VOLUME 3 | ISSUE 3

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

CRITICAL ANALYSIS OF NATIONAL JUDICIAL APPOINTMENTS COMMISSION AND RELATED CASE LAWS

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ABSTRACT: -

National Judicial Appointments Commission (NJAC) was bought in the Constitution of India, 1950 after getting assented by the Parliament on 15th August, 2014 but and was referred to be bought under the 99th Constitutional Amendment Act issued on 13th April, 2014. The amendment act added article 124A in the constitution which was about the NJAC and its procedures. The NJAC was later struck down on 16th October 2015 by the Supreme Court of India in the case of *Supreme Court Advocates-on-record Vs. Union of India*. In this research paper we are going to analyze whether the removal of NJAC was a right decision or wrong by the apex court by looking into various case laws, parliamentary debates and articles. This paper will also include a comparative analysis of NJAC and JAC (Judicial Appointments Commission) of the United Kingdom.

KEYWORDS - NJAC, Supreme Court, Basic Structure Doctrine, Lok Sabha, Judiciary.

RESEARCH QUESTION: -

Is the decision to remove the NJAC and stick with the already existing Collegium System a right decision or wrong?

METHODOLOGY: -

To find out our analysis on the aforesaid research question we found various case laws, parliamentary debates which took place in the Lok Sabha and also went through articles given legal sights. We went through the arguments presented by the counsels in the case laws

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and how the bench gave their judgment on the appeals which helped us find a proper analysis.

INTRODUCTION: -

NJAC is a body formed responsible for the appointment and move of judges to the higher judiciary in India. JAC Bill tried to supplant the collegium system for designating the judges of Supreme Court and 24 High Courts with the JAC (Judicial Appointments Commission) wherein the executive will have something to do with appointing the judges. The 99th Amendment enacted on 13th August 2014, and assented on 13th April 2015 introduced the NJAC in India under Article 124A of the Constitution of India. This amendment was struck down on 16th October 2015 by the Supreme Court as it was 'ultra vires' to the provisions enshrined by the Constitution of India in the case of 'Supreme Court Advocates-on-record Association Vs. Union of India'.

CASE LAWS: -

- **Supreme Court Advocates-on-record Association Vs. Union of India**

After a lot of similar petitions were filed questioning the constitutionality of NJAC, the supreme court heard all the matters, and this case played the most vital role in removal of NJAC which came under the ninety-ninth amendment. Started with the case "S.P. Gupta v. Union Of India", a seven judge bench was constituted. It is also known as the first judge case. The issues raised in this case were who should appoint the judges? Is NJAC the right authority to do so? It was contended that introduction of NJAC led to very high involvement of executive in the appointment of judges, hindering the independence of judiciary. It involved the word "consultation" which meant the executive, i.e. the president has to take recommendation from the Chief Justice of India. But another problem raised here, that was, what if the executive, i.e.the president and the judiciary i.e. the CJI are not on the same page about appointing a particular person. The court here said that the word "consultation" cannot be equated with "concurrence". Even if the judiciary is not agreeing with the decision of the executive, the executive can move ahead with the appointment. But the judiciary was not okay with the judgment, as it was giving more power to executive over judiciary. Another case came before the supreme court almost after a decade in "Subhash Sharma v. Union of India". It is often referred to as second judge case. A nine judge bench was constituted to hear

this matter and to reconsider the contention made in S.P. Gupta case by the Supreme Court. In this case a seven against two judge judgment was passed. The collegium was constituted for the first time for appointment of judges. The first collegium consisted of CJI and two senior most judges of the Supreme Court. Now a decision was passed by the court which was more favorable to the judiciary. The court said the word "consultation" can be equated with "concurrence". The executive was now bound by the decision made by the judiciary, i.e. the collegium. Even if the president has some recommendation to make, it is not binding. The collegium can either accept the recommendation or reject the recommendation of the president. And the president cannot do anything about it and he is bound to accept their recommendation. This case is also reported as Supreme Court Advocates-on-Record Assn. v Union Of India. Now the new problem arises, that is, what if there is no consensus among the judiciary itself. In case Special Reference No. I of 1998, re. It is referred to as the third judge case. Again a 9 judge bench was constituted to hear the matter. As a solution to the problem and to come to a consensus about appointment of judges, they increase the number of members. Now the CJI and the four senior most judges were part of the collegium. And the candidate was rejected, if at least two judges were against him. Earlier whatever CJI said was considered as the collective opinion of the judiciary but now on, the CJI has to consider the opinion of the members of collegium before sending it to the government of india. The judges in the collegium have to give a written statement of their opinion and give the same to the Government of India to maintain transparency. If the CJI consults someone else in the process as well, for example, the senior most judge of a concerned High Court then he might not provide a written statement rather just provide the summary of his statement. But the question still lingers if the president can deny the recommendation of collegium. In an incident where Chief Justice Shah of Delhi High Court and Chief Justice Patnaik were ignored and a judge younger to them was elevated as judge of the supreme court. They raised the issue and were denied by saying that mere seniority is not the only criteria, it is merit cum seniority, so both are to be considered. Even after tremendous pressure by the law ministry and the collegium, President Kalam did not appoint them as judges of the Supreme court. So a tough leader like him can defy law ministry and the collegium on factually and morally firm ground.

- **"Aravinda Kamath Puttur Vs. The Hon'ble Chief Justice, High Court of Karnataka and Ors."**

3 Petitioners had filed a writ petition in the Karnataka High Court under Article 226 of The Constitution of India claiming that Petitioner 1 and 2 are eligible to be Judges of Karnataka High Court or any other High Courts. Both Petitioner 1 and 2 are advocates but Petitioner 3 is not an advocate. Petitioners also claimed that the NJAC case should not be binding on all courts of the country as per Article 141 of The Constitution because the judgment given by the bench was *per incuriam* and hence it should not be binding. The High Court held that Petitioner 3 was not an "aggrieved person" and dismissed his petition. They further held that the judgment of the Supreme Court in the NJAC case is a binding precedent and is authoritative in nature and should not be ignored on the application of doctrine of *per incuriam* without assigning specific reasons. The Judgement was given by the Supreme Court because a challenge was made against the 99th Constitutional Amendment and the NJAC Act of 2014 because of the 'ultra-vires' of the amendment. The High Court also held that when the Supreme Court has given a decision rendering the conclusion of the controversy, it is not permissible for any party, tribunal or any court to reopen the issue and record a contrary finding.

- **"National Lawyers' Campaign for Judicial Transparency and Reforms and Ors Vs. Hon'ble Shri Justice J.S.Kheher and Ors."**

The Petitioners had filed a writ petition in the Supreme Court under Article 32 of the constitution of India to disqualify the appointment Justice J.S. Kheher as the designate for the Chief Justice of India for reason of conflict of interest as the NJAC case was authored under his lordship and also to hold the NJAC case as *void ab initio* on various grounds. The bench consisting of Justice R.K. Agrawal and Justice D.Y. Chandrachud dismissed the writ on absence of any merit in the petition. They stated that the Petitioners have by their own quoted the qualities of Justice Kheher so there is no question of Justice Kheher being ineligible and should not be disqualified from his appointment and for holding the NJAC case *void ab initio* the Petitioners can file a curative petition regarding it to question the judgment rendered in the NJAC case.

PARLIAMENTARY DEBATES: -

- **Debate on the NJAC bill being struck down by the SC in the Lok Sabha on 7th December, 2015 and 8th December, 2021 -**

  In both these sessions the house discussed the NJAC bill being struck down which was part of the 99th Constitutional Amendment. The opposition present in the sessions were questioning the government as to why they did not respond to the judgment of the apex court which termed the 99th Amendment as *'ultra vires'* to the Constitution. The opposition were saying that as the NJAC bill was passed by both the houses of the Parliament and also by all the respective state assemblies that the judges prioritized their own interest over the will of the people. The opposition stated that the NJAC bill should be brought back and be implemented again as it is the will of the people. The government said that they respect the order of the court and respect the independence of the executive, legislature and the judiciary in our country. The opposition wanted the government to fix the points in the bill and implement it again so that it will not be '*ultra vires*' and to this they stated that the entire house will support it because it is the will of the people and as the representatives of the people they will do what the people want.

COMPARISON BETWEEN JAC AND NJAC: -

- **JAC -** The JAC comprises two men from the legal sector out of which one ought to be a solicitor and other to be a barrister, six laymen including the head/chairman, five judges, one court part and one lay equity someone like the magistrate. The JAC was shrewdly drafted as none of the head individuals from the executive or judiciary like the Chief Justice and the Lord Chancellor have something to do with the appointment of Judges to the Courts and tribunals. Having a layman as an individual from appointment of Judges is to keep away from prejudice towards the appointed authorities who are yet to be delegated. This in addition safeguards the JAC individuals from political impact.
- **NJAC -** NJAC comprises of the Chief Justice of India, the two most senior judges of the Apex Court, the Law Minister, and two 'famous people'. On comparing the synthesis of JAC and NJAC, expansion of laymen to the last option would keep away

from pointless contentions and furthermore gives responsibility to it. The system followed by NJAC in the choice course of arrangement of Judges is on merits which depends on five characteristics -

1. Intellectual capacity
2. Personal qualities (independence, integrity, judgment, ability, strong will)
3. Ability to understand and deal fairly
4. Authority and communication skills
5. Efficiency

Likewise, the strength given to two famous people in NJAC ought to be confined to the degree where it gives an immediate nexus between the freedom of the Executive and the Judiciary.

ANALYSIS: -

The NJAC judgment, often known as "Fourth judges case", which removed NJAC in the ninety-ninth constitutional amendment. The debates about the issue had three dimensions:- parliamentary supremacy, judicial interdependence and the separation of powers. Firstly, parliamentary supremacy, a concept which was prevailing in Britain but never established in India. The principles that the parliamentary power in lawmaking has no limitation, it has power to amend the constitution through majorities, and the members of parliament are the representatives of the people, so they should be supreme does not hold true in totality. It is a well known fact that the constitution itself places a number of restrictions in lawmaking power of the parliament. The amendments undertaken by the parliament with a majority supporting it is also subjected to judicial review. Also the court contended that though parliament is a representative of people, this matter does not involve direct public interest and the respect to the decision made by the parliament is shown through actions. The fact that the supreme court assumed that the NJAC amendment was constitutional and the one who challenges it bears the burden of proof, shows that the court was right with the decision and was in line with the principles. Secondly, the dimension of judicial independence which also forms the part of the "basic structure of the constitution", cannot be arbitrated. But the question raised in the fourth judges case was, was the judicial members the best method for the appointment of judiciary? The judges answered in favor. The contention that the primacy

of judiciary in appointment of judges is a method to promote judicial independence has no firm grounds. The apex court not only denied executive supremacy in appointment but all non-judicial bodies. The supreme court had made far reaching assumptions,i.e., that the nominated members of NJAC outnumbered the CJI and could be politically inclined. Hence they might not make unbiased decisions. Another assumption was judges and ministers might divide when it comes to voting for an individual and it might be possible that it would be hard to get a majority because of major differences in opinions and interest of the members of the NJAC, who are from diversified fields. The court might have given the veto power only to the CJI or it could have narrowed down the definition of the eligibility of the persons who can be nominated as a member in the NJAC. Judges did not provide an explanation as to why they never considered these options. Thus the judgment seems a little weak when we look at it through the lens of the second dimension. Thirdly, the dimension of separation of power among branches of the government for the protection of their liberty and powers vested in them. While the former demands there should be no concentration of power with one branch while the latter concerns with distribution of power according to competence of the branch. The judges majorly considered the liberty rationale while dealing with the case. But again mere intervention in appointment hinders the separation of power still stands grayish and requires more concrete arguments.

CONCLUSION: -

The NJAC act which was accepted by the parliament and majority of the state assemblies was referred to as the 'Will of the people' due to which a lot of the opposition questioned the silence of the government on the decision which was given in Supreme Court Advocates-on-record vs Union of India which struck down the 99th Amendment because it was unconstitutional. The bench consisting of Justices Jagdish Singh Khehar, J. Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel that this act was conflicting with the concept of an independent judiciary and giving executive authority over judiciary. There have been quite a number of shouts by the opposition to review the judgment by the Apex Court and implement the NJAC act again with certain amendments so that it does not become '*ultra vires*' again. On 17th of November 2022 the current CJI Justice D.Y. Chandrachud agreed to a list of pleas challenging the collegium system for the appointment of Judges

which might after its order become an important case for what is to come next in the judges appointing system in our country.

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6. Lok Sabha Debates -

Type of Debate:	GOVERNMENT BILLS
Title:	The High Court and Supreme Court judges (salary and conditions of service) amendment bill, 2015
Date:	**07-12-2015**
Participants:	**Chaudhary Shri P.P.,Dubey Shri Nishikant,MoilyDr. M. Veerappa,Gowda Shri D.V. Sadananda,Gowda Shri D.V. Sadananda,Gowda Shri D.V. Sadananda,SanghamitaDr.(Smt.) Mamtaz,Raut Shri Vinayak Bhaurao,Shanavas Shri M. I.,Premachandran Shri N.K.,Boianapalli Shri Vinod Kumar,Kumar Shri Kaushalendra,Satpathy Shri Tathagata,Satpathy Shri Tathagata,Thambidurai, Dr.M.,Sampath Shri Anirudhan,Sampath Shri Anirudhan,Yadav Shri HukmdevNarayan,KamaraajDr. K.,PandulaDr. Ravindra Babu,Singh Shri Raj Kumar**

Ref.Keywords: **Advocates**,**Autonomy**,**Decentralization**,**Judges**,**Judiciary**,**LawCommission**,**Lawyers**,**PayCommission**,**PensionSchemes**,**SocialJustice**,**Accountability**,**CourtBenches**,**Appointment**,**JudicialSystem**,**Vacancies**,**Allowances**,**SC&ST**,**JudicialAdministration**,**RetirementBenefits**,**Decentralisation**,**Right to Information Act**,**Collegium System**

Type of Debate: GOVERNMENT BILLS

Title: Further discussion on the motion for consideration of the High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Bill, 2021 (motion adopted and bill passed).

Date: **08-12-2021**

Participants: **Rijiju, Shri Kiren**,**Premachandran, Shri N.K.**,**Rijiju, Shri Kiren**,**Mahtab, Shri Bhartruhari**,**Banerjee, Shri Kalyan**,**Premachandran, Shri N.K.**,**Tharoor, Dr.Shashi**,**Dubey, Dr.Nishikant**,**Chowdhury, Shri AdhirRanjan**,**Rijiju, Shri Kiren**

Ref.Keywords: **Judges**,**JudicialServices**,**Appointment**,**Vacancies**,**JudicialAdministration**,**Fast Track Court**,**RetirementAge**,**salaries**,**CourtCases**,**National Judicial Appointment Commission**

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