The procedure and process for the appointment of judges to the higher courts in India have become an important subject matter of constitutional adjudication. The Supreme Court is expected to determine the constitutional validity of the Constitution (99th Amendment) Act, 2014, and the National Judicial Appointments Commission Act, 2014 (NJAC Act). Both these acts have been passed with the objective of promoting greater transparency in the appointment of judges to the high courts and the Supreme Court. Any system of appointment of judges, which is going to replace the collegium system should fulfil at least four requirements:

Assessing the constitutionality of the legislation: The test of constitutional scrutiny is critical for both these Acts. These Acts need to be examined in the light of the judgments of the Supreme Court where it was held that Parliament is empowered to amend all provisions of the Constitution so long as these amendments do not alter the “basic structure” of the Constitution.
While the court did not define as to what constitutes the “basic structure”, it has articulated in a number of judgements that anything that will fundamentally alter the nature of the powers exercised by the different wings of the government will invite constitutional scrutiny of the court.

After the decisions of the Supreme Court in the First Judges, Second Judges and the Third Judges cases, the law and practice relating to the appointment of judges have been firmly established. The constitutional questions that are being argued regarding the NJAC system of appointment of judges to the higher judiciary include an article 14 (Equality Clause) challenge on the ground that the method of appointments suffers from the vice of arbitrariness; the question of interpreting the phrase “eminent persons” in the NJAC Act; the possible misuse of the veto powers provided to any two members under the NJAC and, most importantly, the question whether the NJAC system jeopardises the independence of judiciary by failing to insulate the appointment process from political considerations.

**Protecting the independence of judiciary:** Independence of the judiciary is one of the central tenets of the Indian constitutional framework. The word “independence” needs to be underscored in the light of the deep and pervasive concern even among the framers of the Constitution that judicial appointments should not be based upon political consideration. Our Constitution envisaged a judiciary absolutely independent from influences of the legislature and the executive. The NJAC framework for the appointment of judges will undermine the independence of the judiciary.

The presence of the Chief Justice of India (CJI) in the three-member selection committee to select two “eminent persons” with other members being the Prime Minister and the Leader of Opposition puts the CJI in a delicate situation. The past experience of the functioning of many high-powered selection committees has demonstrated that governments tend to use these opportunities to negotiate their nominees for the appointments that will best reflect their own interests. In fact, in many such appointments to commissions, this negotiation and protecting divergent interests on the part of the ruling party or the Opposition is not inappropriate and, at times, even desirable to promote diversity and democratic engagement.

It is not appropriate for negotiations to be in the form of give and take of the kind that is envisaged in other committee processes, because of the very presence of the CJI. The office of the CJI is not just an individual, but an institution in itself, which will be put in a difficult situation when there will be a need for negotiations that involve political considerations, but are not necessarily merit oriented.

The institutional integrity of the office of the CJI will be undermined while serving as a member of the selection committee. This will potentially lead to the office of the CJI becoming the weakest institution represented in this committee for not being able to exercise any power while participating in the process of identifying the “eminent members” to serve in the NJAC.

**No room for arbitrariness in the procedure:** The procedure for appointment of judges should not suffer from arbitrariness. One of the ways by which we can reduce arbitrariness is by having greater clarity on the meaning of the words that are used in the legislation. The use of “eminent
persons” in the legislation creates an opportunity to exercise powers in an arbitrary manner, unless there is legislative guidance of some kind. This is further accentuated by the fact that “eminence” is a subject matter of opinion of individuals and there could be differences of opinion among members in the absence of criteria for determining as to what constitutes eminence. Checks and balances are essential for reducing the risk of arbitrary exercise of powers. There is a risk of political or other vested interests dominating the decision-making process in selecting the “eminent persons”. The CJI might end up becoming a mute spectator in the process, which will be controlled by the legislature (Leader of Opposition) and the executive (Prime Minister).

**Ensuring transparency in the process of appointments:** One of the ways by which transparency is promoted is by making the process of appointment of judges democratic in nature. In fact, this is the main reason for the establishment of the NJAC. However, the new framework of the functioning of the NJAC is not only undemocratic, but also has the risk of creating a constitutional crisis with any two members exercising their veto powers. One of the significant drawbacks of the collegium system of judges exercising absolute powers to appoint judges is the complete lack of transparency in the procedure and process of appointments.

Nobody outside the system knew as to why some judges were appointed and some others were rejected. The new framework by providing veto powers to any two members of the NJAC has pretty much undermined the opportunity to seek transparency in the process relating to appointment of judges. Democratic governance expects a higher level of transparency in the appointment of judges and any effort to reform the collegium system cannot legitimise the undemocratic system of allowing veto powers to a few members for rejecting nominees without assigning any reason. The veto powers that the NJAC Act provides in Sections 5(2) and 6(6), which has recognised the legal authority for any two member of the NJAC to reject the nomination without assigning any reason. The legislation does not provide any guidance as to what are the circumstances, if any, under which the two members can exercise these veto powers.

The new law relating to judicial appointments through the NJAC, unfortunately, violates the “basic structure” of Constitution, while undermining the independence of judiciary and institutionalises a process that will lead to arbitrary exercise of powers.

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