

## **Criteria for appointment of Judges- Need of the hour with reference to National Judicial Appointment Commission Act**

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### **Abstract**

*National Judicial Appointment Commission is an act became statute on December 31, 2014, consisting body of six members articulated to appoint judges for Indian Judicial system which replaces years old collegium system. Proviso of two eminent persons and their identity is still in dark and unanswered. Original constitution empowers President to consult the judges and make appointments as he may deem necessary for the purpose. Considering voice of executive body for the said purpose is not tenable in law and violates the Independency of judiciary thereby violating the basic structure of the Constitution of India. Collegium could be aptly described as 'judicial coup of power' from the actual authority, contrary to the original constitutional scheme through the process of interpretation. If, the collegium was to be criticized allegedly curtailing the president's power in appointing judges, the National Judicial Appointment Commission is no better. Exclusion of an executive voice in the matter of appointment is the only way to maintain the independence of the judiciary. Regulations and criteria for suitability, conditions and selection grounds are yet to be set by the commission for appointment of judges. Finality is given to the words of the commission which goes contrary to the constitution. History has been a witness to the fact that, there has never been any sort of regulations, norms, conditions or criteria of suitability for appointment of judges like other common law countries, except a conventional system created by judges on their own. Absence of constitutionally approved guidelines and a set of criteria for appointment and elevation of judges have given a room for corruption in the judicial system. The said guidelines will be a substantial support to president for appointment of appropriate judges with clear history and performance of candidates.*

**Keywords:** *Judiciary, Indian Constitution, Basic Structure, Violation, Independency of Judiciary, President, Judicial Accountability, Appointment Criteria.*

### **National Judicial Appointment Commission**

National Judicial Appointment Commission (NJAC) Act consists of six members. The Chief Justice, Two senior most judges of Supreme Court, Union Minister of Law and Two eminent persons. The said eminent persons are to be appointed by the consortium of Chief Justice of India, Prime Minister and person from single largest opposition party.

It has been a matter of high level of discussion earlier and even as on today that, who will be those two eminent personalities. Whether they will be from Legislatures or Executive or Judiciary? They will be Ex-judge? Film stars? Litigants? Army officials. What are the eligibility criteria he shall be selected to hold post? This particular provision of two eminent persons is purely vague and loose in the eyes of law. Inclusion of prime minister and person from single largest opposition party breaches the independency of judiciary, reason that, as per the original constitutional scheme only and only the president, in consultation with Chief Justice of India for Supreme Court judge and Chief Justice of High Court for High court judge, is vested with decisive authority for appointing judges as envisaged by Article 124 of the Original Constitution. It must a matter of debate that, how prime minister can have knowledge of functions and duties of judiciary? The basic tenet of separation of power may be recollected. Inclusion of Prime Minister in selection of two eminent persons and unclear selection criteria for those two eminent persons, render this act unlawful and violate Independency of Judiciary.

Scheme of the original constitution empowers President to appoint judges, with appropriate criteria, as he may deem necessary, by bequeathing discretionary ability to Consult Chief Justice/s of Supreme Court and High Court, to appoint and elevate as the members of judiciary in higher rank. It is a matter of fact that the collegium is proved to be major failure but it does not mean a new legislation, by violating constitutional purposes and hindering the independency of judiciary, by allowing politicians and/or any other person, while appointing judges. Independence of the judiciary is a basic feature of the constitution and the exclusion of the final words of any, other than president, in the matter of appointment of judges, is the only way to maintain the same. Non transparency of the collegium system should not be made a pretext for giving any inappropriate body or an individual with sweeping powers in the matter of judicial appointments.

It appears from perusal of the new Act that, some of the provisions are violating the basic structure of the constitution by allowing interference of some Legislative and other bodies in

procedure of appointment of the judges. Provisions of the said act such as section 6(7) (Particularly interference of Chief Minister), 12(e), 13 allowing legislative and executive bodies to interfere in appointment of judges are not tenable Constitutional law.

Though the act no more exists, it is crucial to have an overview as to how it was unconstitutional and inoperative.

**Section 6(7) of NJAC Act** may be read as follows;

*'The Commission shall elicit in writing the views of the Governor and the Chief Minister of the State concerned before making such recommendation in such manner as may be specified by regulations.'* According to Article 217 of the Constitution of India, Governor's view in appointment of High Court Judges is lawfully valid, but view of Chief Minister of the concerned state and consideration of his views or of any Minister has never been a part of Constitution because ministers are the executors of Law set by the Parliament. Executives are always kept separate from the functions of the Judiciary so as to achieve very purpose the Constitution i.e. Separation of Power and Independency of Judiciary.

Insertion of clause 6(7), allowing commission to consider the views of Chief Minister of the concerned state, in the new law, violates the constitutional purpose of Independency of Judiciary.

**Section 12(e) of NJAC Act**

*'The Commission may, by notification in the Official Gazette, make regulations consistent with this Act, and the rules made there under, to carry out the provisions of this Act. (e) The manner of eliciting views of the Governor and the Chief Minister under sub-section (7) of section 6;'*

Perusal of the abovementioned clause of the new law of NJAC, it appears that, regulations and criteria for suitability, conditions and selection grounds yet to be set by the commission for appointment of judges. For the said regulations and criteria of suitability also, the Chief Minister of the concerned state is to be consulted. Legislatures are not willing to give away their word in appointment of Judges in fact trying to control the appointment mechanism. Such clause violates independency of judiciary thereby violating basic structure of the constitution. Henceforth, section 12(e) is completely usurper and interloper. Said provision of law and its interference in judicial aspects, is not tenable and maintainable under Law of Constitution of India.

### Section 13 of NJAC Act

*'Every rule and regulation made under this Act shall be laid... before each House of Parliament... both Houses agree in making any modification in the rule or regulation or both Houses agree the rule or regulation should not be made... thereafter have effect only in such modified form or be of no effect, as the case may be...'*

Any rule proposed to be made under this law shall have to have prior assent of the law makers, in absence of which, any change made cannot be implemented. By this provision, it appears that, the law makers are going to take away the power from the authority to which it was originally vested by the Constitution. If, the changes are made without their consent, it shall have no validity.

It is quite vibrant from section 13 of the said act that law makers' i.e. parliamentary authorities, by surpassing the powers vested to them, have made a law which is not acceptable, since such provisions are against the scheme of the original constitution and its framework against parliamentary wisdom. The President is assumed power for appointment of Judges. Nowhere Parliament is involved or mentioned according to Constitution, for appointment of judges. In so far as rule making regarding criteria and eligibility is concerned, the parliament can never be construed to be the authority the way new law is expecting. Referred provision seizes the power now, originally vested with the president.

The terms such as in 'Consultation with', 'May' and 'Deem necessary' is used for the presidential power in the appointment of judges. Thus, it is deemed to be unspoken that, such discretionary words allows and permits President for framing the appropriate rule and norms for appointment of judges. The said provision of law violates the Independency of judiciary thereby violating the basic structure of the Constitution of India and is *Suggestio falsi* and *suppression veri*. It must be taken into consideration that, President should not be simply diluted as an executive head, in fact he is vested with much more higher office, beyond our assumption, but not omnipotent authority. Hon'ble Justice Ahmadi in his dissenting dictum in 1993 judgment preferred the above view.

### Interpreting original Constitution

Article 124 gives clout of appointment of judicial personals in the hands of President. Original Constitution never mentioned the system collegium of the judges, on the contrarily,

only consultative powers are vested with brethren judges. It was 1993 judgment wherein false and unconstitutional interpretation was rendered inattentively resulting into these disputes and challenges. The constitution never spoke upon pre requisites and conditions for judicial personality except a few, thus in context of the text of the constitution it was burden upon the appointment body to frame appropriate criteria for forthcoming years. Subsequently, it was taken for granted by the selectors to examine candidates on whatever means available to them. It must be noted and accepted that, no other person than one who is working around and with candidate. But this should not be considered appropriate criteria for appointment of that person as a judge.

### **Erroneous Adjudication**

It is quite immaterial to waste time deciding merely that, who is supreme amongst three wings, rather efforts should be to bring to the notice what real Constitution says and what are the false interpretations made by the judiciary in 1993 and 1998 cases, because it was never the purpose of Constitution to indicate who is supreme and who is not. The term Consultation was interpreted wrongly by SCORA (Supreme Court On Record Association) 1993 Nine Judges bench where in, the theory of 'Judges will appoint Judges' was introduced and incorporated and given a birth to, by surpassing the relevant provision. The said theory was the outcome of wrong and arbitrary interpretation of article 124 without realizing the actual purpose of appointment of judges, thereby, failing to achieve the Constitutional purpose. Appointing judges can never be a judicial function. The law makers never assumed that judges will appoint judges. It was only in 1993 judgment by which the apex court gave itself, a muscle to appoint other judges. The term Consultation has been interpreted wrongly and power of concurrence, in second judge's case, has been erroneously vested to the Chief Justice of India and Chief justice of respective High Courts.

The collegium system of judicial appointment, which remained vogue since the decision of Supreme Court of India in Supreme Court *Advocate on Record Association vs. Union of India*<sup>1</sup> could be aptly described as 'judicial coup of power' from the actual authority, contrary to the original constitutional scheme through the process of interpretation (one can refer Arohan Barack's Purposive interpretativism), where Supreme Court of India read and

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<sup>1</sup> Advocate on Record Association vs. Union of India (1993) 4 SCC 441

attributed meaning to the word 'Consultation' as 'Concurrence'.<sup>2</sup> These judgments are rendered with patent disregard of legislative history and intent in arriving at the conclusion that the consultation means concurrence.

In *Mahesh Chandra Gupta vs. Union of India*<sup>3</sup> the Supreme Court held that the appointment of a judge is an executive function of the President (even the smallest discretion in the exercise of this function, however, was wrestled away by the Court in the earlier Second Judges case).

In the matter of *Union of India vs. Sankal Chand HimatlalSeth*<sup>4</sup> the Supreme Court was apt in rendering interpretation that, Consultation does not mean Concurrence and held that, the opinion of the chief justice in making transfers was not binding on the executive. This decision was partially affirmed by Seven Judges bench in S.P Gupta, the First judge's case and subsequently the situation was exactly altered by rendering Second Judges case, which has been proven to be a failure today.

The arrogation of power to the collegium which comprises of the CJI and four senior most judges of the Supreme Court dilute the effect of individual consultation of the President of India with such other judges as he may deem necessary.<sup>5</sup>

There is a cardinal rule of construction (interpretation) of statutes. According to this rule, words must be given their ordinary, literal, grammatical meaning. The literal rule is the first rule to be used in establishing the intention of the legislature. This rule comes directly from the English law. In an English case *Hess v The State*<sup>6</sup> the court states as follows:

'I have no doubt as to the intention of the legislature, but quod *voluerunt non dixerunt*...[ i.e. that which was really intended by the legislature was not said in the statute] The legislative intent must appear from the words actually used, and not from what the legislature intended to say, but did not say...'

According to the literal rule, interpretation of the word 'The President may', bearing ponderousness, which gives discretionary authority of appointment of judges exclusively to

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<sup>2</sup> <http://onelawstreet.com/2015/04/of-reference-to-larger-bench-and-njac-challenge-petition-some-points-forconsideration/> by RAVI PRAKASH APRIL 15, 2015

<sup>3</sup> *Mahesh Chandra Gupta vs. Union of India* (2009) 8 SCC 273

<sup>4</sup> *Union of India vs. Sankal Chand HimatlalSeth* 1977 AIR 2328, 1978 SCR (1) 423

<sup>5</sup> <http://lawmantra.co.in/aiba-seeks-presidential-reference-on-controversial-collegium-and-njac-issues-asappointment-of-at-least-125-judges-for-various-high-courts-is-hanging-fire/> by Dr.Adish Agrawal Sr. Advocate President AIBA

<sup>6</sup> *Hess v The State* (1895) 2 O.R.C. 112

the president, has been devastated from the interpretation of Second and Third Judges case and thereby giving birth to collegium of four senior most judges, arbitrarily. The president, according to scheme of the original constitution, required to weigh all views while arriving at the decision of appointment, but the second and third judges case obliterates the importance given to the president and plurality of the views.

Under the original Constitution of India, the President was empowered to 'Consult' judges of the Supreme Court to arrive at a decision of appointment. This has been given a cheerio by the 1993 judgment, violating the doctrine of separation of powers among the three organs, viz executive, judiciary and legislature thereby violating constitutional provision Article 124(2) of the said constitution. The petitioner strongly feels that vesting absolute power on the Chief Justice of India and the collegium in the matter of appointments for all times to come needs reconsideration to restore the equilibrium in the Constitution.<sup>7</sup>

Core of the present dispute before India is that, if it has already been held that the exclusion of an executive voice, in the matter of appointment is the only way to maintain the independence of the judiciary (which is part of the basic structure), the 99th amendment is nullity and void for violating the basic structure of the Constitution of India. 1993 and 1998 judgment and its bench, by giving system of judges will appoint judges, has travelled beyond their jurisdiction and overlooked Art.124 and its constitutional purpose by giving Chief Justice an omnipotent authority. Be that as it may, there is a more serious objection going to the root of matter, and which, by itself, is sufficient to render the decision in the Second Judges case, and the collegium system of judicial appointments introduced by it, constitutionally invalid.<sup>8</sup>

Hon'ble Justice Ahmadi in his dissenting opinion in the Second Judges case (at paragraph 395, 403) argued that the original intent of the framers did not support an interpretation of the constitution that conferred primacy on the Chief Justice and that such a change would require a constitutional amendment.<sup>9</sup>

Now, since the Supreme Court itself has struck down the act itself, the need of appointment criteria emerges with greater force considering drastic failure of collegium system which can

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<sup>7</sup> ibid

<sup>8</sup> <http://www.lawyersupdate.co.in/LU/1/1591.asp> By N.hHingorani, Senior Advocate Supreme Court of India visited at 07.09.2015 at 6:30pm

<sup>9</sup> <https://indconlawphil.wordpress.com/2015/06/09/guest-post-the-njac-and-an-unconventional-constitutionalconvention/> by AkilDeo on June 9, 2015 @9:42AM

also be named as a system of appointment of judges on the bases of favours to other judges for transfer and elevation.

### **Collegium as Convention- Question on its validity**

In the collegium system, so far, judges, by recommending the name of their colleague/s used to appoint the judge/s. The system of judges will appoint judges, without a constitutional backup, started becoming a convention and that, appears by perusal of Art.124 of Indian Constitution, to be invalid. In paragraphs 469 and 470 of Second Judges case, the Court found that by 1948, a convention had been established that the appointment of a judge could only be made with the concurrence of the Chief Justice. Further, it found that almost all subsequent appointments were made with the concurrence of the Chief Justice. Based on Ivor Jennings' popular three step test in determining the existence of a convention –

- (i) the availability of precedents,
- (ii) that the actors feel bound by the rule and
- (iii) that there exists a good reason for the rule, the Court went on to hold that;

*“...the convention, to the effect that the opinion and the recommendation of the Chief Justice of India in the matter of appointment of Judges is binding on the executive...”*

Convention in the second judge's case was unusual insofar as it was held to be binding, because constitutional conventions are ordinarily regarded as not being enforceable in Court. Only precedents are binding.<sup>10</sup>

### **Section 7 of NJAC Act**

The said amendment act is going against the constitutional provisions which can be proven by stating that; in one of the sections, that, (Section 7) may be read;

*‘The President SHALL, on the recommendations made by the Commission, appoint the Chief Justice of India or a Judge of the Supreme Court or, as the case may be, the Chief Justice of a High Court or the Judge of a High Court...’*

If, the collegium was to be criticized allegedly curtailing the president's power in appointing judges, the National Judicial Appointment Commission is no better. Neither the question of primacy or supremacy of law makers and legislatures nor finality of their words arises, but the query is on the validity of Section 7 of the said Act. It appears, from the perusal of the

<sup>10</sup> dissenting judgment of Ahmadi J. dated August 24, 1993

said provision that, it has failed to achieve and comply with the intention of the framers of Constitution by overruling and circumscribing Article 124 of the Constitution of India. The capacity of the president is completely circumscribed under the new law stating that the President SHALL accept, by putting compulsion, to the recommendation made by the commission. Such compulsive clause of the referred act is violating the powers, originally, vested to the president by the Constitution of India. Section 7 of the act, giving no room to Article 124 of Indian Constitution and the powers of president is hindered, which, in the eyes of law of India, is not tenable.

Further, section 7 denotes that the reconsideration of such recommendation of the commission shall be deemed to be final as per para 3 of the said section because once the recommendation is advised for reconsideration and, if, such reconsideration is correct in the eyes of the commission, the President, by perusal of the relevant para of section 7, is bound to appoint the judge. Authority vested to the president by original constitutional scheme is not looked at in NJAC and the efforts are being made with a view to grab powers from the president. Finality is given to the words of the commission which goes against the constitution also traversed to article 124 of the original Indian constitution.

According to the original constitution article 124 lays down that, President may, as he may deem fit for the purpose, appoint the judge. Contrarily, the new act says that, President is bound to accept the recommendations, even after reconsideration and accordingly the judges are bound to be appointed by president through Commission. The said commission travels beyond the purpose of appointment of judges and therefore is *ultra vires*. Author strongly objects Section 7 of the National Judicial Appointment Commission act which categorically moves beyond original intent of Constitution of India.

### **Suggestions**

India is a country where judges are believed next to God or the almighty on earth. With high respect and expectations of good justice, people approach Courts of Law. Sadly, the appointment of judges and relevant *proviso* has been a matter of controversy due to erroneous and false interpretation of Constitution for considerable long time. It's a matter of great importance for this country to have uninterrupted and independent judiciary. The said juncture is essential for smooth and unwrinkled functioning of nation. Legislative and executive branches, with utmost integrity and consciousness, shall have to come up with ever reforming criteria to bring judicial system on the heights as envisaged by the constitutional

committee. Merely prescribing grass root criteria of a judge as integrity and competence shall not be practicable in today's scenario. History has been a witness of the fact that, there has never been any sort of regulations, norms, conditions or criteria of suitability for appointment of judges like other common law countries, except a conventional system created by judges on their own i.e. Collegium System. This has given a room for corruption in the judicial system due to the judicial pronouncements taken, like that in 1993 and 1998, where judges themselves were given powers to appointment of their brethren and his elevations and appointments.

Judges are of the view that the collegium system can be improved and chances for which are foreseen by acting and former judges. The only need and impediment we face, lack of criteria for appointment of a judge. What are pre requisites and basic norms to elevate and appoint a as judge. Only a few criterions such as minimum years of practice in lower court and minimum age should not be the end process to appoint or elevate a person as a judge.

A search for appropriate system of appointment will have to address fundamental question if, people of India to be persuaded to accept the appointment system in the name of protecting the "independence of judiciary". Since the court are trying to figure out how and why the collegium can be retained and secure independence and accountability on which it failed to prove its superiority to the earlier model, setup of appropriate criteria for selection is the only apt option visible.

With due respect of Supreme Court, act of allowing to frame guidelines and putting balls into the hands of the central government for procedure of appointment i.e. Memorandum Of Procedure (MOP), it is pre needed to check validity of this act.

The sole reason behind aforesaid events taking place is, absence of appropriate constitutionally approved guidelines for appointment of judges and their elevation to higher rank. The said guidelines will be a substantial support to president for appointment of appropriate judges with clear history, their performance and work in the judicial system.

The act itself, in many of the provisions, indicated that criteria of suitability, qualifications and other guidelines for appointment by notification will be set. By prioritizing the qualifying criteria first further appointments should be made. Appropriate guidelines may be notified as envisaged by Article 124 of the Constitution.

No say of politicians in the appointment of judges because usually, the government is the main opponent in the people's cases and there is chances abuse of executive powers".

### **Conclusion**

If past was a mistake, future is an opportunity to correct it. Criteria for appointment of judges must be expressly and consciously premeditated such as Experience, Professional Competence, Judicial temperament and service to the law and contribution to effective administration of justice, Judgments reported etc. It may be observed in detail. Judicial Accountability and Judicial Independence have to work hand in hand to ensure the real purpose of setting up of the institution of judiciary.