Vice President Dhankhar is wrong in attacking the judiciary,* THE INDIAN EXPRESS, January 16, 2023, https://indianexpress.com/article/opinion/columns/vice-president-jagdeep-dhankhar-judiciary-comment-8379457/.

[17] P. Puneeth, *Collegium System: Suggestions for Reforms*, VIVEKANANDA JOURNAL OF RESEARCH, https://vips.edu/wp-content/uploads/2019/11/Collegium-System.pdf.

[18] SCAORA v. UoI, AIR 2015 SC 5457.

shortcomings of the NJAC Act rightly pointed out by the majority bench cannot be weighed in favour of Collegium system. The reliance shall be placed on the opinion of the only dissenter of the case as he repudiated his fellow judges as he firmly stated that *the Collegium proceeding were absolutely opaque and inaccessible to the public and history*.[19]

V. CONCLUSION

The Collegium system renowned to lack transparency, through the eyes of ***Justice Ruma Pal***, the process of appointments of judges to the higher judiciary is completely shrouded with secrecy. In her words the appointment of judges in India is *one of the best secrets in India.* Nevertheless, the possible reciprocal favour exchange between executive and judiciary being one of the stout shortcomings of NJAC is abysmal, however the dissenting opinion alluding India to discard Collegium system, has to be acknowledged prominently. If all the discussions and the debates onto the appointment of judges has summoned up, it has always been around who can appoint the higher judicial officer and was never predominantly on who can be appointed and how he shall be appointed.

*****

[19] *Id*. at 17.

© 2023. International Journal of Law Management & Humanities