

ISSN: 2582-6433



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

[www.ijlra.com](http://www.ijlra.com)

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis



IJLRA

## **EDITORIAL TEAM**

### **EDITORS**

#### **Megha Middha**



*Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar*

*Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society*

#### **Dr. Samrat Datta**

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



## Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

## Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



## Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

## **ABOUT US**

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# **JUDICIAL INDEPENDENCE IN JUDICIAL APPOINTMENTS?**

Authored By.: Prof. Dr. Mahavir Singh Kalon  
Designation: Professor-in-charge, Law Centre II  
Institution: University of Delhi, Delhi  
E-mail id: drmahavirsinghkalon@gmail.com

## **Abstract**

One of the most sought after issue of debate in judicial cosmos is appointment of judges in higher judiciary. Owing to its prominence and value attached to the process it is obvious that one will go down in detail of the process adopted. The most closely attached issue of concern is its effect on judicial independence. The judiciary has been time and again emphasizing that the judicial independence will be affected adversely, if the executive is allowed any say in the process of appointments to higher judiciary i.e. to the courts of record. For once, we can agree that this hypothesis might be true and executive's say is most likely to negatively affect the judicial independence. This has been the heart of the argument against the change proposed by legislature in form of N.J.A.C. But the problem is that, is the present system of appointment, which ensures the so called "no say" of executive in process of judicial appointments, is truly independent in terms of the role of executive in appointment process?

The thing is that the executive plays a vital role, both directly and indirectly in the present appointment regime. So this argument that executive having a part to play in judicial appointments will jeopardize the judicial independence is hard to stand in the face of reality. It is having a crucial role to play in the present regime (both formally and informally). Then what is the problem in legalizing the entire process by converting this informal role into a straight jacketed formula which will not only add transparency and accountability to the appointments and at the same time ensure that judiciary is independent by avoiding any space for arm-twisting of the judiciary by executive? The problem with present process is not only limited to the informal role of executive or the other misgivings of the process but also the role of unimportant, irrelevant and even ridiculous undertakings which influences the final judgement. This research work tends to support the case of the N.J.A.C. in light of short comings of collegium system.

## **Introduction:**

There has been some serious criticism of the judiciary at the hands of critics on the lines that judges are themselves appointing judges. Former C.J.I. at a public vent brushed aside such criticism describing them as just a myth which widely propagated as well.

*"It is nowadays fashionable to reiterate phrases such as, "judges are themselves appointing judges". I consider this to be one of the widely propagated myths"<sup>1</sup>, former C.J.I. Ramana said.*

Speaking at the fifth late Sri Lavu Venkateswarlu Endowment Lecture, the CJI added :

*"The fact is the Judiciary is merely one of the many players involved in the process. Many authorities are involved including the Union Law Ministry, State Governments, Governor, High Court Collegia, Intelligence Bureau, and lastly, the topmost executive, who all are designated to examine the suitability of a candidate".*

The Chief Justice of India said he was "sad to note that the well-informed also propagate the aforesaid notion". *"After all, this narrative suits certain sections"*, he said.

It is worth mentioning that it is a hotly debated topic and point of interest of many to discuss and argue the issue of appointment of judges. Time and again the arguments are raised by either side and same demands exploring the point of equilibrium to say the least. The former CJI's point of view is relevant in this regard. *"The appointment of judges is a continuous process. After being elevated as the Chief Justice of India, I have focussed on increasing judicial appointments. I appreciate the Government's effort in appointing several judges in recent times.*

*However, some recommendations made by High Courts are yet to be transmitted to the Supreme Court by the Union Law Ministry. It is expected that the Government needs to strictly adhere to the timelines laid down in the Malik Mazhar<sup>2</sup> Case. High Courts must also accelerate the process of making recommendations to fill vacancies. I am constantly persuading Chief Justices of various High Courts to take up this issue. My desire is to witness a near-zero vacancy", he said.*

---

<sup>1</sup> Justice N V Ramana (Former Chief Justice of India), "Judges appointing judges, a propagated myth: CJI NV Ramana", Press Trust of India, Amravati, Dec 27, 2021.

<sup>2</sup>Malik Mazhar Sultan and Another vs. Uttar Pradesh Public Service Commission and Others, (2008) 17 SCC

It was also made clear by the Hon'ble C.J.I. (retired) *"It is a well-known fact that a popular majority is not a defence for arbitrary actions taken by a Government. Every action is mandatorily required to comply with the Constitution. If the judiciary does not have the power of judicial review, then the functioning of democracy in this country would be unthinkable"*, he said.

*"The concept of separation of powers cannot be utilised to restrict the scope of judicial review. This concept only protects bona fide legitimate actions. It is required that the legislative and executive wings recognise their limits under the Constitution to ensure the smooth working of the democracy.*

*The power of judicial review is often sought to be branded as Judicial overreach. Such generalisations are misguided. The Constitution created three co-equal organs, namely the legislature, the executive and the judiciary. It is in this context that the judiciary has been given the role of reviewing the legality of steps taken by the other two organs"*, he added.

Besides many things elaborated on by the former CJI, a pivotal point of discussion was judicial vacancy and the need to fill it under the present appointment regime. The opinions of former chief justice of India about the existing system of appointment, highlights the direct role of executive in appointments. Besides this there are scattered evidences of the indirect role of executive in the present system of appointments where judiciary is influenced by the executive to recommend the names of its candidates. Moreover there are innumerable instances where there have been ridiculous considerations taken into account in selecting the judges. The book by Abhinav Chandrachud *"Supreme Whispers"*<sup>3</sup> is filled with glaring examples highlighting such considerations and how they have been influencing the appointment hitherto.

He further said that, *"A Judges should be of stem stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says, Be you ever so high, the law is above you."*

Transparency of the mode and methodology of appointment of judges lies at the core of the principles judiciary cherishes to protect. The method of appointment that brings arbitrariness in the selection process is something which needs to be prevented at all costs. The entire selection

---

<sup>3</sup>Abhinav Chandrachud, *Supreme Whispers*, 1st edition (Penguin Random House India, India, 2018). Also See

process must be guided by clearly laid down criteria that which eliminates any form of arbitrariness. Though discretion is necessary but whether it can be limited or not is a question to ponder upon in light of misgivings of the process.<sup>4</sup>

The judiciary plays such a crucial role that it is necessary that it governed by same set of norms that are expected of other organs of government. This is isolation and sense of being above than rest of the society is something that needs to be checked as it mutually disadvantageous to both society and judiciary. After all no matter how high a post they hold they are also humans with all the shortcomings and are liable to err.

The appointment regime of judges in U.S. is governed by executive subject to approval by legislature which also is dominated by executive and in the same way the process is controlled by executive in U.K. which is supported by a Judicial Appointment Commission to do the required. In sharp contrast in India it is dominated by judiciary itself with the process being more subjective then objective. This will remain to be so until constitution is amended and the amendment passes the test of judicial review.<sup>5</sup>

## **THE ORIGINAL INTENT**

The Constitutional assembly was succinct and to the point in adopting and implementing an appointment process for judiciary that is just, fair, reasonable and more importantly able to deliver. The process that is able to deliver is one which appoint judges who are able to stand against the might of executive and pronounce judgments impartially.

In Nehru's words, judge should be of the "*highest integrity*" and who would be "*[persons] who can stand up against the executive government and whoever might come in their way.*"<sup>6</sup> The constituent assembly also agreed that, "judges should be independent and not insulated."

The constituent assembly was clear in the idea of rejecting upper hand to judiciary in appointment process as it firmly rejected the use of the word concurrence in place of consultation. Explaining the rationale Dr. Ambedkar said that–

---

<sup>4</sup>See Arghya Sengupta and Ritwika Sharma, *Appointment Of Judges To The Supreme Court Of India*, 1st edition (Oxford University Press, Delhi, 2018).

<sup>5</sup> Refer, 5th Late Shri Lavu Venkateswarlu Endowment Lecture, Vijayawada, Sunday, 26 December 2021.

<sup>6</sup> See Justice AP Shah, "Appointment Of Judges: Balancing Transparency, Accountability And Independence", Justice VR Krishna Iyer Memorial Lecture, 2016.

*“It would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable position ... With regard to the questions of the concurrence of the Chief Justice , it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all that, the Chief Justice is a man with all the failings and all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore think that is also a dangerous proposition.”*

These discussions led to adoption of an appointment regime where appointment was supposed to be made by the executive but only after consulting the judiciary speaking through Chief Justice of India and such other judges of Supreme Court as the President deems fit, in form of Articles 124 and 217 of the Constitution of India. The appointment process in which top constitutional functionaries had crucial role to play was deemed to be sufficient enough to ensure that the best talent finds its way to the top of judicial hierarchy.

## **THE CONSTITUTIONAL PRACTICE AND** **ADJUDICATION**

The appointment of judges to the apex court functioned more closely and collaboratively than it did in 70's. This is evident from the fact that judges were appointed always after consultation with the judiciary and it will not be wrong to conclude that there was concurrence of Chief Justice of India to all the appointments made by the executive during the initial years after independence. After change in person at helm of executive the things begin to change quickly. There were many confrontation and way too many incursions in the domain of other organ of government. This led the judiciary to take a stand and virtually take away the powers into its own hands to usurp the control over appointment process in 2<sup>nd</sup> judges case.<sup>7</sup>

---

<sup>7</sup>Supreme court advocates-on record association vs Union of India, (1993) 4 SCC 441.

## **The Disintegration of an Independent Judiciary**

There four crucial turning points which led us to where we are today. The crucial turning points were 4 landmark judgments. The first judgment was the *Sri Sankari Prasad Singh Deo*<sup>8</sup> case of 1951. Then came the *Sajjan Singh*<sup>9</sup> case of 1965 where the courts accepted the power of legislature to amend the Constitution but this was reverted back in *Golaknath*<sup>10</sup> case where a 11 judge bench ruled that the legislature does not have power to amend the chapter on fundamental rights of the Constitution of India. This led to rumours that judiciary will be packed with judges that will over rule the verdict of Supreme Court in Golaknath case. Then came the *Kesavananda Bharti*<sup>11</sup> case where the apex Court laid down the basic structure doctrine by a slim majority of 7-6 and held that parliament does not have power amend the basic structure of the Indian Constitution. On the immediate next day the supersession took place and Justice A.N. Ray superseded 3 Supreme Court Judges to be C.J.I.

The then Law Minister of Union explained that the political alignment of the candidate with ethos and motto of the Constitution along with spirit of social justice of the Constitution needs to be assessed to appoint a person as Supreme Court Judge. This was nothing but the attempt to appoint the person who could toe the line of executive.

Then came the *Habeas Corpus* case<sup>12</sup> where the sole dissenting judge Justice H.R. Khanna was punished and superseded by a Junior Judge Justice M.H. Beg.

This paved the way to 3 judges case where ultimately the power to appoint was led in the hands of judiciary itself.

### ***The First Judge's Case***

In 1989 a 7 judge bench of the Hon'ble Supreme Court in *S.P. Gupta v. Union of India*<sup>13</sup>, sat and decided that the Union executive can over-rule the views rendered by the Collegium. This caused the opinion that judiciary has surrendered and started to toe the line of executive.

This opinion changed a few things permanently. So much so that an article in India Today in 1989

---

<sup>8</sup>*Sankari Prasad Singh Deo vs. Union of India (UOI) and State of Bihar*, [1952] 1 SCR 89.

<sup>9</sup>*Sajjan Singh vs. State of Rajasthan*, [1965] 1 SCR 933.

<sup>10</sup>*I.C. Golak Nath and Ors. vs. State of Punjab and Ors.*, [1967] 2 SCR 762.

<sup>11</sup>*Kesavananda Bharati Sripadagalvaru vs. State of Kerala*, (1973) 4 SCC 225.

<sup>12</sup>*Additional District Magistrate, Jabalpur vs. Shivakant Shukla*, (1976) 2 SCC 521.

<sup>13</sup>*S.P. Gupta vs. Union of India (UOI) and Ors.*, [1982] 2 SCR 365

said, “.....unless the Chief Justice of a High Court displays a high degree of independence and integrity, many of the judges end up being appointed because of their political affiliations.”

This laid the foundation for the second judge’s case.

### ***The II<sup>nd</sup> Judge’s Case<sup>14</sup>***

Thenine judge bench of Hon’ble Apex Court came to the conclusion by a majority of 7:2 that executive is bound by the views of judiciary in matters of appointment. The Hon’ble Apex Court also held that Collegium consisting of C.J.I and 2 senior most judges has primacy over decisions pertaining to the appointment of judges. This also came to be heavily criticized. In words of Justice Krishna Iyer “this judgment is an egregious fraud on the Constitution”. HM Seervai, the constitutional expert is of the view that “never has a majority judgment of the Supreme Court reached a lower level of judicial incompetence.” Some even went on to say that, “fools run where angels fear to tread.”

### ***The Third Judge’s Case<sup>15</sup>***

The Collegium recommended certain names in 1998, to which the executive expressed certain reservation to few names. While reconsidering the names Collegium laid the ultimatum that either appoint all or none. This led to the reference sought by President in form of the third judge’s case. The system of appointment that was implemented by this verdict was criticized as it laid no criteria to evaluate the candidature for the top post, no mechanism, no staff, no institutional framework for appointments. This was most unique mode of appointment as nowhere in the world judiciary had such great power as it did in India.

### ***The National Judicial Appointments Commission***

The NJAC was established by the parliament of India by a unanimous verdict where there were no negative votes and only one abstention. The idea of Commission for appointment was not new and had been implemented by many other countries. This was welcomed in light of the arguments that it will prevent improper politicization of the process, increase fairness, promote diversity and support faith of masses in the process and system.

The composition proposed which never saw the light of day was of 6 members i.e. Chief Justice of India, 2 senior most judge of Supreme Court, Law Minister, and 2 members of civil society

---

<sup>14</sup>Supreme Court Advocates-on-Record Association vs. Union of India, (1993) 4 SCC 441

<sup>15</sup> See *In Re: Under Article 143(1) Of Thevs Unknown*, 1998 (5) SCALE 629 (presidential reference).

who were to be appointed by Committee consisting of CJI, P.M. and leader of opposition. But this was all to be rejected by the NJAC Judgment or the fourth judge's case.''

### ***The NJAC judgment***

The 99<sup>th</sup> constitutional amendment was nullified by the Hon'ble Apex Court in NJAC Judgement or *Supreme Court Advocates On Record Association v. Union of India*<sup>16</sup> on the premise that it vitiates the primary structure of the Constitution and the dissenting Judge Justice Chelameswar (ratio of judgment was 4:1) held that judicial independence in part of basic structure but there is nothing in NJAC Act that violates the basic structure of the Constitution.'

## **THE NJAC JUDGEMENT AND BEYOND**

### ***NJAC and Basic Structure***

In the Kesavananda Bharti case the Hon'ble Apex Court propounded the doctrine of Basic structure whereby, "an amendment or the law of land violates of basic structure of the Constitution will be considered ultra vires and thus unconstitutional. The judgment itself laid down that principles like secular nature of Constitution, republic form of government, supremacy of Constitution, separation of powers etc."

The Hon'ble Supreme Court while elaborating the basic structure doctrine restricted itself to lay the components of basic structure. Moreover it said that change in a thing does not necessarily mean destruction of basic structure and whether a basic structure is destroyed or not is a matter of substance and not of form. This means that the change in a component does not necessarily mean that basic structure is destroyed. Whereas on the contrary the Hon'ble Supreme Court in NJAC case raised a part of a feature of basic structure to the status of basic structure. Furthermore it held that any change in component of feature of basic structure would mean destruction of basic structure.

Justice Chelameswar held that the Articles 124 and 217 deal with a feature of independence of judiciary. He also said that there are many safeguards in place in our Constitution which are aimed to preserve and protect independence of judiciary. Some of the prominent safeguards in the Constitution aimed to the requisite can named as follows:

*"....Certainty of tenure, protection from removal from office except by a stringent process in the cases of Judges found unfit to continue as members of the judiciary, protection of salaries and*

---

<sup>16</sup> NJAC case (2016) 5 SCC 1.

*other privileges from interference by the executive and the legislature, immunity from scrutiny either by the Executive or the Legislature of the conduct of Judges with respect to the discharge of judicial functions except in cases of alleged misbehaviour, immunity from civil and criminal liability for acts committed in discharge of duties, protection against criticism to a great degree...*<sup>17</sup>

## **Problematic interpretive process**

There has been some harsh criticism of the interpretative process adopted by the Hon'ble Apex Court in NJAC Judgment. To name a few prominent ones would surely include the rationale accorded by majority judges in the NJAC judgment. An argument was raised by the petitioner in the NJAC case that the II<sup>nd</sup> judges case laid down that primacy of judiciary in appointment process is indispensable for judicial independence (basic feature of Constitution). Thus cannot be destroyed by the Parliament. They further argued that abolishing the Collegium system of appointment the parliament is doing something which is ultra vires and out of the purview of the powers of Parliament because abolishing Collegium would mean that it violated the basic feature of Constitution. This is something which it cannot do.

The majority judgment agreed with the views of the petitioners on two grounds. They are, first of all the interpretation of articles governing judicial appointment to court of record require that primacy is with judiciary only because otherwise it would mean compromising judicial independence. Secondly there is a long standing practice in support of primacy for views of judges in decision of appointments to higher judiciary.

Interpretation as applied by the judiciary in the matter that the primacy of views of collegium in appointment of judges is a basic feature is incorrect. The mention of second judges case here is important because the II<sup>nd</sup> judges case though interpreted the word 'consultation' as 'concurrence' but it did not mention that the primacy of judiciary is utmost necessity for maintaining judicial independence nor it held that judicial primacy is an indispensable feature of judicial independence. On the contrary it has been held in NJAC judgment that judicial primacy in appointment process is a necessary feature of judicial independence therefore it cannot be tampered with or taken away.

---

<sup>17</sup>(2016) 5 SCC 1132.

Moreover, drawing an inference that judicial primacy which is just a component of judicial independence is itself a basic feature of constitution is just not right. These are two different things. As part cannot be whole, as it is just a component of feature of basic structure and not the basic structure.

### **Long practice is no justification**

The long practice is just to consult the C.J.I. and not to have concurrence. Moreover, a long practice in itself does not mean that judicial primacy is part of basic structure because it is only the judicial independence that is a part of the basic structure. If only long practice can justify it to be part of basic structure then basic structure needs to look back upon as to what it actually is?

### **Incorrect reliance on Ambedkar's views**

The interpretation of the judgment in NJAC case relies heavily on the interpretation given by Dr. Ambedkar. This is also not entirely correct. Dr. Ambedkar specifically stated that the judiciary alone cannot be trusted with the power over appointment. Whereas the constituent assembly aimed for the consultation to provide a balanced approach and each organ will act as a check on the other organ. The participation of both organs was considered necessary to ensure that the truth will prevail in the process. The constituent assembly nowhere conferred the power on the judiciary alone nor conferred the primacy to the judiciary.

### **Primacy in judicial appointments**

The judiciary should have primacy in the appointment process is the only way to ensure judicial independence should be given reasons for. The judgment which does not provide reasons for giving the basic premise of the judgment is hard to support as it does not inspire confidence because of this reason. Moreover, there is a need to define judicial independence also so that its protection can be ensured.

### **Accountability to the people:**

The role of lay members was also heavily criticized by the NJAC judgment. The concern of Justice Kehar and Justice Goel was that the lay members should not be made member. And concern of Justice Lokur was that the lay members were given the veto power. The problem is that if the court had objection to membership or the veto power only then it is not right to reject

the NJAC in totality. The NJAC should have been given a fair chance to be implemented and work and only then it should have been rejected.

Furthermore the participation of individual law minister in the Commission was considered a threat as he could over power the process is not justified because how come so highly placed 3 judges of Hon'ble Supreme Court will be over powered by just one minister? And even if can? What is stopping them to overpower in the present regime as though not sitting in Collegium but he has all the resources of the state to do the requisite for the unjustified ends.

### ***No alternative to the collegium***

Shortcomings of the process

*'Best kept secret'*

The problem with the Collegium system of appointment is that the judges are being appointed but what is the criteria for it, is not known to anyone. It can be described as a best kept secret. Justice Ruma Pal, a retired judge of the Apex Court, has propounded it to be as *"one of the best kept secrets in this country."* Moreover as the commentator Ashok Malik explains, "the selection process for judges has its roots in personal connections by which children of influential lawyers and judges are placed in chambers of senior lawyers. Senior advocates are usually identified from this pool. The actual selection of judges is narrowed to being selected from this pool." He argues that, *"an M.S. Dhoni could emerge from lower middle class India to captain the cricket team; but what are the odds that he could have become a judge in the Supreme Court if Dhoni been an exceptional graduate from a Ranchi law college?"*<sup>18</sup>

### ***Conclusion:***

The Collegium needs amendment but what should be done could have been decided by the Judiciary. The NJAC judgment provided a wonderful opportunity, but it failed to do it. Justice Kurian Joseph, recently regretted about NJAC judgement, but he also said that the independence of the judiciary is better protected under the 'Collegium system', but, there is a need to devise, how should it work.<sup>19</sup>

---

<sup>18</sup>Justice AP Shah, "Appointment Of Judges: Balancing Transparency, Accountability And Independence", Justice VR Krishna Iyer Memorial Lecture 2016.

<sup>19</sup> See Padmakshi Sharma, "Regret NJAC Decision, 2018 Press Conference A Story Of 'Lost Expectations': Ex-SC Judge Justice Kurian Joseph", Livelaw, 3 June 2023, <https://www.livelaw.in/top-stories/supreme-court-justice-kurian-joseph-njac-decision-press-conference-229991>.

At last it can be said that the judiciary did not provide an alternative to the present regime of appointments even though the Court admitted the shortcomings of process in following words “*the present Collegium system lacks transparency, accountability and objectivity and very serious allegations and many a time not unfounded too, have been raised that its approach has been highly subjective.*” After these comments the Hon’ble Judge joined the majority of judges giving the verdict and rejecting the Collegium all together.

MrParasaran provided insights to the judgment in NJAC Case. He is of the view that, “*as a future course of action, that all cases questioning the validity and/or interpretation of a constitutional amendment must be heard by a bench consisting of not less than 13 judges. And after thus amending the Constitution, the president may exercise his power to consult the Supreme Court by framing appropriate questions and making a reference under Article 143 to revisit the NJAC decision. The government should seriously consider making a constitutional amendment to this effect. Alternately, the court itself can provide by its own rule that cases pertaining to constitutional amendments will be heard only by 13 judges.*”Justice John Marshal<sup>20</sup> has once warned that the power of the judiciary resides not in deciding the cases or imposing sentences, or sanctioning contempt but it is in the public’s trust, confidence, and most importantly in faith.<sup>21</sup>



---

<sup>20</sup>Former Chief Justice of the American Supreme Court.

<sup>21</sup>Rajesh Kumar Singh vs. High Court of Judicature of Madhya Pradesh, Bench Gwalior,(2007) 14 SCC 126.