

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)
Writ Petition (Civil) No. of 2015
PUBLIC INTEREST LITIGATION

In the matter of:

1) Centre for Public Interest Litigation
Through Its General Secretary
43, Lawyers Chambers
Supreme Court of India-110001
Kamini.jaiswal@gmail.com
Ph: 011-41764137

..... The Petitioner

VERSUS

1) Union of India
Through Its Secretary
Ministry of Law and Justice
4th Floor, A-Wing
Shastri Bhawan, New Delhi-01

..... The Respondent

A Writ Petition in Public Interest under Article 32 of the Constitution of India for preservation of basic structure of the Constitution of India and for the enforcements of rights under Articles 14 and 21 of the Constitution of India, challenging the validity of the Constitution 99th Amendment Act, 2014 and the National Judicial Appointments Commission Act, 2014

To,

**THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS COMPANION
JUDGES OF THE HON'BLE SUPREME COURT OF INDIA**

The Humble Petition of the
Petitioner above-named

MOST RESPECTFULLY SHOWETH: -

1. That the Petitioner, Centre for Public Interest Litigation, is a registered society (No.) formed for the purpose of taking up causes of grave public interest and conducting public interest litigation in an organized manner. Its founder President was the late Shri V.M. Tarkunde and its Executive Committee consists of several senior advocates including Shri Fali S. Nariman, Shri Shanti Bhushan, Shri Anil Divan, Shri Rajinder Sachar, Shri Colin Gonsalves among others. Over the years, the petitioner has established itself as a credible public interest organisation. Ms. Kamini Jaiswal, General Secretary of the Petitioner Society is authorized to file this PIL. Petitioner is a non-profit body (PAN No.). The requisite certificate

and memorandum/rules of the society are filed along with the vakalatnama. The petitioner has no personal interest, or private/oblique motive in filing the instant petition. There is no civil, criminal, revenue or any litigation involving the petitioner, which has or could have a legal nexus with the issues involved in the PIL. The petitioner has not made any representation to the authorities since the issue involves a challenge to Constitutional amendment and also because similar petitions are already pending before this Hon'ble Court.

Case in brief

2. The Petitioner is filing the instant writ petition in public interest challenging the validity of the Constitution 99th Amendment Act, 2014 as violative of the basic structure of the Constitution. The petitioner is also challenging the validity of the National Judicial Appointments Commission Act 2014. Through the said amendment, the Constitution has been amended to set-up a National Judicial Appointments Commission (NJAC) for the appointment of judges of the Hon'ble Supreme Court of India and of the Hon'ble High Courts.

Background

3. The attempt to undermine the independence of the judiciary originated in 1973, after the Kesavananda Bharti judgement which struck down some constitutional amendments by saying that the basic structure of the Constitution could not be amended [(1973) 4 SCC 225]. The Government of the day decided that only those judges who are committed to the ideology of the government should be appointed. That began the process of supersession of Judges (for appointment of Chief Justices). At that time, judges were appointed by the government in "consultation" with the Chief Justice of India as provided by the Constitution. The Congress government then said that it was not bound by the advice of the Chief Justice. Thereafter some persons who had proximity to the government were appointed as Judges by the Government. The saying, that in order to become a judge, it was not important to know the law, but more important to know the law Minister, became the prevailing wisdom. The subversion of the independence of the judiciary by the appointment of convenient judges became a major issue, especially with increasing corruption within the executive.

4. The issue of the manner of appointment of judges was first raised in S.P. Gupta's case [1981 (Supp) SCC 87]. The question was whether the government or the Chief Justice should have primacy in the matter of appointment of judges, especially because independence of the judiciary had been declared a basic feature of the Constitution. In that case, the majority held that primacy in judicial appointments was with the government and it could disregard the opinion of the Chief Justice in the matter of appointments and transfers of judges and Chief Justices. But as this led to more brazenly partisan appointments, the issue was referred to a larger bench for reconsideration.

5. Finally in 1993, the view in S.P. Gupta's case was reversed by an innovative judgement in the Supreme Court Advocate on Record Association case [1993(4) SCC 441], which wrested the control in the matter of judicial appointments from the executive and vested it with the judiciary. The words "in consultation with the Chief Justice" was interpreted to mean, "with the consent of the Chief Justice". The meaning of Chief Justice was interpreted as, a collegium of Chief Justice plus 3 senior judges of the Court. In fact, a new elaborate procedure was laid out by the court for appointment of judges, in which the role of the government was reduced to returning a name recommended by the collegium for reconsideration. If the collegium reiterated its recommendation, the President would have no option but to go through with the appointment. High Court appointments would also go through a similar procedure, except that the recommendations there would originate from the collegium of the High Courts.

6. In 1998, the Supreme Court further tweaked its judgement of 1993 in a Presidential Reference on this issue [(1998) 7 SCC 739]. The collegium was widened to 5 judges. Consultation with other judges in the court who came from the same High Court as the proposed nominee was also provided. But the control over the appointments continued to vest with the Judiciary.

7. This system of appointment of judges by the judiciary did lead to the de-politicization of the judiciary to a large extent and did substantially improve its independence. But the process of appointments was still shrouded in secrecy and keeping the control over appointments with sitting judges who had little time from their judicial work, coupled with the lack of

transparency in such appointments led to nepotism and arbitrary appointments. No criterion for selection was laid down nor any system was devised to evaluate various candidates in the zone of consideration on any criteria. No system of inviting any applications or nominations was devised either. Thus the quality of appointments did not substantially improve even in this system. The appointments of Justice Soumitra Sen and Justice P.D. Dinakaran who had to resign facing impeachment, were also products of this judiciary driven system of appointments.

8. All this led to the political establishment seeking a greater say in judicial appointments. There were also serious voices like that of Late Justice Krishna Iyer who called this an incestuous system and a snatching of appointments by abuse of judicial power. Even Late Justice J.S. Verma, the author of the original 1993 judgment came to say that he did not anticipate that his judgment would lead to such poor appointments by the judiciary.

Proposal for Reform

9. The Committee on Judicial Accountability (a voluntary body of Senior Lawyers and retired judges) proposed a bill for the Constitution of a full time and independent body called the Judicial Appointments commission for the selection of judges to the High Courts and the Supreme Court. It was proposed that such a body could be constituted from among retired judges or other eminent persons who are selected in the following manner: The Chairman to be selected by the collegium of all judges of the Supreme Court. A second member by the collegium of all Chief Justices of the High Courts. A third member by the Union Cabinet. A fourth by collegium of the leaders of Opposition of the two houses of Parliament along with the Speaker of the Lok Sabha. A fifth by a collegium of the CEC, the CAG and the CVC. Each of these members of the Judicial appointments commission would have a tenure of 5 years and would thus be independent of the government as well as of the sitting judiciary. This body would be mandated to function transparently and would have to publish the persons shortlisted for appointment for the information and comments of the people, before the final selection. Being a full time body, it would lay down the criteria for selection and would be mandated to go about its task in a structured and rational manner.

10. However, the political executive was not interested in creating an independent full time body as exists in United Kingdom (UK) to select judicial appointees and has created an ex-officio body called NJAC vide the Constitutional amendment of 2014. Thus, the NJAC is conceived as an ex-officio body of people who would have little time to devote to appointments and does not lay down any standards of transparency in the appointments.

Judicial integrity and appointments

11. Undoubtedly the judicial integrity, judicial independence and judicial review are part of the basic structure of our Constitution. Judicial integrity and independence is necessary for the maintenance of democracy and rule of law in the country.

12. Judicial integrity is not only to be ensured by insulating the judges after their appointment, but also by ensuring that best persons are appointed as Judges of the Supreme Court and High Courts. Greatest care in the selection of Judges for the higher judiciary is required in order to ensure that most suitable persons with highest competence and integrity are appointed as Judges of Supreme Court and High Court. Anything less than the above would ipso facto violate the basic structure of our constitution, which includes judicial integrity, judicial independence and judicial review.

Constitution 99th Amendment Act

13. The Constitution 99th Amendment Act 2014 makes changes in Articles 124(2) (as well as Article 217(1)) of the Constitution relating to provisions for appointment of Judges of the Supreme Court and of the High Courts, and also makes some other changes in Chapter IV of Part V of the Constitution (Union Judiciary) as well as Chapter V of Part VI of the Constitution (High Courts in the States) – as stated below:

a) Article 124 (2) as it stood, as enacted in the Constitution of India 1950, reads as follows:

“(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:

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;*
- (b) a Judge may be removed from his office in the manner provided in clause (4).”*

b) After the latest amendment, Clause (2) of Article 124 now reads as follows:

“124. Establishment and constitution of Supreme Court

(1)..

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to Article 124A, and shall hold office until he attains the age of sixty-five years:

Provided that –

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;*
- (b) a Judge may be removed from his office in the manner provided in clause (4).”*

c) Clause 3 of the Constitution 99th Amending Act provides for the following additional articles to be inserted in the Constitution:

(i) Article 124A – provision is made for appointment of a “National Judicial Appointments Commission”; consisting of six members: three of whom are to be the three seniormost Judges of the Supreme Court including the Chief Justice of India (as Chairperson); the remaining three members are the Union Minister of Law and Justice and two “eminent persons” to be nominated – not by the Chief Justice of India – but by a panel (consisting of the Prime Minister, the Chief Justice of India and

Leader of Opposition or leader of the single largest Opposition Party in the Lok Sabha.

(ii) Article 124B – prescribes the “Functions of the National Judicial Appointments Commission”; viz. that it shall be the duty of the National Judicial Appointments Commission to 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; and to recommend transfers of Chief Justices and other Judges of High Courts from one High Court to any other High Court and to ensure that the person recommended is of ability and integrity.

(iii) Article 124C – provides that “*Parliament may by law regulate the procedure for the appointment of the 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 discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it*”.

d) Clause 4 of the Act provides for an amendment to Article 127 of the Constitution (Appointment of ad hoc Judges) in that in clause (1) of Article 127 for the words “the Chief Justice of India may, with the previous consent of the President” the following words are substituted viz. “the National Judicial Appointments Commission on a reference made to it by the Chief Justice of India, may with the previous consent of the President”.

e) Clause 5 of the Act provides that in Article 128 of the Constitution (Attendance of retired judges of the Supreme Court may be required by the Chief Justice of India with the previous consent of the President) for the words “the Chief Justice of India” the following words are substituted: “the National Judicial Appointments Commission”.

f) Clause 6 of the Act provides for an amendment of Article 217 of the Constitution (Appointment and conditions of the office of a Judge of a High Court) – viz. for the portion “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” the following

words figures and letter are to be substituted viz. “on the recommendation of the National Judicial Appointments Commission referred to in Article 124A”

g) Clause 7 of the Act provides that in Article 222 of the Constitution (Transfer of a Judge from one High Court to another) - for the words “after consultation with the Chief Justice of India” the following words, figures and letter are to be substituted viz. “on the recommendation of the National Judicial Appointments Commission referred to in Article 124A”.

h) Clause 8 of the Act provides for an amendment of Article 224 of the Constitution (Appointment of additional and acting Judges) viz. in clause (1) and Clause 2 of Article 224 for the words “the President may appoint”, the following words are to be substituted viz. “the President may in consultation with the National Judicial Appointments Commission appoint”.

i) Clause 9 of the Act provides that in Article 224A of the Constitution (Appointment of retired Judges at sittings of the High Courts) for the words “the Chief Justice of a High Court for any State may at any time, with the previous consent of the President” the following words are to be substituted viz. “the National Judicial Appointments Commission on a reference made to it by the Chief Justice of a High Court for any State may with the previous consent of the President”.

j) Clause 10 of the Act provides that sub-clause (a) of the clause (2) of Article 231 of the Constitution shall be omitted.

A copy of the said Constitution 99th Amendment Act, 2014 is annexed as **Annexure P1** (Pg _____).

14. The Constitutional 99th Amendment Act 2014 only establishes a largely ex-officio body having three sitting judges of the Supreme Court, the sitting law minister and two jurists. 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. The same cannot be done by an ex-officio body. An ex-officio body of sitting judges and ministers cannot devote the kind of time required for this task. Therefore, the

said Amendment does not create a body that can fulfill the onerous task of appointing Supreme Court and High Court judges by finding out the best available talent. The Amendment does not ensure judicial integrity and thus violates the Basic Structure of the Constitution.

15. The country therefore need a broad-based independent constitutional body that would make appointments of judges in a transparent manner by calling for applications and nominations of candidates and evaluating them on set criteria. This body can be on the lines of the Judicial Appointments Commission (JAC) of the United Kingdom, which is also a full-time body, which has adequate time, expertise and resources to select the best candidates. Having an ex-officio body would lead to arbitrary appointments which violates Article 14 and 21 of the Constitution of India. The said Articles are part of the basic structure of the Constitution and guarantee non-arbitrariness and rule of law.

NJAC Act 2014

16. By clause 3 of the Constitution Amendment Act 2014, Article 124C has been *inter-alia* inserted in the Constitution. The said Article 124C states: *“Parliament may, by law, 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.”*

17. In exercise of the power granted by said Article 124C, the Parliament has enacted the NJAC Act, 2014. The said Act has been enacted *“the regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto.”*

18. The National Judicial Appointments Commissions Act, 2014 has been enacted to regulate the procedure to be followed by the NJAC for appointments of Judges of the Supreme Court of India and the High Courts. A copy of the said Act is annexed as **Annexure P2** (Pg _____). The Act provides for the following:

a) Central Government will make a reference to the NJAC regarding the vacancies of judges of Supreme Court and High Court that need to be filled up. Whenever a vacancy arises due to completion of the term, a reference shall be made to NJAC six months in advance.

b) Procedure for selection of Supreme Court judges: (i) The NJAC shall recommend the senior most judge of the Supreme Court for appointment as Chief Justice of India if he considered fit to hold the office. (ii) The NJAC shall recommend names of persons on the basis of their ability, merit and other criteria specified in the regulations. (iii) The NJAC shall not recommend a person for appointment if any two of its members do not agree to such recommendation.

c) Procedure for selection of High Court judges: (i) The NJAC is to recommend a Judge of a High Court to be the Chief Justice of a High Court on the basis of seniority across High Court judges. The ability, merit and other criteria of suitability as specified in the regulations would also be considered. (ii) Nominations shall be sought from Chief Justice of the concerned High Court for appointment of High Court judges. (iii) The Commission shall nominate names for appointment of High Court judges and forward such names to the Chief Justice of the concerned High Courts for their views. (iv) In both the above cases, the Chief Justice of the High Court shall consult two senior most judges of that High Court and any other judges and advocates as specified in the regulations. (v) The NJAC shall elicit in writing the views of the Governor and the Chief Minister of the State before making recommendations. (vi) The NJAC shall not recommend a person for appointment if any two members of the Commission do not agree to such recommendation.

d) Transfer of Chief Justices and High Court judges: (i) The NJAC is to make recommendations for transfer of Chief Justice and other judges of the High Courts. (ii) The procedure to be followed will be specified in the regulations.

e) Power of the President of India: (i) The President may require the NJAC to reconsider the recommendation made by it. (ii) If the NJAC reiterates its recommendation, then the President shall act according to the same.

19. However, the said Act does not lay down any standard of transparency, which is a *sine qua non* for appointments to high offices as held by this Hon'ble Court in various judgments. The said Act also does not lay down any objective criteria for the selection of judges. It does not also state how the NJAC would evaluate the candidates for final selection. Therefore, the said Act gives unguided discretion to the NJAC to make arbitrary selection in an opaque manner. The said Act is thus violative of Article 14 and 21 of the Constitution, which guarantee non-arbitrariness and rule of law, and is therefore unconstitutional and void.

20. It is therefore essential that a full-time broad-based body is set-up that would make appointments to constitutional courts in a transparent and rational manner after evaluating candidates on set criteria. The minimum level of transparency would require that the names of shortlisted candidates ought to be made public so that the public can send any evidence, if any, against any of the shortlisted candidates to the said body, which would then take that into account.

21. The Petitioner Society has not filed any other writ, complaint, suit or claim in any manner regarding the matter of dispute in this Hon'ble Court or in any High Court or in any court throughout the territory of India. The Petitioner has no other effective remedy available.

Grounds

A. That the judicial integrity, judicial independence and judicial review are part of the basic structure of our Constitution. Judicial integrity and independence is necessary for the maintenance of democracy and rule of law in the country.

B. That judicial integrity is not only to be ensured by insulating the judges after their appointment, but also by ensuring that best persons are appointed as Judges of the Supreme Court and High Courts.

C. That the greatest care in the selection of Judges for the higher judiciary is required in order to ensure that most suitable persons with highest competence and integrity are appointed as Judges of Supreme Court and High Court. Anything less than the above would ipso facto violate the basic structure of our constitution, which includes judicial integrity, judicial independence and judicial review.

D. That the Constitutional 99th Amendment Act 2014 only establishes a largely ex-officio body having three sitting judges of the Supreme Court, the sitting law minister and two jurists. The Constitutional 99th Amendment Act 2014 only establishes a largely ex-officio body having three sitting judges of the Supreme Court, the sitting law minister and two jurists. 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. The same cannot be done by an ex-officio body.

E. That an ex-officio body of sitting judges and ministers cannot devote the kind of time required for this task. Therefore, the said Amendment does not create a body that can fulfill the onerous task of appointing Supreme Court and High Court judges by finding out the best available talent. The Amendment does not ensure judicial integrity and thus violates the Basic Structure of the Constitution.

F. That the country needs a broad-based independent constitutional body that would make appointments of judges in a transparent manner by calling for applications and nominations of candidates and evaluating them on set criteria. This body can be on the lines of the Judicial Appointments Commission (JAC) of the United Kingdom, which is also a full-time body, which has adequate time, expertise and resources to select the best candidates.

G. That having an ex-officio body would lead to arbitrary appointments, which violates Article 14 and 21 of the Constitution of India. The said Articles are part of the basic structure of the Constitution and guarantee non-arbitrariness and rule of law.

H. That the NJAC Act 2014 does not lay down any standard of transparency, which is a *sine qua non* for appointments to high officers as held by this Hon'ble Court in various judgments. The said Act also does not lay down any objective criteria for the selection of judges. It does not also state how the NJAC would evaluate the candidates for final selection.

I. That the NJAC Act gives unguided discretion to the NJAC to make arbitrary selection in an opaque manner. The said Act is thus in violation of Article 14 and 21 of the Constitution, which guarantee non-arbitrariness and rule of law, and is therefore unconstitutional and void.

J. That it is essential for ensuring judicial integrity that a full-time broad-based body is set-up, which would make appointments to constitutional courts in a transparent and rational manner after evaluating candidates on set criteria. The minimum level of transparency would require that the names of shortlisted candidates ought to be made public so that the public can send any evidence, if any, against any of the shortlisted candidates to the said body, which would then take that into account. The same would sub-serve the principles of judicial integrity and preserve rule of law.

PRAYERS

In view of the above, the Petitioner most respectfully in public interest pray before this Hon'ble Court to:

- a) Issue appropriate writ, order or direction that the Constitution 99th Amendment Act, 2014 violates the basic structure of the Constitution and is void and unconstitutional.
- b) Issue appropriate writ, order or direction that the National Judicial Appointments Commission Act, 2014 is unconstitutional and void.
- c) Issue appropriate writ, order or direction mandating the Respondent to set-up a broad-based full-time body for the selection of the judges of the Hon'ble Supreme Court of India and the Hon'ble High Courts that would work in a transparent manner and would evaluate candidates on set objective criteria.
- d) Pass any other order deemed fit in the facts and circumstances of this case.

Petitioner
Through

Drawn by: Pranav Sachdeva

New Delhi
Dated: February , 2015

(PRASHANT BHUSHAN)
Advocate for the Petitioner