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99TH AMENDMENT ACT 2014

AUTHORED BY - ADITI JHA & DURGESH KUMAR SINGH

INTRODUCTION

The joining of judges in Indian courts has been a topic of ongoing discussion, raising questions regarding the selection process, the qualifications of appointed judges, and the competence of the committees or individuals involved in the joining procedure. In response to these concerns, the 99th Constitutional Amendment was introduced, which represents a significant milestone in addressing judicial appointments in India. This amendment holds considerable significance within the framework of the Indian Constitution as it aims to tackle and assess the state of judicial appointments in the world.

99th Constitutional Amendment¹

The process for amending the Indian Constitution, as expressed in Article 368, involves the following steps:

1. **Proposal:** An amendment bill is introduced in either the Lok Sabha or the Rajya Sabha, initiated by a minister or a private member.
2. **Discussion as well as Voting:** The bill undergoes thorough discussion and debate in both Houses of Parliament, requiring a simple majority to pass in each House.
3. **Joint Sitting (if required):** If there is a disagreement between the Houses or if the bill is refused by one House, a joint sitting may be called. The bill should proceed by a special majority at the joint sitting.
4. **Presidential Assent:** Once the bill is proceeded by both Houses, it is presented to the President for approval. The President's approval is necessary for a constitutional amendment.
5. **Incorporation into the Constitution:** After receiving the President's approval the bill becomes an amendment and is integrated into the Indian Constitution.

Constitutional amendments serve as a formal means to modify the text of a constitution. These amendments are essential to address any shortcomings, respond to emerging demands, introduce new rights, and cater to current political and social requirements. Without the ability to amend, a constitution would be unable to adapt to evolving needs.

However, it is vital to prevent impulsive or ill-considered changes that could undermine the constitution's integrity. There is a need for safeguards to ensure that amendments are made with careful thought and consideration for their long-term consequences.

This helps maintain the stability, coherence, and fundamental principles of the constitution, while still allowing for necessary updates to reflect the changing times. Striking the right balance between the necessity for change and the need for prudence is crucial in the process of constitutional amendment.

An analysis of the 99th Constitutional Amendment

The National Judicial Appointment Commission Act (NJAC)³ was established in 2014 through the 99th Constitutional Amendment Act. This amendment was introduced alongside the Constitutional 121st Amendment Bill, that created the National Judicial Appointments Commission (NJAC). The NJAC Bill outlines the process for recommending candidates for various judicial positions, including the Chief Justice of India, Supreme Court judges, Chief Justices, as well as judges of High Courts.

In India, there exists a system known as the "Collegium," where judges have the sole authority to choose and shift other judges. This process, often referred to as "Judges selecting Judges," was implemented to strengthen the appointment process. Although the word "Collegium" was not originally mentioned in the Constitution, it was coined by the judiciary itself.

The formation of the National Judicial Commission was a result of the 99th Constitutional Amendment, that aimed to return the collegium system with the NJAC. However, the Supreme Court ruled in favor of the collegium system, deeming the NJAC to be inconsistent with the principles of the Constitution's basic structure and judicial independence.

As per the proposed NJAC Act, the commission would consist of six members, including the Chief Justice of India as the Chairperson, two senior Supreme Court judges, the Union Law Minister, and two notable men selected through committee consisting of the CJI, the Prime Minister, and the Leader of the Opposite party. The NJAC would be responsible for recommending candidates for key judicial positions and facilitating the transfer of Chief Justices as well as other judges of High Courts based on its recommendations.

The 99th Constitutional Amendment introduced several changes through its provisions

The inclusion of the 99th Constitutional Amendment led to the addition of Article 124A, which followed Article 124 in the Constitution.

Article 124 pertains to the formation and structure of the Supreme Court in India.

It specifies that the Apex Court shall comprise the Chief Justice of India along with a maximum of seven additional judges, with the provision to appoint a higher number if authorized by law. It further outlines that the appointment of Supreme Court justices will be carried out by the President through a warrant bearing the President's signature.

Article 124A introduces the National Judicial Appointments Commission, which will be led by the following members:

- The Chief Justice of India,
- The two most senior judges of the Apex Court, and
- Two notable individuals appointed by a committee containing the Chief Justice of India, the Prime Minister of India, and the Leader of the Opposition in the Lok Sabha or the leader of the largest opposition party in the absence of a designated Leader of the Opposition.

Among the two notable men, one must either come through a minority class similar as SC/ST/OBC or be a female. Their appointment is for a fixed term of three years and they are not qualified for reappointment.

The main part of the National Judicial Appointments Commission (NJAC), as stated in Article 124B, is to propose suitable candidates for several judicial positions in India. These positions encompass the Chief Justice of India, Apex Court Justices, Chief Justices of the High Court, and other High Court Judges. Furthermore, the NJAC is entrusted with the responsibility of suggesting transfers of Chief Justices and other Justices between different High Courts.

Article 124C confers upon Parliament the authority to approve legislation concerning the appointment of the Chief Justice of India, and the more justices of the Apex Court and High Court.

These laws are designed to manage the process of appointment. Furthermore, the National Judicial Appointments Commission (NJAC) is empowered to establish any necessary rules and regulations to ensure the smooth operation of this appointment system.

An amendment is proposed for **Article 127** of the Constitution, which entails modifying Article 127(1). The suggested change involves replacing the mention of "the Chief Justice of India"

with the phrase "the National Judicial Appointments Commission on a reference made to it by the Chief Justice of India." This amendment pertains to the joining of ad hoc Judges and aims to transfer the responsibility for these appointments from the Chief Justice of India to the National Judicial Appointments Commission. However, such appointments will only occur when the Chief Justice of India refers the affair to the Commission.

Article 128 of the Constitution is proposed to be modified, replacing the mention of "the Chief Justice of India" with the term "the National Judicial Appointments Commission." This amendment relates to the presence of retired Judges at sittings of the Apex Court.

Similarly, **Article 217(1)** is subject to an amendment, where the part starting with "after consultation" and finishing with "the High Court" will be substituted with the phrase "on the recommendation of the National Judicial Appointments Commission" as stated in Article 124A. This amendment concerns the appointment and conditions of office for Judges of the High Court.

Article 222 – Transfer of a Judge from one High Court to another

In Article 222 of the Constitution, an amendment is proposed to replace the phrase "after consultation with the Chief Justice of India" in clause (1) with the expression "on the recommendation of the National Judicial Appointments Commission referred to in Article 124A." This amendment specifically relates to the transfer of a Judge from one High Court to another.

Article 224 – Appointment of additional and acting Judges

The proposed amendment to Article 224 suggests substituting the phrase "the President may appoint" with "the President may, in consultation with the National Judicial Appointments Commission, appoint" in clauses (1) and (2) of the existing article. This amendment pertains to the appointment of additional and acting Judges and emphasizes the involvement of the National Judicial Appointments Commission in the decision-making process.

Article 224A – Appointment of retired judges as sittings of High Courts

In Article 224A of the Constitution, a proposed amendment aims to replace the phrase "National Judicial Appointment 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" with the phrase "the Chief Justice of a High Court for any State may at any time, with the previous consent of the President." This amendment pertains to the appointment of retired judges to serve as sittings of High Courts.

Article 231 – Formation of a common High Court for two or more States in Article 231 of the Constitution, an amendment suggests the removal of clause (2) sub-clause (a).

NATIONAL JUDICIAL APPOINTMENT COMMISSION

The 99th Constitutional Amendment introduced by the Union Government of India led to the establishment of the National Judicial Appointment Commission (NJAC). This amendment received the necessary approval through a 2/3 majority vote in both houses of parliament. According to Articles 124, 217, and 222 of the Indian Constitution, the appointment and shifting of judges to the Apex Court and High Courts are mandated. Prior to the formation of the NJAC, the President sought consultation with the Chief Justice and other judges when making judicial appointments. Decisions regarding transfers were also made by the President after consulting with the Chief Justice. The NJAC Act governs the process by which the NJAC recommends suitable candidates for joining as judges to the Apex Court and High Courts, and their transfers. The recommendations are based on criteria such as seniority, aptitude, merit, and other qualifications marked in the NJAC regulations. Subsequently, the President is obligated to make nominations in accordance with these recommendations.

Background of NJAC

The Justice Venkatachaliah Commission, established by the NDA, suggested the establishment of a National Judicial Commission for judge nominations in its 2002 report. Subsequently, the NJAC Act was passed by the Indian Government as a Constitutional Amendment in August 2014, receiving President Pranab Mukherjee's approval on December 31, 2014. However, on April 13, 2015, the Apex Court Advocates on Record Association and other parties filed petitions challenging the validity of the law, asserting that it violated judicial independence. On October 16, 2015, a five-judge bench comprising Justices JS Khehar, J. Chelameswar, Madan B. Lokur, Kurian Joseph, and Adarsh K. Goel declared the NJAC Act unconstitutional in the Apex Court Advocates-on-record Association v. Union of India (2015) case. The bench also directed the reinstatement of the "judges selecting judges" collegium system, which had been in place for over two decades. Additionally, in the C. Ravichandran Iyer case (1995), the Court said that internal self-regulation and procedures could be used to address situations where there was a significant discrepancy between proven misconduct and conduct inconsistent with the esteemed position of a discipline judge or Chief Justice of a High Court, bridging the constitutional gap and promoting positive outcomes.

On the 65th anniversary of Republic Day, the Parliament approved the National Judicial Appointments Commission Act in 2014. This legislation figures the protocols and policies to be followed when appointing Chief Justices of the Supreme Court, High Court judges, and transferring judges between courts.

Process of selecting Apex Court judges and High Court judges under the NJAC Act 2014

Apex Court Judges:

According to the Act, the NJAC is mandated to propose a candidate for the position of Chief Justice of India from among the senior judges of the Apex Court. The NJAC ensures that the recommended judge possesses the necessary qualifications and suitability for the role. When suggesting candidates for other Supreme Court judge positions, the NJAC takes into consideration factors such as qualifications, merit, and other criteria specified in the regulations.

High Court Judges:

Regarding the appointment of Chief Justices of the High Courts, the NJAC recommends a judgebased on their seniority among the High Court judges. In addition to seniority, the NJAC considers factors such as aptitude, merit, and eligibility standards outlined in the regulations. When nominating a regular High Court judge, the NJAC seeks the opinion of the Chief Justice of the relevant High Court, along with the two most senior judges. The Chief Justice may also consult with other judges and legal professionals, if required. The recommendations also take into account the views of the Governor and Chief Minister. The NJAC plays a central role in proposing candidates for the appointment of Chief Justices and judges in the High Courts.

The President has the power to request a review of the NJAC's recommendations. After conducting the review, the President must ultimately make a decision that aligns with the unanimous recommendation provided by the NJAC.

LANDMARK JUDGEMENTS REGARDING TO JUDICIAL APPOINTMENTS

- **S.P GUPTA V. UNION OF INDIA**

The case of S.P Gupta v. Union of India (1982) focused on the appointment as well as transfer of judges and the issue of judicial independence. One concern raised was the validity of government directives that prohibited the appointment of two judges. The petitioners sought entry to correspondence between the Law Minister, the Chief Justice of Delhi, and the Chief Justice of India to support their claims. However, the state argued that these documents were confidential under Article 74(2) of the Indian Constitution and Section 123 of the Indian Evidence Act.

In the Judges' Transfer Case, the Apex Court, with a majority of 4:3, ruled that the Union Government, not the Chief Justice of India, shall be ask regarding difference in constitutional functions. The Apex Court agreed with the clarity of 'consultation' in Articles 124(2) and 217(1) of the Constitution. It said that the Chief Justice of India's role in consultation is advisory, and the transfer of judges between High Courts shall be based on discussion with the Chief Justice of India in the public interest, rather than as a form of punishment. The Chief Justice of India must also consult with at least two senior judges to

ensure harmony between the government and citizen rights. This case reinforced the judiciary's independence as guaranteed by the Constitution.

In the **Supreme Court Advocates on Record Association v. Union of India (1993)**¹ case, a Constitution Bench of nine judges reversed the S.P. Gupta ruling with a 7:2 majority and established the "Collegium System" for the appointment and transfer of judges in the higher judiciary. This case clarified that the term "consultation" would not diminish the crucial role of the Chief Justice of India (CJI) in judicial appointments. It affirmed that the CJI would have primary authority in appointment and transfer matters, reducing the executive's power in judicial selections and upholding the essence of Article 50 of the Constitution. The ruling aimed to remove personal preferences and political interference from the appointment process.

The court's decision overturned the First Judges' Case by stating that when disputes arise between the President and the Chief Justice of India regarding judge appointments, the CJI's opinion, while not always given primacy, would be decisive in making the final decision. The court also established that the collegium system would govern the Chief Justice's powers, ensuring a system of checks and balances.

To ensure the judiciary's ultimate authority in appointing judges to the Supreme Court and High Courts, the Chief Justice of India would make decisions after consulting with the two most senior judges of the Supreme Court. Similarly, for High Court judges, the Chief Justice of the respective High Court would only make recommendations after consulting with the two most senior judges of that High Court.

The Supreme Court of India (IN RE: APPOINTMENT & TRANSFER OF JUDGES)

v. Civil Advisory Jurisdiction (1998)

The collegium system, responsible for nominating judges, was expanded to include a five member body for the nomination of Supreme Court judges based on the President's recommendation. This body would consist of the Chief Justice of India and the four most senior judges. Similarly, for the appointment of High Court judges, the collegium would be composed of the Chief Justice of India and

the two most senior judges.

In the Third Judges' Case, IN RE: APPOINTMENT & TRANSFER OF JUDGES v. Civil Advisory Jurisdiction (1998), a nine-judge bench of the Supreme Court established a consistent stance on the collegium system. They concluded that the collegium for appointing judges should be comprised of the Chief Justice and four senior judges, deviating from the two senior judges mentioned in the Second Judges' Case. Furthermore, the Supreme Court determined that the phrase "consultation with the Chief Justice of India" as mentioned in Articles 217(1) and 222(1) of the Constitution requires a majority opinion of the judges to appoint the Chief Justice

WHY WAS THE NATIONAL JUDICIAL APPOINTMENT COMMISSION DECLARED UNCONSTITUTIONAL

The case of Supreme Court Advocates-on-record Association v. Union of India (2015), known as the 'Fourth Judges Case', emerged from several petitions that questioned the constitutionality of both the NJAC Act and the 99th Amendment.

Facts of the case

The constitutionality of the NJAC Act and the 99th Constitutional Amendment was questioned in front of a five-judge Constitution Bench through multiple petitions. These acts aimed to establish the National Judicial Appointments Commission (NJAC) as the body responsible for selecting, appointing, and transferring judges in the higher judiciary, as outlined in Articles 124(2) and 217(1) of the Constitution. The NJAC included the Chief Justice of India, the two most senior Supreme Court judges, the Union Minister for Law and Justice, and two distinguished individuals. It sought to replace the collegium system, which comprised the Chief Justice of India and a group of the four most senior judges of the Supreme Court.

The central **issue of the case** revolved around the constitutional validity of the NJAC Act and the 99th Amendment Act.

Court Observation

The Supreme Court noted that the inclusion of the Chief Justice of India and the two most senior Supreme

Court judges in the NJAC did not adequately represent the judiciary, thus undermining its independence in the process of appointing judges. The Court expressed concerns that the involvement of the Union Minister for Law and Justice in the NJAC violated the principles of separation of powers and could lead to compromised judicial independence. There were fears that this arrangement could result in reciprocal actions and biased decisions favoring the political executive, posing a threat to the judiciary's independence. As a result, the NJAC Act and the 99th Constitutional Amendment were struck down primarily due to the excessive influence of the executive branch.

Judgement of the case

In this case, the Court declared the 99th Constitutional Amendment and the NJAC Act unconstitutional and void with a 4:1 majority ruling. The majority, comprising Justices Khehar, Lokur, Goel, and Joseph, held that the involvement of the executive in judicial appointments undermined the judiciary's authority and violated the principle of separation of powers between the executive and judiciary.

However, Justice Chelameswar dissented from the majority view, arguing that while judicial independence is important, it is not the only factor determining the judiciary's effectiveness. He contended that giving excessive weight to the judiciary's opinions is not a constitutional requirement.

Although the collegium system for judicial appointments was upheld by the majority, it was acknowledged that improvements were necessary to enhance transparency and responsiveness. The majority recognized that the existing collegium, consisting of the Chief Justice of India and two senior Supreme Court judges, did not sufficiently uphold the judiciary's authority in appointments. Additionally, they agreed that the NJAC Act violated the fundamental principles of judicial independence. As a result, the collegium process for selecting Supreme Court and High Court judges was to be continued with necessary enhancements.

Going forward, there is a need to establish a permanent and independent organization to institutionalize the process of filling judicial vacancies. This organization should have strong safeguards in place to protect the judiciary's independence and ensure its supremacy, while also considering the involvement of other stakeholders.

The organization should prioritize key principles such as independence, diversity, professionalism, and integrity in its functioning. The current system of judges appointing judges forms the foundation of this process, and it has been emphasized by the Supreme Court that excessive executive intervention should be avoided.

It is evident that maintaining checks and balances is essential for all aspects of a democratic government. The framers of the Constitution recognized the significance of involving the executive in judicial appointments to prevent the concentration of power in one branch of government. While the principle of separation of powers aims to keep each branch independent, it also acknowledges the need for collaboration and interaction among them.

Therefore, moving forward involves establishing a well-structured and independent organization that can effectively handle the judicial appointment process. This will ensure the judiciary's independence, while also maintaining a balance of power among the branches of government.

CONCLUSION

To summarize, it can be stated that the NJAC presents a higher degree of judicial accountability compared to the collegium system. However, it is crucial to recognize the fineline between promoting judicial accountability and compromising the independence of the judiciary. While the NJAC may offer some advantages over the unclear collegium system, it may not be the most suitable approach for the appointment of judges.

The creation of a National Judicial Appointments Commission (NJAC) through the 99th Constitutional Amendment was deemed by the Supreme Court to infringe upon “judicial independence”, which is considered an essential part of the basic structure of the Constitution.

In 2015, a five judge Constitution Bench declared the 99th Amendment to the constitution as unconstitutional. This 99th Constitution amendment was removed in 2015.