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## **FROM NJAC TO COLLEGIUM**

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### **ABSTRACT**

In this paper, we are discussing about the system for the Appointment of judges in the higher judiciary in India. This system consists of a 'consultative' process between the executive and judiciary. After the constitution has been framed this system was followed for almost four decades adequately. But after the second judges' case, the 1993 supreme court has evolved a new system for appointment namely "Collegium". Collegium is comprised of Chief Justice of India with two senior-most judges of the Supreme Court after third judges case this number was increased from two senior-most judges to four seniors most judges they recommend the names for appointment to the President. but there are certain irregularities present in this system 214<sup>th</sup> law commission has also criticized the Collegium system. So, we will be discussing the collegium system and NJAC in detail and why the Supreme court held NJAC void and revived Collegium System.

## Introduction

"The Appointment of Judges" is the most contentious issue (Collegium System and NJAC). For the first time after independence, a consultative method of appointment was proposed, that they will be President appointing the Supreme Court judges in consultation with the Chief Justice of India, and the President will be appointing the judges of the high courts in consultation with the Chief Justice of the high court and the governor of the region concerned, and the Chief Justice of India.

till 1973, the practice was to appoint the senior-most judge of the supreme court as the chief justice of India, However, this practice was suddenly shattered by the government. and they superseded three senior-most judges and made the fourth senior-most judge the Chief Justice of India, this action was highly criticized by the public and the bar. The government justified its action on the ground of absolute discretion of the President.

This action of the government was considered a threat to the independence of the Judiciary.

## Birth of the Collegium System

The system of appointment and transfer of Judges by collegium has evolved through several Supreme Court judgments, not by an act of the parliament. the cases are famously referred to as the Three Judges case.

So, in all three cases, the main question was whether the word consultation provided under article 124 means concurrence? is the consultation binding over the President? this has been answered in the judgments by the Supreme court.

In the *First Judges case of 1980*<sup>1</sup>, the Supreme court had declared that there was no need to provide primacy for the opinion of the chief justice of India while recommending a candidate to the President. Here we can see that the Supreme Court has ruled against its interest.

But in 1993 this judgment was overruled by the nine-judge bench and ruled in favor of granting primacy to the Chief Justice of India in appointing the key members of the top judicial brass in the *Second Judges Case*<sup>2</sup>. here the selection of judges came under the hands of the judiciary in our country.

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<sup>1</sup> *S.P Gupta vs. President of India*

<sup>2</sup> *Supreme Court Advocate on Record Association of India vs. Union of India*

The above judicial pronouncements were reaffirmed through the judgment of Apex Court in 1998 *The Third Judges Case*<sup>3</sup>. It was a reference made by the President under Art. 143 of the Constitution of India. It was held that the recommendation must be made by the chief justice of India and his four senior-most colleagues. The Chief Justice of India and his four senior-most colleagues are now referred to as collegium.

### **Separation of Power and Independence of Judiciary**

So, let us first discuss in brief about separation of power before discussing the National Judicial Appointments Commission. to understand better why the Supreme Court held it void.

Art. 50 of The Indian Constitution provides for the Separation of power. It says separation of judiciary from the executive- the state shall take steps to separate the judiciary from the executive in the public services of the state.

In India, there is a duality between executives and the legislature. Members of the parliament after winning the election are appointed as union ministers. Their roles are not confined just to making/passing the laws.

However, in other countries where the proper separation of power is followed like the United States of America. In the USA their roles are confined to just passing the laws. And who will be selected as a secretary of a particular department depends upon the discretion of the President if the president wants to make a member of parliament the secretary, then the Member of Parliament must resign from his post.

Hence, we can infer that our democracy is unique and the concept of proper separation of power is alien to our country. To keep check and Balance upon the other two bodies judiciary needs power which can be possible only then when our judiciary is independent.

### **What is the Principle of Checks and Balances?**

This is a constitutional doctrine in which all three branches of the government share some of the power of the other branches to limit their actions.

### **Position Before 99th Constitutional Amendment**

The Supreme Court judges and the Chief Justice of the Supreme Court were appointed by the

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<sup>3</sup> *In re Presidential Reference* AIR 1999 SC 1

President. The President appoints the CJI after consulting with as many Supreme Court and high court judges as he deems appropriate, the president would always consult the chief justice of India. He might consult such other judges of the Supreme court and High court as he deemed necessary (art. 124(2)). under article 124 (2) the President, in appointing other judges of the supreme court was bound to consult the chief justice of India, but in appointing the Chief Justice of India he was not bound to consult anyone.

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### **National Judicial Appointments Commission**

In *S.P Gupta vs. Union of India*<sup>4</sup>. Justice Bhagwati had suggested the appointment of a Judicial commission on the line of the Australian Judicial commission.

The National Judicial Appointments Commission (NJAC) was a body proposed to be responsible for the appointments and transfer of Judges of the higher judiciary in India. this body was brought into existence by the constitution 99th amendment to replace the "collegium" system that was being followed by the judiciary. it was asserted by the President on 31st December 2014, the NJAC act and constitutional amendment act came into effect on 13th April 2015.

### **Composition of NJAC**

According to Art. 124A, the NJAC is a six-member constitutional body comprised of the following individuals:

Chairman – India's Chief Justice

Members – Two of the Supreme Court's most senior judges

Union Minister of Law and Justice

Two more eminent individuals (Two eminent persons will be nominated by the committee led by the Prime Minister of India, the CJI, and Leader of Opposition in the House of People).

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<sup>4</sup> AIR 1982 SC 149

## Functions of NJAC

According to Art. 124B Functions of NJAC are:

The functions include recommending persons for the appointment as CJI, Judges of SC, Chief Justices, and other Judges of High Courts.

To recommend a transfer of Chief Justices and other Judges HCs from one High Court to another High Court.

## Constitutionality of NJAC

In “*Supreme Court Advocates-on-Record Association v. Union of India*”<sup>5</sup>, the Supreme Court by its order held the National Judicial Appointments Commission Act, 2014 and the Constitution (Ninety-ninth) Amendment Act, 2014 ultra vires and void. The system of appointment of Judges to the Supreme Court, Chief Justices and Judges to the High Courts, and transfer of Chief Justices and Judges of High Courts from one High Court to another as existing before the Constitution (Ninety-ninth Amendment) Act, 2014 and revived the collegium system. The Court also ordered to list the case to consider the introduction of appropriate measures, if any, for an improved working system of the "Collegium System". All the five Judges gave their separate judgments. Four Judges held the amendment unconstitutional. Justice Chaleswar upheld the amendment.

## Ratio decidendi

The main reasons stated by the Supreme Court in the *Fourth Judges Case*<sup>6</sup> for striking down the Ninety-Ninth Constitutional Amendment Act (and consequently the NJAC Act, 2014), were as follows:

1. That the inclusion of the Chief Justice of India and two other senior Supreme Court judges in the NJAC did not adequately reflect the judicial component and was insufficient to maintain the judiciary's supremacy in the selection and appointment of judges. This violated the principle of “independence of the judiciary”.
2. The presence of the Union Minister in charge of Law and Justice in NJAC infringes the independence of the judiciary and the doctrine of separation of powers, as per the

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<sup>5</sup> (2015) AIR SCW 5457

<sup>6</sup> *Supreme Court Advocates-on-record Association & Anr. vs. Union of India* (2015) AIR SCW 5457

supreme court held in “*kesavananda Bharti case*”<sup>7</sup> that the amending power 368 was subject to an implied limitation; a limitation which arose by necessary implication from its being a power to ‘amend the constitution by a majority of 7:6 the court ruled that ‘art. 368 does not enable Parliament to alter the ‘basic structure’ or framework of the constitution.

3. Reciprocity and emotions of payback toward the political executive would greatly diminish the judiciary's independence.
4. By eliminating the Chief Justice of India's and Judges' required consultations, the judiciary's institutional participation is eliminated, and the Chief Justice of India is reduced merely to a number in the NJAC.
5. The initiation for the appointment has been wrested from the Chief Justice of the High Court and only a nomination is sought, reducing him to a position of a mere nominating officer.

Through the act was struck down as unconstitutional, the court while hearing recognized that the collegium system had its shortcomings. Therefore, The Supreme Court called for suggestions.

### **Position after 99<sup>th</sup> constitutional amendment**

Article 124 (2) and 128 were amended by the 99th Amendment Act. Article 124A, 124B, and 124C were also inserted. as per the amended Article 124 (2), every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in Article 124A. After the amendment, Following the amendment, the President is no longer compelled to consult with the Supreme Court and High Court judges. The first proviso, which required consultation with the Chief Justice of India in the event of the appointment of a judge other than the Chief Justice of India, has been omitted.

### **Problems of the collegium system**

#### **Lack of transparency**

The collegium system has certain problems including lack of transparency the judges inside the system reveal nothing before the completion of the process. Also, its biggest loophole is

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<sup>7</sup> *Kesavananda Bharti Sripadagalvaru & ors. Vs. State of Kerala & Anr.* (1973) 4 SCC 225: AIR 1973 SC 1461

the question regarding its constitutionality as we know it has evolved from several judgments, not an act passed by the legislature. The basic criterion of appointment of judges in this system is one of the independence of the judiciary which is held to be the paramount value. It is not the most efficient system of appointment, and it was criticized by Justice J.S Verma as well.

### **Politicization of judiciary**

As we have discussed above that the separation of the Judiciary from the executive is the keystone of our democracy, and this idea has been emphasized by the Founding Fathers by including Art. 50 (directive principles of state policy) mentioning that the state shall take steps to separate the judiciary from the executive in the public services of the state. But sometimes the politicians fulfill their self-interest with the help of an opaque collegium system.

### **Nepotism**

As there is no transparency, appointments based on preferences are there, and the ones who don't deserve got appointed over deserving candidates.

### **Absence of Permanent Commission**

Lack of permanent commission is causing inefficiency in the process of appointment and the higher judiciary has a huge number of vacant positions. There has been an administrative burden because there is no separate secretariat for the appointment and transfer of judges.

### **Criticism by the 214th law commission**

The 214th law commission said that the word 'collegium' was not used by the constitution originally and the S.P. Gupta case brought about its usage by using it. According to article 74 of the Indian constitution, the president should always act on the aid and advice of the council of ministers. However, the two judges' cases have held that the consultation with the chief justice of India and two or four judges as the case may be. Thus, the cases held that the chief justice should consult the collegiums while the constitution says that the chief justice of India and the judges should consult the president.

### **Conclusion**

So, here I conclude with my opinion and perspective towards the collegium system and NJAC. As I have mentioned above the problems of the collegium system and criticism by the

214th law commission. Although I agree with Justice Bhagwati judiciary needs a transparent and accountable system for the appointment of judges to make the judiciary more credible. But I do not support the NJAC act as it was violative of separation of power which is the basic feature of our Indian constitution as held by the supreme court in the fourth judges' case. So, the independence of the judiciary must remain preserved along with the accountability of the judges. the supremacy of the constitution can be maintained only if the powers are separated. The system of checks and balances is also implemented. In our democratic society where the legislature is accountable to the people and the executive branch is accountable to the legislature, the judiciary is accountable to the people in a constitutional manner. As it is said, absolute power corrupts absolutely. We (the citizens of India) must ensure that all the three organs of the State function in a manner that is in harmony with the observance of the Constitution and have checks and balances on each other.