

“ROLE OF EXECUTIVE IN APPOINTMENT OF JUDGES – WITH SPECIAL REFERENCE TO NATIONAL JUDICIAL APPOINTMENT COMMISSION (NJAC) OF INDIA”

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ABSTRACT

The Constitution (Ninety-ninth Amendment) Act of 2014 established the National Judicial Appointments Commission (NJAC) with the goal of increasing openness and accountability in India's judicial appointment process. However, its implementation has encountered considerable challenges that have hampered its efficacy. One of the main difficulties is the constitutional challenge that prompted the Supreme Court to overturn the NJAC in 2015, citing concerns about judicial independence and the possibility of political intervention in judge nominations. This verdict has kept the present collegium system in place, which, while criticized for its lack of openness, continues to operate in the absence of a strong alternative structure. Concerns over the perceived elitism and opacity of the judicial establishment are also raised by the lack of a clear framework for public participation and accountability in the selection process. In addition, there have been concerns raised about the NJAC's original design, which comprised members from the executive and judicial branches, thereby weakening the separation of powers and causing judicial selections to become politicized.

This paper emphasizes the complex issues that the NJAC must deal with, highlighting the necessity for a well-rounded strategy that protects judicial independence while fostering accountability and openness. It is imperative that these shortcomings be addressed in order to promote public confidence in the court and guarantee that the selection procedure adheres to the democratic values of justice and equity in India.

Keywords – Accountability, 99th Constitutional Amendment Act 2014, Supreme Court, Judicial Independency.

INTRODUCTION

“...The first and the last refuge of the maintenance of the independence of the judiciary is the Bar of this Country. Time and again they have fought to frustrate the executive attempt to overawe the judiciary. It is now imperative that the Bar questions the validity of this insidious policy, taking the cue from the latest decision of the Supreme Court in the Administrative Tribunal Act case...”¹⁰⁰¹

An independent judiciary serves as a fundamental pillar in any democratic

framework governed by the Rule of Law. It acts as a crucial protector of citizens' rights and serves as the guardian of the Constitution. For judges, it is essential to adjudicate cases free from any external pressures—be it fear, favouritism, affection, or animosity—while steadfastly upholding both the Constitution and the law. This raises an important question: Is the Supreme Court Collegium the exclusive authority responsible for the selection of judges who are truly independent and impartial? Furthermore, does the involvement of the executive branch or civil society members undermine the judiciary's independence?

¹⁰⁰¹ Sampath Kumar Vs. Union of India, AIR 1987 SC 386

The appointment of High Court Judges is not an unchecked power of the executive; rather, it is subject to significant oversight. The President cannot appoint a High Court Judge without first consulting the Chief Justice of the High Court and the Chief Justice of India. This requirement ensures that the process is collaborative and transparent. Additionally, a strong convention has emerged whereby the government refrains from making any appointments that lack the endorsement of the Chief Justice of India. This framework establishes essential checks and balances, safeguarding the integrity of the judicial appointment process.

The current system, wherein the Collegium makes judicial appointments, raises concerns about whether this centralized power effectively ensures the selection of unbiased judges. Critics argue that the absence of broader participation, including input from the executive or civil society, may hinder the diversity and representation needed for a well-rounded judiciary. Conversely, some contend that incorporating perspectives from the executive branch or civil society could enrich the appointment process, ensuring that judges not only possess legal expertise but also reflect the societal context in which they operate.

Ultimately, striking a balance between the independence of the judiciary and the potential benefits of a more inclusive appointment process is crucial. It is essential to foster an environment where judicial appointments can be made transparently and equitably, thereby reinforcing public trust in an impartial and independent judiciary.

Evolution in appointment of judges in the Judiciary

In the case of *S.P. Gupta v. President of India*¹⁰⁰², the Supreme Court held that the executive would appoint judges in "consultation" with the Chief Justice rather than requiring "concurrence." Justice P.N. Bhagwati, delivering the majority opinion, stated that the views of all

three constitutional authorities should carry equal weight. He argued that prioritizing the opinion of the Chief Justice of India over those of the other two authorities would effectively amount to requiring concurrence. This would imply that the Chief Justice's opinion must take precedence over that of the Chief Justice of the High Court and the Governor, meaning the Central Government would be obligated to accept it. However, as previously noted, Article 217(1) of the Constitution specifies a process of consultation, not concurrence, with the Chief Justice of India.

A decade later, the court retaliated the verdict in *Supreme Court Advocates-on-Record Association v. Union of India*¹⁰⁰³, the majority of the 9-judge bench concluded that "consultation" effectively equated to "concurrence" or "consent." The ruling established that no judge could be appointed to the Supreme Court or any High Court without aligning with the opinion of the Chief Justice of India (CJI). Additionally, the seniority principle was emphasized, stating that the senior-most judge would be appointed as Chief Justice if deemed suitable for the position.

Amid the confusion with respect to the appointment of the judges and the powers of executive in it, the President of India in 1998¹⁰⁰⁴ invoked Article 143 to seek clarification from the Supreme Court regarding the appointment process. The Court clarified the composition and functions of the judicial collegium, stating it should include the Chief Justice of India (CJI) and the senior-most judges of the Supreme Court. The CJI was required to consult the four senior-most judges for Supreme Court appointments and two senior-most judges for High Court appointments. This decision established that substantive appointment power resided with the judiciary, reducing the President's role to a nominal one.

¹⁰⁰² SP Gupta V Union of India, AIR 1981 SC 149

¹⁰⁰³ Supreme Court Advocate-on-Record Association V Union of India, (1993) 4 SCC 441

¹⁰⁰⁴ Special Reference No. 1 of 1998, Re: (1998) 7 SCC 729

Presently, the process for appointing judges to the Supreme Court and High Courts is outlined in Article 124(2) and Article 217(1) of the Constitution of India, 1950. In 2013, two significant bills were introduced to overhaul the judicial appointment process for the Supreme Court and High Courts in India: The Constitutional (120th Amendment) Bill and the Judicial Appointments Commission Bill. These proposed the establishment of a Judicial Appointments Commission (NJAC) to oversee the selection of judges. However, just a year after its implementation, the NJAC faced legal challenges due to its collegium consisting of all parts of the government, leading to a doorway for arbitrariness and lack of transparency, which lead to its dissolution. As a result, the judiciary reverted to the collegium system established in the 1998 Special Reference case, which continues to govern judicial appointments to this day.

Functioning and Composition of the NJAC

The National Judicial Appointment Commission (NJAC) was established to enhance the transparency and efficiency of judicial appointments in India, marking a significant shift in the country's approach to judicial governance. At the helm of this commission is the Chief Justice of India, who serves as its chairman. Accompanying the Chief Justice are two of the senior-most judges of the Supreme Court, ensuring that the judiciary's voice remains central in the appointment process. The commission also includes the Law and Justice Minister, which integrates the executive branch into the appointment framework, creating a more collaborative approach to judicial selections. Additionally, two eminent persons are appointed by a selection committee that consists of the Prime Minister, the Chief Justice of India, and the Leader of the Opposition. This diverse composition aims to strike a balance between judicial independence and governmental oversight, fostering a more robust and democratic judicial appointment process.

The procedure for filling vacancies within the Supreme Court and High Courts involves several key steps designed to ensure timely and efficient appointments. The central government is mandated to refer any vacancy to the NJAC as soon as it arises, thereby ensuring that the commission is proactive in addressing judicial vacancies. For existing vacancies, the law requires notification to the NJAC within thirty days of the Act's commencement. In anticipation of future vacancies due to the expiration of a judge's term, the NJAC must receive a reference six months in advance. This forward-thinking approach is crucial in preventing delays that could hinder the judicial process. Furthermore, in instances of sudden vacancies resulting from the death or resignation of judges, the NJAC is to be notified within thirty days, ensuring that the judicial system remains functional without undue interruptions. This systematic method reflects a commitment to maintaining the integrity and efficiency of the judiciary.

When it comes to selecting judges for the Supreme Court, the NJAC plays a pivotal role by recommending the senior-most judge for the position of Chief Justice, thereby honouring the principle of seniority within the judiciary. For the selection of other Supreme Court judges, the NJAC evaluates candidates based on their merit and capability, employing a rigorous vetting process. A key feature of this process is the veto power regulation, which stipulates that if any two members of the commission disapprove of a candidate, that name will not be forwarded for consideration. This regulation serves as a safeguard against arbitrary decisions and upholds the quality of judicial appointments. Similarly, the procedure for selecting High Court judges involves a thorough vetting system. The NJAC recommends candidates for the Chief Justice of a High Court based on a combination of seniority, ability, and merit. For other High Court judges, the NJAC forwards names to the Chief Justice of the concerned High Court, who must then consult with senior judges and other legal professionals

if necessary. The perspectives of the Chief Minister and the Governor are also considered before final recommendations are made, ensuring a comprehensive evaluation process.

Beyond appointments, the NJAC is also responsible for recommending the transfer of Chief Justices and High Court judges, further emphasizing its integral role in maintaining the judiciary's integrity and balance. Through this structured approach to appointments and transfers, the NJAC aims to strengthen the judiciary while preserving its independence. By fostering collaboration between the judiciary and the executive, the NJAC seeks to enhance public trust in the judicial process. This comprehensive framework reflects a significant evolution in India's judicial appointment system, blending meritocracy with accountability, and ultimately striving for a more transparent and efficient judiciary.

Reason for the NJAC's collapse

The striking down¹⁰⁰⁵ of the NJAC Act can be traced to several fundamental flaws that rendered it incompatible with the principles of judicial independence and constitutional integrity. One of the primary issues was the poor drafting of the NJAC Act, which was plagued by contradictions that could have led to its eventual collapse. Stakeholders within the legal community indicated their willingness to accept the NJAC as a replacement for the collegium system, but only if judges constituted a clear majority within the Commission. The government's refusal to make this crucial adjustment ultimately contributed to the 99th Amendment being deemed violative of the Constitution's basic structure.

The appointment process established by the NJAC was fraught with challenges. Article 124A created a six-member Commission, which included the Chief Justice of India (CJI) but did not grant the CJI a casting vote. This setup meant that in the event of a tie, the NJAC would

face a deadlock, leaving critical appointments unresolved and unaddressed. Moreover, the Act lacked a clearly defined category for "eminent persons." While the CJI and two senior-most judges represented the judiciary, the other three members—consisting of the Law Minister and two "eminent persons"—had no requisite legal background. This raised significant concerns regarding their qualifications to influence judicial appointments effectively.

Further complicating the situation were the contradictions embedded in the Act. For instance, Section 5(1) mandated the NJAC to recommend the senior-most judge of the Supreme Court as the Chief Justice of India "if he is considered fit to hold the office." However, the Act failed to specify the criteria for determining such fitness, creating ambiguity and allowing for arbitrary interpretations. There were no grounds outlined for declaring a senior-most judge "unfit," leaving the process open to potential biases.

The veto power allocated to any two members of the six-member Commission further exacerbated these issues. This provision meant that no recommendation could be made if just two members disagreed, which risked frustrating the entire appointment process. Such a scenario could enable the executive branch to exert undue influence over the judiciary, undermining the principle of separation of powers that is fundamental to the Constitution. The selection procedure for High Court judges was equally perplexing. The Chief Justice and two senior-most judges of each High Court were required to nominate candidates to the NJAC for appointment. However, the NJAC also retained the ability to nominate candidates independently, creating the potential for conflicts between the two sets of nominees. This lack of clarity could lead to confusion and inefficiencies, further complicating an already flawed system.

Finally, the NJAC was granted the authority to frame regulations outlining the criteria for suitability and the procedure for appointing

¹⁰⁰⁵ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1

judges, which had to be tabled before both Houses of Parliament. This meant that Parliament had the power to modify or nullify these regulations, raising concerns about legislative interference in judicial appointments. The combination of these factors ultimately highlighted the NJAC Act's incompatibility with the basic structure of the Constitution, leading to its eventual annulment by the Supreme Court. The need for a judicial appointment system that prioritizes independence, transparency, and accountability remains paramount, underscoring the importance of reform in this vital area of governance.

Recommendations for Reforming the Appointment Process

The NJAC should be revised to ensure that the judiciary maintains its independence, with judges holding a clear majority within the Commission. This restructuring would help safeguard judicial decision-making from external influences. Additionally, the Supreme Court should release a comprehensive manual detailing the appointment procedures to establish a standardized process that all members can follow, promoting consistency and clarity.

To enhance transparency, the deliberations of the Collegium should be recorded and made publicly accessible. This would allow for greater public scrutiny and trust in the appointment process. Furthermore, establishing specific criteria such as regional representation, seniority, and gender would provide a structured framework for selecting judges and advocates for the Supreme Court. This approach would reduce reliance on unanimous decisions within the Collegium, helping to minimize disagreements and conflicts in future appointments.

In 2020, Subhash Chandra Agarwal, a prominent RTI activist, requested information related to the correspondence and documents concerning the appointments of certain Supreme Court judges, as well as a separate application for the declaration of the judges'

assets. A five-judge bench¹⁰⁰⁶ of the Supreme Court ruled that revealing the assets of Supreme Court judges does not infringe on their personal information or right to privacy. Regarding the disclosure of Collegium proceedings related to judicial appointments, the Court determined that while the final resolution of the Collegium may be made public, specific personal data or details cannot be shared, as this would violate both the right to privacy and the obligation of confidentiality.

Alternative Models for Appointment

One potential reform could draw inspiration from the UK model, where a dedicated selection commission is responsible for evaluating and selecting judicial candidates. This commission operates under clearly defined qualifications and procedures, ensuring a thorough and objective selection process. The nominees would then be reported to the Lord Chancellor, who would recommend a candidate to the Prime Minister for formal appointment, thereby streamlining the process.

Similarly, adopting a model similar to that of the United States could strengthen the appointment system. In this framework, the President would nominate candidates for the Supreme Court, while the Senate would be tasked with approving these nominations. This system of checks and balances would help ensure that the appointment process remains transparent and accountable, ultimately fostering public confidence in the judiciary.

Need for a Diversity¹⁰⁰⁷

The Indian judiciary faces a critical need for increased diversity among its judges to better reflect the nation's varied demographics. Currently, no judge below the age of 55 has been appointed, which limits the infusion of younger viewpoints essential for contemporary legal issues. Additionally, only four women have

¹⁰⁰⁶ Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481

¹⁰⁰⁷ Madhav Khosla, Sudhir Krishnaswamy "Inside Our Supreme Court" (Vol. XLVI No. 34), (Aug 2011) Pg no.29

served as Chief Justices of India (CJI) since the court's establishment, emphasizing the underrepresentation of women in judicial leadership.

Demographically, about 40% of judges belong to the Brahmin community, and 50% are from forward castes, while merely 10% represent Scheduled Castes (SC) or Scheduled Tribes (ST). This stark imbalance is concerning, especially given that SCs and STs constitute a significant portion of the population. Furthermore, the judiciary has faced criticism for its lack of regional representation, as most judges come from urban areas, potentially alienating rural voices.

To address these disparities, initiatives like affirmative action and merit-based recruitment are essential. Ensuring that the judiciary reflects the nation's diversity is not just a matter of equity; it is vital for the legitimacy of legal proceedings and the overall trust in the judicial system, fostering a more just society. The time has come for reforms that prioritize inclusive representation in the judiciary.

CONCLUSION

The National Judicial Appointments Commission (NJAC) was deemed unconstitutional and annulled, yet this does not imply that the current system is without flaws. In invalidating NJAC, the court acknowledged that the "judges appointing judges" approach is inadequate and requires re-evaluation. Nearly three decades have passed since the introduction of the collegium system, and an effective alternative has yet to emerge.

Firstly, it lacks clear guidelines or criteria for appointing Supreme Court judges, which fosters favouritism. There are no established procedures for evaluating candidates or conducting background checks to verify their credibility. Additionally, the absence of an administrative body raises concerns, as collegium members are not held accountable for their selections.

The 'Second Judges Case' affirmed the judiciary's dominance over the executive, which disrupts the essential principle of checks and balances. This principle is crucial to prevent any democratic institution from overstepping its authority.

While NJAC was annulled for being unconstitutional, it's important to note that the collegium system, though not explicitly outlined in the Constitution, has gradually developed through significant judicial rulings. Moreover, the system suffers from a lack of transparency, and instances of nepotism have been reported, undermining meritocracy and allowing biases to compromise judicial quality.

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