



THE DEBATE AROUND NJAC AND COLLEGIUM SYSTEM

*By Rishika Singh & Akanksha Tiwari
From Hidayatullah National Law University*

INTRODUCTION

There has always been a debate of appointing judges and conflicts between the executive and judiciary is something that has always remained a bone of contention among the two organs. The constitution of India states about the appointment of Supreme Court and High Court Judges under Article 124 & 217 respectively. After Independence, the judges were appointed by the president in consultation with the law minister and the Chief Justice of India. For few years the system worked well but gradually it started witnessing discrepancies in the appointment of judges.

After the case of *S.P. Gupta v. Union of India*¹ the matter of judges' appointment came under limelight and a new concept of collegium was introduced by the Supreme Court for the appointment of Judges. The collegium was comprised of CJI and two senior most judges of the Supreme Court. The matter was again referred to the SC in the year 1991 in the case of *SCAOR v. Union of India*². This time the strength of Collegium was increased from three to five by increasing the number of senior most Judges of the SC. Finally, the whole chaos was settled by the honourable Supreme Court in the

case of *Re Presidential Reference*³ in the year 1993 when the court determined the true meaning of the word "consultation" given under Article 124 and 217 of the Indian Constitution. The Supreme Court of India's collegium system, which appoints judges to the nation's constitutional courts, has its genesis in, and continued basis resting on, three of its own judgments which are collectively known as the Three Judges Cases. The Collegium System is one in which the Chief Justice and a forum of four judges Senior most Judges of Supreme Court recommend appointments and transfer of judges. The Supreme Court Bar Association had blamed the Collegium System for creating a give and take culture, creating a rift between the haves and have not. The Politicians and actors get instant relief from courts; the common man still has to struggle for years to get Justice.

National Judicial Appointment Commission was a Constitutional Body formed to replace the Collegium System of appointing Judges. The National Judicial Appointment Commission was established by amending the Constitution of India by passing the Ninety-Ninth Amendment Act, 2014 by the Lok Sabha on August 13, 2014 and by Rajya Sabha on August 14, 2014. Alongside the Parliament also passed the National Judicial Appointment Act to regulate the NJACs functions. Both the bills were ratified by 16 State Legislatures and the President gave his assent on December

¹ 1982(2)SCR365

² Writ Petition (Civil) No. 13 of 2015

³ AIR 1999 SC 1



31, 2014. Hence, the NJAC Act and the Constitutional Amendment Act came into force from April 13, 2015. The NJAC will consist of six people which will include the two most senior judges of Supreme Court, the law minister and two eminent persons. These eminent persons are nominated for a period of three year by a committee consisting of the Chief Justice, the Prime Minister and the leader of the opposition in the Lok Sabha, and are not eligible for re-nomination.⁴

The Supreme Court has declared the National Judicial Appointment Commission Act, 2014 and the 99th Constitutional Amendment Act, 2014 void and unconstitutional. The Supreme Court has now held that the collegium System will remain operative which was established by its ruling earlier in the 1993 case for appointment of judges to higher judiciary.

NATIONAL
APPOINTMENT COMMISSION
COMPOSITION OF NJAC:

The National Judicial Appointments Commission Bill, 2014 was introduced in the Lok Sabha on August 11, 2014 by the Minister of Law and Justice, Mr. Ravi Shankar Prasad, a new article, Article 124 A, (which provides for the composition of the NJAC) is also be inserted into the Constitution. If we talk of a National Judicial Commission, what is fundamentally important is its

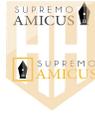
composition. Its composition should not be that which should effect directly or indirectly the independence of the judiciary and the power of judicial review both of which have been held to be the basic features of our Constitution. Our Constitutional system comprises the written Constitution, the conventions like DPSP, Fundamental rights and Duties which have been developed and are being followed and the interpretation of the Constitution by the Supreme Court.

The NJAC bill provides for a procedure that is to be followed by the NJAC for recommending persons for the appointment for the post of Chief Justice of India and other judges of the Supreme Court, the Chief Justice and other judges of High Courts. The 121st constitutional bill stipulates amendments to Article 124 (2) and 217 (1) which deal with the appointment of Judges in the Supreme Court and the High Courts. Under 121st amendment every judge in Supreme Court and High Court will now be appointed by the President in consultation with the National Judicial Appointment Commission.

The National Judicial Appointments Commission will be a six member body composed of the following members:

- Chief Justice of India – (will be the ex-officio Chairperson)
- Two other senior judges of the Supreme Court, next to the Chief Justice of India – (ex officio members)

⁴ <http://www.thehindu.com/specials/in-depth/njac-vs-collegium-the-debate-decoded/article10050997.ece>



- The Union Minister of Law and Justice – (ex-officio)
- Two eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination. – (to be nominated by a committee consisting of the Chief Justice of India, Prime Minister of India and the Leader of opposition in the Lok Sabha or the Leader of single largest Opposition Party in Lok Sabha), provided that of the two eminent persons, one person would be from the Scheduled Castes or Scheduled Tribes or OBC or minority communities or a woman.⁵

FUNCTIONS OF NJAC:

The Functions of the National Judicial Appointment Commission is to recommend candidates for appointment as Chief Justice of India, Judges of Supreme Court, Chief justice and Judges of High Court. The NJAC will also play a role in the Transfer of Chief Justice and other judges from one high court to another. The main task of NJAC is to ensure that the persons recommended are of ability and integrity.

To begin with, the NJAC definitely cures the earlier allegations of unconstitutionality arising due to the executive's opinion bearing 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.⁶

COLLEGIUM SYSTEM IN INDIA

Collegiums system in India is the system by which the judges are appointed by the judges only also referred to as “Judges-selecting- Judges”. It is the system of appointment and transfer of judges that has evolved through judgments of the Supreme Court, and not by an Act of Parliament or by a provision of the Constitution. The Supreme Court collegium is headed by the Chief Justice of India and comprises four other seniormost judges of the court. A High Court collegium is led by its Chief Justice and four other seniormost judges of that court. Names recommended for appointment by a High Court collegium reaches the government only after approval by the CJI and the Supreme Court collegium.

Judges of the higher judiciary are appointed only through the collegium system — and the government has a role only after names have been decided by

⁵ <https://exampariksha.com/national-judicial-appointments-commission-njac-bill-political-science-study-material-notes/>

⁶ <http://www.manupatrafast.in/NewsletterArchive/s/listing/ILU%20RSP/2015/Aug/The%20National%20Judicial%20Appointment%20Commission%20-.pdf>



the collegium. The government’s role is limited to getting an inquiry conducted by the Intelligence Bureau (IB) if a lawyer is to be elevated as a judge in a High Court or the Supreme Court. It can also raise objections and seek clarifications regarding the collegium’s choices, but if the collegium reiterates the same names, the government is bound, under Constitution Bench judgments, to appoint them as judges.⁷

CONSTITUTION ON THE APPOINTMENT OF JUDGES:

There is as such no mention of the collegiums system in the original constitution or in the recent amendments. But the Constitution of India lays down certain guidelines as to the reference to the appointment of the judges in the supreme courts and the high courts. The appointment of the judges in the High Courts and the Supreme Courts is done by the President of India and the powers are given to him under Articles 124(2) and 217 of the Indian Constitution. The President is just required to hold consultation with judges of Supreme court and High Court as it may deem necessary.

According to Article 124(2): “Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States

as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.”

And Article 217 says: “Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.”

FUNCTIONS OF THE COMMISSION:

The functions of this Commission are as follows:-

- Nominating people for the position of Chief Justice of India, Judges of Supreme Court, Chief Justices of all the High Courts and also the other judges of the High Courts.
- Recommending the transfer of the Chief Justice or Judges of the High Court, from one High Court to another High Court.
- To make sure that the people recommended are of ability, integrity and standing in this legal profession. The procedure for recommendation with respect to the appointment of High Court judges involves obtaining the views of the Governor, Chief

⁷http://ijariie.com/AdminUploadPdf/Collegium_System_%E2%80%93_The_Unveiled_Darkness_ijariie5835.pdf



Minister and Chief Justice of High Court of that particular state in a written manner. This should be as per the procedure specified by regulations made by this Commission.

GENESIS OF COLLEGIUM SYSTEM:

Collegium system has evolved through the series of judgement of “Judges case”. There were three cases namely:

- S. P. Gupta v. Union of India - 198 (also known as the Judges' Transfer case): it was found that CJI does not have any primacy. The Constitution Bench also held that the term “consultation” used in Articles 124 and 217 was not “concurrence” — meaning that although the President will consult these functionaries, his decision was not bound to be in concurrence with all of them.
- Supreme Court Advocates-on Record Association vs Union of India – 1993: a nine-judge Constitution Bench overruled the decision in S P Gupta and devised a specific procedure called ‘Collegium System’ for the appointment and transfer of judges in the higher judiciary. The majority verdict accorded primacy to the CJI in matters of appointment and transfers while also ruling that the term “consultation” would not diminish the primary role of the CJI in judicial appointments. Ushering in the collegium system, the court said

that the recommendation should be made by the CJI in consultation with his two seniormost colleagues, and that such recommendation should normally be given effect to by the executive.

- In re Special Reference 1 of 1998: In 1998, President K R Narayanan issued a Presidential Reference to the Supreme Court over the meaning of the term “consultation” under Article 143 of the Constitution (advisory jurisdiction). The question was whether “consultation” required consultation with a number of judges in forming the CJI’s opinion, or whether the sole opinion of CJI could by itself constitute a “consultation”. In response, the Supreme Court laid down 9 guidelines for the functioning of the coram for appointments and transfers — this has come to be the present form of the collegium, and has been prevalent ever since. This opinion laid down that the recommendation should be made by the CJI and his four seniormost colleagues, instead of two. It also held that Supreme Court judges who hailed from the High Court for which the proposed name came, should also be consulted. It was also held that even if two judges gave an adverse





opinion, the CJI should not send the recommendation to the government.⁸

This system is criticised because it is considered to be non transparent as there is no official mechanism involved. There are no prescribed norms regarding the eligibility criteria or even selection criteria. The NDA government has tried twice to replace the collegiums system with National Judicial Appointments Commission (NJAC) to address the concerns but failed and the collegium system still prevailing but the parliament has slowed down the process of appointment and is drafting the MoP (Memorandum of Procedure) to guide future appointments so that concerns regarding lack of eligibility criteria and transparency could be redressed.

SUGGESTIONS TO ENHANCE THE MECHANISM OF JUDGES APPOINTMENT:

On the basis of the criticisms observed and discussed, following are the suggestions to improve the functioning of the Collegium System for elevating the judges of High courts and Supreme Courts:-

To ensure the transparency of the system, the documents and audio recordings of the collegiums and candidates should be made accessible to the citizens from the Collegium Secretariat under the Right to Information Act. These records should be routinely uploaded on the website of

respective Supreme Court or High Court and must be accessible through a simple net search.⁹

- The collegium Secretariat should be headed by a team consisting members of senior bureaucrats who are sufficiently insulated from pulls and pressures caused by judges, lawyers, ministers, etc. They should support the Collegium in its Decision – making process with all the background data of candidates, along with the objective comparison and analysis of the data along several parameters.
- The Secretariat should maintain the eligibility records of each and every candidate or judge of the higher judiciary and the other senior advocates who apply for the post of judge in the higher judiciary.
- Short term promotions to the post of Chief Justice of several High Courts, just for the sake of rendering the eligibility of the candidate for elevation to the Supreme Court, should be expressly forbidden.
- Appropriate criteria must be given by the Collegium of Supreme Court, made into an enactment after passing through the houses of Parliament and carefully implemented by the Collegium Secretariat and Ministry of Justice. Making the criteria a law would perform as way to protect “moving goal-posts” for favoring a few candidates.

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<http://www.beingyourlawyer.com/Collegium%20System%20in%20India.php>

⁹http://ijariie.com/AdminUploadPdf/Collegium_System_%E2%80%93_The_Unveiled_Darkness_ijariie5835.pdf



- Appropriate Rules and formats may be developed for receiving complaints against individual judges and combining it into the eligibility criteria.
- Suitable laws may also be laid down to safeguard frivolous complaints against judges by the parties with their personal interests, but also to facilitate the independent investigation of complaints if found have substance.

THE COLLEGIUM SYSTEM VERSUS THE JUDICIAL APPOINTMENTS COMMISSION BILL

The judiciary is perhaps the only institution in our country to which the citizens accord utmost credibility. It is indeed the most trusted and respected institution. Then why does the selection of judges to serve in the Supreme Court and the High Courts take place through an impenetrable process? Questions have been raised time and again on the genuineness and transparency of the existing collegium system for appointment of the judges to the Supreme Court and the High Courts. Justice Rumpa Pal has rightly remarked that the process of appointments of judges to the superior courts is the best kept secret in the country. The Judicial Appointments Commission, Bill 2013 has been introduced to replace the existing collegium system by an independent Judicial Appointments Commission. The collegium system undoubtedly gives supreme power to the judiciary in making the appointments and there is an

immediate need for a complete overhaul of this system. But is the Judicial Appointments Commission a better successor?¹⁰

IS NJAC BETTER THAN COLLEGIUM SYSTEM?

The National Judicial Appointments Commission had been passed to replace the collegium system. It has been sought to effectively remove the issues and make better the procedure of appointment of judges to the High Court and Supreme Court of India. While the main issues with the collegium system included transparency and the power of appointing judges remained with the judges, the NJAC took a much more practical approach. The act promoted the relationship between the executive and the judiciary. It provided the President with the power to reconsider the recommendations made by the commission. The commission had ensured more transparency and accountability, this was one of the major changes to be included with respect to the collegium system which was opaque and provided no amount of transparency or accountability. This would ensure that the executive would also be kept in loop regarding the appointments. Another major benefit the NJAC sought to provide was that it would remove the elements of nepotism and favouritism and appoint

¹⁰ <https://academy.gktoday.in/current-affairs/njac-act-2014-99th-amendment-of-indian-constitution/>



candidates based on merit and experience. This was considered as a major step in the interest of justice when we consider the fact that the collegium system did not always appoint judges based on merit, but certain appointments were based on factors like nepotism, favouritism, bribery etc. The benefits of the NJAC act were many, including a check on corruption and non-arbitrary appointment of judges to the High court and Supreme Court of India. The non-arbitrary selection was ensured because of the implementation of the power to veto by the members. The act provides that if any two members of the commission do not accept a proposal or a recommendation then that person shall not be recommended for appointment. These were among the most prominent advantages of the NJAC over the collegium system.

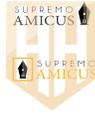
JUDGEMENT HOLDING NJAC UNCONSTITUTIONAL

On October 16, 2015, the Supreme Court of India had issued a landmark judgment in Supreme Court i.e Advocates-on Record Association v. Union of India (NJAC Judgment). In The judgment the Ninety-ninth Amendment was held unconstitutional to the Indian Constitution and accompanying legislation, which established a National

Judicial Appointments Commission (NJAC or Commission)¹¹

On 16 October, 2015 the Supreme Court upheld the collegium system and struck down the NJAC as unconstitutional after hearing the petitions filed by Supreme Court Advocates on Record Association (SCAORA) and others. Previously the validity of the constitutional amendment act and the NJAC Act were challenged by certain lawyers, lawyer associations and groups before the Supreme Court of India through Writ Petitions. On August 2014, Supreme Court had dismissed few Writ Petition that had challenged the validity of NJAC on the ground that the challenge was premature as the constitutional amendment and the NJAC Act had not been notified then. After the fresh challenge in 2015 after the acts were notified, a three judge bench of the Supreme Court referred the matter to a Constitution Bench. The five-member Constitution bench struck down the NJAC and constitutional amendment. It has also referred to the "insularity and independence of judiciary" as an intrinsic feature of the "basic structure" of the Constitution. In the court's view, judicial independence would be compromised if the executive gains an influence in the appointment of judges. The Court by a 4-1 majority, struck down the 99th Amendment. Justice Kehar's judgment concluded that the NJAC did "not provide an adequate representation, to the judicial component" and that "clauses (a)

¹¹ http://www.gwilr.org/wordpress/wp-content/uploads/2017/05/ILR-Vol-49.3_Rehan-Abeyratne.pdf



and (b) of Article 124A(1) are insufficient to preserve the primacy of the judiciary in the matter of selection and appointment of Judges” It further held that “Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an ex officio Member of the NJAC.” The clause it was held, impinged upon the principles of “independence of the judiciary”, as well as, “separation of powers”. The clause which provided for the inclusion of two “eminent persons” as Members of the NJAC was held ultra vires the provisions of the Constitution, for a variety of reasons. The four judgments of the majority have reasserted judicial independence with its concomitant autonomy in appointments, as an integral part of the Constitution’s basic structure. No parliamentary majority can amend the Constitution to alter its basic structure and hence the 99th Amendment failed constitutional scrutiny. The court has reinstated the collegium as the hearing house of all judicial appointments to the constitutional courts.¹²

CONSTITUTIONAL PROVISIONS AND JUDICIAL INTERPRETATION

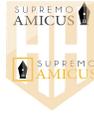
The constitution of India provides under Article 124(2) that the judges of the Supreme court shall be appointed by the President in consultation with such of the judges of the Supreme court and the High Courts as he may deem necessary provided that in case of appointment of a

judge other than the Chief Justice, the Chief Justice of India shall always be consulted and Article 217(1) provides that the judges of the High Courts shall be appointed by the President after consulting the Chief Justice of India, the Governor of the State concerned and in case of appointment of a judge other than the Chief Justice of the High Court to which the appointment is to be made. Thus the Constitution has vested the power of appointments with the executive in consultation with the Chief Justice and such other judges deemed necessary by the President. A question came before the Supreme Court in *S.P. Gupta V. Union Of India* that whose opinion amongst the various functionaries participating in the process of appointment should have primacy? It was held by the Supreme Court that the opinion of the Chief Justice of India and the Chief Justice of the High Court are *MERELY CONSULTATIVE* and the power resides solely and exclusively in the Central Government. Thus, a literal interpretation was given to the word consultation. In 1993, a nine judges Bench **OVERRULED** this decision in *Supreme Court Advocates On Record Association V. Union Of India* and conferred wide powers on the judiciary in making the appointments.

The Supreme held that:

- That the opinion of the Chief Justice of India should have the greatest weight as he is best suited to know the worth of the appointee,

¹²



- The selection should be made as result of a participatory consultative process in which the Executive has the power to act as a mere check on the exercise of power by the Chief Justice of India

In case of a conflict the primacy must lie in the final opinion of the Chief Justice of India and this primacy in effect means primacy of the opinion of the Chief Justice of India formed collectively after taking into account the views of his senior colleagues who are required to be consulted by him.

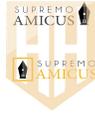
CONCLUSIONS

Appointment of Judges is a cardinal process in a democratic country like India and it should be done with utmost care and caution. In a country like India where government is the biggest litigator and the judiciary is the only wing which can provide justice to the people of without any fear, therefore judges should not be under any political influence. Independence of Judiciary & separation of power should be considered while formulating a process in which judges are supposed to be appointed. Though the constitution of India explicitly states about the appointment of Judges under Article 124 & 217, but it was not enough to suffice the purpose of appointments because of the arbitrary actions taken by the executive and made some noncompetent appointment as per there won whims and fancies. As a result, judiciary has settled the situation by interpreting these articles beyond doubt and setup the collegium. Executive interference came to an end and the

collegium served the need in the proper manner. But now, even the collegium is also under several allegations and people are continuously raising questions over the working process of collegium. Collegium has been blamed of not being transparent and accountable and corruption charges have been levied.

The parliament passed the National Judicial Appointment Commission in such haste and without much debate and discussion. This clearly shows the intention of government about controlling the Judiciary and putting it under the political influence. Parliament was trying to evade the independence of Judiciary with the help of this bill. The weightage should always be given to the judiciary in appointment but this bill was contrary to it and as a result it was struck down by the honorable Supreme Court. Collegium, in spite of having few faults and flaws, is currently the best option for appointment of judges as compared to the NJAC. We did not demolish the whole building if there is any problem in the construction rather we focus on figuring out the problems and repair them with all available means. Similarly, it would be better to figure out the problems in collegium and correcting them by taking all due actions rather than introducing a whole new system for appointing judges which has designed faults in it and are identifiable at the face of it. Therefore, I have tried to figure out some problems in existing system of collegium and have given few suggestions accordingly to improve it and make it more effective and efficient.

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