



404



# SUPREME COURT ADVOCATES-ON-RECORD ASSOCIATION & ANR. VS. UNION OF INDIA

(2016) 5 SCC 1, (2016) 2 SCC (LS) 253

## 2015

Case Status **NOT  
OVERRULED**

Case Type **CIVIL WRIT  
PETITION**

Constitutional  
Provision(s) **ARTICLES  
21,124,124A,217,  
222,224,224A**

The right to know and the right to privacy are both implied fundamental rights. Information voluntarily supplied by a person recommended for appointment to higher judiciary must not be disclosed.

Bench  
Strength **5**  
JUDGES

Number of  
Opinion(s) **5/1**  
OPINIONS DISSENT

4 separate opinions by  
Justice J.S. Khehar,  
Justice M.B. Lokur,  
Justice A. K. Goel and  
Justice K. Joseph  
and 1 dissenting opinion by  
Justice J. Chelameswar.

*“The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance.”*

---

**T**his landmark judgment has come to be known as the ‘Fourth Judges Case’. It stemmed from a group of petitions challenging the validity of the Constitution (Ninety-Ninth Amendment) Act, 2014 (99th Amendment) along with the National Judicial Appointments Commission Act, 2014 (NJAC Act). These Acts sought to replace the prevailing collegium system used for making appointments to the higher judiciary with the National Judicial Appointments Committee (NJAC).

The NJAC proposed a greater role for the executive in making judicial appointments. This was allegedly to introduce transparency and accountability in the selection process. However, the Court found the NJAC to be in violation of the principles of separation of power and independence of

judiciary that formed part of the basic structure of the Constitution, and a five Judge Constitution Bench struck down the 99th Amendment and consequently the NJAC Act by a majority of 4:1, declaring the Acts unconstitutional.

While discussing concerns regarding transparency and accountability in the NJAC, Justice Lokur observed that the 99th Amendment and the NJAC Act left open questions regarding the privacy of the candidates for appointment as judges. He concluded that the 99th Amendment and the NJAC Act, which were represented to allow transparency into the previously opaque collegium system, did not attempt to balance the candidates’ right to privacy with the citizens’ right to know. In doing so, he acknowledged the existence of an implicit fundamental right to privacy which would be subject to checks and balances.

---

## Facts

The constitutional validity of the NJAC Act and the 99th Amendment Act was challenged through this group of petitions before a five Judge Constitution Bench. The NJAC was set up for selection, appointment, and transfer of the judges to the higher judiciary to replace the prevailing collegium system under Articles 124(2) and 217(1) of the Constitution. The NJAC included the Union Minister for Law and Justice and two eminent persons, besides the Chief Justice of India, and next two senior most judges in the Supreme Court. The collegium, which the NJAC proposed to supplant, included the Chief Justice of India and a forum of the four senior-most judges of the Supreme Court.

## Issue

A) Whether the NJAC Act and the 99th Amendment Act were constitutionally valid.

## Arguments

Regarding the need for increased transparency and accountability, the Attorney General, on behalf of the Respondents asserted that the manner of selection and appointment of the Judges to the higher judiciary must be known to civil society as they have the right to know. He referred to a range of precedents to buttress the existence of the right to know as part of the fundamental right to freedom of speech and expression, including *Indian Express Newspapers vs. Union of India* ((1985) 1 SCC 641), *Attorney General vs. Times Newspapers Ltd.* (1973 3 All ER 54) and *State of U.P. vs. Raj Narain* ((1975) 4 SCC 428). The Attorney General pointed out that the NJAC would come within the ambit of RTI Act, to help remove the

opacity of the prevailing collegium system and introduce fairness as well as a degree of meritocracy. He also submitted that the NJAC would diversify the selection process in order to ensure accountability and that the NJAC would introduce transparency in the process of selection and appointments of judges.

## Decision

The Court by a majority of 4:1 struck down the 99th Amendment and consequently the NJAC Act as unconstitutional and void. The majority including Justices Khehar, Lokur, Goel and Joseph, held that the involvement of the executive in the appointment of judges impinged upon the primacy and supremacy of the judiciary, and violated the principle of separation of powers between the executive and judiciary which formed part of the basic structure of the Constitution. However, Justice Chelameswar in his dissenting opinion disagreed that the NJAC was unconstitutional. He pointed out that though judicial independence formed a part of the basic structure, there was an abundance of opinion that suggested that primacy to the opinion of the judiciary was not the only way for establishing an independent and efficient judiciary and that it was neither a norm nor a fundamental aspect of the Constitution. He added, 'Independence of such fora rests on two integers - independence of the institution and of individuals who man the institution'.

While the majority judgment revived the collegium system, it acknowledged that the system had to be streamlined to make it more responsive and transparent. However, Justice Chelameswar observed that the present collegium system lacks transparency, accountability and objectivity, and barring occasional leaks, the public had no access

to information relating to it. He noted that the proposed composition of the NJAC could have acted 'as a check on unwholesome trade-offs within the collegium and incestuous accommodations between Judicial and Executive branches.'

While analysing the issue of transparency and accountability in the NJAC framework, Justice Lokur observed that the 99th Amendment and the NJAC Act did not take into account the privacy concerns of individuals who had been recommended for appointment as a judge. Referring to the contentions made by the Attorney-General in this regard, he noted that given that proceedings of the NJAC would be completely accessible and if sensitive information about the recommended individual were made public, it would have a serious impact on the dignity and reputation of the recommended individual. Highlighting the need to balance transparency and confidentiality, he rejected the Attorney-General's contention that the right to know was a fundamental right, and asserted that it was an implicit fundamental right, which was tethered to the implicit fundamental right to privacy and the two implicit rights needed to be balanced.

Further, Justice Lokur also highlighted privacy concerns in the working of the NJAC. He observed that in a situation where information was voluntarily supplied by the candidate, they might not have an absolute right to privacy but might expect that information shared in confidence would not be disclosed to unconcerned third parties. Further, in case the President did not accept the recommendation, the candidate should have the right to non-disclosure of the information supplied by the President, suggested Justice Lokur. He noted that the 99th Amendment and NJAC Act were oblivious to these concerns and

did not incorporate any measures required for balancing the two implicit fundamental rights. He concluded by stating that adequate thought had not been given to the privacy concerns of the candidates, and 'merely on the basis of a right to know, the reputation of a person cannot be white-washed in a dhobi-ghat.'

---

