

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, Lakshmanagarh, Sikar*

*Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, 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.Kalpna

Assistant professor of Law

Mrs.S.Kalpna, 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.

# **National Judicial Appointments Commission** **Judgement Case Analysis**

Authored By- Arya Vansh Kamrah

**(2016) 5 SCC 1**

**BEFORE THE HON'BLE SUPREME COURT OF INDIA**

(Before Jagdish Singh Khehar, Chelameswar, Madan B. Lokur, Kurian Joseph and  
Adarsh Kumar Goel, JJ.)

Supreme Court Advocates-on-Record Association ..... **Petitioner**

*Versus*

Union of India..... **Respondent**

**Decided on 16.10.2015**

## **CASE FACTS**

The government of India enacted two acts, namely the Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014. The direct outcome of the enactment of the above-mentioned acts was the establishment of the National Judicial Appointments Commission (NJAC). The NJAC was set up to regulate the selection and transfer of judges to the Higher Judiciary. The NJAC was proposed to replace the Collegium (to replace

the existing procedure as mentioned under Article 124(2) and Article 217(1) of the Indian Constitution). The proposed NJAC was argued to promote transparency in the process of judicial appointments. In consonance with the above idea, Articles 124 and 217 of the Indian Constitution were amended by the Constitution (Ninety-ninth Amendment) Act, 2014.

Initially, the Supreme Court Advocates-on-Record Association and many independent parties filed a writ petition challenging the constitutional validity of the Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014. The matter was first presented before the three-judge bench of the Supreme Court of India, which referred the case to the five-judge Constitution bench.

### Issues

1. Whether the new procedure of appointing and selecting judges for higher judiciary through NJAC in consonance with the 'basic structure' of the Constitution, which fosters Separation of powers and Judicial Independence?
2. Whether the Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 are constitutionally valid?
3. Whether judicial primacy in appointment of the judges to the higher judiciary is directly linked to the judicial independence?

### Rules Involved

The below-mentioned Articles of the Constitution of India are imperative rules applied in the matter herein concerned.

1. Article 14 – **Equality before the Law-**

*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex*

or place of birth.

2. Article 124 - **Establishment and constitution of Supreme Court-**

(1) *There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.*

(2) *Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.*

3. Article 217 - **Appointment and conditions of the office of a Judge of a High Court-**

(1) *Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years.*

## **Ratio**

The court in a majority decision (4:1) declared the Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 as unconstitutional and reinstated the collegium system for appointment of judges in the higher judiciary.

## **Analysis**

In the matter here-in concerned, the Indian judiciary was supposed to deal with an imperative subject of judicial appointments.

The need to strike a balance between the three organs of the government has been felt since time immemorial. The 'balance' in itself is a very subjective notion and various theories have been

propounded to create a balance of roles and power among such organs. French revolutionary Montesquieu was amongst the first to do so by proposing “Separation of Powers” theory, which provided for dispersion of powers between the legislature, executive and judiciary. This way, he highlighted, each organ can work autonomously and can be more accountable.<sup>1</sup>

The conflict between the operations of the legislature, executive and judiciary can be witnessed in early 1960s when in the case of **Sajjan Singh v. State of Rajasthan**<sup>2</sup>. In this case the apex court held that Constitutional Amendments can be ultra-vires to the “basic structure” of the Constitution. Then later, in the case of **Golaknath v. State of Punjab**<sup>3</sup>, the Supreme Court restricted the amending powers of the legislative authorities. Constitutional experts like Granville Austin as the starting point of rift between the legislature and judiciary in India.<sup>4</sup> Herein, Justice Subba Rao stated that Article 368 of the Indian Constitution does not confer any power to the legislature to amend the Constitution but lays down procedure for amendment. He, moreover, opined that Constitutional Amendment falls under the ambit of Article 13 and thus under “judicial review”.

Furthermore, in the case of **Kesavananda Bharti v State of Kerala**<sup>5</sup>, the judgement in the Golaknath case was overruled and two key inferences were drawn regarding the same subject. The first one being that the Constitutional Amendments do not fall under the purview of the Article 13 of the Indian Constitution. The rationale behind the same is that Constitutional Amendment is not an ordinary law or statute created by the Parliament and therefore, the same does not fall under the scope of “law” under Article 13. The second key inference which the Supreme Court reflected upon in the above matter was that the Supreme Court may deem any Constitution Amendment as unconstitutional, if the same is found in violation of the “basic structure” of the Indian Constitution. Since, this particular dealt extensively with the “basic structure” doctrine, it vehemently held that independence of judiciary is a cornerstone of the Indian Constitution’s basic structure.

In the case of **Shamsher Singh v. State of Punjab**<sup>6</sup>, one of the judges of the bench, Justice Krishna Iyer gave a dictum that the executive should not have a final say on the subjective of judicial appointments in higher judiciary. He believed that in all matters relating to the judicial

---

<sup>1</sup> Montesquieu, Charles-Louis. (1747). “*Espirit des Louis (The Spirit of the Laws)*”.

<sup>2</sup> Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

<sup>3</sup> Golaknath v. State of Punjab, (1967) 2 SCR 762.

<sup>4</sup> Austin G. (2013). “*Working a democratic Constitution: A history of the Indian Experience 197.*”

<sup>5</sup> Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225

<sup>6</sup> Shamsher Singh v. State of Punjab, (1974) 2 SCC 831

appointments, the decision of the Chief Justice of India should be binding on the government.

The discrepancies and inconsistencies in the matter of judicial appointment and promotion in the higher judiciary became a focal point of debate in the 1970s. The Supreme Court's senior-most judge by convention becomes the Chief Justice of India, but there is no provision in the Constitution regarding it. This became a point of controversy when in 1973, on retirement of Justice Sikri, Justice A.N Roy was appointed as the Chief Justice, superseding three other senior judges, following which the three judges resigned. A similar incident took place with Justice H.R.Khanna, who was renowned for his critical judgements on Civil Rights, which often ended up against the Executive and Legislature's favour. He gave the also gave the dissenting judgement in the **ADM Jabalpur Case**<sup>7</sup> – against the government, which in the present day falls in line with his views. He was also superseded by another judge, Justice Beg, following which he resigned. The followings incident ensued a series of judgements, commonly referred to as the 'Judges cases.'

In the **First Judges Case**<sup>8</sup> it was held that the final power with regards to appointment of a High Court or a Supreme Court judge rests with the executive, which implied, the Union Government and not the Chief Justice of India. This controversial decision was not accepted by the legal fraternity and was called an impediment to the judicial independence.

The jurists and legal critiques also criticised the judgement by pointing out the condescending nature of the executive.

In the **Second Judges Case**<sup>9</sup>, the judgement in the earlier judgement was reversed. The Supreme Court made it clear, that although it is necessary for the President of India to appoint the judges of the Supreme Court and the High Court, the Constitution does require prior consultation from the Judges of the High Court and the Supreme Court. Such a consultation, the court opined, is always necessary. The court interpreted that the process of appointment is initiated by the Chief Justice of India and the two senior-most judges of the Supreme Court, ordinarily called the collegium. The Hon'ble court stated that the recommendation of the collegium is binding upon the President of India and that he cannot veto the recommendation. He may point out the reason, if he may find,

---

<sup>7</sup> ADM Jabalpur vs Shivkant Shukla, (1976) 2 SCC 521

<sup>8</sup> S. P. Gupta v. Union of India, A.I.R. 1982 S.C. 149.

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

that the recommended judge is not suitable for the post, to which the collegium may accept the recommendation or reinforce their previous recommendation. In such a case, the President is obliged to accept the collegium's recommendation.

In the **Third Judge Case**<sup>10</sup>, the Supreme Court upheld the judgement of Supreme Court Advocates-on-Record Association v. Union of India, 1993. Moreover, the collegium was expanded to include the Chief Justice of India and the four senior-most judges of the Supreme Court.

The above-mentioned judgements have been heavily relied upon in the case of Supreme Court AOR v UOI. In the present case Justice Khehar stated that the S.P.Gupta case belittled the importance of judiciary and its independence and hence was rightly overruled by the second judges case. He affirmed the standing of the judiciary in the Shamsher Singh case.

I believe the standing of the Supreme Court was wrong on this part, since the latter judgement shared only a dictum on the judicial primacy and the subject matter of the Shamsher Singh was different, meanwhile the former corresponded completely to the topic of judicial appointments. After the second and third judges' case, the Indian Judicial system clearly hinted out on the judicial primacy in the matters of appointment, selection, and promotion of judges in the higher judiciary.

Although the Judicial Independence is undeniably an integral feature of the basic structure of the Constitution, the primacy of judiciary in appointments of Supreme Court and High Court Judges has never been substantiated as a vital part of judicial independence. Justice Khehar in the judgement baldly associates Judicial Independence with judiciary's right to appoint judges in higher judiciary. The claim has not been deliberated upon and no evidence has been put out to reflect that it is core to the basic functionality of the Indian Constitution. Moreover, on comparative analysis one can find that in countries like the US, Australia, Canada and the UK, the executive's interference in appointment of judges is far greater in extent when compared to India.

To state that any kind of political interference in the process of judicial appointments would be an impediment to the independence of the judiciary is an astonishing claim, when majority of the countries have independent commissions and authorities, with members from the executive, legislature and the judiciary involved in the process.

---

<sup>10</sup> In Re Special Reference 1 of 1998

Although, in my opinion there are overt fallacies in the judgement, which one may point, at the same time NJAC itself was not free from ambiguity. The members of the NJAC were supposed to be the Chief Justice of India, the next two-senior most judges, the Union Law Minister and two eminent persons. It is merely stated that the 2 eminent persons would be appointed by a committee comprising of the Prime Minister, Chief Justice of India and the Leader of Opposition. The criteria for the credentials and the qualification of such a person remained ambiguous. Moreover, such a person was also given the power to veto the decision of the Chief Justice of India or the President in the matter of judicial appointment, which could be gravely misused.

### **CONCLUSION**

The present judgement fails to justify in totality, its standing, on the basis of empirical evidence. The claim that 'judicial primacy in appointment of the judges to the higher judiciary is directly linked to the judicial independence' was not aptly justified and its correlation with the 'basic structure' of the Indian Constitution was not presented. It is not indicative, on the face of it, that Articles 124 and 217 of the Indian Constitution are a component of the 'basic structure' of our Constitution. Thus, the apex court fails to substantiate its sole authority in such a matter.

On the other hand, the implementation of the NJAC would have reduced the judicial say in appointments from at-present 5 judges to 3, coupled with the inclusion of an executive member namely the Union Law Minister and 2 eminent people, with exclusive powers, which could have imposed a potential threat on the judicial independence.

The judgement can, therefore, be argued to have maintained the institutional autonomy of the Indian Judiciary. However, the institutional prerogative of the court is still questionable as rightly pointed out in the dissenting opinion of Justice Chelameswar, who questions the accountability of the collegium in the present state of affairs.