

## The National Judicial Appointment Commission - A Critique

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The National Judicial Appointments Commission Act, 2014 (“NJAC Act”) has been notified in the official gazette on the 13th of April, 2014. The Judicial appointment mechanism provided for in these Acts has become a subject of controversy raising fresh concerns about judicial independence and accountability.

Article 124A has been introduced in the Constitution of India, which provides for the National Judicial Appointments Commission (Hereinafter called “the NJAC”) consisting of the Chief Justice of India, two other senior Judges of the Supreme Court, the Union Minister of Law & Justice and two eminent persons nominated by a committee consisting of the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the House of People, and if no such Leader is there then the Leader of the single largest Opposition Party in the Lok Sabha.

The NJAC Act regulates the procedure to be followed by the NJAC for recommending persons to be appointed as judges of the Supreme Court and the High Courts, along with their transfers. The recommendation for appointment of Judges has to be made on the basis of seniority, ability, merit and any other criteria of suitability as may be specified by regulations of the NJAC<sup>1</sup>. Based on these recommendations, the President has to make the appointment.

### Background

The 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*<sup>2</sup> (First Judges Case). 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.

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<sup>1</sup> Section 5 of the NJAC Act provides for the procedure for selection of Judge of Supreme Court and Section 6 of the NJAC Act provides for the procedure for selection of Judge of the High Court.

<sup>2</sup> 1982(2)SCR365

However, the First Judges Case was overruled by the Second Judges Case<sup>3</sup>, 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, now about 21 years old, was not only recognized in the Second Judges Case but also in the Third Judges Case<sup>4</sup>. Thus the Collegium system of appointment became 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 attempts<sup>5</sup>. Thereafter discussions took place and several recommendations were made by various committees emphasizing the need for changing the collegium system. Finally on 31st December, 2014 the NJAC Act and the 121st constitutional Amendment Bill received the presidential assent.

### The Ailing Collegium and the Need for NJAC

The Collegium system 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 summarized as follows:-

- i. The Appointment of Judges by the Collegium system was completely opaque and there was no procedure for checking the reasonableness of appointment<sup>6</sup>.
- ii. 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."<sup>7</sup>
- iii. 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<sup>8</sup>.
- iv. 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<sup>9</sup>.
- v. 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.

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<sup>3</sup> Supreme Court Advocates on Records v. Union of India, 1993

<sup>4</sup> In re Special Reference 1 of 1991

<sup>5</sup> See 82nd Constitutional Amendment Bill in 1997, 98th Constitutional Amendment Bill in 2003 and the 120th Constitutional Amendment Bill in 2013.

<sup>6</sup> 21.10.2008, "The Hindustan Times" quoting the then Law Minister, Mr. H.R. Bhardwaj, had reported "Collegium system has failed. Its decisions on appointments and transfers lack transparency and we feel courts are *not getting judges on merit*".

<sup>7</sup> Page 50, Fourth Report, 'Ethics in Governance', Second Administrative Reforms Commission.

<sup>8</sup> 26.09.2014, "The Times of India", quoting the then Union Law Minister, Mr. Sadananda Gowda.

<sup>9</sup> Page 59, 214th Report of the Law Commission of India.

## NJAC: The cure for the ailment?

The NJAC Act and the 121<sup>st</sup> Constitutional Amendment are already under challenge before the Supreme Court of India. The Public Interest Litigations<sup>10</sup> were initially before the bench of Justice Anil R. Dave, Justice Chelameswar, and Justice Madan B. Lokur. By way of an Order dated 7<sup>th</sup> April, 2015 the said bench had placed the matters before a larger bench as it involved “*substantial questions of law as to the interpretation of the Constitution of India*”, without passing any interim order as to the operation of the NJAC.

The real question which arises for consideration is whether the formation of NJAC really cures the ailments that the collegium system suffered from?

To begin with, the NJAC definitely cures the earlier allegations of unconstitutionality arising due to the executive’s opinion having no weight in comparison to the judiciary. The NJAC consists of three judicial officers and the Union Law Minister, along with the involvement of several political bodies.

The recommendation would finally be made to the President. Hence the NJAC gives much more primacy to the executive, rather than the judiciary. Secondly, to some extent it can also be said that the problem of judicial accountability may also have been solved as the judiciary would now be accountable to the executive in the matter of its appointments.

However, apart from the above, it does not score in any other way over the collegium system. It does not cure the lack of transparency. The considerations and procedure of appointment would still be shrouded in mystery. Along with the criteria of appointment specifically provided for, in the provisions of the NJAC Act, the words “any other suitable criteria” will continue to afford sufficient amount of nepotism and favoritism to the members of the NJAC.

Also, the provisions of the NJAC Act provide that amongst six members of the NJAC, a minimum of five persons have to agree with the recommendation, in absence of which the recommendation cannot be made. This majority is not only more than a simple majority (50%) but even more than a special majority (67%) as contemplated in the Constitution for passing of money bills.

Furthermore, the long procedure of continual debates and discussions ordinarily preceding the passing of legislation in the country has also not been followed in this case. The passing of the legislation in such a hurried manner has also been viewed with suspicion alleging lack of jurisprudential application.

Apart from these drawbacks of the collegium system which the NJAC Act fails to overcome, it has several loopholes and infirmities of its own.

The constitutionality of the NJAC Act and the 121<sup>st</sup> 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.

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<sup>10</sup> *Supreme Court Advocates-On-Record Association and Anr. v. Union of India*, Writ Petition (Civil) No. 13 of 2015 being lead matter.

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.

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.

## 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 Superieur de la Magistrature* makes recommendations to the President on the basis of which the appointments are made<sup>11</sup>. 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 one public prosecutor. Thus the primacy of judiciary in the appointment procedure can be clearly seen. Similarly, in the United Kingdom<sup>12</sup>, for appointments to the Supreme Court, the Lord Chancellor has to convene a commission which consults judges and heads of jurisdiction. On the basis of the recommendation of the commission, the Lord Chancellor notifies this selection to the Prime Minister.

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.

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<sup>11</sup> Article 34 of the French Constitution

<sup>12</sup> Constitutional Reform Act, 2005 (UK)

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 endeavored 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.

In the words of Mr. Soli Sorabjee<sup>13</sup>:-

*"Please remember no system can be perfect. You cannot ensure independence, you cannot legislate independence. A judge must be independent even of himself, of his biases, prejudices, predilections, preconceptions. But the thing is, on the whol, it is a human system, it is not a perfect system. I think I would rather go with the collegium system, make it broad based, it to be taken into consideration in appointment of judges rather than scrap it altogether. I would rather trust the judges than the executive.*

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<sup>13</sup> November, 2013, as quoted by "the FIRM"