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INDEPENDENCE: EVALUATING THE NJAC VS COLLEGIUM SYSTEM IN INDIA

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Abstract **:** This paper deeply analyses the current judge's appointment system in India i.e., collegium. Papers include the evolution of the collegium system i.e., Three judges' cases. We will discuss the Three Judge's cases individually. It primarily focuses on how collegium favours elitism, favouritism, & nepotism. The concept of creating an independent judiciary & judges appointing judges has loopholes of its own, which we intend to discuss in this paper. To further democratise the judges' appointment process and ensure the representation of people, Union Government proposed a Commission which will ensure uniformity and transparency in the process. This National Judicial Appointment Commission was later struck down by the court as violative of the basic structure of the Constitution. This paper also analyses the NJAC & its practical applicability.

Index Terms – **Collegium, NJAC, Constitution, Basic Structure, Judiciary**

I. INTRODUCTION

In the August of 2014, just three months after the Narendra Modi government took its inaugural breath, the NJAC law, brought to life by the 99th Constitutional Amendment, was passed in Parliament with near unanimity. Flash forward eight years, and the debate surrounding NJAC has been reignited, with political crevasses growing ever deeper. While the top court declared that the Collegium system is the 'law of the land,' Law Minister Kiren Rijiju stated that a new appointment system is necessary. Yet, he stopped short of revealing the government's intention to resurrect the National Judicial Appointments Commission (NJAC), which was previously deemed 'unconstitutional' by the Supreme Court.

"Representations from diverse sources on lack of transparency, objectivity and social diversity in the Collegium system of appointment of judges to the constitutional courts (Supreme Court and the High Courts) are received from time to time with the request to improve this system of appointment of judges. Government has sent suggestions for supplementing the Memorandum of Procedure for appointment of Judges to the High Courts and Supreme Court," Mr Rijiju informed the Rajya Sabha on December 22. This sparked a new round of debate on the ever-burning topic of Judicial appointment, with some opposing the government's stance, arguing that although there is a strong case for reforming the 'opaque' Collegium system, they cannot 'empower' the government in matters of judicial appointments.

Further stirring up the existing heat on the topic, a clandestine bill emerged in the Rajya Sabha, seeking to wield dominion over the appointment of judges through the National Judicial Commission. Bikash Ranjan Bhattacharyya of CPI(M) took the stage and brandished the National Judicial Commission Bill 2022, its favor solidified by a triumphant chorus of voice votes in the Upper House.

With unwavering resolve, the CPI(M) legislator unveiled a meticulously crafted bill, devised to regulate the convoluted path traversed by the National Judicial Commission in recommending individuals for the exalted positions of Chief Justice of India and judges of the Supreme Court. It extends its authority to encompass chief justices and judges of high courts, imposing order upon this intricate web of power.

If embraced, this bill will wield control over the intricate web of transfers of judges, weaving a tapestry of judicial standards and fostering unwavering accountability. It seeks to establish a credible and expeditious mechanism to probe into individual complaints of misbehavior or incapacity exhibited by a judge of the apex court or a high court, all while regulating the intricate procedure for such an investigation.

An independent judiciary is not only sine qua non to the existence of a democracy, but it is also essential to ensure check and balance on the other organs of the democracy. It is inconceivable that a democracy based on fundamental freedoms and the rule of law would stand without an independent and impartial judiciary.

Therefore, the appointment of judges has been of great importance due to the fact that it revolves around an important fact, that is, whether the judiciary is independent or not. On many occasions, this debate about judicial independence has been brought up in many forums and discussions have taken place. From the judicial primacy of appointment in the collegium and the executive's attempt to venture into judge's appointment with the creation of the National Judicial Appointment Commission, the questions regarding judicial independence have come a long way. But surprisingly still, this question remains unanswered.

Thus, the reason why the appointment of judges is of great importance is due to the fact that the procedure of appointment is a great hint towards the independence of the judiciary. This argument has been used many times to attack the Judicial institution. Although the questions about judicial independence have come a long way, starting from the judicial primacy of appointment in the collegium and the executive's attempt to venture into judge's appointment with the creation of the National Judicial Appointment Commission and judiciary's further dismissal of the same, surprisingly, it remains unanswered.

The tussle between the judiciary & the government is not unknown. Until 1993, judges were promoted to higher courts by the executive in consultation with the judiciary. However, the judicial views did not always play a decisive role in the ultimate appointment. In the darker times of emergency, the government demanded a "*committed judiciary*", ignoring the basis of the constitution of the independent judiciary for this the government was also indulged in rank favouritism. Mr Ram Jethmalani famously remarked, *"There are two kinds of judges, those who know the law & those who know the law minister."*

Judicial appointments are so vital in running a constitutional democracy as the single verdict of a court can dismiss the most powerful person of a state without delay, but we cannot sideline the need for an independent judiciary to run a democracy like India. Power tends to corrupt; absolute power corrupts absolutely. Everybody likes to get as much power as circumstances allow. Humans tend to be biased towards their loved ones, a tendency which cannot be denied.

II. BIRTH OF COLLEGIUM

During the period of independence and prior to the second judge's case, the government appointed judges in collaboration with the judiciary in compliance with the constitution's requirements. On similar lines, this procedure was also upheld in the first judge's case. However, things hastily changed after a few appointments made by the authoritarian & arbitrary executive which were criticised highly.

The collegium system, as presented today, has evolved with the Supreme Court's Trinity decision famously known as the "*Three Judges' case*". In *S.P Gupta vs Union of India* (First Judges Case), Supreme Court observed that the word 'consultation' in Article 124 & Article 217 does not mean 'concurrence' & hence, the ultimate power would be vested with the president. This decision made the opinion of the collegium redundant as it can be ignored by the president while appointing judges.

In the year 1993, when the country was clocked up with economic liberalization & Babri masjid demolition, it was during this period of Narasimha Rao's govt. that a rather modest declaration of judicial independence was made. The judgement of Justice J.S. Verma in the *Supreme Court Advocates On Record* case, famously known as the 2nd judges' case, paved the way for the collegium system's supremacy in judicial appointments. With the overruling of the previous judgement in S.P Gupta's case, the apex court ruled that in case of any conflict of interest between the judiciary & the govt. in appointments of judges in the supreme court & high courts, the power to make decisive recommendations will be with the Chief justice & 2 senior judges. Any vacancy that arose within the High Courts & the apex court would be filled by someone whom the 'Elite Judges' have approved. The executive could only object on pertinent grounds. But, if the judiciary insisted on the appointment, then the executive can do nothing but confirm it. The court observed, "*Should the executive have an equal role & be in the divergence of many a proposal, germs of indiscipline would grow in the judiciary*". The judiciary helped itself to protect its 'Sanctity' by creating a supreme self-appointing body. This body was called the collegium.

In 1998, during the regime of Atal Bihari Vajpayee, on a presidential reference, the court restructured the collegium system increasing the size to five members to include 4 senior most puisne judges & creating a separate collegium for High Court appointments with three senior judges.

III. CONSTITUTIONAL BACKGROUND OF JUDGES' APPOINTMENT

The constitution makers had anticipated politics getting into the judiciary. So, they ensured that the appointment of judges should be with the consultation of someone having ample experience in the judicial office.

The architects of the Indian constitution had, for harmonious balance in governance, built-in it a system of checks & balances. They had anticipated that the concentration of power in a single hand will lead to the collapse of an effective democracy. The judiciary, one of the three wings of the state, has been entrusted with the power to adjudicate & interpret laws. Though the constitution provides for a dual polity, the judiciary is integrated to preside upon both laws. The independence of the judiciary has been a key element in the Constitution. For this purpose, it has been held as a part of the basic structure. The constitution has time & again favoured judicial independence. Even according to the Government of India Act 1935, the entire power of appointment, transfer & all other conditions of the judiciary was entrusted to itself. The executive was expected to only issue formal orders.

The article relating to the appointment & removal of judges in the apex court is Art. 124. Art. 125 to Art. 129 are related to certain ancillary matters. Similarly, the articles governing the appointment & removal of the High Court judges are Art. 217. Art. 218 & Art. 223 to Art. 224A provides for certain ancillary matters. Art. 222 deals with the transfer of High Court judges. For subordinate judiciary concerning the appointment & transfer of judges are the constitutional provisions under Art. 233 to Art. 237 supplemented by the rules made by respective governors of the states under proviso to Art. 309.

The Supreme Court judges are appointed by the President. The president appoints the chief justice with the advice of any Supreme Court or High Court justices he thinks necessary for the job. However, for any other appointment, the president must consult with the CJI. According to Art 124(2), there are two types of consultation; President may consult other judges while appointing a judge to Supreme Court or High Court, but it is mandatory to take consultation with CJI under the proviso.

IV. SHORTCOMINGS OF COLLEGIUM

The appointment of judges is one of the primary questions as it erases the doubt about whether the Indian judiciary is independent or not. The primary function of judges is to adjudge the cases while the appointment of judges is an absolute administrative function, therefore, the process of collegium is an extra burden over the justice keepers, the second problem is the molestation of power & as a result of nepotism crept in, as a result, the deserved ones are often ignored. Last & but not least there is no check & balance over this appointment procedure.

It has been widely noted by scholars and experts that allowing Judiciary to decide their members through systems like collegium may give way to favouritism as critics believe such methods lack transparency or accountability. A possible outcome entails transforming into an archaic judicial aristocracy with a select few holding all powers both past & present, thereby dismissing principles like fairness & diversity for some more autocratic ones such as nepotism or cronyism which can adversely affect justice delivery mechanisms.

V. NATIONAL JUDICIAL APPOINTMENTS COMMISSION (NJAC)

NJAC - short for National Judicial Appointment Commission - seeks to enhance objectivity when selecting High Court or Supreme Court judge candidates while ensuring clarity on their qualifications for serving within this branch of government in India. The composition entails inclusion based on diversified profiles about four pivotal positions: first being the Chief Justice Of India (as chairperson), followed immediately by 2 Senior-most Supreme Court judges, and a Minister Of Law And Justice; lastly, two preeminent persons recommended under the direction of the committee that involves CJI, Prime Minister and Leader of opposition.

There have been persistent demands for establishing a judicial commission to ensure that we have a democratic society anchored on fairness and justice. This view aligns with ongoing debates advocating for maintaining independence within our legal system. It is pertinent to note here that the same view was shared by our great constitution drafters who, during the making of our constitution, appointed an ad hoc committee responsible for overseeing all aspects relating to making judicial appointments. Their goal was simple - guaranteeing that we enjoy unbiased and just decisions from our courts at all times.

In a unanimous decision, the committee proposed a plan to establish a panel of 11 esteemed members, consisting of chief justices from various high courts and representatives from both houses of government. The nomination of a judge required the approval of a minimum of seven-panel members, which then had to be confirmed by the president. This innovative approach can be seen as an early version of a judicial commission, but alas, the constituent assembly did not concur with these visionary suggestions.

As time marched forward, the 121st Law Commission Report of 1987 referenced the Missouri Plan of the United States. It envisioned the Chief Justice of India collaborating with three of the senior-most judges, the Ex-Chief Justice of India, followed by the Chairman, three Chief Justices of High Courts based on seniority, the Union Law Minister, the Attorney General of India, and an exceptional legal academic.

Again, in 2003, based on law commission reports of 1987, a National Judicial Commission was proposed in the 67th constitutional amendment bill 1990.

In 2003, the NJAC bill was introduced through the 98th amendment bill but due to the dissolution of the 13th Lok Sabha, the bill lapsed. Finally, in August 2013, the Constitution (120th Amendment) Bill, 2013 and the Judicial Appointments Commission (JAC) Bill, 2013 were introduced in the Rajya Sabha.

VI. UNCONSTITUTIONALITY OF NJAC

After a difficult journey, the 99th constitutional amendment was introduced in the parliament & soon the bill was passed in the parliament which led to the amendment of the Art. 217, Art. 124 & Art. 222 of the Indian constitution, through this NJAC, became a constitutional body but later this was challenged in various public interest litigations in the supreme court of India. The bench with a 4:1 majority declared it unconstitutional & void in a concurring judgement. The bench comprised of J.Chelameswar, J.Madan B.Lokur, J.Kurien Joseph, J.A.K. Goel & J. J.S Khear was the presiding judge of the constitutional bench & in this, J. Chelameswar was in dissent. The verdict of the court concluded that it did not provide adequate representation to the judicial minds & the principle of independence of the judiciary was being compromised. While another major significant thing is the reason of Justice Chelemeswar, he had criticized the collegiums system of appointing judges, which he said has become "*a euphemism for nepotism*" where "*mediocrity or even less*" is promoted & a "*constitutional disorder*" does not look distant.

VII. CRITICISM OF THE JUDGMENT

The 5-judge bench struck down the NJAC act by a majority of four to one. This was one of those few cases where the '*Basic structure*' principle formulated in the *Kesavananda Bharti case* was cited to strike down the amendment. The court held that the amendment interferes with the independence of the judiciary, which forms a part of the basic structure of the constitution.

But, maybe in a haste to protect its sanctity, the court created a blunder. It is correct & clear out of the confusion that the independence of the judiciary forms a basic part of the Constitution. But the assumption that for securing the independence of the judiciary, there must be the primacy of the judiciary in its appointments is outrightly erroneous.

The Apex Court in its judgment depicted that it was unsatisfied with the composition of NJAC. This discomfort was because the two eminent persons will be political appointees entrusted with the task of appointing judges. This is a serious threat to the independence of the judiciary. But there could have been several constructive solutions to this problem than striking down the entire act.

An exceptional occurrence, in this case, was that the apex court did not follow its standard procedure when reviewing the constitutional amendments. In this aspect, the court follows a three-staged procedure. In the first stage, it checks whether the law, as ordinarily interpreted, is valid. If the result is negative, the court moves to the second stage. In the second stage, the court checks whether the law can be interpreted in compliance with constitutional requirements. Last, only if a law cannot be interpreted so, it is struck down.

In the NJAC case, the Supreme Court did not follow the second stage. If done so, most of the court's concerns could have been addressed. The main concern of composition could have been addressed with a provision of providing a veto to the Chief Justice in the appointment of eminent persons. Also, to avoid a secret pact between the government & the opposition to appoint eminent persons where both will secure the appointment of one person each, there can be a list of candidates presented to a vote of the Supreme Court judges. Even the dissenting opinion provided for this.

Most importantly, the approval of this bill unanimously in both houses with the approval majority of the states gives a strong message. Although the extent of support is irrelevant once a bill gets approved, the

majority opinion projects that the failure of the collegium system is well known to all. The judges have also supported this fact in numerous press meets.

VIII. APPOINTMENT OF JUDGES IN A FEW OTHER COUNTRIES

Each country has its system for appointing judges. As a developing country, India can use methods taken by developed nations to assist in creating a balance between judiciary independence, nepotism, and bias. The developed countries listed below are a few examples:

U.S.A - The President appoints judges to the Federal Court with the Senate's advice and permission. Before a vote in the Senate, the nominees are evaluated by a committee of the American Bar Association and examined by the Senate Judiciary Committee. In the US, judges are not required to retire at a certain age since they are retained for "good behaviour."

U.K - The independent Judicial Appointments Commission (JAC) controls the process of appointing judges in the United Kingdom. The JAC has 15 members, three of whom are judges, while the remaining 12 are chosen through an open competition.

FRANCE - The President appoints judges at the suggestion of the Judiciary's Higher Council. The judges are appointed for three-year periods that are renewed based on the Ministry of Justice's recommendation.

IX. RECOMMENDATIONS

- The balance between Judicial Independence and Judicial Accountability - Striking a balance between judicial independence and accountability is crucial, regardless of the Judicial Appointment Commission's (JAC) makeup. The Executive should have some input into appointments, but the JAC should be structured so that judicial independence is not jeopardized.
- Justice within the Judiciary: Care must be taken to ensure that the Court's institutional mandate of administering justice is upheld inside the judiciary, with equality of opportunity and defined criteria for selecting judges.
- Revamping the NJAC's Establishment: The NJAC Act may be changed to contain safeguards that would make it constitutionally valid and reorganized to guarantee that the judiciary retains majority power.

X. CONCLUSION

Although, it is not over for the government yet; the court has positively held the primacy of the judiciary in judicial appointments & judicial independence as a basic part of the constitution, not the collegium system. This depicts that another commission can be still formulated as long as it complies with the principles set in the judgement. Even the majority opinion has put forth the idea that civil society can be included in the appointment process through a non-binding consultation procedure.

The above statement hints towards the fact that the judiciary also seeks collaboration rather than confrontation. Whether it is collegium or NJAC both Carry their loopholes & lead to abuse of power. Therefore, India needs to seek a midway where there is a balance between the power of the executive & judiciary, it must include an effective system of "check & balance". We need an independent judiciary which does not have any political influence & shall functions as unbiased & uphold the sanctity of the justice system in a democratic nation. This paper argues that the executive should only play a role in judicial appointments & should not be involved in the transfer of Judges or the appointment of Chief Justice.

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