

## A Study of Constitutionality of Collegium System and Proposed NJAC Act.

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### ABSTRACT

Since the independence in India the appointment of judges have been conducted through the collegiums system and there has been amendment process and improvement. In 2014 the National Judicial Appointment commission Act was passed in both the houses but its still not in force. It has faced several criticism. As per the Indian constitution appointment of Judges in higher judiciary i.e. High courts and Supreme Court is being conducted. There is lack of transparency in the collegiums system. The article is about the current legal situation and opinions of the judges towards the system of appointment. Wherein both the system of appointment whether being collegiums system or NJAC have its pros and cons.

KEYWORDS: Collegiums System, NJAC, Indian Constitution, Appointment of Judges in Higher Judiciary

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### INTRODUCTION

- 1) The beginning of legal system prevalent in India in 21<sup>st</sup> Century owes its allegiance to the British Empire, which, along with other changes in Indian society, brought the culture of common law Courts or English Courts to the Indian sub-continent. The history of High Courts in India can be traced back to The Indian High Courts Act, 1861, which established chartered high courts in the presidency of Calcutta, Madras and Bombay. Few years later, another high Court was established at Allahabad. The Indian High Courts Act of 1861, along with the establishment of high courts in India, also gave the pre-requisites or qualifications required for the Judges of the high courts. The judges then appointed would serve at the pleasure of the British government.
- 2) Thereafter, by the Government of India Act, 1935, a Federal Court was enacted, at New Delhi, which in-turn would hear appeals from the High Courts established in India. Above the federal court, there was the Privy Council which sat in UK. The Constitution of India abolished the Privy Councils and the Federal Court was thereafter, post enactment of Constitution, converted into what is today known as the Supreme Court of India.

- 3) Establishment Of Collegium System With Judicial Pronouncement:
- 4) The Collegium of judges, as proposed by Bhagwati J, could only be established in India through the passing of an amendment to the provisions of Articles 124(2) and 217(1) of the Constitution. But in 1993, a majority of Nine-Judge Constitutional Bench of the Supreme Court in the Second Judges' Case and in 1998, the unanimous opinion of the nine- Judge Constitutional Bench of the Supreme Court in the Third Judges' Case did accomplish the task of setting up of the collegium of judges.
- 5) The composition of the collegiums as contemplated by Bhagwati J in the First Judges' Case that it 'should be more broad- based and there should be consultation with wider interests' was completely ignored; the membership of the Collegium was kept narrow-based (i.e. confined only to the judges of the superior courts).
- 6) The word Collegium is nowhere mentioned in the Constitution, it has come in force as per Judicial Pronouncement. The origin of the concept for establishment of the system may be traced by the recommendations of the Bar Council of India made on 17 October 1981, during a national seminar of the lawyers at Ahmedabad. It was recommended that there should be a collegium system for the appointment of the Supreme Court Judges by the following authorities:
  1. The Chief Justice of India
  2. Five senior Judges of the Supreme Court
  3. Two representatives who would be representing the Bar Council of India and the Supreme Court Bar Association.

After independence, India adopted the Constitution in 1950. According to the Constitution, up to 1973, the President appointed the Chief Justice of India and remaining judges of the Supreme Court in consultation with the CJI and other judges as he deemed necessary.

### 1. Appointment of CJI 1950-1973

- Until 1973, there existed a consensus between the Government of the day and the Chief Justice of India.
- A convention was formed where the senior-most judge of the Supreme Court was to be appointed as the Chief Justice of India.
- In 1973, A.N.Ray was appointed as the Chief Justice of India. This violated the convention formed earlier since Justice A.N.Ray superseded three other Supreme Court judges senior to him.
- Again in 1977, another chief justice was appointed who superseded his seniors.
- This resulted in a clash between the Executive and the Judiciary.

### 2. First judges case, 1982

- A petition was filed in 1982 in the Supreme Court of India.
- This case is known as the S.P.Gupta Case or First Judges case.
- The Supreme Court discussed 2 major points during the proceedings of this case

- When asked the Supreme Court of India whether the word “consultation” in the constitutional article 124 mean “concurrence”; the Supreme court overruled this and denied saying that Consultation does not mean concurrence. The President was not bound to make a decision based on the consultation of the Supreme Court.
- Another important point in the discussion, in this case, was the part where the Supreme Court decided that a High Court Judge can be transferred to any other high court of a state even against his will.

### **3. Second judges case,1993**

- Another petition was filed in 1993 by the Supreme Court Advocates on Record Association (SCARA).
- In this case, the Supreme court overruled its earlier verdict and changed the meaning of consultation to concurrence. Thus binding the President of India with the consultations of the Chief justice of India.
- This resulted in the birth of the Collegium System.

### **4. Third Judges Case, 1998**

- In the year 1998, the presidential reference to the Supreme court was issued questioning the meaning of the word consultation in articles 124, 217, and 222 of the Constitution.
- The chief justice won't be the only one as a part of the consultation process. Consultation would include a collegium of 4 senior-most judges of the Supreme court. Even if 2 of the judges are against the opinion, the CJI will not recommend it to the government.
- In the verdict, the Supreme Court laid down strict guidelines for the appointment of Judges of the Supreme Court and high courts which is currently known as the Collegium System.

### **Collegium System**

- In this system of appointment of Judges, the collegium will recommend the names of the candidates to the Central Government.
- Also, the central government will send the names of the proposed candidates for consultation.
- The appointment process takes a long time since there isn't a fixed time limit for it. If the Collegium resends the same name again then the government has to give its assent to the names.

The Collegium System faced a lot of criticism not only from the government but also from civil society due to its Lack of Transparency and Accountability. This led to the 99th Constitutional Amendment Act, 2014 the National Judicial Commission Act (NJAC) to replace the collegium system for the appointment of judges.

## 6. National Judicial Appointment Commission Act, 2014

- The 1993 judgment was the basis on which a five-judge Constitution Bench declared the National Judicial Appointments Commission Act (NJAC) and the Constitutional (Ninety-Nine Amendment) Act, 2014 unconstitutional in October 2015.
- NJAC too would recommend names for the Appointment of Supreme Court Judge and Appointment and Transfer of High Court Judge

### Composition of NJAC

1. The Chief Justice of India
2. 2 senior-most judges of the Supreme Court
3. The Law Minister of India
4. 2 eminent members that are chosen by the Selection Committee

## 7) National Judicial Appointments Commission – NJAC

The aspirants should note that NJAC was established to achieve greater transparency and accountability for the appointment of judges. But it was struck down by the Supreme Court on the grounds that it was against the “Independence of Judiciary” i.e Principles of Basic Structure<sup>1</sup> since it involved the Political Executive in the appointment of Judges.

### The current system of appointment of Judges

- In judicial appointments, it is obligatory for the President to take into account the opinion of the CJI.
- The opinion of the CJI is binding on the Government. The opinion of the CJI must be formed after due consultation with a collegium of at least four senior-most judges of the Supreme Court.
- Even if two judges give an adverse opinion, then he should not send the recommendation to the Government.

### Constitutionality of NJAC and Replacing Collegium System

Constitutionality of NJAC is not perfect governing body to select appointments of judges of Supreme Court, High Court and transfer of high court judges. There is an argument that NJAC is Unconstitutional Or Void in some extend. Through NJAC government is trying to interfere or monitor the independence judiciary.

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<sup>1</sup> Basic Structure Doctrine of Indian Constitution - Landmark Cases In Indian Polity. According to the Indian Constitution, the Parliament and the State Legislatures can make laws within their jurisdictions. The power to amend the Constitution is only with the Parliament and not the state legislative assemblies.

## **Result of NJAC replaces Collegium System:**

National Judicial Appointment Commission Act, 2014 ensures to bring a change in the appointment of judges of Supreme Court, high court and transfer of high court judges. This act further seeks to replace the collegium system. The two bills the constitution (99th amendment) Act, 2014 and National Judicial Appointment Commission Act, 2014 (121st amendment) was passed in both the houses and it was published in gazette of India on 31st December, 2014.

## **Collegium System Functionality:**

The Collegium system consists of the Chief Justice of India and four most senior judges of Supreme Court for appointment and transfer of judges. Article 124<sup>2</sup> and Article 217<sup>3</sup> of the Indian Constitution defines the appointment of judges of Supreme Court and High Court.

**Article 124 states** – Every judge of the Supreme Court shall be appointed by the president by the warrant under his hands and seal and shall attain office until he attains the age of sixty five years.

**Article 217 states** – Appointment and conditions of the office of a judge of a High Court- Every judge of High Court shall be appointed by the president by warrant under his hand and seal and shall hold the office until he attains the age of sixty two years.

**The collegium system was originated in a series called three judges cases.**

## **Collegium System Limitations:**

- When NJAC bill passed in both houses some people were criticizing collegium as a closed door affair and no transparency in working.
- The administrative burden of appointing High Court and Supreme Court judges and transfer of judges.
- No dedicated mechanism to check personal and professional backgrounds of prospective appointees.
- Collegiums system field of choice to senior most judges from the High Court for appointment to the Supreme Court, neglecting several talented junior judges and advocates.
- For example- Justice Dinakaran appointment for judge of Madras High Court even after corruption charges against him. Some feels that government wants to interfere in the working of the independence judiciary through NJAC.

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<sup>2</sup> Establishment and constitution of Supreme Court. (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

<sup>3</sup> a) a Judge may, by writing under his hand addressed to the President, resign his office. (b) a Judge may be removed from his office by the President in the manner provided in clause ( 4 ) of Article 124 for the removal of a Judge of the Supreme Court.

## What is good about the collegium system?

A simplistic understanding might make the collegium system look rather opaque, especially because only judiciary has the power to select future judges. However, this is also a way to make judiciary independent of politics. Having been kept outside of the legislature and executive, the system is believed to keep selection of future judges free from outside interference. It upholds the seniority of candidates and is supposed to abide by the principles of separation of powers in the Constitution. With the government's involvement, many fear the judiciary might have to compromise on its independence.

## Criticisms on Collegium System

- **Least Transparent:** Due to the lack of a published operational manual, the absence of selection criteria, the arbitrary reversal of previously made decisions, and the selective distribution of meeting recordings, the collegium system is opaque.
- **Members' Lack of Consensus:** When it comes to appointing judges, the collegium members regularly face the issue of mutual consent.
- **Unequal Representation:** Another source of worry is the makeup of the higher courts. Despite the paucity of data on caste, women are disproportionately underrepresented in the upper courts.
- **Delay in Judicial Appointments:** Due to a delay in the collegium's recommendations for the higher judiciary, the judicial appointment process is being slowed.

## Constitutionality of NJAC Justification:

So the question arises Does National Judicial Appointment Commission Act ensure the independence of Indian Judiciary.

NJAC amends

Article 124(a) defines composition of NJAC.

Article 123(2) – Creation of NJAC and inserts new articles.

Article 124(b) – Functions of NJAC.

Article 124 (c) – Powers of parliament to make laws on procedures.

## Collegium Systems Transparency:

Collegiums system has been criticized for closed door affair and no transparency. When the NJAC bill was passed in both the houses it seems that the long pending demand for transparency and accountability have been forgotten in these new bills. Government wants interfere in the working of independence judiciary.

**As Article 124(c) states** – Parliament may, by law 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.

### Judges views on appointment of judges

Former Chief Justice of India R M Lodha<sup>4</sup> said

There is a misleading campaign to defame the judiciary and repeated attempts has been made to spread incorrect information. If there is a campaign to defame judiciary in the eye of public, you are doing great damage to a very important organ of the democracy. The world is not perfect. No system is perfect, no one is perfect, the society is not perfect and we all are from the society. We are not perfect. We cannot be, but we are very important institution in a democracy.<sup>5</sup>

Justice J.S Khehar<sup>6</sup> explained in his judgment.

It is difficult to hold that the wisdom of appointment of judges can be shared with the political-executive. In india, the organic development of civil society has not as yet sufficiently evolved. The expectation from the judiciary to safeguard the rights of the citizen of this country can be ensured by keeping it absolutely insulated and independent, from the other organs of the governance<sup>7</sup>

Former SC judge Justice M.B. Lokur<sup>8</sup>, who was Justice Chelameswar's bench partner in the NJAC case, said an "extensive debate" is needed on the appointment system. Justice Lokur's had been among the majority verdict that declared the NJAC unconstitutional.<sup>9</sup> Former Supreme Court judge Justice J. Chelameswar, who had given a dissenting opinion in the 2015 verdict striking down NJAC.

In a strongly-worded dissent, Justice Chelameswar had then said that to entirely eliminate the government in the selection process of judges would be against democratic principles.<sup>10</sup> He had advocated for transparency in the selection of judges, saying it is a vital factor in governance and is an aspect of rationality. He stated that my opinion in the NJAC verdict was on the constitutional validity of NJAC and was not a value judgement on whether it is the best system," The judge added that his views on the collegium system have not changed.

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<sup>4</sup> Justice R. M. Lodha is a former Chief Justice of the Supreme Court of India. Before being elevated to the Supreme Court, he served as the Chief Justice of Patna High Court. He has also served as a judge in Rajasthan High Court and Bombay High Court.

<sup>5</sup> <http://indianexpress.com/article/india/india-others/justice-lodha-defends-collegium-system-says-there-is-a-campaign-to-defame-judiciary/>

<sup>6</sup> Jagdish Singh Khehar was the 44th Chief Justice of India. Khehar is the first CJI from the Sikh community. He has been a judge in Supreme Court of India from 13 September 2011 to 27 August 2017

<sup>7</sup> <http://www.thehindu.com/news/national/supreme-court-verdict-on-njacandcollegiumsystem/article7769266.ece>

<sup>8</sup> Justice Madan Bhimarao Lokur is an Indian jurist. He is a Judge of Supreme Court of Fiji. He is former Judge of Supreme Court of India. He is also former Chief Justice of Andhra Pradesh High Court and Gauhati High Court and Judge of Delhi High Court.

<sup>9</sup> <https://theprint.in/judiciary/former-judges-lawyers-say-collegium-system-needs-to-change-but-njac-is-not-the-answer/779758/>

<sup>10</sup> <https://theprint.in/judiciary/former-judges-lawyers-say-collegium-system-needs-to-change-but-njac-is-not-the-answer/779758/>

The five bench judges also said that the collegium system judges appointing judges is not perfect. The collegium is very useful and can be improved. Thus, some measures should be taken to improve this system and not repudiate it.

### **Conclusion**

The court, as the fundamental bastion of civil liberties, must remain completely independent and undisturbed by the Executive's direct and indirect influence. The absolute least that can be done to safeguard India's judicial system's independence is to find and nominate judges of the highest integrity to the country's highest courts.

One of the main concerns regarding NJAC was the involvement of government in the council. The main ground on which the Supreme Court made its judgment was that by giving the government a substantial say in the appointment of judges, NJAC might compromise the independence of the judiciary.