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CASE ANALYSIS ON: SUPREME COURT ADVOCATES ON RECORD V. UNION OF INDIA

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INTRODUCTION

The *Supreme Court Advocates- on Record Association and Anr v Union of India*¹ is a landmark judgment that significantly changed the constitutional and judicial fraternity. The case played a determining role in revamping the judicial appointment mechanism to secure a legitimate balance between the judiciary and executive powers. The kernel of this case is the appointment of judges, the collegium systems validity and the setting up and functionality of the National Judicial Appointments Commission Act, which was annulled later. With the act being struck down, the judgment and its implications strengthened the power of the legal and constitutional framework. This has led to tremendous changes in the appointment process of judges since Indian Independence.

The procedure for appointing Supreme Court and High Court judges has been laid out in **Articles 124² and 217³** of the Indian constitution. Incipiently, the president held the primary role in the appointment of judges, where with the consensus and opinion of certain other authorities, the judges were appointed. The executive had a significant hand in the selection process at this time. The President and the Governor for the Supreme Court and High Court, respectively, along with influential judges and certain executive members, would appoint the Judges. This system faced criticism as it involved a lot of political influence.

After 1981, the Indian judicial system went through tremendous alterations based on the interpretation and application of the provisions under the constitution. In a series of collective landmark judgments known as the “Three judges cases”, the Supreme Court altered the judicial appointment system significantly. presently, the Indian Judicial system follows the collegium

¹ Supreme Court Advocates- on Record Association and Anr v Union of India (2016) 5 SCC 1.

² INDIA CONST. art. 124.

³ INDIA CONST. art. 217.

method. To understand the changes and its implications that have come up in the judicial appointment process and in the establishment of the collegium system, looking at the preceding cases is important.

It began with the case of **S.P. Gupta v. Union of India 1981**⁴, commonly also known as ‘first judges case’. The Supreme Court held that in the case of appointment of judges the president has the final say and there is no binding power on the president regarding the consultation of judges. Consultation under Articles 124⁵ and 217⁶ does not mean concurrence. This judgment also gave importance to the value of the executive’s judgments and held that they have primacy in the appointment process.

The aftermath of this case, was the **Advocates-on-Record Association v. Union of India 1993**⁷, also known as the Second Judges case. This case overruled the previous case and stated that “consultation” meant "concurrence." ⁸ Hence, ensuring the chief justice's opinion is essential and binding in the judges appointment process. It was in this case that the collegium system was brought into existence. The opinions of the Chief justice along with two senior most Supreme court judges would be binding upon the president.

This judgment was strengthened in the subsequent case of **In re Presidential Reference**⁹, also known as the Third Judges Case 1998. The idea of the collegium was broadened and from senior most judges, it was increased to four senior most judges and the chief justice of the supreme court and high court respectively.¹⁰

With this the collegium system came into force for the appointment and transferring of judges. Through the collegium system, the judiciary had direct and primary control over appointments, almost negating the power of the executive in the selection process, hence maintaining a healthy balance of separation of power between the executive and the judiciary. In the case of the Supreme court, the collegium was constituted of the chief justice and four most senior judges of the Supreme court and in the case of High court, two judges along with the Chief

⁴ S. P. Gupta v. Union of India, AIR 1982 SC 149.

⁵ *Supra* note 2.

⁶ *Supra* note 3.

⁷ Supreme Court advocates on record association v. Union of India, (1993), AIR 1993 4 SCC 441.

⁸ *Id.*

⁹ In re Presidential Reference AIR 1999 SC 1.

¹⁰ *Id.*

Justice decided upon the matter of the appointment, which was to be approved by the president later. The collegium system faced a lot of backing as well as active criticism.

It was till the NJAC act of 2014 that the collegium was in power, but with the act coming into force, a new regime came into force which tried to revoke the collegium system. It was held by the court, struck down the NJAC Act's provisions and considered it evil.

The apex court in the case of **Advocates on Record V. Union of India 2015**¹¹, constituting a five judge bench gave a majority judgment that the basic structure of the constitution was getting violated with the implementation of the NJAC act, specifically judicial independence was getting affected. Indian constitution lays significant importance to the independence of judiciary as this helps to ensure a fair and just legal system. The active involvement of the executive in appointments of judges, as to be implemented by the NJAC act, posed to be a threat to the judicial system and in the long run the fundamental rights of the citizens.

JUDGMENT

In this referral constitutional case, the Constitution bench of the Supreme Court quashed the 99th Constitutional Amendment and the National Judicial Appointments Commission Act of 2014. The majority decision on this case was provided by a 4:1 with contributions from Justice J. S. Khehar, Justice Madan B. Lokur, Justice Kurian Joseph, as well as Justice Adarsh Kumar Goel, who reinstated the judicious appointments of Judges through the Collegium system.

The Court reached the conclusion that the NJAC was unconstitutional and went against the Constitution's structure. It also departed from the doctrine of the separation of power, which included the judiciary. As be constructed, NJAC was proposed to bestow a significant role to the Executive in affairs of this nature, thereby reducing the judiciary to an insignificant entity in the protection of the Constitution, which is an imperative benefit that cannot be underestimated.¹² Thus, the majority wrestles that the executive arm should not have a hand in appointing people to the Judiciary. Democracy, this rule of law, and constitutionalism are made to be preserved through this institution.¹³

¹¹ *Supra* note1.

¹² Khandelwal, A. (2022). Independence of Judiciary. *Part 1 Indian J. Integrated Rsch. L.*, 2, 1.

¹³ Chandra, P., & Garg, A. (2021). Judicial Accountability and Transparency in India: Flaws and Road Ahead. *GLS Law Journal*, 3(2), 79-86.

Even as the Court has referred to the NJAC and struck it down, the Court has not shied away from admitting that the collegium system has its demerits, including an opaque system that is not answerable to anyone. The bench has recommended changes to the collegium system of selection of judges, placing much importance on the system's proper functioning in justice appointments. This observation may not have been set in stone because it paved the way for further debates on enhancing the judicial selection process.

Justice J. Chelameswar, while descending the majority opinion, accepted the concept of NJAC and felt that the collegium system had become very secretive and inefficient hence, the NJAC provided a balanced mechanism for appointing judges. He disagreed with the majority in this regard, which it declared that NJAC is in any way a threat to the independence of the judiciary.¹⁴

CRITICAL ANALYSIS

On the basis of the constitutional validity of the NJAC Act and the 99th Constitutional Amendment, *the Supreme Court Advocates- on Record Association and Anr v Union of India*¹⁵ had made the constitutional amendment and the NJAC Act as unlawful and void, thus reinstating the Collegium system in the appointment of the judges. This was a 4:1 majority Decision that upheld judicial independence as one of the basic structures of the Constitution. On the one hand, it upheld the judiciary's independence regarding decision-making. Still, on the other hand, it has kept many questions about the collegium system's accountability unanswered.¹⁶ This paper raises questions on the judgment and analyses it with principles of judicial independence, separation of powers, and cases relevant to the exercise.

Judicial Independence and the Basic Structure Doctrine

Out of the three reasons that the Court used to strike down NJAC, the principle of judicial independence was the main one adopted by the Court. The majority opinion also stressed that, by entrusting the role of appointments to the judicial positions to the executive, the NJAC was unconstitutional as it infringed upon the basic structure doctrine mentioned in *Kesavananda*

¹⁴ Patnaik, J. A. (2015). A Critique of the NJAC Judgement. *Journal of National Law University Delhi*, 3(1), 17-24.

¹⁵ Supreme Court Advocates-on-Record Ass'n v. Union of India, (2016) 5 S.C.C. 1.

¹⁶ Priyanshu. (2022). Supreme Court Advocates on Record Association & Anr vs Union of India. *Jus Corpus LJ*, 3,

*Bharati Sripadagalvaru and Ors v. State of Kerala and Anr. , 1973.*¹⁷ This aspect of the constitution prevents key areas of the constitution from being changed by Parliament: the judiciary and, more specifically, judicial independence, which has been successfully defended in terms of this doctrine.¹⁸

The use of the basic structure doctrine was first applied to declaring invalid amendments that would have detrimentally affected the independence of the judiciary, as in *Indira Nehru Gandhi v. Raj Narain, 1975.*¹⁹ This case stated that the independence of the judiciary cannot be compromised. Saying that the NJAC would jeopardize this independence, the 2015 judgment thus safeguarded the basic structure and the judiciary against a probable erosion by the higher executive.²⁰

Scrutiny of this judgment has, however, attracted criticism because the Court was inflexible in its approach to the concept of judicial independence. Some analysts have argued that provisions of the NJAC that demanded the involvement of the executive in the appointment of judges were actually a cause of checking executive influence and not an infringement on the independence of the judiciary.²¹ Even in *S. P. Gupta v. Union of India, 1982 (First Judges Case),*²² the Court once said that executive dominance in judicial appointment is preferable, and the Court pointed out that involvement from the executive was not always detrimental to independence.

The Collegium System: Transparency and Accountability Issues

On the one hand, the Court admitted that the collegium system has its demerits. Nevertheless, the decision to retain collegium as the mode of appointing Judges has been one of the most criticized parts of the Judgment. As for the *Second Judges Case, Supreme Court advocates on record association v. Union of India, 1993,*²³ the collegium system gives the senior judge's body the authority to make appointments. However, this system has been described as wearing a veil and being very much impersonalized.²⁴

¹⁷ Kesavananda Bharati Sripadagalvaru and Ors v. State of Kerala and Anr. , (1973), AIR 1973 SCC (4) 225.

¹⁸ Hsu, B. F. (2004). Judicial independence under the Basic Law. *Hong Kong LJ*, 34, 279.

¹⁹ Indira Nehru Gandhi v. Raj Narain, (1975), AIR 1975 Supp SCC 1.

²⁰ Rakove, J. N. (2006). The Original Justifications for Judicial Independence. *Geo. LJ*, 95, 1061.

²¹ Pasquino, P. (2003). Prolegomena to a theory of judicial power: the concept of judicial independence in theory and history. *Law & Prac. Int'l Cts. & Tribunals*, 2, 11.

²² *Supra* note 4.

²³ *Supra* note 7.

²⁴ Tripathy, R. P. (2021). The Supreme Court Collegium and Transparency: A Non-Committal Relationship.

The Court itself said so in obiter dictum in the aforesaid judgment of 2015 that the collegium system has its drawbacks. It demanded change to make the system more transparent without prescribing how this change could be effected or making the changes immediately.²⁵ The lack of explanation on addressing these issues has been considered a lost chance by society, as illustrated below. In *Ashok Kumar Yadav v. State of Haryana, 1985*,²⁶ such concern was highlighted, stressing the need to make public appointments transparent, indicating that lack of the latter erodes the public's confidence in state institutions. However, the collegium system has continued to be an enigma because of the behind-closed-doors decision-making process and a secretive regime in the selection process.²⁷

In addition, the Court in *Ashok Reddy v. Govt. In Architects & Engineers (P) Ltd v. State of India, 1994*,²⁸ the Hon'ble Supreme Court of India pointed out that evaluating criteria should not be conducted so that the desired result of the person making the appointment is achieved. While the collegium system supports the independence of the judiciary, it has still not been able to escape from being charged with charges of appeasement and favoritism.²⁹ This brings the issue of democratic credibility to such a system where accountability, which is a crucial factor, is not well exercised.

Separation of Power and the Role of the Executive.

The process of separation of power is another significant principle that the Constitution upholds since the executive, legislative, and judicial powers are well established without being interconnected. It may be noted that the Supreme Court in India in *Ram Jawaya Kapur v. State of Punjab, 1955*,³⁰ asserted the principle of Separation of powers whereupon, no branch should usurp the jurisdiction of the other branches of Government.³¹

The 2015 judgment once again supports the notion of the separation principle of power, which means that judicial appointments should be in the hands of the Judiciary. The majority of the

Socio-Legal Rev., 17, 1.

²⁵ Bhatnagar, V. (2021). Revisiting the Collegium System. *Jus Corpus LJ*, 2, 139.

²⁶ Ashok Kumar Yadav v. State of Haryana, (1985), AIR 1985 4 SCC 417.

²⁷ Singh, V. (2016). Collegium system vis-à-vis national judicial appointments commission: a critical appraisal. *International Journal of Research in Economics and Social Sciences*, 6(1), 348-354.

²⁸ Ashok Reddy v. Govt. In Architects & Engineers (P) Ltd v. State of India, (1994), AIR 1994 2 SCC 303.

²⁹ Ananda, D. (2023). Judges Appointments: Collegium System versus National Judicial Appointments Commission. *GNLU JL Dev. & Pol.*, 13, 53.

³⁰ Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549.

³¹ Chaudhuri, T. (2007). Relations of Judiciary and Executive in India. Available at SSRN 1672222.

judges opposed the NJAC because the executive would participate in the appointment of judges. However, Justice Chelameswar, who was part of the minority opinion, made a blurred argument. He pointed out that the NJAC has merit because it was composed of persons from outside the judiciary and hence had strict supervision. As per Justice Chelameswar's observation, the 'collegium system of appointments' does not have any outside checks; thus, it becomes a system organised from within that is vulnerable to biases and not transparent.³²

It has further with the dissent of Justice Chelameswar, a global trend where the appointment of judges is sometimes more open to the larger public. For example, in the U.K., the Judicial Appointments Commission, while including lay members, does not threaten the independence of the judiciary as it is composed of representatives of the judiciary, the executive and the lay persons. Likewise, the President appoints federal judges in The United States of America.³³ Still, their appointment requires approval from the Senate to warrant that even the legislative branch of government has some check over the appointments made by the executive arm of the government. The Indian model, on the other hand, has progressed into a scenario wherein the judiciary owns the appointing power and hardly reports it to any external body.³⁴

Checks and Balances: Judicial Review vs. Executive Power

The judgment also asserts the judiciary on the doctrine of judicial activism in preserving constitutionalism.³⁵ The doctrine of judicial review has been held to be part of the constitutional fundamental by *L. Chandra Kumar v. Union of India, 1997*.³⁶ This principle was applied in the 2015 case to do away with the NJAC because, according to the judiciary, the interference by the executive was capable of vitiating the judicial review process.

Nevertheless, this focus on the independence of the judiciary means that much power resides with the judiciary³⁷. In *Shamsher Singh v. State of Punjab, 1974*,³⁸ the Court acknowledged

³² Gupta, N. (2019). Role of Fundamental Rights in Balancing Powers between the Legislature, the Executive and the Judiciary. *Int'l JL Mgmt. & Human.*, 2, 116.

³³ Bzad, R. (2021). A Deep Concern of Executive Aggrandizement: A Comparative Study of Separation of Powers in India and the USA. *Issue 4 Int'l JL Mgmt. & Human.*, 4, 2564.

³⁴ Gilchrist, R. N. (1923). *The Separation of Executive and Judicial Functions: A Study in the Evolution of the Indian Magistracy*. University of Calcutta.

³⁵ La Porta, R., Lopez-de-Silanes, F., Pop-Eleches, C., & Shleifer, A. (2004). Judicial checks and balances. *Journal of Political Economy*, 112(2), 445-470.

³⁶ *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261.

³⁷ Calabresi, S. G., & Owens, J. (2014). The Origins of Judicial Review. *Northwestern Public Law Research Paper*, (14-05), 14-01.

³⁸ *Shamsher Singh v. State of Punjab*, (1974), 2 SCC 831.

the executive's modest but indisputable function in appointing judges. Not only did the Supreme Court eliminate the NJAC in its entirety, but it also negated any type of executive participation, which, according to some, maybe unfair regarding checks and balances. The judgment of 2015, in essence, manufactured a situation whereby the judiciary is the only institution with a say in appointment processes and hardly any accountability.³⁹

Potential Reforms: Bridging Independence and Accountability.

The control of the judiciary over its selections has led to debate on the aspects of accountability and the issue of disclosure. The Court has not shied away from admitting the challenges posed by the collegium system in the Supreme Court Advocates-on-Record Association. Still, it has not offered any idea about concrete changes or immediate system removal.⁴⁰ However, the NJAC, as much as it was filled with some issues, was trying to involve more people in these appointments.

As stated in the case of *Ashok Kumar Yadav v. State of Haryana & Ors.*,⁴¹ bringing transparency is an important factor in the judiciaries that will enhance the public's faith in the judiciary systems. Possible changes in relation to the Collegium system are revealing the rationale for appointments or non-appointments, which can increase openness while preserving its appellate jurisdiction independence.⁴² Further, a more diverse panel could bring in checks from outside while still not allowing the executive to call the shots.

In *S. P. Gupta v. Union of India*,⁴³ the court also noted the need to balance power between the executive and judicial branches in the appointments, which the NJAC was poised to deliver. Although the apex court has quashed the NJAC, this proposition is still relevant, given the fact that all over the developed countries, there should be some degree of executive participation since the two branches of government already exist.⁴⁴

³⁹ Dargar, A. (2024). Doctrine of Judicial Review: A tool to examine the constitutional validity of Legislative, Executive and Judicial actions. *Executive and Judicial Actions (April 2, 2024)*.

⁴⁰ Sengupta, A. (Ed.). (2017). *Appointment of judges to the Supreme Court of India: Transparency, accountability, and independence*. Oxford University Press.

⁴¹ *Supra* note 26.

⁴² Mehra, A. K. (2018). India's democratic adaptations and experiments. In *Routledge Handbook of Politics in Asia* (pp. 307-329). Routledge.

⁴³ *Supra* note 4.

⁴⁴ Pai, S., & Sudhish, V. (2023). Judicial Independence as a Basic Feature of the Constitution of India. *CMR Univ. J. Contemp. Legal Aff.*, 5, 7.

The *Supreme Court Advocates-on-Record Association v. Union of India 2015*⁴⁵ decision is a landmark in the constitutional legal system of India that strengthens the intention of the judiciary's independence. However, by completely disowning NJAC and sticking to the collegium system, the Court has continued to defend a system that has been so condemned for its opaqueness and irresponsibility.⁴⁶ While again a win for judiciary independence, the judgment has raised issues of democratic accountability about appointing judges.

The case highlights that while being independent is good, being accountable might be even better; it also clearly shows that the need for judicial reforms has never been more critical.⁴⁷ In any case, the Court was able to maintain the status quo, opting not to delve deeper into the problems inherent in the collegium system while opening up further discourses concerning the question of judicial independence on one side and the question of transparency and accountability on the process of selecting judges, on the other.⁴⁸

CONCLUSION

The effects of the *Supreme Court Advocates-on-Record Association v. Union of India, 2015*⁴⁹ judgment brought massive changes in the rules on appointing judges in India. After the abrogation of the 99th Constitutional Amendment and the NJAC Act, the collegium system of the appointments of the higher judiciary judges, even with its demerits, is the only functioning system now. While the decision strengthened the independence of the judiciary, it led to further discussions regarding the openness and responsibility of the collegium model.

However, the judgment awoke the Supreme Court into more formative actions over the problematic issues that surround the collegium system. In 2016, to replace the collegium system that had been in place since 1999, a draft Memorandum of Procedure (MoP) was introduced to increase the transparency of the appointing process. Some changes are establishing more objective requirements for the selection of judges, strengthening the activities of the collegium, and indicating a way to receive comments on it. However, the actualization of the MoP has been hampered by the discord between the judiciary and the

⁴⁵ *Supra* note 15.

⁴⁶ Alam, A. A. (2023). Politics Of Judiciary: The Origin and Development Of Collegium System. A Landmark On The Indian Constitution, 315.

⁴⁷ Jha, M. K. Indian Politics and Political Processes.

⁴⁸ Chandra, A., Hubbard, W., & Kalantry, S. (2018). From Executive Appointment to the Collegium System. *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America*, 51(3), 273-289.

⁴⁹ *Supra* note 15.

executive over a number of provisions of the legislation, such as the veto regarding the dismissal of appointments on account of national security. Affecting the balance between the separation of power between the judiciary and the executive is a direct hit on the basic structure of the Constitution. Hence, letting the Judiciary separately establish its own rules and regulations to ensure its primacy was essential. Striking down of the NJAC act ensured that the executive does not overstep its boundaries.

The collegium system has been criticized; improvement in the system has not been a major overhaul. This leaves the judiciary as the leading participant in the appointment process, with minimal interference from outside forces that preserve the current state. The issue of transparency in the appointment process has been the subject of concern; thus, politicians' confidence in the same still remains an impediment.

In totality, while the judgment safeguarded judicial independence, the questions related to the accountability and transparency of the powerful collegium system remained unanswered and further perpetuated speculations about the requirement of judiciary reforms concerning the appointments in India. It is also the duty of each and every citizen to ensure that there is free and fair appointments. It is essential to also keep the judicial in check to ensure there is no judicial activism does not end up becoming Judicial overreach.