

## **Concept Note for CLS-NLUO Panel Discussion, 26<sup>th</sup> November, 2023**

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### **Present system of appointment of judges: The Collegium system**

The exercise of judicial functions has far reaching impacts, especially in a democratic country like India. They have an influence upon the development of rights, liberties and laws, their implementation, and the overall jurisprudence which reflects in the future decisions of the courts. It is of paramount importance that in carrying out these functions, the judiciary remains impartial and free from any external influence. Hence, the current system in India for appointing the judiciary is one where the judges appoint other judges to the Supreme Court and High Courts to ensure the independence of judiciary, which has been recognised as a basic feature of the Indian Constitution.

This system is known as the Collegium System, where judges are appointed the advice of a Collegium comprising of the Chief Justice and other senior-most judges of the Supreme Court. The recommendation of the Collegium are sent to the Union Minister of Law, who submits these to the Prime Minister, upon whose assent, the President makes the appointment. The scope and impact of such executive involvement is one of the issues under debate today.

### **Origins of the Collegium System: The Three Judges Cases**

The Collegium system finds its origins in three significant judgments concerning the appointment of judges, popularly known as the 'Three Judges cases'. The primary issue in these cases was the interpretation of the Constitutional text concerning appointment of judges. Article 124 of the Constitution, which contains provisions for the creation and composition of the Supreme Court, entrusts the President to appoint judges but also mandates that the Chief Justice of India be consulted before making such appointments. Now, the question arose regarding the nature and effect of such consultation and if the President could act outside the advice tendered.

The Court first ruled upon this in the case of *S. P. Gupta v Union of India*,<sup>1</sup> where a seven-judge bench held with a slim majority, that ‘consultation’ mentioned in the Constitution does not mean ‘concurrence’. This meant that the Chief Justice’s opinion was not of primacy and the President was not bound by it.

However, only a decade later this proposition was recognised as flawed and overruled in part by a nine-judge bench in the ruling in *Supreme Court Advocates on Record Association v Union of India*.<sup>2</sup> The Court observed that in mandating consultation with the Chief Justice, the Constitution confers a significant symbolic value upon the office of the Chief Justice, and thus the President could not override any advice flowing from this office. This judgment established the current Collegium system of appointment and mandated that the President act in accordance with the advice of the Collegium while making judicial appointments. Later, in response to the *Special Reference No. 1 of 1998*, the Court clarified, and to a certain extent, modified, its opinion which established the Collegium system as it exists today.

### **Attempts at Legislative Interference: The National Judicial Appointments Commission**

In 2022, the Indian Parliament passed the 99<sup>th</sup> Amendment to the Constitution of India to replace the Collegium system of appointing of judges. In its place, the legislative sought to establish the National Judicial Appointments Council (the NJAC) for appointing judges. It was to comprise of:

1. The Chief Justice of India as the ex officio chairperson
2. Two senior-most judges of the Supreme Court
3. The Law Minister of India
4. Two eminent persons from civil society. This would be appointed by a commission composed of the Prime Minister, the Chief Justice, and the Leader of the Opposition in the Lok Sabha. One of these members would be from the SC/ST/OBC minority or a woman.

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<sup>1</sup> *S. P. Gupta v Union of India* AIR 1982 SC 149.

<sup>2</sup> *Supreme Court Advocates on Record Association v Union of India* AIR 1994 SC 268.

One of the major flaws with the NJAC was that it took away the primacy of the opinion of the Chief Justice, as any recommendation could be vetoed by a majority of non-judge members. For this reason, the amendment was challenged as being unconstitutional and invalid by the Supreme Court Advocates on Record Association.<sup>3</sup> One of the primary contentions raised was that the amendment threatened the independence of the judiciary, and hence was violative of the basic structure of the Constitution.

Accepting this, the Court, with a 4:1 ratio, held the Act to be unconstitutional on 16<sup>th</sup> August, 2015.

### **Justice Chelameshwar's Dissent**

In the judgement, Justice Chelameshwar was the sole dissenter, who raised the following two questions:

1. Whether Article 124, as constituted by the Constituent Assembly, is the only way to secure the independence of the judiciary?
2. If there are alternatives to the above, and does NJAC transgress the boundaries of constituent power?

He differentiated between basic features and basic structure of the constitution, and opined that the opinion of the Chief Justice does not come under basic feature of the constitution, therefore nullifying the arguments of the petitioner. Therefore, he held that the amendment does not affect the basic structure.

The basic feature, he opines, is that the entirety of the power of appointment should not rest with the President, and therefore the 99<sup>th</sup> Amendment fulfils this criterion. Moreover, should the issue of the Government pushing its own candidates arise, the judiciary can stop it with its own members. The Executive, through the Law Minister, forms only 1/6<sup>th</sup> of the committee.

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<sup>3</sup> *Supreme Court Advocates on Record Association v Union of India* AIR 2016 5 SC 1.

The same provision that the petitioners argue is violative of the basic structure can also work in their favour.

### **Conclusion**

Despite the 99<sup>th</sup> Amendment not becoming law, it has been observed time and again that this has not stopped the Government from blocking members it deems against its interests. At the end of the day, every appointment needs the approval of the Prime Minister and the assent of the President. Therefore, the question arises, could NJAC have been the solution to judicial-executive cooperation with respect to the appointment of judges, and therefore, by extension, the solution to the problems of vacancy in higher judiciary? Or is it truly infringing upon the basic structure of the constitution by compromising the independence of the judiciary from the executive?

For further reading, access: <https://doj.gov.in/memorandum-of-procedure-of-appointment-of-supreme-court-judges/>.

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