

The National Judicial Appointment Commission (NJAC) in India: Judicial reform or act of political aggrandizement?

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Independence of judiciary is sine qua non for the survival of a healthy democracy. One of the elements having important bearing on the independence of judiciary is- an appropriate method of appointment of judges. While devising methods for appointment of judges, some of the common questions faced by all nations are: how to assess, evaluate and select individuals possessing required judicial qualities? Who is most competent to select judges? Is it only the judges who can be considered best suited to select judges? Will independence of judiciary be compromised if non-judges (intellectuals or people from different walks of life), or the politicians or members of the executive are given role in selection of judges? The judicial system in India is currently going through that decisive phase where the whole nation along with the Supreme Court of India is trying to find answers to the above questions. The whole nation is debating a new method of appointment of judges- the constitution of a National Judicial Appointments Commission (NJAC), with an aim to ensure transparency in appointment and transfer of judges in the higher judiciary. This article aims to draw attention towards the raging debate on the issue of appointment of judges in India.

Introduction

Independence of judiciary, as is well known, is vital for a democracy governed by rule of law. This independence from other organs of the State, legislature and executive is essential to ensure that judges can perform their role- the role of checking abuse of power, the role of safeguarding rights of people without fear, favor, bias and prejudice. Judicial system, manned by judges, free from extraneous influences, is the only guarantee for a robust democracy, where there can be expectation for justice even for a common man.

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While there are many elements which affect the independence of judiciary, there has always been great concern among political scientists and law makers as about the methods used for the appointment of judges. Aspiring to induct the most deserving individuals in the judicial system who can uphold the ideal of independence of judiciary, democratic nations in different parts of the world have experimented with different methods for appointment and removal of judges. Some of the common questions faced by all nations were: how to assess, evaluate and select individuals possessing the requisite qualities? Who is most competent to select judges? Is it only the judges who can be considered best suited to select judges? Will independence of judiciary be compromised if non-judges (intellectuals or people from different walks of life), or the politicians or members of the executive are given a role in the selection of judges?

While the above questions have been debated in the democratic nations of the world at different historical junctures, the judicial system in India is currently going through that decisive phase where the whole nation along with the Supreme Court of India is trying to find answers to the above-mentioned questions. The whole nation is debating a new method of appointment of judges- the constitution of a National Judicial Appointments Commission (NJAC) which came into existence through a recent amendment to the Constitution of India.

After having experimented with two different methods- first, where executive played an important role in the appointment of judges² and second where the judges enjoyed primacy in appointment of judges³- NJAC is an attempt to put in place

2 Article 124 of the Constitution of India: Establishment and constitution of Supreme Court: (1) There shall be a Supreme Court of India consisting 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 the 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 purposes and shall hold office until he attains the age of 65 years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted: Provided further that - (a) a Judge may, by writing under his hand addressed to the President, resign his office; a Judge may be removed from his office in the manner provided in clause (4).

3 The Collegium System of appointment of judges came into existence in India as a result of three Supreme Court judgments, commonly referred as three judges' case, first in 1981, then in 1993 and the last one in 1998: *S.P. Gupta v Union of India*, *SC Advocates-on-Record Association v. Union of India*, (1993) 4 SCC 441: AIR 1994 SC 268-9 Judges. From 1950s till 1993s judges in the Supreme Court and the High Courts were appointed by the government in "consultation" with the Chief Justice of India (CJI). However, the word "consultation" in Article 124 came up for inter-

a new method, wherein other functionaries and organs of the state and society can also play a role in the appointment of judges. It is the result of almost a decade long effort of different Governments in India to set up a constitutional body, which is independent and which would ensure transparency in the appointment and transfer of judges in the higher judiciary.⁴ While NJAC in many ways can be seen as an expression of people's will,⁵ its emergence has met with strong opposition from many quarters. It has given rise to a heated debate on the most suitable method of appointment of judges, which does not impinge on the independence of judiciary. Emergence of NJAC has been followed by a host of petitions which challenged its constitutional validity on the ground that it violates the basic structure of the

pretation before the Supreme Court for the first time in 1981 in the case of *S.P. Gupta v Union of India*, where the question was whether the word "consultation" meant "concurrence" of judiciary. Denying to read "consultation" as "concurrence", the Supreme Court ruled that the recommendation made by the CJI to the President can be refused for "cogent reasons", thereby tilting the scales in favour of the executive. However, the above tilt was re-adjusted by nine judges' bench, this time, fully in favour of judiciary in the subsequent case in 1993, and later while responding to the Presidential reference in 1998, (the second and the third case respectively), when the Supreme Court ruled that the opinion of the collegium (the CJI and the four senior most judges of the Supreme Court) will be binding on the President. Devising a system of collegium for appointment of judges, the nine judges' bench of the Supreme Court held, that no appointment of any judge to the Supreme Court or any High Court can be made unless it is in conformity with the opinion of the CJI. It further held that in exceptional cases, the recommendation made by the CJI may not be made provided there are strong and cogent reasons for doing so and is made known to the CJI. But in case the CJI reiterates his recommendation then, the appointment should be made in accordance with his recommendation. In 1998, President K R Narayanan issued a Presidential Reference to the Supreme Court over the meaning of the term "consultation" under pertinent constitutional provisions. The question was whether "consultation" mentioned under Article 124 of the Constitution required consultation with a number of judges in forming the CJI's opinion, or whether the sole opinion of CJI could by itself constitute a "consultation". In response, the Supreme Court laid down 9 guidelines for the functioning of the coram for appointments and transfers, and this has come to be the present form of the collegium, and has been prevalent ever since.

4 The NJAC is the second attempt by an NDA government to change the way judges are appointed. The BJP-led government of 1998-2003 had appointed the Justice M N Venkatachaliah Commission to opine whether there was need to change the collegium system. The commission opined in favour of change, and prescribed an NJAC consisting of the CJI and two senior most judges, the law minister, and an eminent person from the public, to be chosen by the President in consultation with the CJI. However, the said Commission negated any possibility of Judges on the National Judicial Commission being outvoted by reason of its composition. It also specifically provided that no person who is not recommended for appointment as a Judge 'by the Commission' shall be so appointed by the President.

5 The Amendment Act, 2014 was passed with overwhelming majority in both houses of the Parliament under Article 368(2) of the Constitution of India. According to the procedure prescribed in the above Article, the Amendment was required to be ratified by more than fifty percent of the States as required under the Constitution of India. The Amendment Act, 2014 received ratification from the required more than fifty percent states within a period of six months.

Constitution.⁶ This article aims to draw attention towards the raging debate on the issue of appointment of judges in India. It looks into the main features of the NJAC Act which lays down the procedure for functioning of the NJAC. It highlights those features of NJAC which are becoming cause of resistance to the NJAC.

Emergence and Backdrop of the National Judicial Appointments Commission

NJAC became a legal reality in India on 13th April, 2015, after the Parliament of India enacted the National Judicial Appointments Commission Act, 2014 and the Constitution (Ninety-ninth Amendment) Act, 2014 for bringing in changes to the existing system of appointment of Judges in the Supreme Court and the High Courts. While the Constitution (Ninety Ninth Amendment) Act, 2014 (hereinafter the "Amendment Act") provides for the composition and the functions of the proposed NJAC, the National Judicial Appointments Commission Act, 2014 (hereinafter "the Act") provides for the procedure to be followed by the NJAC for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court (SC), and the Chief Justices and other Judges of the High Courts (HC).

In addition to introducing changes to the various Articles of the Constitution⁷ concerned with appointment of judges in the Supreme Court and the High Courts, the Amendment Act has introduced three new Articles, Article 124 A, B and C in the Constitution which affect the constitution of NJAC, as a new constitutional body, able to make recommendations to the Government for appointment of judges. Earlier under Article 124 it was the Chief Justice of India who was to make recommendations to the Government for the appointment of Judges.⁸ As provided for

6 A five-judge bench comprising Justice Khehar, Justice Chelameswar, Justice Lokur, Justice Kurian Joseph and Justice Goel are presently hearing arguments from the 10 petitioners challenging the Constitutionality of the NJAC Act. The respondents include the Central Government, 22 states and 2 Union Territories.

7 The Amendment Act has introduced changes in Articles 127, 128, 217, 222, 224 and 231 of the Constitution of India.

8 While Article 124 A provides the composition of the Commission, Article 124 B prescribes the functions of the Commission. It states, it shall be the duty of the National Judicial Appointments Commission to, (a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts; (b) recommend

in the newly added Article 124 A, the NJAC would be chaired by the Chief Justice of India as in the earlier collegium system. The NJAC membership would include two senior most Judges of the Supreme Court, the Union Minister of Law and Justice, two eminent persons to be nominated by a committee of the Prime Minister of India, the Chief Justice of India, and the Leader of the Opposition in the Lok Sabha (lower house of the Parliament), or if there is no Leader of the Opposition, then the Leader of the single largest Opposition Party in the Lok Sabha (lower house of the Parliament). With a view to ensuring that the composition of the National Judicial Appointments Commission is inclusive, the Act provides that one of the eminent persons shall be nominated from amongst persons belonging to the Scheduled Caste, the Scheduled Tribes, Other Backward Classes, Minorities or Women⁹. The NJAC will frame its own regulations.

Prescribing the functions of the Commission, Article 124 B of the Amendment Act makes it a duty of the Commission to (a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts; (b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and (c) ensure that the person recommended is of ability and integrity.

Emergence of NJAC brought to an end the "system of collegium"- the system for

transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and (c) ensure that the person recommended is of ability and integrity. On the other hand Article 124 C gives power to the Parliament to make law to regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it."

9 124A. (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely, (a) the Chief Justice of India, Chairperson, *ex officio*; (b) two other senior Judges of the Supreme Court next to the Chief Justice of India --Members, *ex officio*; (c) the Union Minister in charge of Law and Justice--Member, *ex officio*; (d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People: Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women: Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for re-nomination. (2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

the appointment of judges of the higher judiciary which was in existence since 1993. As a result of the Supreme Court's decisions in the much talked about "three judges' cases", the effect of giving primacy to the judges of the Supreme Court in the selection and appointment of judges came into fore. It brings to end the collegium system, which had in turn replaced the system of appointment of judges which was in existence since independence by virtue of Article 124 of the Constitution, which gave an important role to the Executive in the appointment of judges. Emergence of NJAC, in other words, is, *prima facie*, about re-emergence of that system of appointments where executive can also have a role in appointment of judges. However NJAC goes further as it aims to give role to people from other walks of life having included 'eminent persons' in its composition. Although lawyers and political scientists are debating the extent and nature of role of the executive, hardly anybody rejects the necessity of giving role to the executive in appointment of judges. NJAC is about developing and prescribing an objective and transparent process for appointment of judges. The NJAC, as the next section describes, is accompanied by a separate Act- the National Judicial Appointment Commission Act, 2014, which is meant to provide for a transparent and broad-based process of selection of Judges of the Supreme Court and High Courts by the NJAC.

Main Features of the NJAC Act, 2014

Emphasis on merit for the Supreme Court Judges

For the purpose of appointment of the Chief Justice of India and also for the Chief Justices of the High Courts, while this Act keeps the condition of seniority as the criteria, it brings stronger emphasis on merit in the appointment of judges. For the appointment of Chief Justice of India, while seniority is given due weightage, the Act mentions more prominently the requirement of "if considered fit to hold office" as mentioned also in the Second Judges' case. On the other hand for the purpose of appointment of other judges of the Supreme Court, the Act, taking a departure from the earlier systems where there did not exist any clear criteria for assessing the candidature for the judgeship, envisages appointments to be made on the basis of ability and merit, and aims to develop regulations for determining suitability, ability and merit of the candidates for the post of the Supreme Court judges.¹⁰

¹⁰ Section 5 of the 2014 Act mentions, (1) The Commission shall recommend for appointment the

Emphasis on Criteria for Assessing Suitability

One of the important features of this Act is the power to frame regulations to lay down the criteria for assessing suitability for appointment as judges. According to section 12 of the Act the Commission is required to frame regulations for the following matters: (a) the criteria of suitability with respect to appointment of a Judge of the Supreme Court; (b) other procedure and conditions for selection and appointment of a Judge of the Supreme Court; (c) the criteria of suitability with respect to appointment of a Judge of the High Court; (d) other Judges and eminent advocates who may be consulted by the Chief Justice; (e) the manner of eliciting views of the Governor and the Chief Minister; (f) other procedure and conditions for selection and appointment of a Judge of the High Court; (g) the procedure for transfer of Chief Justices and other Judges from one High Court to any other High Court; (h) the procedure to be followed by the Commission in the discharge of its functions; (i) the rules of procedure in regard to the transaction of business at the meetings of Commission, including the quorum at its meeting, (j) any other matter which is required to be, or may be, specified by regulations or in respect of which provision is to be made by regulations.

While the NJAC Act vests wide powers in the commission by giving it responsibility to make regulations, the regulations made by the commission are required to pass the scrutiny of the Parliament. Section 13 of the Act requires that every rule and regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days, which may be comprised in one session or in two or more successive sessions.

Role of the State Executive in selection process of the High Court judges

For the purpose of appointment of High Court judges, the Act gives importance

senior-most Judge of the Supreme Court as the Chief Justice of India if he is considered fit to hold the office: Provided that a member of the Commission whose name is being considered for recommendation shall not participate in the meeting. (2) The Commission shall, on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, recommend the name for appointment as a Judge of the Supreme Court from amongst persons who are eligible to be appointed as such under clause (3) of article 124 of the Constitution: Provided that while making recommendation for appointment of a High Court Judge, apart from seniority, the ability and merit of such Judge shall be considered: Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation. (3) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Judge of the Supreme Court as it may consider necessary.

to the role of the Chief Justice of the High Court concerned either in the form of seeking nomination or by seeking opinion of the Chief Justice on the names that have been shortlisted on the basis of criteria developed through regulations. In order to make the appointment process broad based, the Act makes it obligatory for the Chief Justice to seek opinion of the two senior-most Judges of the High Court concerned and such other Judges and eminent advocates of that High Court as may be specified by regulations.¹¹ The Act also gives a role to the Governor and the chief minister of the State concerned as section 7 of the Act provides that the Commission shall elicit in writing the views of the Governor and the Chief Minister of the State concerned before recommending any name for appointment as a judge.

Time Period for notification of vacancy

Considering selection and appointment of judges as a time consuming process, section 4 of the Act makes it obligatory for the central government to make a reference to the Commission for making its recommendation to fill up any vacancy six months prior to the date of occurrence of any vacancy by reason of completion of the term of a Judge of the Supreme Court or of a High Court.

11 Section 6, NJAC 2014: (1) The Commission shall recommend for appointment a Judge of a High Court to be the Chief Justice of a High Court on the basis of *inter se* seniority of High Court Judges and ability, merit and any other criteria of suitability as may be specified by regulations. (2) The Commission shall seek nomination from the Chief Justice of the concerned High Court for the purpose of recommending for appointment a person to be a Judge of that High Court. (3) The Commission shall also on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, nominate name for appointment as a Judge of a High Court from amongst persons who are eligible to be appointed as such under clause (2) of article 217 of the Constitution and forward such names to the Chief Justice of the concerned High Court for its views. (4) Before making any nomination under sub-section (2) or giving its views under sub-section (3), the Chief Justice of the concerned High Court shall consult two senior-most Judges of that High Court and such other Judges and eminent advocates of that High Court as may be specified by regulations. (5) After receiving views and nomination under sub-sections (2) and (3), the Commission may recommend for appointment the person who is found suitable on the basis of ability, merit and any other criteria of suitability as may be specified by regulations. (6) The Commission shall not recommend a person for appointment under this section if any two members of the Commission do not agree for such recommendation. (7) 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. (8) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Chief Justice of a High Court and a Judge of a High Court as it may consider necessary.

Emergence of NJAC: A Revolutionary Step?

A National Judicial Appointment Commission in India is a legal reality in India. It can be perceived as a revolutionary step to the extent that it aims to serve a long-standing demand of an institutional framework with a rational and transparent procedure for the appointment of judges at the higher judiciary.¹² Like any other legislative experiment, success of this new measure will undoubtedly depend on implementation of the new Act. However, while there is a strong public opinion against the 'collegium system' and in favour of an institutional framework for appointment of judges, the NJAC in its present form has attracted strong criticism and opposition. The challenges to NJAC have arisen, interestingly enough, from both supporters and detractors of the collegium system¹³. While supporters of the collegium system find any role of executive in selection of judges as a threat to the independence of judiciary¹⁴, the detractors find it difficult to support NJAC, in its current form, as a viable alternative to the collegium system. The constitutional validity of the Act has been challenged for a wide range of reasons ranging from procedural lapses in the promulgation of the Act to the Act being a threat to the independence of judiciary and also to the basic structure of the Constitution. The argument common to all petitions is that the NJAC will lead to a violation of Article 50 of the Constitution, i.e. the separation of the judiciary from the executive. Furthermore, the enforcement of the NJAC Act, critiques contend, would lead to a scenario where the biggest litigant (the government) is appointing the judiciary.¹⁵

12 Prashant Padamnabhan, "Revamp the System of Judicial Appointments- A Demand Long Overdue", *Live Law*, July 26, 2014, <http://www.livelaw.in/revamp-system-judicial-appointments-demand-long-overdue>

13 Indira Jaisingh, "National Judicial Appointment Commission, A Critique", *Economic and Political Weekly*, xlix (2014) 35, 16-19; Kaleeswaram Raj, "Federalism in Judicial Appointments", *The Hindu*, September 17, 2014, <http://www.thehindu.com/opinion/op-ed/federalism-in-judicial-appointments/article6416552.ece>; Santosh Paul, "NJAC and the Tragedy of the Library of Alexandria", *Live Law*, April 16, 2015, <http://www.livelaw.in/njac-and-the-tragedy-of-the-library-of-alexandria-2>

14 Ram Jethmalani, "First, insulate the judge from politics", *Indian Express*, August 7, 2014; S. Sanal Kumar, "Collegium in Collation with Executive's Frailty", *Live Law*, May 4, 2015, <http://www.livelaw.in/collegium-in-collation-with-executives-frailty/>

15 Aditya AK and Anuj Agarwal, "The NJAC Challenge- Round Up of Legal Arguments", *Bar and Bench*, April 29, 2015; Aditya AK and Anuj Agarwal, "The NJAC Challenge- Round Up of Legal Arguments", *Bar and Bench*, April 29, 2015, <http://barandbench.com/njac-challenge-roundup-legal-arguments>

Describing this provision as being part of the basic structure of the Constitution, the petitioners have cited *Kesavanada Bharati* and *Indira Gandhi vs. Raj Narain*, where it was held that the power to amend the Constitution under Article 368 does not enable Parliament to alter the basic structure of the Constitution.

Many critiques of NJAC argue that the establishment of NJAC in its current form seems to mean nothing more than simply replacing collegium of judges with another body, with no in-built mechanisms for ensuring transparency and objectivity in the process of selection.

While general public opinion is in favour of giving role to the executive, the NJAC Act, due to some of its provisions has come to be seen by critics as an attempt by a 'strong government' to take control over the judiciary. The Commission in its present form is being seen as a major threat to the ideal of independence of judiciary in India. Some of the most criticized provisions of the Amendment Act and the 2014 Act which are perceived as transferring control to the executive are: the provisions relating to selection of 'eminent persons'¹⁶ and the power of dissent given to 'any two members' of the commission to whittle down any recommendation of the Commission.¹⁷ While the provision of 'eminent persons' is meant to make the selection process more broad based and inclusive,¹⁸ the role of two politicians- the prime minister and the leader of opposition in Parliament- in the selection of the 'eminent persons' has been a strong reason for challenge to the NJAC.¹⁹ Many

16 The amended Article 124 A (d) prescribes that NJAC is to consist of two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People. Proviso to the Article mentions that one of the eminent persons shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women.

17 See Proviso to section 5(2), NJAC Act, 2014: Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation and Section 6 (6): The Commission shall not recommend a person for appointment under this section if any two members of the Commission do not agree for such recommendation.

18 The newly added Article 124 A in the Constitution provides that one of the eminent persons shall be nominated from amongst persons belonging to the Scheduled Caste, the Scheduled Tribes, Other Backward Classes, Minorities or Women

19 For views of the Supreme Court judges hearing challenge to the constitutional validity of NJAC, see Utkarsh Anand, "Freedom Key, NJAC Can't Violate Basic Structure of the Constitution", *Indian Express*, May 6, 2015, <http://indianexpress.com/article/india/india-others/freedom-key-njac-cant-violate-basic-structure-of-constitution-supreme-court>

critics apprehend that the dominance of politicians in the selection of 'eminent persons' would give ample opportunity to the executive to appoint persons with specific political and ideological orientation. Provision relating to 'eminent persons' is also criticized for lack of clarity on the criteria for selection of the 'eminent persons'. There have been divergent views on the background of the 'eminent persons', that is, whether these persons have to be from a legal background or non-legal background or either.

Critiques of NJAC have also shown concern about giving "equal power" to all the members, judicial as well as non-judicial, in the appointment of judges, and also the power of veto given to any two members of the NJAC. The fact that the six-member NJAC will comprise 3 Supreme Court judges including the Chief Justice, the law minister and 2 eminent jurists, gives rise to a possibility of the CJI and two senior-most Judges of the SC being out-voted by two non-judge Members of NJAC, which effectively means that a situation may arise where judges are appointed by non-judges.

There is a serious concern amongst experts about the law minister having the same vote as the Chief Justice of India. Presence of law minister in the Commission is also challenged on the basis of the fact that the executive is the biggest litigant in cases of citizen complaints.²⁰ NJAC is also being challenged for being too vague or ambiguous about the criteria for assessing the suitability and merit of judges.²¹ There is skepticism about not including the criteria for appointment of judges in the constitutional amendment. Such petitioners contend that by moving the

20 Ram Jethmalani, "First, Insulate the Judge from Politics", *Indian Express*, August 7, 2014, <http://indianexpress.com/article/opinion/columns/first-insulate-the-judge-from-politics>, accessed on 2nd June, 2015. Ram Jethmalani a senior lawyer and seasoned politician mentioned,

"Politicians as a class and the executive in power must therefore have no voice in the appointment of judges. The executive is the biggest litigant in cases of citizen complaints of the oft-corrupt misuse of executive powers. Even a good judge appointed by a corrupt minister will not command public confidence. The second judges case, the origin of the present collegium system, was a correct decision, and the current system is vastly superior to the one it supplanted. It was the one that produced the tellingly sarcastic comment, "It has created two kinds of judges — those who know the law and those who know the law minister."

21 The criteria of suitability for appointment of Judges to the higher judiciary have not been provided for in the impugned 99th Constitution Amendment Act. Moreover, the NJAC Act does not lay down any standard of transparency, which is a *sine qua non* for appointments to the high offices.

power to appoint judges into an Act, Parliament now has an unfettered ability to amend laws and regulations pertaining to functioning of the NJAC²². This in other words, means indirectly modifying the appointment procedure without requiring a constitutional amendment. Some fear that the Act has the effect of diluting the power of CJI, and thereby belittling the role of judges in appointment of judges.

The petitions challenging NJAC have raised doubts about the ability of an ex-officio body like the NJAC. One petition, as reported by Aditya AK and Anuj Agarwal, states²³,

"Selecting more than 100 judges of the higher judiciary every year (from amongst thousands of potential candidates) in a rational and fair manner is an onerous task requiring a full-time and not an ex-officio body. Before making a selection, the candidates have to be evaluated for their competence, integrity, judicial temperament and their sensitivity for the concerns of common persons... Having an ex-officio body would lead to arbitrary appointments, which violates Article 14 and 21 of the Constitution of India."

While there is a demand for an independent body for the appointment of judges, larger opinion is in favour of a body on the lines of the Judicial Appointments Commission (JAC) of the United Kingdom, which is also a full-time body.²⁴

Conclusion

Many apprehensions regarding NJAC are undoubtedly well-founded. Given the past incidents of executive trying to interfere in the appointment of judges, more stringent checks and balances are needed not only to regulate the procedure of selection and appointment of judges but also to make the Commission and its members accountable. Support to NJAC can, in no way, mean support to the idea of replacing a set of judges with another, howsoever diversified, set of people, without appropriate mechanisms to ensure transparency and accountability in functioning

²² While the Constitution Amendment Act, 2014 provides for constitution of the Commission, the criteria for suitability and the merit are to be laid down through legislation, the NJAC Act, 2014.

²³ (Aditya and Agarwal, 2015), see note 15 above.

²⁴ Kaleeswaram Raj, "Federalism in Judicial Appointments", *The Hindu*, September 17, 2014, <http://www.thehindu.com/opinion/op-ed/federalism-in-judicial-appointments/article6416552.ece>

of this new body. While discussing the issue of appointment of judges, the main issue perhaps is not, who will select the judges. Composition of the Commission, undoubtedly, is an important issue; however, what is more, or at least of equal importance, is the issue of ensuring transparency in the functioning of the Commission.²⁵ The public demand for a new system of appointment of judges, is not restricted to the issue of who is best suited to select the judges. Whether judges are best suited to select the judges, surely, is a matter of strong debate. However, limiting the debate to the question of primacy or non-primacy of judges in the selection process would miss the point that the primary reason for the attack against the collegium system has been its arbitrary and opaque nature of functioning. Surely, long experience as a judge of the Supreme Court endows judges with better insights for judging the suitability of a person for the exalted position of a judge of the High Court and the Supreme Court. However, at the same time it can also not be denied that, merely by being a judge, no matter howsoever long a period, does not impart required and sufficient competence for selection, or at least better selection of judges. Therefore, what is needed is a new mechanism which can make the judges, the politicians, the eminent persons, collectively as well individually, accountable.

Future of this commission and the accompanying Act, for the moment is shrouded in doubts, with the constitutional validity of the Act under challenge. Deciding upon its constitutional validity is a prerogative of the Supreme Court of India. However, whatever maybe the result of the 'validity test', the process of emergence of NJAC has a value for having initiated a strong debate in India on the selection and appointment procedure for the higher judiciary too. It undoubtedly signifies a paradigm shift in the manner that judges of the higher judiciary in India have been appointed in the last 22 years²⁶. The Supreme Court, with its five judges' bench has an extremely onerous task for deciding the future of democracy in India. There are some difficult questions to answer. Whether collegium system is to be considered dead forever or whether it can be revived in case the Supreme Court decides it to be constitutionally invalid remains to be seen. In case the collegium system cannot be revived, can the Parliament be required to pass a new Amendment to the Constitution for devising an alternate method for the appointment of judges? However, in case the 2014 Act and NJAC pass the test of constitutional validity,

²⁵ *ibid.*

²⁶ Utkarsh Anand, "Appointment of Judges- 34 Year Stop-Start Battle of Interpretation", *Indian Express*, April 30, 2015.

much depends on the rules and regulations that are to be framed under the Act. NJAC is a new experiment and what is required is stricter scrutiny in the process of formation of rules and regulations which are to regulate the functioning of the Commission.²⁷

Whatever may be the result, the value of NJAC lies in having brought to the forefront the longstanding requirement of an institutional framework for selection and appointment of judges. Debate on the constitutional validity of NJAC has made selection of judges a matter of public debate. Debate on NJAC makes it clear that people of India want to be governed by rule of law and want to ensure that those responsible for upholding rule of law for common people are themselves governed by it. It, now, lies on the five judges' bench to suggest a solution to balance the ideal of independence of judiciary with the will of the people for a broad-based institutional framework for appointment of judges.

²⁷ Naren Thapetta, "Big data analysis must aid 'eminent persons' in judicial appointments under NJAC #longread", *Legally India*, May 15, 2015.