

# NATIONAL JUDICIAL APPOINTMENT COMMISSION: A CURE OR TRAUMA TO INDEPENDENCE OF JUDICIARY

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**Abstract:** The mid of 20<sup>th</sup> century witnessed *Three Judge Cases* that brought a drastic change in the Indian Judiciary in regard to appointment of judges. The Cases introduced the collegium system in India. This article provides for the significance of the judicial independence. The way the appointment of the judges is done presently and even before. Process of appointment of judges in other countries is also compared with that of India. To replace this system National Judicial Appointment Commission was set up. Article also provides arguments for and against the National Judicial Appointment Commission, its drawbacks and Scope of improvement in the model of National Judicial Appointment Commission to secure independence of judiciary in regard to the appointment of the Judges.

**Index Terms - Judicial Independence, Appointment of Judges, Collegium System, NJAC.**

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## I. INTRODUCTION

*“All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.”*

– Andrew Jackson.

Freedom and liberty have no value if the basic rights of the citizen are not protected. The protection of these rights is the function of judicial body and such judicial body has no relevance if it is not independent.

Every democratic state adopts various means to adopt freedom of judiciary and the freedom of its individual judges. The Indian constitution provides for independent judiciary as it is the only institution that can protect the rights of the citizen of the country. The U.S. democratic system adopts the concept of separation of power to ensure its judiciary to be free. On the other hand, the U.K model is based on the Parliamentary sovereignty that drops the principle of separation of power. In India the power of the Parliamentary and constitutional sovereignty is tied together.

### *i. Historical Background*

During the early time the British Empire did not recognise the theory of free judiciary. It took time to place it in position in the British Colonial system. In the initial stage, the judges used to hold the position on Crown's pleasure. It was the crown who appointed and removed the judges. They were the server to the crown and were under the control of King or Queen. There subordination led the judges favour the crown. Moreover, the people were accountable towards the crown.

It was by the Act of Settlement 1701 when the judicial independence in England was secured. The Act recognised the principle of security tenure of judges and it was for the first time taken away

from the crown and vested on the good behaviour of the king. Now by the statute a formal and appropriate process was followed to remove a judge from his service. This ensured his security and made the courts capable to decide the cases without favour or fear. Form the very statute a senior judge can be removed through addressing the charges to the Queen provided it is passed by both the houses that are House of Lord and House of Common.

#### ii. Definition

In India the Framers of the Constitution were well aware of the social structure therefore they kept a special provision declaring that judiciary shall be separate from the executive. Even though there is provision to secure judicial independence, but the term 'judicial independence' is not defined either in the Constitution of India or in any legislature.

Article 2 of The International Commission of Jurist 1981 defines independence of judiciary as:

1. that every judge is free to decide matters before him in accordance of the facts and his understanding of the law without any improper influences, inducements, or pressures direct or indirect, from any quarter or for any reason, and
2. that the judiciary is independent of the executive and the legislature, and has jurisdiction, directly or by way of review, over all issues of judicial nature.

According to Duhaime's Law Dictionary "(T)he term judicial independence embodies the concept that a judge decides cases fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictate of the legislature or executive, or the latest opinion poll."<sup>1</sup>

The term Independent Judiciary consists of two words independent and judiciary. Independent means free, liberal, unrestrained or self contained. The word is used in the context of judiciary i.e. the third wing of the government upon which the responsibility of administration of justice is vested. Judiciary is the legal body derived from the Grundnorm. Independent Judiciary refers to the courts and judges that have to deliver the judgements on the basis of facts and laws without any pressure or interference from the government or private person.

#### iii. Need for Judicial Independence

Judiciary has mainly three functions:

- a. Check the functioning of the other organs

Judiciary has been vested the function of the watchdog to ensure that the other three organs of the government that the executive and legislature perform their function within their ambit. It also helps in achieving the spirit of the Doctrine of Separation of Power. The judiciary is the guardian of the Indian Constitution.

- b. Function to interpret

All courts in India are the interpreter of laws. The Supreme Court and the High Court being the Courts of Record are the interpreter of the Constitution. The Framers of the Constitution were well aware of the ambiguity that may arise in the post independence period in creation and execution of law. Therefore the courts were given such position to interpret the law in the interest of public. The judiciary needs to interpret the law according to Constitutional philosophy.

- c. Delivering Justice

Judiciary is the last door that a citizen can knock to secure his fundamental right. On the other hand it is the duty of the court to deliver justice and that too in time. One cannot accept a judiciary to deliver justice until it is independent. The case brought to the court must be resolved impartially on the facts and law. A judge while delivering judgement shall consider all the aspect.

#### iv. Importance of Independence of Judiciary

The question as to why the Framers of the Constitution made the judiciary a separate and competent authority lies in the answer that the Framers of the Constitution were aware of the importance of independent judiciary. Independent judiciary is important on the following basis:

- Secure the stability and prosperity of the society it is significant to have independent judiciary.
- In India the judiciary is of utmost importance to uphold all the three pillars of the democracy. Rule of law results in a free and fair society. Independent judiciary plays a significant role in establishing Rule of Law which is important for the good governance of the country.

<sup>1</sup> Available at: <http://www.duhaime.org/LegalDictionary/J/JudicialIndependence.aspx>(last visited on February, 28 2019).

- The judiciary's supervisory role is important for the functioning of Separation of Power and if this role is given to any other organ then it may not be able to perform it proficiently.
- The independence of judiciary is also to be regarded in the social, economic and political changing scenario.

## II. APPOINTMENT OF JUDGES

In India, the appointments of judges are done in the higher Judiciary and lower judiciary. The appointment of lower judiciary judges is done by the Governor with consultation with the High Court. For the appointment of higher judiciary the system of collegium prevails. Prior to the system the judges were appointed by the President on the consultation with the Chief Justice of India. The system of collegiums is not completely pure but is satisfactory to the present situation. Need for more advance system is felt and National Judicial Appointment Commission is constituted for the appointment of judges to the higher courts. Judges should not only be first rate, but should be acknowledged to be first-rate in the country, and of the highest integrity, if necessary, people who can stand up against the executive government, and whoever may come in their way.

Various societies in the modern world adopted different models of selection processes for appointment of judges. India chose a model when it becomes a republic. But the model is based on the past colonial practise. With changing time and changing economic factors the need to revisit the model is felt from time to time both by successive government and civil society. The latest experiment was the 99th Constitutional Amendment. The *Constitution (99<sup>th</sup> Amendment) Act 2014* is stuck down by the Supreme Court. The amendment attempted for the establishment of National Judicial Appointment Commission, a body on which the task of appointment of higher judiciary was vested.

The independence of judiciary completely depends on the appointment of judges. The appointment process needs to be transparent and accountable. Addition to this no organ of the state shall have power in excess to suppress the mechanism process of appointment of judges.

### i. History of Judicial Appointment

#### a. From 1950 to 1973

On January, 26 1950, the founder of the India Republic created the Supreme Court of India. It was the work of great faith. The court was the sentinel on the 'qui vive'. The nation needed an independent judiciary and not a subservient body.

The first phase saw the court traverse all possible jurisprudential philosophies on the journey from the literalism of *A.K. Gopalan v. State of Madras*<sup>2</sup> in 1950 to becoming an unapologetic and de facto third chamber of the legislature restraining the parliamentary right to amend the Constitution itself in *Keshvananda Bharti v. State of Kerala*<sup>3</sup> in 1973. The court has performed such strong function on the judicial method best illustrated by American Chief Justice Charles Evan Hughes, Sr., who once said that we are under the Constitution, but Constitution is what judges say it is.<sup>4</sup>

#### b. From 1975 to 1977

This period is remembered in the Court's history for having dealt a severe blow to the importance of the judiciary, as was evident from action of the executive as well as from certain decision rendered by the Supreme Court during this time. The time is also regarded as the period when the Supreme Court failed to protect the rights of the citizen as well as the Constitution.

The practise came under the shadow when the friction arose between the Court and the Parliament after judgement in three consecutive cases. These cases were *Golak Nath v. State of Punjab*,<sup>5</sup> *Rustom Cavasjee Cooper v. Union of India*,<sup>6</sup> and *Madhav Rao Jiwaji Rao Scindia v. Union of India*.<sup>7</sup>

In the history of the Supreme Court there have been two instances of bypassing the seniority convention in the appointment of the Chief Justice of India. The first was in the case of *Keshvananda Bharti Case* when the executive appointed Justice A.N. Ray as the next Chief Justice of India. This was disregard to the three senior most judges. The second instance of

<sup>2</sup> AIR 1950 SC 27.

<sup>3</sup> AIR 1973 SC 1461.

<sup>4</sup> *Sengupta Arghya and Sharma Ritwika*, Appointment of Judges to the Supreme Court of India 4 (India, 2<sup>nd</sup>edn., 2018).

<sup>5</sup> (1967) 2 SCR 762.

<sup>6</sup> (1970) 1 SCC 248.

<sup>7</sup> (1971) 1 SCC 85.

supersession occurred after what is considered to be the most deplorable decision of the Supreme Court during the Emergency in the case of *Additional District Magistrate, Jabalpur v. Shivakant Shukla*.<sup>8</sup> In the case majority of judges comprising then C.J.I Ray held that by the reason of proclamation of Emergency any petition to question the legality of detention made under the Maintenance of Internal Security Act, 1971 (MISA) whether mala fide or otherwise could not be had judicial review.

The sixteen High Court judges who had opinion contrary to the Supreme Court were transferred without revealing their name in public. Second justice Khanna who gave powerful dissenting opinion against the decision was superseded for the appointment as Chief Justice despite being the next in line in terms of seniority. Consequence of this was that between 1977 and 1979 the Chief Justice started consulting its two senior most judges in the appointment process. With four senior most judges later on.

### c. From 1980 and onwards

The 1980 was a curious decade when the constitutional order in the appointment of judges was restored. This was not achieved through any particular act but rather a combination of a mature judgement by the Supreme Court couples with a new found respect amongst the political class for a judiciary that is independent at its core. The major development in the decade with regard to appointment of the judges was the First Judge Case (*S.P. Gupta v. Union of India*)<sup>9</sup> the case is regarded as the landmark in the Constitutional history of India. The reason was the real interest in the case is that it is about judges and not only by the judges. The case laid down the proposition of law that would obviate the possibility of the executive taking over the appointment process.

Then came the Second Judge Case (*Supreme Court Advocates-on Record Association v. Union of India*)<sup>10</sup> In the case court held that the power of the appointment of the judges will rest with collegiums of senior most judges of the court. It was also held that in case of disagreement between the different functionaries of the Constitution the opinion of the Chief Justice will be given weight age. Further no appointment could be made by the President if the Chief Justice is not of the opinion favouring the appointment.

The Third Judge Case (*In re Special Reference*)<sup>11</sup> was a Presidential reference to the Supreme Court. In this case the court firmly underlined the significance of collegium system in appointment of judges. In all the cases the court firmly established that the last opinion on the appointment of the judges will be of collegiums.

National Judicial Appointment Commission (hereinafter referred to as “NJAC”) was the next step by the legislation to replace the two year old collegiums system. The NJAC case may be considered as Fourth Judge Case.

### ii. National Judicial Appointment Commission

NJAC is the judicial body setup by the 99<sup>th</sup> Constitutional Amendment Act. The body is purposed to make the process of appointment and transfer of the higher judiciary judges more accountable and transparent. The body is given a Constitutional Status as it is brought by amending the Constitution of India. The amendment inserted *Articles 124A, 124B and 124C in the Constitution*.

#### a. Composition of National judicial Appointment Commission

As per *Article 124 A*, the NJAC was purposed to be constituted with six members. The composition of the body was as follow:

- One chairman – who to be the Chief Justice of India.
- Member – two senior most judges next to chief justice of India.
- Member – Union Minister of Law and justice.
- Members - Two eminent persons (to be nominated by a committee consisting of the Chief Justice of India, Prime Minster of India and the Leader of Opposition.)<sup>12</sup>

#### b. Functions of NJAC

Article 124 B dealt with the function of this body that were:

<sup>8</sup> (1976) 2 SCC 521.

<sup>9</sup> AIR 1982 SC 149.

<sup>10</sup> AIR 1994 SC 268.

<sup>11</sup> AIR 1999 SC 1.

<sup>12</sup> The Constitution of India, 1950.

- Recommending persons for appointment as Chief Justice of India, judges of Supreme Court of India, Chief Justices of High Courts and other judges of the High Courts.
- Recommending transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court
- Ensuring that the recommended persons have ability and integrity.<sup>13</sup>

c. Commission under the Power of the Parliament

The parliament, under the amendment has the power to lay down the procedure for the appointment of Chief Justice of India, Chief Justice of High Courts and other judges of Supreme and High Court judges. The Parliament also has the power to regulate function and procedure of the Commission.

The commission is the new model for the appointment of the judges of the higher courts. As the past has shown tussle between the government and judiciary with regard to appointment of judges. No such model has been used earlier to smoothen the appointment process of the judges.

iii. *Appointment of Judges around the World*

The 99<sup>th</sup> Constitutional Amendment Act is completely based on the NJAC. This brings us to study of the process of appointment of judges in the different country in the world. Processes adopted by other constitution in the world.

a. *United Kingdom*

The constitutional Reform Act 2005 (CRA) modified the office of Lord Chancellor by establishing new Supreme Court and reformation in the appointment process of judges was most significant feature.

For England and Wales, a judicial Appointment Commission (JAC), an independent body, is created that is not the agent of the Crown and does not form the part of executive. The commission was entrusted with the appointment process of all the higher courts judges except the Supreme Court. It is a permanent fifteen member commission consisting of five judicial members, two professional legal member, six lay member who have never practiced law or held judicial office, one member from tribunal and one lay justice.

Appointments of Supreme Court are made by ad hoc commission each time a vacancy arises. The commission consists of President of Supreme Court, a senior judge nominated by the President of Supreme Court and one member from judicial appointment commission from Scotland, Wales, England and Ireland.

b. *South Africa*

The South Africa Judicial Service Commission (JSC) plays a central role in the selection of judges. The JSC was established under the interim Constitution of South Africa. The composition and functions were redefined in the year 1996 under new Constitution.

Section 174<sup>14</sup> allots the President and JSC different role in selection process. The President has the final say in the appointment of the Chief Justice and Deputy Chief justice of Constitutional Court. The power is exercised after consultation with the JSC. Unlike India the term 'after consultation' gives the final call to the decision maker after taking advice from other.

The JSC also hold public interviews since 1994. The process has been very well formulated in the rules of JSC. This brings transparency in the process as public can comment on the nominees.

c. *Canada*

Appointments to the judiciary in Canada are done under the *Supreme Court of Canada Act of 1875*. The procedure in the Act is brief and only envisages that judges are to be appointed by the Governor in council. The way judicial appointment has worked in Canada has constituted an important lesson for India. A reform procedure for appointment involves the Prime Minister

<sup>13</sup>Available at: [https://www.gktoday.in/gk/njac-act-2014-99th-amendment-of-indian-constitution/#Composition\\_of\\_NJAC](https://www.gktoday.in/gk/njac-act-2014-99th-amendment-of-indian-constitution/#Composition_of_NJAC) (last visited on March 11, 2019).

<sup>14</sup> Available at: <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng-08.pdf> (last visited on March,19 2019).

and the Minister of Justice interacting with various Chief Justices, Law Deans, and provincial justice minister to solicited name of potential appointees

d. *Pakistan*

The 18<sup>th</sup> Constitutional Amendment of Pakistan dealt with the appointment process of the judges. The process for appointment to the Supreme Court included inputs from a much wider array of functionaries and individuals. The amendment provides for provided for the establishment of Judicial Commission of Pakistan (JCP).

Apart from JCP the 18<sup>th</sup> amendment also constituted an eight member Parliamentary Committee with the representatives from the National Assembly and Senate. The process followed is that for each vacancy the JSP will forward the name to the Parliament Committee to confirm the name within 14 days. If the Parliamentary Committee rejects the name by three fourth majorities then JCP will have to nominate another name to the Committee.

e. *Nepal*

Nepal has consciously made attempts to depoliticize judicial appointment. Earlier the appointments to the Supreme Court were originally made at behest of the executive the fifth Constitution onwards, appointment became prerogative of judicial council. It is the body comprising of Chief Justice, members from parliament as well as from bar. By the time Nepal enacted its interim Constitution of 2006 judicial appointment involved all three branches of the government. The procedure required judges nominated by judicial council to attend a compulsory hearing before the Parliamentary Hearing Special Committee. The 2015 Constitution of Nepal remains the powers sharing model between three branches of the government.

### III. COLLEGIUM VERSES NJAC

It has always been an area of confusion in the judiciary. The process of appointment of the judges has faced tremendous issues in the past. This is the system where judge selects a judge. This system of appointment has come into existence by the pronouncement of cases. Neither can it be found in the Constitution nor in any Parliamentary legislature. Judges of the higher courts are appointed only after they are recommended by the collegium.<sup>15</sup>

The collegium system was introduced to give the Chief Justice of India the power to appoint the upcoming judges (with the consultation) with consultation with senior most judges of the Supreme Court. The collegiums system has been criticized since the time of its coming; there are two reasons for it. One it does not have the scope to oppose the opinion of Chief justice and second that it lacks in transparency. In a democratic state like India the transparency in the government institution is must. The system gives opportunity of misusing it. The collegium system fails in knowing the career background of the candidate. As the opinion of the Chief Justice is of utmost importance so there may be probability that judges may appoint the upcoming judges of same ideology.

The system was intended to substitute the collegiums system by the legislation. It had the face of NJAC. The NJAC Act and the 99<sup>th</sup> Constitutional Amendment was brought to bring complete transparency in the system. Under the Act the commission and the government were given the power to make regarding the selection process. The Act also did not provide a principle on which a judge is to be selected. The Act simply transferred the problems of the collegian system to the NJAC.

i. *Arguments For and Against the Creation of NJAC*

In the summer of 2015, for 32 days the Supreme Court of Indian heard the argument in *Supreme Court Advocate-on-Record Association and others v. Union of India and Others*<sup>16</sup> also known as NJAC Case. It concerned to the 99<sup>th</sup> *Constitutional Amendment* that provided for the establishment of the NJAC. The amendment also laid the power to NJAC to make appointments of judges to the President of India.

- *Argument in favour of NJAC*

<sup>15</sup>Available at: <http://www.beingyourlawyer.com/Collegium%20System%20in%20India.php>(last visited on March,10 2019).

<sup>16</sup> (2006) 5 SCC 1.

The issue around which the argument revolves in the NJAC Case is the independence of judiciary. The model of NJAC has both pros and cons. It is essential to consider them both. The NJAC is favoured on the following arguments:

- The primary question that arises is that should the appointment of the judges' rest upon the judiciary to uphold the independence of judiciary? Because neither the Constitution nor the jurisdiction of court supports this statement.
  - At present it is the collegiums system that appoints the judges. Collegium system has no transparency and lacks accountability.
  - In contrast, the NJAC brought in by the 99<sup>th</sup> Constitutional Amendment has the necessary checks and balances. NJAC will strengthen the independence of judiciary rather weakening it.
  - The Constitution has devised a structure of power relationships with checks and balances wherein limits are placed on the power of all authorities or instrumentalities under the constitutional scheme. The independence of the judiciary is protected under the basic structure of the Constitution through various facets and is not drawn from the appointment of judges alone.
  - NJAC is acceptable because it favours the separation of power. No organ including judiciary shall enjoy absolute freedom.
  - In addition to the independence of the judiciary and separation of powers, public confidence stemming from democracy shall also has to be kept in mind.
  - NJAC is a model looking beyond the perspective of the courtroom to serve the public who are the ultimate seekers of justice. There are possibilities that a person may not possess legal awareness but is bound to have a deeper understanding of life beyond the courtroom. Therefore there is no reason to raise question on the membership of two eminent persons from non judicial background.<sup>17</sup>
- *Arguments against the NJAC*

NJAC would endanger the independence of the judiciary as guaranteed under the existing collegium system. The Constitution framers had stressed on separation of superior judiciary from the control of legislature and executive. The argument is based on two issues. First One, the law was enacted by Parliament when the constitutional provisions were contrary and second the provisions of the NJAC Act attempted to encroach into judicial independence.

- The primacy of the CJI in initiating an appointment of judge had been taken away. The infamous supersession of senior judges by the executive during the time of Emergency era and due to the tendency of the executive and legislature to interfere in the independence of judiciary NJAC is a big question.
- The creation of NJAC destroys the independence of judiciary as it is against the principle of separation of powers by bringing judiciary under parliamentary control. It will hamper the functioning of the court.
- The law is serious assault on the independence of judiciary. NJAC with law minister is meant to denude, reduce and diminish the primacy of the CJI and destroy the prestige of the judiciary. The government should never be allowed to play a direct role in the appointment of judges.
- The amendment Act intends to alter the Constitution with respect to judicial appointment of Supreme Court and High Court judges.
- The composition of the NJSC consisted of three person from judiciary and three from non judiciary. Two out of these three non judicial persons are to be appointed by executives. Hence, the executive attempts to influence the final decision of the Commission.
- Involvement of law minister will compromise the independence of judiciary as the executive representative will frequently sit with CJI and senior judges of Supreme Court. The independence of judiciary cannot be maintained at any cost when the power to appoint judges rests with the executive.<sup>18</sup>

#### IV. Conclusion and suggestions

<sup>17</sup>Available at: <https://www.livemint.com/> (last visited on March 11, 2019).

<sup>18</sup>Available at: <https://www.livelaw.in/njac-conundrum-re-cap-of-arguments-and-counter-arguments-with-written-submission/> (last visited on March 11, 2019).

The research paper presents the importance of appointment of judges in the context with independent judiciary. At present the appointment of higher judges is under the collegium system. It was the outcome of the Second Judge Case. The collegium system is not a perfect model because it lacks in transparency. No country adopts such a system in selection of judges. The system does not have a Constitutional position. To substitute the system 99<sup>th</sup> Constitutional Amendment is brought in to setup NJAC. NJAC is a positive step in furtherance to collegiums system but it has some drawback because of which it cannot be enforced. The primary concern regarding the Commission is that it takes away the primacy of Chief Justice in making the selection of judges. The Chief Justice is the first among the equal in the Supreme Court. He shall possess the primary power. *Second*, the government has its distinct role in working towards the welfare state it has its own function to perform and if it interferes in the appointment process of the judges it will violate the principle of separation of power. *Third*, The Commission has serious complication with the composition of NJAC. The power to appoint the judges cannot be given to one body absolutely as *Lord Acton says, "Power tends to corrupt and absolute power corrupts absolutely"*. Therefore the involvement of Law Minister in the Commission is acceptable. The composition of the NJAC consists of three person from judiciary and three from non judiciary. Two out of these three non judicial persons are to be appointed by executives. Hence, the executive attempts to influence the final decision of the Commission. The Commission do not have complete authority over the adoption of procedure for appointment. By the 99<sup>th</sup> proposed amendment, *Article 124C* gave the power to Parliament to regulate the function of the Commission. It is simply interference of legislature in the judiciary.

#### SUGGESTIONS

- The collegiums system is least trusted because of its lack in transparency therefore it is the need of the hour that an appropriate mechanism may be adopted. NJAC is an appropriate model if its short comings are removed.
- Under the Commission in the appointment of the judges the public interview shall also be conducted. The opinion of general public about the nominee judge shall be given weight age.
- The two eminent persons in the Commission shall be from the field of lawyers of High Court and Supreme Court, dean and principles of National Law School and legal activist.
- Before finally appointing the judges the Commission shall sent the name of such judges in the Parliamentary committee which shall raise any objection within the period of fourteen days. And shall send the reason for disapproval to the Chief Justice and two eminent persons (members) within seven days of disapproval.
- The legislation shall have no power to regulate the appointment procedure.
- NJAC model is acceptable and it won't hamper independence of judiciary if aforesaid changes are incorporated in the model.