

# Composition of National Judicial Appointment Commission and Its Judicial Scrutiny: An Analysis

## Abstract

The National Judicial Appointment Commission Bill, 2014 and 99<sup>th</sup> Constitutional Amendment Bill have completed all its formal stages. The bench of five judges of Supreme Court has been formed for checking its constitutional validity that whether the present provisions of NJAC Act and 99<sup>th</sup> constitution amendment Act are according to the basic structure of the Constitution. The debate of supremacy with regard to the appointment of judges appears to be a tug of war between the politicians and the judges. The collegium system has been scrapped by the NJAC and it establishes dominance of political class as the ruling party along with the opposition has gained maximum role in the appointment of judges. However, by the judicial scrutiny in October 2015, the Supreme Court found that the new appointments procedure and the constitutional amendment passed by the Parliament were unconstitutional. The present paper will critically analyze both acts and the verdict of the Supreme Court and give suggestion that we can ensure an independent and accountable judiciary.

**Keywords:** Accountability, Constitutional Amendment, Impeachment, Parliament, Political Interference.

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### Introduction

The consecutive moves by the governments of National Democratic Alliance and United Progressive Alliance in their respective terms of power position from the past fifteen years to the formation of National Judicial Appointment Commission for the appointment of the judges of Supreme Court of India and the High Courts of the states finally got success when the President of India gave assent to the 99<sup>th</sup> constitutional amendment and National Judicial Appointment Commission (NJAC) bills. The law minister introduced the constitutional amendment bill in the Parliament. The ruling alliance had no majority in Rajya Sabha so they were totally dependent on the opposition, mainly the Indian National Congress. The opposition appreciated the move of the government to establish NJAC. The largest opposition party, Indian National Congress overwhelmingly supported the bill and suggested that the house should take great care to save this amendment from judicial review.

After long legislative journey, the NJAC was incorporated in the constitution of India and the question of its constitutional validity[1] is still arises in the Supreme Court of India. The five judges' bench has been constituted to check whether this amendment is according to the spirit of constitution or if it violates its basic structure. There is the long standing debate regarding the mode of appointment of the judges in High courts of states and the Supreme Court of India. Many philosophical and historical events have been considered and reconsidered since the formation of constituent assembly and is continuing till date. The basic question as to whom the primacy will go for selecting the judges; the executive, legislature or judiciary itself, so that the best brains should be appointed for these prestigious posts, is still a part of debate.

### National Judicial Appointments Commission Act and 99<sup>th</sup> Constitutional Amendment: A Critical Analysis

The Constitution (121 Amendment) Bill, 2014, enacted as the Constitution (99 Amendment) Act and the National Judicial Appointments Commission Act, 2014[1] were initially not function due to judiciary give the impression that it is stay till to check its constitutional validity. The main provisions are analysis into following way:

"124A (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting (a) the Chief Justice of India, Chairperson, ex officio; (b) two other senior Judges of the Supreme Court next to the Chief Justice of India —Members, ex officio; (c) the Union Minister in charge of Law and Justice—Member, ex officio; (d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People — Members: Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women: Provided further that an eminent

person shall be nominated for a period of three years and shall not be eligible for renomination”.

The bill for arrangement of NJAC is prepared by immense talent. The permanent presence of Law Minister in Commission will be harmful for Judicial Impartiality and independence. The tenure of chief justice of India in NJC will be comparatively less than other members of the Commission especially the law minister and two eminent persons. This provision will deliberately undermine the powers of chief justice of India. Further the appointment of two eminent persons is also a controversial phenomenon because it is difficult to ensure that these two eminent persons will remain immune from political interference. Seventy nine seats for SCs and forty one for STs are reserved in the Lok Sabha. History tells that these categories of members hardly stand up against the party whip. The question arises as to how a person with a political patronage can represent sincerely the interest of their community. Instead of making provisions that meritorious aspirants of these communities should be promoted, the executive makes a provision just to include their own member in commission. The provision of the Leader of opposition or single largest party clearly shows that the Indian National Congress and BJP play major role in appointment of judges. After four years they will be in a position to threaten the leaders of small parties or regional parties in the name of Supreme Court and high courts. This will be dangerous for regional interest of country and as a consequence harmful to unity in diversity.

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission. According to article 124B that “it shall be the duty of the National Judicial Appointments Commission to (a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts; (b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and (c) ensure that the person recommended is of ability and integrity.”[1]

The National Judicial Appointment Commission seems as Hobbes’s Leviathan. How these provisions are possible in a democratic state? The transfer of judges becomes a tool to punish the judges themselves. Kuldip Nayar describes his memory of emergency as “I have never been cheated except when the Emergency was declared and I was detained without any rhyme or reason. The two-judge Bench accepted my wife’s habeas corpus petition and released me. The reason for my release was that since I did not belong to any political party and pursued my journalistic work professionally, there was no ground to detain me. Both the judges were, however, punished. The senior judge, Justice S. Rangarajan was transferred to Sikkim and Justice R.N. Aggarwal was reverted to the Sessions Court from where he had been elevated,”[2]. The powerful NJAC will constantly be threat to the independent decisions of the judges.

The article 124C provide “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”[3].

This article is a clear violation of the ‘Separation of Power’ inscribed in article 50 of the constitution. It is the parliament that empowers to regulate the appointment process which is against the basic structure of the constitution as it would lead to the executive and legislature encroaching upon the powers of the judiciary. The spirit of constituent assembly is brutally slaughter by these provisions.

In article 127 of the Constitution, in clause (1), for the words “the Chief Justice of India may, with the previous consent of the President”, the words “the National Judicial Appointments Commission on a reference made to it by the Chief Justice of India, may with the previous consent of the President” shall be substituted. In article 128 of the Constitution, for the words “the Chief Justice of India”, the words “the National Judicial Appointments Commission” shall be substituted. In article 217 of the Constitution, in clause (1), for the portion beginning with the words “after consultation”, and ending with the words “the High Court”, the words figures and letter “on the recommendation of the National Judicial Appointments Commission referred to in article 124A” shall be substituted. In article 222 of the Constitution, in clause (1), for the words “after consultation with the Chief Justice of India”, the words, figures and letter “on the recommendation of the National Judicial Appointments Commission referred to in article 124A” shall be substituted. In article 224 of the Constitution, (a) in clause (1), for the words “the President may appoint”, the words “the President may, in consultation with the National Judicial Appointments Commission, appoint” shall be substituted; (b) in clause (2), for the words

“the President may appoint”, the words “the President may, in consultation with the National Judicial Appointments Commission, appoint” shall be substituted. In article 224A of the Constitution, for the words “the Chief Justice of a High Court for any State may at any time, with the previous consent of the President”, the words “the National Judicial Appointments Commission on a reference made to it by the Chief Justice of a High Court for any State, may with the previous consent of the President” shall be substituted. In article 231 of the Constitution, in clause (2), sub-clause (a) shall be omitted[4].

All the powers of Chief Justice of India regarding the appointment of judges in Supreme Court and high courts are usurped by NJAC through this constitutional amendment. Now the hegemony in this regard is completely vested in NJAC by giving the argument that wider consultation is better than individual consultation. The provisions inscribed in National Judicial Appointment Commission Act are as follow:

(2) The Commission shall, on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, recommend the name for appointment as a Judge of the Supreme Court from amongst persons who are eligible to be appointed as such under clause (3) of article 124 of the Constitution: Provided that while making recommendation for appointment of a High Court Judge, apart from seniority, the ability and merit of such Judge shall be considered: Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation[5].

The rules and regulations regarding ability, merit and other criteria of suitability will be decided by the parliament. If the three senior most judges of Supreme Court collectively recommend a person for bench, the two from remaining three may veto the recommendation of judges. On the other hand, if the judges want to veto the decision, they can do it temporarily only because the records show that the judges of Supreme Court frequently retire from their posts after short terms. The next appointed judge may go in accordance with the other members. The position of Chief Justice of India has become miserable after these Acts. So it is very clear that commission will become all powerful which will steer the judicial system. In addition, headquarter of the commission shall be at Delhi, the capital of India; will continue to be under the direct pressure of executive and legislature over the working of commission. Hundreds of posts have been on the desk and every local to top level politician will approach the commission to appoint their own judge.

### **Why The Political Class Wants To Scrap Collegiums System**

The system of coalition governments at the centre came into being from 1989 and marked the end of the single party dominant system in state as well as national politics in India. The coalition impacted the central government and weakened its decision making power. Due to the absence of a single party majority system in Lok Sabha, the other constitutional bodies get strengthened and the collegiums system of appointment of judges was started by the judiciary itself. During that time the parties were divided on their respective line of action. The main opposition i.e. BJP was considered as politically untouchable because its image had been tarnished after the demolition of Babri Masjid in Ayodhya. Further the new economic policies emerged in 1991 which also divided the political parties creating great suspicion against each other. The separatist movements in different regions of country were also at their peak. In these circumstances judiciary succeeding in taking over the appointing powers of judges of Supreme Court and High Courts from executive after second judge case in 1993. The powerful judiciary exposed the long series of scams and explored the ugly face of politicians. The eminent leaders got caught in corruption cases and were imprisoned. The scope of PIL also expanded during this period. The directions regarding electoral reforms and the organization like political parties come under the preview of R T I and many other decrees of Supreme Court was perceived by political classes as that the Judges are crossing their limits. “The Bench, after examining the scope and powers of Parliament to enact laws and include them in the Ninth Schedule, held that the power of judicial review could not be taken away by putting a law under the Ninth Schedule,”[6]. It was also described that the judiciary is the sole guardian of fundamental rights and of the basic structure of the constitution. The twenty two years experience of Collegium system was a nightmare for the political class, be they in the ruling class or in the opposition and or whether they are in national politics or in state politics. Much of the debates have taken place and lot of hue and cry has been raised by the political class on the subject of the social philosophy of the judges. But the question remained as to who will talk about the economic philosophy. As far as the economic philosophy of these two major political parties (BJP and INC) is concerned, it can be said that they are sailing on the same vessel. It fears that many private players who sponsor these political parties during elections will play a crucial role in the selection of judges after the composition of the judicial commission because they could not fulfil the criteria of the labour laws. These

private players want to escape the judicial punishments and thus they want judges favouring their part and this can be possible when they sponsor the parties selecting the judges. This is a dangerous nexus. So the politician need a person who is appointed as judge, should be follower of social philosophy as well as economic philosophy of that party. The politics of vendetta have emerged in recent years. The control over judiciary by the ruling class will mean the control over political opponent mainly the small and regional parties will remain under judicial threat.

**The Verdict**

The Supreme Court of India in a landmark verdict declared the 99th Constitutional Amendment and the National Judicial Appointments Commission (NJAC) Act void and unconstitutional. This is not an entirely un- expected consequence. The Supreme Court has upheld the values of constitutionalism and independence of judiciary, which is a part of the "basic structure" of the Constitution[7]. The verdict of the Constitution Bench of five judges invalidated the 99th Constitution Amendment and the NJAC Act. The decision of the Court was based upon a deeper recognition and under- standing of the role of the judiciary within the Indian democracy. The decision is most compelling and is an appropriate one for definite reasons. Judicial independence was cited as a key justification by the Supreme Court in rejecting the proposed commission. Instead, the Court resurrected the collegium system. However, critics of the collegium system argue (among other things) that it is undemocratic since no rationale is given by the Court to explain what criteria it uses to accept and reject candidates[8].

**Conclusion**

The attitude of political class towards judiciary has been exposed when the bills (NJAC and 121th Constitutional amendment bill now 99<sup>th</sup>) passed through Parliament and State Legislative Assemblies without considering the will of judiciary and the bars and all the stages crossed without any serious discussion. Political class repeatedly describes the collegium system as not suitable but the question arises that if the judges are incapable then why they were not removed through impeachment. The only procedure of removal of the judge of Supreme Court and High Courts is impeachment which is described in the constitution in article 124. It is interesting to note that when the parliament fails to remove a single corrupt judge then how they can be trusted to appoint an honest judge. The National Judicial Appointment Commission will pose danger to the impartiality and independence of judiciary because the judges will be appointed on the basis of their political affiliations. The logrolling between the two eminent members of the commission is possible because they will have politically patronage. The small and regional political parties will be threatened by the big national parties in the name of judiciary as they use C.B.I and other agencies to suppress their regional opponents. The NJAC in its present form is deadly against the vision and thought of constituent assembly. Not a single member of constituent assembly was of the opinion that the fate of judiciary would be decided by the executive in such a rigorous way. The consecutive law commission reports and the constitutional expert were in favour of creating a permanent body which will be able to appoint capable persons as judges of Supreme Court and high courts. Nobody had visualized the present type of NJAC except the political class. The Bar councils also rejected the present provision of NJAC.

The state legislative assemblies were disillusioned by central leadership of these two parties (most of the states are ruled by BJP and INC) and they passed this constitutional amendment bill without any serious discussion. The main leaders of most political parties kept distance from media and avoided commenting on the new provision. So NJAC remained far away from national media reports.

**Suggestion**

The system should be of such type that it is acceptable to everyone. It should ensure that only meritorious person is appointed as a judge. The Supreme Court and high courts have their own website and they should display on it the retirement of the judges and advertise the forthcoming vacancies and also make circular to all the bar councils for the upcoming vacancies. The minimum qualifications have been described in the constitution. The further merit will be decided on the basis of law related to quality of publications done by the candidates. A minimum qualifying test should be conducted to shortlist the candidates. Moreover, the understanding of laws by the candidates during their practice should also be considered in merit because these perceptions depict their constitutional philosophy. The total merit of the candidate should be opened to access by public. For the appointment of the chief justice Supreme Court or high court only the method of seniority should be adopted.

The constitution of India describes the check and balance between the judiciary and legislature and judiciary and executive. It is feared that the NJAC will demolish this

principle. In our country, the Constitution is Supreme and the Judiciary has been designated by the Constitution to keep Parliament within the bounds of the Constitution. If it oversteps it, the Judiciary can strike down the law and so did it.

**References**

1. *Supreme Court Advocates-on-Record-Association and others V. Union of India*, (2016) 5 SCC1; (2016) 2 SCC (LS) 253.
2. *Gazette of India on December 31, 2014*
3. *Ibid.*
4. *Nayar, Kuldip (2015): "Courts Tilt towards the Rich," Mainstream, Volume LIII, No. 22.*
5. *Gazette of India on December 31, 2014*
6. *ibid*
7. *ibid*
8. *Venkatesan, J. (2007): "IX Schedule laws open to review," The Hindu, 12 January.*
9. *C. Raj Kumar, Future of Collegium System Transforming Judicial Appointments for Transparency, Economic and Political Weekly, Vol. 50, No. 48 (NOVEMBER 28, 2015), pp. 31-34.*
10. *Aparna Chandra, William Hubbard and Sital Kalantry, From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court, Verfassung und Recht in Übersee VRÜ 51 (2018) 273-289.*