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## REANALYSING THE EXPEDIENCY OF NJAC

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### Abstract

*The Judiciary of India is the most renowned and highly celebrated institution across the globe. In addition to having laid innumerable fundamental principles of law, the judiciary has been the resolver of even the infinitesimally small grievances of its people. However, on the backside, this great institution faces its own intricacies. One such contemporary controversy is the issue of judicial appointments. With the Indian executives keen to grasp the role of appointments into the judiciary, this paper delves into complications involved in the same. In addition to it, the article also provides a critical summary of the advancements in the past & proposes the possible & steady way forward. Further, diving into the suppository perception of executive's role in judicial appointments, the article analyses, the key-factors that disprove the executive's assumption of tentative authority over judicial appointments.*

**Keywords:** Judicial appointments, executive body, Supreme Court, collegium, government

### 1. EMANATING OF QUESTION OVER COLLEGIUM APPOINTMENTS:

In early February 2023, the hon'ble bench of the Supreme Court of India led by hon'ble Chief Justice Dhananjaya Yeshwant Chandrachud, agreed to examine and consider a petition that urged the court to re-evaluate the modus operandi of collegium system for judicial appointments in the hon'ble High Courts & the hon'ble Supreme Court. The writ petition also called for revival of the National Judicial Appointments Commission (NJAC), which was formally instigated 9 years back, by the parliament. Corroborating this petition, there were numerous events & exchanges between the executive body and the judiciary over the controversy of a say of the government (specifically, the executive) in appointment of judges in the higher judiciary of the nation. For the instance, the comments of hon'ble Vice President Jagdeep Dhankhar, tagging NJAC as "the will of the people" & hon'ble Union Law Minister Kiren Rijiju, calling the collegium system

as "alien to the constitution". These exchanges spreading over a span of 4-5 months have reactivated the consideration for NJAC or any other structural body (comprising some members from the executive) to replace the decades old collegium system and to briskly deal with judicial appointments.

### 2. THE EXIGENCY FOR NJAC AS AN ALTERNATIVE TO COLLEGIUM

The collegium system can be understood as a faction of 5 judges of the hon'ble Supreme Court, led by the hon'ble chief justice, that deals with the appointment of judges in the higher judiciary. The collegium also recommends for the transfer of judges of the hon'ble High Courts of the respected states. The collegium does not find any specific mention in the constitution, yet, its legitimacy and operability stand on the verdict in the *Three Judges Case*. In *S.P. Gupta vs Union of India*<sup>8</sup>, the executive was given an upper hand vis-à-vis the judiciary for the next

<sup>8</sup> S.P Gupta vs Union of India, (1981) AIR 1982 SC 149

1.2 decade, in lieu of the fact that the verdict laid that the CJI's recommendation can be rejected by justified reasons. Subsequently, in *Supreme Court Advocates-on-Record Association & Anr. Vs Union of India*<sup>9</sup> a nine judge constitutional bench of the hon'ble Supreme Court, overturned the verdict in the former case by a 7:2 majority judgement & held that executive cannot have an equal say in the judicial appointments. Ultimately, *in re Special Reference 1 of 1998*<sup>10</sup>, the collegium system, currently in vogue, was established. Prior to this system, the appointments of judges were under hon'ble President's seal in consultation with other judges. In addition to executive's urge for considerable say in judicial appointments, the question over legitimacy of collegium system is also raised owing to couple of loopholes in the system, namely, tendency for nepotism (i.e. the judges may be partial towards appointing their offshoots, who are practicing law or appointing their brother/sister justices' offshoots); lack of transparency (the appointments are based primarily on the experience and contributions of the distinguished jurists and law practitioners, but there is a scope for bias) & ignorance towards young judges serving in the lower judiciary (when the previous 2 factors operate, there is negligible opportunity left for promotion of a district judge/ additional judge to the higher judiciary).

Considering the aforementioned aspects, the parliament had enacted the National Judicial Appointments Commission Act (2014) and had also passed the Constitution (Ninety-Ninth Amendment) Act 2014 which were assented to by more than half of the states and came in to force in 2015. The acts called for establishment of an independent commission (regulated by the parliament) for the appointment, transfer & removal of judges of hon'ble Supreme Court & the hon'ble High Courts. The keynote provision of these acts was that they stated that the

appointment commission would comprise of the Union Law Minister along with the CJI and other judges of the hon'ble Supreme Court. They also provided that recommendation for appointment to the hon'ble Supreme Court and the hon'ble High Courts would be based on merit, ability & other criteria specified in regulations (by the parliament) except for appointment for the CJI & chief justice of respected High Courts. These legislative developments were followed by numerous petitions filed before the hon'ble Supreme Court, challenging the constitutional legitimacy of these legislations, but they were not entertained by the court as it was "premature interruption" to these acts. Ultimately, when the Supreme Court Advocates-on-Record Association filed a plea contending that the NJAC act was invalid considering that it was enacted when articles 124(2) & 217(1) of the constitution were in vogue and the president had not assented to the 99<sup>th</sup> amendment act.

It led to the landmark judgement of the hon'ble Supreme Court in *Supreme Court Advocates-on-Record Association & Anr. Vs Union of India*<sup>11</sup>, wherein a 5-judge constitutional bench struck down the act and held the establishment of NJAC as ultra vires the constitution and a breach of the Basic Structure Doctrine<sup>12</sup> (independence of judiciary for healthier democracy). In this judgement, the court, apart from striking down the controversial acts, also penned that the transparency in functioning of collegium system needs to be relooked upon.

### 3. SUPPOSITIONAL ASSUMPTION OF THE EXECUTIVE'S AUTHORITY IN APPOINTMENTS

With regards to the alleged contentions raised (tentatively), by the executives & assuming that the executive body is given ultimate authority in judicial appointments, numerous irrevocable & democratically heinous disasters are anticipated, which might emerge, if the

<sup>9</sup> Supreme Court Advocates-on-Record Association & Anr. Vs Union of India, (1993) 4 SCC 441

<sup>10</sup> In Re: Under Article 143(1) of the Constitution of India vs Unknown, (1998) AIR 1999 SC 1

<sup>11</sup> Supreme Court Advocates-on-Record Association & Anr. Vs Union of India (2015) 5 SCC 1

<sup>12</sup> Kesavananda Bharati Sripadagalvaru & Ors. vs State of Kerala & Anr. (1973) 4 SCC 225



aforesaid circumstance comes into reality. The foremost foreseeable complication is with regards to decelerating growth potential of the societal mindset. A recent evidentiary situation, of this state, can be attributed towards the central government's cold attitude in the appointment celebrated advocate Saurabh Kirpal (practising at the Supreme Court of India), as a judge of the apex court. An over-the-top tentative conclusion of the central government's such reaction, notwithstanding, the reiteration of recommendation for appointment by the collegium, exposes the prejudicial & sidelined temperament of the people's representatives. India has been facilitative for peaceful co-existence amongst every member of its society, notwithstanding their sexual orientations or gender identities. Additionally, the nation & its educational framework has been a well-knitted bouquet holding celebrated dignitaries, who've become infamous for their indifferent orientations. However, in not giving a normative & procedurally mandatory approval for the appointment of the abovementioned personality, the union government showcases its indifferent perspective and non-inclusive/conservative thought process, which is in absolute contrast with the ground level reality. Another notable controversy, that affirms the executive's inability in the present contentious issue, is its rightist inclination rather its religion-centric take on every issue, that awaits a democratic and open-minded solution. A politically elected government is deemed to be politically correct in not streamlining itself with a religious faction or not adopting a religious identity, contrastingly, the current dispensation goes to prove a prevalence of the contrary. The executive body cannot, considering the present circumstantially proven facts, take over the role of judicial appointments, in so far, that it intends to pursue its religious inclination, which is not acceptable in the arena of political governance. Again, assuming the executive's hypothetical authority over judicial appointments, such

illusionary stance, shouldn't be in vogue, due to the possible admission of pro-executive and pro-government officials in the court of neutral legal stance. Lastly, the executive should be kept significantly distinct from the function of judicial appointments, anticipating the probable inclusion of majoritarianism approach in resolving the grievances of the common masses. The executive body, encompassing the interests & expectations of the majority, may inculcate a perspective of majoritarian superiority either culturally or linguistically or religiously. The same, shall be reflected in the judiciary & other dispute resolving authorities of the nation, if the executive were to make the alleged appointments. Hence, even the suppositional situation of the issue, that this article tends to cater to, disproves all or any meagre possibilities of executive's takeover upon judicial functionalities. Despite, such indicatory & prognostic parameters, the executive body of the nation has entered into a tentative deadlock with the judicial institutions over the matter of appointments & has indirectly challenged the process of the appointments, in vogue.

### CONCLUSION

The deadlock prevailing between the executive and judicial body of the nation (since the struck down in 2015), and with the recent exchanges between the hon'ble Law Minister of India, hon'ble Vice-President & the Chief Justice, other retired judges, over the perpetual use of collegium, it is opined that the need of the hour is a balanced approach towards the judicial appointments. There needs to be synchronised system for judicial appointments which strikes off all imbalances between judicial independence & accountability.

Another crucial development in this arena is the recent introduction of a private member's bill in the parliament (December, 2022) by Mr. B.R. Bhattacharya for regulation of appointments to higher judiciary as well as to ensure accountability by the judicial body. However, the same has been opposed in the name of



government's unconstitutional efforts in usurping control over independent judiciary.

Thus, there can be 2-fold ways for this contentious controversy viz. amendments in the functioning of collegium for greater transparency & fair opportunity to every deserving candidate or re-enactment of NJAC with the necessary tweaks to mitigate any sheer possibility of executive's overstepping of power.

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