

# Judicial Independence and Reformation of The Collegium System: Evaluating the NJAC Judgement and Foreign Judicial Appointment Systems

Nikhil Srivastava

Student – 3<sup>rd</sup> Year BA LLB (Hons.), Symbiosis Law School, Pune, Symbiosis International University

## Abstract

The National Judicial Appointments Commission, introduced by the 99<sup>th</sup> constitutional amendment, was struck down by the Supreme Court of India while the collegium system was upheld. The basic structure doctrine of the independence of the judiciary was contested to be violated by the amendment, and the striking down of the amendment ensured that judicial supremacy was protected. Yet, India is the only country where the spirit of democracy is of utmost importance. Still, the judges are appointed by fellow judges in the current practice of the collegium system.

In this research article, the researcher will evaluate the dissenting view of Justice Chelameswar in the NJAC judgement and tackle the issue of the need for reformation of the collegium system to make it more transparent and democratic. The article will also deal with a comparative analysis of the Indian judicial appointment setup and the setup of judicial appointments in foreign countries like the USA, UK, France, Australia and Canada to formulate recommendations for reformation in the Indian setup.

**Keywords:** NJAC, COLLEGIUM SYSTEM, DISSENTING VIEW, REFORMATION, JUDICIAL APPOINTMENT

## 1. Introduction

### 1.1 Background of the Topic

*Article 124 clause (2)*<sup>1</sup> and *Article 217 clause (1)*<sup>2</sup> of the Constitution of India lays down the process for the appointment of Supreme Court judges and High Court Judges, respectively, by the President on a recommendation received from the Chief Justice of India. The court, in the case of *Supreme Court Advocates-on-Record Assn. v. UOI*<sup>3</sup> or commonly known as the 2<sup>nd</sup> judges case, held that no appointment can be made unless it is in conformity to the opinion of the Chief Justice of India. The term “consultation of the Chief Justice of India” was expanded by the court in the 3<sup>rd</sup> judges case or *Special Reference No. 1 of 1998*<sup>4</sup> by the President of India. The court stated that by the expression “consultation of the Chief

<sup>1</sup> Article 124(2) – Constitution of India

<sup>2</sup> Article 217(1) – Constitution of India

<sup>3</sup> Supreme Court Advocates-on-Record Assn. v. UOI (1993) 4 SCC 441

<sup>4</sup> Special Reference No. 1 of 1998, 7 SCC 739

Justice of India” under *Article 124(2)*<sup>5</sup> and *Article 217(1)*<sup>6</sup> it meant consultation by a plurality of judges alongside the Chief Justice. The court, after due consideration, came to the conclusion that for the appointment of Supreme Court judges, the Chief Justice, along with a collegium of 4 senior-most judges of the court, would provide their recommendation to the precedent that would be binding. While in the case of High Court appointment, the process will be started by the Chief Justice of the concerned High Court with consultation with at least two senior-most High Court justice of the concerned court. The recommendation by the Chief Justice of the High court and his collegium will be considered by the Chief Justice of India and his collegium of 2 senior-most judges of the Supreme Court. This is the collegium system that remains in practice for the appointment of Judges in the Supreme Court and High Court of India.

The collegium system was said to be run on the system of nepotism and corruption. To deal with this issue and to ensure that the right candidate is appointed for the position of judge in a High Court and Supreme Court, the National Judicial Commission was introduced. The NJAC aimed to end the opaque mechanism of the appointment process and make it more transparent. The NJAC bill was given assent by the President, making it the 99<sup>th</sup> Constitutional Amendment, which inserted *Article 124A*<sup>7</sup>, *Article 124B*<sup>8</sup> and *Article 124C*<sup>9</sup>. It also made changes to *Article 124(2)*<sup>10</sup> and *Article 217(1)*<sup>11</sup>, stating that the National Judicial Appointments Commission will provide a recommendation to the president, scrapping the existing collegium system. The constitution of the commission would be as follows-

1. The Chief Justice of India (ex-officio)
2. 2 senior-most Supreme Court judges
3. Union Minister of Law and Justice
4. 2 eminent persons selected by CJI, PM and L/O. (1 should be OBC/SC/ST/ minority/woman)

However, this amendment was struck down by the Constitutional Bench on the grounds that it is unconstitutional and void by a 4:1 majority in the 4<sup>th</sup> judges case, also referred to as the NJAC judgement case<sup>12</sup>. After this decision, the pre-existing collegium system was re-established.

## 1.2 Research Problem

The relationship between an independent judiciary and the involvement of the executive in the appointment of judges.

## 1.3 Objectives of Research

The objective of the research is to analyse the dissenting view of Justice Chelameswar regarding the basic structure doctrine and basic feature doctrine. The research aims to evaluate foreign judicial appointment systems to find and provide recommendations for reformation to the collegium system suitable for the Indian setup.

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<sup>5</sup> Supra.1

<sup>6</sup> Supra.2

<sup>7</sup> Article 124A – Constitution of India (99<sup>th</sup> Amendment); this amendment has been struck down by the SC

<sup>8</sup> Article 124B – Constitution of India (99<sup>th</sup> Amendment); this amendment has been struck down by the SC

<sup>9</sup> Article 124C – Constitution of India (99<sup>th</sup> Amendment); this amendment has been struck down by the SC

<sup>10</sup> Supra.1

<sup>11</sup> Supra.2

<sup>12</sup> Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1.

## 2. Research and Analysis

### 2.1 Analysis of The Dissenting View of Justice Chelameswar

*Kesavananda Bharti case*<sup>13</sup> established the basic structure doctrine of Judicial Independence which was considered the grounds for the unconstitutionality of the 99<sup>th</sup> Amendment. Honorable Justice Chelameswar, while giving a dissenting view in *Supreme Court Advocates-on-record Association & Anr. v. UOI (4<sup>th</sup> Judges Case)*<sup>14</sup> did uphold that the Independence of the Judiciary is unequivocally a part of the basic structure. However, he raised the issue of whether there is a difference between the basic structure and basic feature of the Constitution. Justice Chelameswar, in his judgement, opined that there is a difference between the two concepts; he concluded that the basic features are components of the basic structure and amendment of an article which lays down a basic feature may or may not result in the destruction of the basic structure of the constitution. Violating a basic feature would not necessarily mean the violation of the basic structure doctrine. Justice Chelameswar stated that the President is not bound by the Chief Justice's advice for judicial appointments by the Constitution. There also seems to be no case laws or dicta that state that judicial primacy is part of the basic structure. The Supreme Court, in the Third Judges case, did uphold Judicial independence as a part of the basic structure. However, the issue of whether judicial primacy was a part of the basic structure remained ambiguous. The basic structure doctrine was evolved to prevent any fundamental changes to the core ideas and values of the Constitution. However, it cannot be logically argued that Judicial Primacy that did not exist pre-second Judges case constitutes a basic structure of the constitution.<sup>15</sup>

The dissenting view of Justice Chelameswar gave light to the issue of Judicial supremacy and the unchecked power of the court. It points out the failure in the mechanism of the system of checks and balances. The majority judgment is celebrated because it upholds judicial independence; however, the dissenting view points out the flaw in the Court's interpretation of judicial primacy as a basic structure. The majority did agree that a change is required in the collegium system and thus, the Supreme Court invited recommendations and suggestions to improve the existing collegium system.

### 2.2 Comparative Study of Collegium System and International Setup for Appointment of Judges

Throughout time the Indian judiciary and pro-collegium factions have stated that the intervention of the executive in the judicial appointment would lead to a violation of judicial independence. To analyse the statement, we go through various setups of judicial appointments in different democratic countries to see whether the intervention of the executive has severed the state of Judicial Independence in the country.

**USA:** In the USA, the power to nominate judges to the federal court has been vested with the President under *Article 2, Section 2 of the U.S Constitution*<sup>16</sup>, and these nominations have to be confirmed by the Senate.<sup>17</sup> The US setup allows a check to be maintained by the legislative on the acts of the executive in appointing Judicial officers. Introducing the system of executive nomination and a legislative check tackles the possible issues of nepotism, favoritism and leads to transparency.

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<sup>13</sup> Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225

<sup>14</sup> Supra.12

<sup>15</sup> Arghya Sengupta, Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment, 48 ECON. & POL. WKLY. 27, 27 (2015).

<sup>16</sup> Article 2 Section 2 – US Constitution

<sup>17</sup> Rehan Abeyratne, Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective, 49 GEO. Wash. INT'L L. REV. 569 (2017).

**UK:** The system of judicial appointments in the UK was recently reformed through the infamous Constitutional Reform Act of 2005. In the current setup, the power to appoint judge's rests with two independent commissions. One commission is created to deal with the appointments of judges in England and Wales and the other deals with the appointment of Supreme Court Judges. The independent commission comprises 15 members who are appointed through open competition. These members range from existing judicial officials, members of the legal profession, non-legally qualified judicial officers and the public. The commission aims to select people solely on merit, and the person is selected only if the selecting body is satisfied that the candidate is of good character.<sup>18</sup> This reformation was to tackle the issue of political influence in judicial appointments.

**FRANCE:** In France, judges are recruited either based on special qualifications of Doctor of Law or through competitive exams. The power to appoint a judge rest with the President on recommendation from a judicial service commission – "*Conseil Supérieur de la Magistrature*". The commission comprises members from the Judiciary and other members appointed by the executive and legislation.

**CANADA:** In Canada, the appointment of federal judges is done by the Governor General, who is acting on the advice of the Prime Minister for judges of the Supreme Court of Canada. At the same time, for all other superior courts, it is the Minister of Justice who advises the Governor General in appointing judges.

**AUSTRALIA:** In Australia, it is the executive; Governor General who appoints the judges on the advice of the attorney general. The Attorney general may consult the Chief Justice and other sitting judges; however, this is not mandatory.<sup>19</sup>

Throughout world democracies, the executive is a major role player in the appointment of judges, and it has been well observed by the nations that their respective setup has led to transparency in the appointment and has not violated the judicial appointment. These systems lay similar to the envisage of the constitutional framers of India. It can be argued that, on the other hand, the Indian collegium setup has led to judicial supremacy over the executive and legislature. The fear of Alladi Krishnaswamy Ayyar has come true during the constituent assembly debates. He warned that vesting immense power with the Judiciary would lead to the creation of a super-legislature, and that is exactly what was witnessed in the second judge case where the collegium system was created by the Supreme Court, which violates the basic principle of separation of power. The 99<sup>th</sup> Amendment was intended to correct this mistake and maintain a balance of power.

### 3. Recommendations for Reformation

After analyzing various judicial appointment systems across various democratic nations, one thing is sure: Judicial Independence has still been maintained in the country, even with executives involved in the appointment process. On the other hand, the Indian collegium system in itself has been created by a body that has no authority to take legislative decisions. India effectively appointed pre-second judges cases

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<sup>18</sup> Constitutional Reform Act, Chapter 2, General Provision Section 63 – Merit and good character  
Judicial Appointments Commission official website - <https://judicialappointments.gov.uk/>

<sup>19</sup> Parliament of Australia official website –

[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2021/November/Judicial\\_Appointments](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2021/November/Judicial_Appointments)

through the President's final say in the appointment process. The NJAC judgement led the judiciary to retain the power to make judicial appointments and forgot to consider a key message that the power to appoint judges should not vest with a single authority. Thus, there is still a need to reform the collegium, which remains opaque and filled with bias.

The Supreme Court did invite suggestions and recommendations to improve the collegium system through the NJAC judgement. The researchers provide the following recommendations and alternatives for the reformation of the collegium system.

1. The collegium should involve public participation by publicizing the names of candidates and creating an independent committee of legal scholars and non-judicial legal experts to interview the candidates. The interview process would result in finding the best possible candidate for the position. The committee should also call for public objections within a specific time window and evaluate the same. This setup that the researcher recommends is quite similar to that of the Israeli judicial appointment system.
2. The collegium meeting should be recorded with audio and should be made available to the public under the Right to Information Act to increase transparency and reduce backroom politics.
3. An independent commission such as the election commission should be established to evaluate the income and assets of the candidates and their close relatives. The candidates eager for an elevation should send a formal application to the collegium and the independent commission with their bio-data, CV, and bank records for evaluation.
4. If the Judiciary is adamant that the involvement of the executive will lead to a violation of judicial independence, then at the very least, the attorney general with no voting rights should be made a spectator with the power to voice his concerns regarding the candidacy to deal with the issue of nepotism, favoritism and the involvement of only one authority in the process. The issue raised by the attorney general should be rightly addressed and a report to deal with the concerns should be created by the collegium.
5. The collegium should also be compelled to provide a detailed statement to the public stating the reason for acceptance and rejection of a candidate, which shall be questionable in a tribunal created for the very purpose of hearing matters regarding the judicial appointment. The tribunal should comprise 2 Supreme Court Judges, a Legal Academician, a Legal expert and the Union minister of Law. The non-judicial and non-elected members should be appointed on the recommendation of the opposition party.

#### 4. Conclusion

The NJAC judgement showed the arbitrary power that the Supreme Court holds in the current scenario through its decision in the second judges case and the interpretation of the same in the third judges case the judiciary has acted as a legislature drafting provisions for its own welfare. The Supreme Court has wrongfully analyzed the concept of the primacy of the judiciary to be a part of the basic structure resulting in the unconstitutionality of the NJAC judgement. The dissenting view of honorable Justice Chelameswar and his judgement is more sound as it deals with the issue of what is the basic structure and what would constitute a basic feature, making it clear that a violation of a basic feature may or may not lead to a violation of the basic structure and judicial primacy is a basic feature and not a part of the basic structure. The recommendations provided by the researcher for the reformation of the collegium have been derived by taking inspiration from various foreign judicial appointment systems. The comparative study was the

primary objective of the research paper to provide quality recommendations to address the Supreme Court opening the forum for suggestions.

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