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"Procedure for the Appointment of Judges in India"

Authored by:

SHOBHIT SACHAN

The Courts in India have a three tier hierarchy. At the bottom, there are the District Courts for the adjudication of disputes and administration of justice. Above them, there are the High Courts for the administration of justice within a state. At present, there are 25 High Courts in the country. The most recent is the Amravati High Court responsible for the administration of justice in the state of Andhra Pradesh. Earlier the disputes came before the High Court of Hyderabad. Above the High Courts and the District Courts there is the Supreme Court of India having control over the disputes that arise within the territory of India. It has its seat in New Delhi. However, it can sit at any other place in India as per the Article 130 of the Constitution of India.

The Judges of the District Courts are appointed by the respective High Courts. It is not designated as the Constitutional Courts. The Supreme Court of India and the various High Courts are called the Constitutional Courts.[1] They are called so because specific provisions are provided for them under the Constitution of India. Like Articles 124 to 147 of the Constitution deal with the provisions relating to the Supreme Court of India. On the other hand, Articles 214 to 231 of the Constitution of India provide for the establishment of the High Courts in the country. The Judges of the Supreme Court and the High Courts are appointed through a system called the Collegium System that is in practice since 1993 which was introduced by the then Chief Justice of India Justice P.N. Bhagwati.

The Parliament of India tried to change the Collegium System through a new system called the National Judicial Appointments Commission (NJAC). The Parliament passed an Amendment Act called the 99the Constitutional Amendment Act. It tried to end the independence of Judiciary by introducing a system allowing the interference of Executive branch of the Government in the appointment of Judges of the Supreme Court and the High Courts. But the Supreme Court held the said amendment Act to be unconstitutional in the landmark case of Supreme Court Advocates-on-Record v. Union of India.[2] This was held so as it violated the Independence of Judiciary which is said to be one of the basic features, basic feature being those which cannot be struck down by the Supreme Court of India, of the

[1]Biju, Rintu Mariam, and Live Law. "Live Law." Live Law, February 15, 2023, https://www.livelaw.in/top-stories/high-courts-are-not-suboridinate-to-supreme-court-sc-221611#.~:text=Under%20the%20Indian%20Constitution%20Constitution%2C%20the,to%20as%20the%20constitutional%20courts

[2](2016) 5 SCC 1

Indian Constitution.

As a result of the Ninety-Ninth Constitution Amendment Act, three Articles were inserted in the Constitution. These were Article 124-A, 124-B, 124-C. Later in the NJAC case, the Supreme Court held this Amendment Act unconstitutional. The NJAC was aimed at removing the Independence of Judiciary which is one of the salient features of the Indian Constitution and forms part of the basic structure. The Basic Structure means that those features of the Indian Constitution which are not to be touched upon by the Constitutional Courts while making or proposing any changes in it.

Judiciary is one of the three organs of the Government. The other two being the Legislature and the Executive. The theory of separation of powers is followed in India. This theory states that the three organs cannot interfere with the working of each other but keep a check on their actions. So there is a system of checks and balances in India. There was an issue regarding the fact that Judges should not appoint other changes and there should be some participation of the Executive in their appointment to remove biasness. To facilitate this, NJAC Act was enacted by the Parliament of India.

First of all, there is a need to look at the history behind the present system of appointment of Judges that is in practice namely the Collegium System. The first case to be noted is the case of S.P. Gupta v. Union of India[3] also known as the First Judges Case. Prior to this case, Judges were appointed by the President of India but he needed to consult the Chief Justice of India and other Judges. This case empowered the Executive in the process of the appointment of Judges. The key observation made in this case was that "consultation" should not be construed as "Concurrence", which meant that the President is not bound to follow the opinion of the Chief Justice of India in the appointment process. It was also observed that the transfer of Judges can also be refused due to "cogent reasons".

The next case is the Supreme Court Advocates-on-Record Association v. Union of India[4] also known as the second Judges case. A nine Judge bench was created in this case. The bench went the other way round and it reversed their previous decision in the First Judges Case. The judgment stated that the Chief Justice of India, who is appointed by the President as being the senior-most Judge of the Supreme Court, should be given the primary

[3]AIR 1982 SC 149

[4]AIR 1994 SC 268

role in the process of the appointment of Judges. The Court stated "justiciability" and "primacy" as the main reasons behind the decision. The Supreme Court held that "consultation" really means "concurrence" and a collegium system was introduced for the appointment of Judges. The reasoning behind the Collegium System's inception was that it shows the collective opinion of the senior-most individuals involved in the process of judicial appointment rather than an individual opinion.

The Third Judges Case is the final case in this direction. It reiterated the supremacy of the Judiciary over the Executive in the course of judicial appointment. On the President's reference, the body of the Collegium

System was expanded to a five-member body (for the Supreme court Judges' appointment), which would consist of the Chief Justice of India and four senior-most Judges. In the appointment of the High Court Judges, the Body of the Collegium System would consist of the Chief Justice of India and two senior-most Judges.

The Second Judges Case is therefore the case which led to the formation of the Collegium System in India for the appointment of Judges of the Constitutional Courts namely the Supreme Court and the High Courts. The case is based on the Independence of Judiciary as the part of the basic structure of the Constitution. To secure the 'Rule of Law' which is essential for the preservation of the democratic system and the separation of powers which is adopted in the Constitution with the directive principles of 'Separation of Judiciary from the Executive', the case was decided on 6th October, 1993.

After its judgment, the Collegium System was adopted in the appointment of Judges of Supreme Court and the High Courts. Nine Judges examined two questions:

1. The position of the Chief Justice of India.
2. The justiciability of fixation of Judge strength.

The nine-judge bench not only overruled S.P. Gupta' case, but also devised a specific procedure for the appointment of Judges of the Supreme Court in the interest of "protecting the integrity and guarding the independence of judiciary. For the same reason, the primacy of the Chief Justice of India was held to be essential.

The bench held that the recommendation in that behalf should be made by the Chief Justice of India in consultation with his two senior-most colleagues and that such recommendation should normally be given effect to by the executive. Thus, in 1993, the Chief Justice of India got primacy in appointing Judges, and till this time, it was the government's job to fill vacancies in HCs and the SC.

The matters relating to the appointment of the Judges have plagued and perplexed the judicial mind ever since the inception of the Constitution. This matter has to be resolved by the interpretation of the Constitutional provisions relating to the appointment of Judges. The omnipresent bogey haunting every pronouncement is the Independence of the Judiciary. A delicate balance had to be struck between democratic control of an essentially undemocratic institution and impartial arbitration.

The matter came up for adjudication in Sankal Chand v. Union of India[5], where the Court upheld the transfer of the Chief Justice of Himachal Pradesh. However, by 1982, the debate had reached epic proportions. These matters took solid form in a batch of writ petitions questioning the move to transfer the Judges challenging the affected transfer of some Judges and demanding the justifiability of Judge strength.

The Supreme Court, while disposing of the matter, vested the ultimate control with the Central Government. At this juncture, a Bill was introduced in the Parliament seeking to amend the Constitution (67th Amendment) Bill 1990 seeking to amend Articles 124(2), 217(1), 222(1) and 231(2)(a). This bill was brought to empower the President to set up a judicial commission known as the National Judicial Commission. The avowed objective was to implement the 121st Law Commission's Report[6]. This report recommended that a

judicial commission should be set up to oversee the appointment of the Judges. However, nothing came of this as the bill lapsed with the dissolution of the 9th Lok Sabha. The writ petitions seeking a review of S.P. Gupta's case were heard by a three Judge bench, namely Chief Justice Ranganath Mishra and Justices MN Venkatchaliah and MM Punchhi, which recommended reconsideration.

Now comes the National Judicial Appointments Commission brought about by the Parliament of India through the 99th Constitutional Amendment Act. The National Judicial Appointments Commission (NJAC) was a body which was proposed to make appointments

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[5]1977 AIR 2328

[6]LAW COMMISSION'S REPORTS | Law Commission of India | India, "June 20, 2023. https://lawcommissionofindia.nic.in/https-cdnbbsr-s3waas-gov-in-s3ca0daec69b5adc880fb464895726dbdf-uploads-2023-06-2023060150-pdf/.

of Chief Justices, Supreme Court Judges, and the High Court Judges in a more transparent manner as compared to the existing Collegium system and to replace it. The NJAC was proposed via the National Judicial Appointments Commission Bill, 2014 by the then Minister of Law and Justice, Ravi Shankar Prasad. The bill was passed by both the Housed; Lok Sabha and the Rajya Sabha, and also received the President's assent. The Commission Commission was established as a consequence of the 99th Constitutional Amendment Act, 2014. The Act proposed that the members of NJAC would be composed from the legislative, judicial and civil society.

The National Judicial Appointments Commission had the following composition:

1. The Chief Justice of India would be the Chairman of the NJAC
2. Two senior-most Judges of the Supreme Court
3. The Law and Justice Minister
4. Two eminent persons would be selected by a committee which would be composed of the Prime Minister, the Chief Justice of India and the Leader of Opposition

To fill the vacancies in the Courts, the following procedure would be adopted by the NJAC:

- The Central Government will make a reference to the NJAC in cases of vacancies arising in the Supreme Court or High Courts.
- Existing vacancies would be notified to the NJAC within thirty days of the commencement of the Act.
- A reference would be made to the NJAC six months prior to when a vacancy arises due to the completion of a term.
- In scenarios of vacancy due to the death or resignation of Judges, a reference would be made to the NJAC within thirty days of the occurrence of such events.
- NJAC would recommend the senior-most Judge of the honourable Supreme court for the office of the Chief Justice of India.
- NJAC shall recommend the names of Judges on the basis of their merit and ability.
- If any two members of the Commission disapprove of any name, NJAC would not recommend that Judge.

- For the purpose of appointing the Chief Justice of a High Court, NJAC would recommend the Judges on the basis of seniority, ability, and merit combined.
- NJAC would nominate names and then send those names to the Chief Justice of the concerned high court for the views. The Chief Justice would then consult two senior-most Judges or some other Judges and advocates if required. The views of the Chief Minister and Governor are also taken into consideration before making the recommendation.
- If any two members of the Commission disapprove of any name, NJAC would not recommend that Judge.

The NJAC is the chief body responsible for making recommendations for the transfer of High High Court Judges and Chief Justices.

The President has the power to ask NJAC to reconsider their recommendations. However, if the NJAC makes a unanimous decision while reconsidering, then the President has to make the appointment as per the NJAC's recommendations.

There are two parts to the NJAC legal regime. One is the Constitutional amendment to allow for the NJAC to be the recommending entity for the appointment of Judges, instead of the CJI led collegium.[7]And the second part is the NJAC Act which details out the procedures to be followed by the NJAC.[8]

The constitutional amendment removed the provision which mandated that the appointment of Judges be made in consultation with the Judges of the Supreme Court and added that the appointment be based on the recommendations of the NJAC. The amendment also inserted three more Articles:

- 124A - constituting the NJAC including four ex-oficio members i.e. CJI, two other senior-most Judges of the Supreme Court, Law Minister and two eminent person of which one should be SC, ST, OBC or Women. The two eminent members are to be nominated by the Committee consisting of Prime Minister (PM), Leader of Opposition (LOP) and the Chief Justice of India (CJI). The Act or proceedings of the National Judicial Appointments Commission shall not be questioned or invalidated merely on the ground of the existence of any vacancy or defect in the Constitution of the Commission;
- 124B – Declaring the duties of the NJAC as recommending names for appointment of Judges of the Supreme Court and the High Courts and the transfer of the Judges from one HC too another and ensure that the person recommended is of ability and integrity;

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[7]The Constitution (Ninety Ninth Amendment) Act, 2014

[8]THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION ACT, 2014 ACT NO. 40 OF 2024

- 124C – Giving Parliament the power to regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it. Other

amendments were made removing the provisions where consultation with the Judiciary was required and replaced the Judiciary's positions with the NJAC.

Effectively, the appointments and transfers in constitutional courts, which used to happen exclusively in consultation with the Judiciary, would happen on recommendation of the NJAC after the amendment. However, the Supreme Court in a 4:1 majority verdict struck down the 99th Constitutional Amendment. The second part of the NJAC regime is the NJAC Act. NJAC Act lays down the procedure for the appointment of the Judges and states that the NJAC shall not pass a recommendation if any two members object to the names. This again is not specifically state for transfer and the Act stated that the Commission would specify regulations for the purpose of transfer.

To summarise the essence of the NJAC regime, Parliament amended the Constitution to empower itself to make regulations on appointment of Judges to Constitutional Courts. It formulated a Commission which would recommend the appointment of judges to the President. To make it balanced and not only controlled by the Executive, the Commission would consist of three members from the apex court, one member from the government- law minister, and two other eminent members who would be nominated by a high-powered committee with the Prime Minister (PM), leader of the opposition (LOP) and Chief Justice of India (CJI) a members. The committee also had a check on its functioning if two members oppose a recommendation, the recommendation shall not or cannot be passed. Finally, the recommendation of the NJAC shall or cannot be questioned just because there is a vacancy or a defect in the constitution of the Commission.

The challenge was, in effect, that this Act and the Amendment violated the basic structure of the Constitution by breaching the principle of the Judiciary being separate from any Executive influence or interference. The majority including Justices Khehar, Lokur, Goe and Joseph, held that the involvement of the executive in the appointment of Judges impinged upon the primacy and supremacy of the Judiciary and violated the principle of separation of powers between the executive and judiciary which formed part of the basic structure of the Constitution. However, Justice Chelameswar in his dissenting opinion disagreed that the NJAC was unconstitutional. He pointed out that though judicial independence formed a part of the opinion of the judiciary was not the only way for establishing an independent and efficient judiciary and that it was neither a norm a fundamental aspect of the Constitution. He added that independence of such for a rests on two integers – independence of the institution and of individuals who man the institution.

While the majority judgment revived the collegium system, it acknowledged that the system had to be streamlined to make it more responsive and transparent. However, Justice Chelameswar observed that the present collegium system lacks transparency, accountability and objectivity, and barring occasional leaks, the public had no access to information relating to it. He noted that the proposed composition of the NJAC could have acted as a check on unwholesome trade-offs within the collegium and incestuous accommodations between Judicial and Executive branches.

While analysing the issue of transparency and accountability in the NJAC framework, Justice Lokur observed that the 99th Amendment and the NJAC Act did not take into account the privacy concerns of

individuals who had been recommended for appointment as a Judge. Referring to the contentions made by the Attorney-General in this regard, he noted that given that proceedings of the NJAC would be completely accessible and if sensitive information about the recommended individual were made public, it would have a serious impact on the dignity and reputation of the recommended individual. Highlighting the need to balance transparency and confidentiality, he rejected the Attorney-General's contention that the right to know was a fundamental right, and asserted that it was an implicit fundamental right, which was tethered to the implicit fundamental right to privacy and the two implicit rights needed to be balanced.

Further, Justice Lokur also highlighted privacy concerns in the working of the NJA. He observed that in a situation where information was voluntarily supplied by the candidate, they might not have an absolute right to privacy but might expect that information shared in confidence would not be disclosed to unconcerned third parties. Further, in case the President did not accept the recommendation, the candidate should have the right to non-disclosure of the information supplied by the President, suggested Justice Lokur. He noted that the 99th Amendment and NJAC Act were oblivious to these concerns and did not incorporate any measures required for balancing the two implicit fundamental rights. He concluded by stating that adequate thought had not been given to the privacy concerns of the candidates, and 'merely on the basis of a right to know, the reputation of a person cannot be whitewashed in a dhobi-ghat.'

NJAC was struck down citing it to be unconstitutional and void, but that does not mean that the existing system is flawless. Even while striking down NJAC, the bench held that the system of 'Judges appointing Judges"[9] is not accurate and needs to be reconsidered. It has been 31 years since the establishment of the collegium system and a better alternative is yet to be found. It is a sad state that an important pillar of democracy is crumbling owing to a lack of system in the process of judicial appointment. Pro-activeness has been missing in resolving the issue since the collegium system came way back in 1993 and ever since it has been questioned even though it has been 10 years since the introduction of the NJAC Act.[10] The matter is very critical and complex because, on the one hand, the Judiciary should act independently, but on the other hand, the legislature and the executive cannot be completely excluded. The only reasonable solution is to amend NJAC Act in a manner in which the powers of legislature and executive are diluted but at the same time a guideline needs to be formed and the judicial appointment should be carried out in its accordance to ensure the transparency and to give a methodical approach towards the appointment of Judges.

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[9]Drishti IAS. "Collegium System for the Appointment of Judegs – Drishti IAS," n.d. https://www.drishtiias.com/daily-news-analysis/collegium-system-for-the-appointment-of-judges.

[10]"National judicial Appointments Commission Act Notified," n.d. https://pib.gov.in/newsite/printrelease.aspx?relid=118224.