

A Critical Analysis Of Provisions Relating To National Judicial Appointments Commission In India

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Abstract

Independence of judiciary ensures the rule of law and realization of human rights and also the prosperity and stability of a society. The Indian Constitution makes provisions to ensure independence of the judiciary, the basic patterns of the courts, their composition, powers, jurisdiction etc. the Constitution makes detailed provisions which cannot be touched by ordinary legislative process and the Constitution of India provides for the independence not only of the Supreme Court, but also the High Courts and the subordinate courts. Independence of judiciary being a basic feature of the Constitution, any attempt to curtail it directly or indirectly even by an amendment of the Constitution would be invalid. Appointment of judges to the higher judiciary assumes utmost importance in the context of independence of the judiciary. The selection of proper judges is of fundamental importance to the progress of the nation, and the selection of judges has necessarily to be made with the utmost care.

Key Words: Indian Constitution, Higher Judiciary, Appointment of Judges, Supreme Court, High Court

1.Introduction

The commission system for appointment of judges can provide a stronger form of scrutiny of prospective candidates for judicial office. It can ensure the selection of the best-qualified candidates for judicial office, if the commission uses a fair and non-discriminatory selection process. Thus, it is likely to increase transparency and accountability and to remove improper political control or other irrelevant considerations from the appointment system. The effectiveness of the commission system depends on the composition of the commission and the system used by it.¹

2. Constitutional Provisions on Appointment of Judges

The Constitution of India established the bare process for appointments to the Supreme Court and the High Courts.² In respect of judges of the Supreme Court of India, Article 124(2) provides:

“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.”

¹ Sarkar Ali Akkas, “Appointment of Judges: A Key issues of Judicial Independence,” *Bond L. Rev.*, 16 (2004), p.208; K.L. Bhatia, “Judicial Independence and Judicial Appointment: Independent From External and Internal Control,” *AIR (J)*, Vol. 87(3) 2000, p.33.

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² Granville Austin, *Working a Democratic Constitution- A History of the Indian Experience*, 11th impression, (New Delhi: Oxford University Press, 2013), pp.124-125.

In respect of judges of the High Courts, Article 217(1) provides:

“Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal 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 Constitution of India has provided that the President of India is to appoint judges of the Supreme Court and the High Courts after consultation with Chief Justice of India, and with such other judges and authorities mentioned in Articles 124(2) and 217(1).

3. National Judicial Appointments Commission

The idea of National Judicial Appointments Commission is an excellent one, for appointment of judges to higher judiciary in India.³ But it somehow could not muster support in Parliament on three separate occasions, in 1990,⁴ 2003⁵ and 2013.⁶ Finally in 2014 the Constitution was amended with the ostensible objective of ‘providing an equal participation of the judiciary and the executive in the appointment of judges to the higher judiciary and make the system of appointments more accountable and thereby, increase the confidence of the public in the institution of judiciary.’ To achieve the purported objective, Articles 124 and 217 were inter alia amended, and Articles 124A, 124B and 124C were inserted in the Constitution, through the Constitution (Ninety-Ninth Amendment) Act, 2014 (hereinafter called Amendment Act) by following the procedure contemplated under Article 368(2),⁷ more particularly, the proviso there under. The amendment, received the assent of the President on 31.12.2014. It was however given effect to, with effect from 13.4.2015.⁸ Simultaneously therewith, the Parliament enacted the National Judicial Appointment Commission Act, 2014 (hereinafter called NJAC Act) which also received the assent of the President on 31.12.2014. The same was also brought into force, with effect from 13.4.2015.⁹

The composition of the National Judicial Appointments Commission (hereinafter called as NJAC) was provided for in Article 124A¹⁰ of the Constitution. Therefore, Article 124A of the Constitution and

³ K.C. Sunny, “Appointment to Higher Judiciary: The Need For National Judicial Service Commission,” *C.U.L.R.*, Vol.XXI, 1997, p.327; Prof. Nisha Dube, “Challenges Before the Indian Judiciary,” *IBR* 34(1to4)2007, p.258.

⁴ The Constitution (Sixty-Seventh Amendment) Bill, 1990.

⁵ The Constitution (Ninety-Eight Amendment) Bill, 2003.

⁶ The Constitution (One Hundred and Twentieth Amendment) Bill, 2013 along with the *National Judicial Appointment Commission Bill*, 2013.

⁷ Article 368(2): An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, [it shall be presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in-

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

⁸ Consequent upon its notification in the Gazette of India (Extraordinary) Part II, Section 1.

⁹ By its notification in the Gazette of India (Extraordinary) Part II, Section 1.

¹⁰ Article 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 - Members:

Article 124(2) are required to be read in conjunction with each other. The Chief Justice of India was the Chairperson of the NJAC. The members of the NJAC are two other judges of the Supreme Court next to the Chief Justice of India, the Union Minister in-charge of Law and Justice and two eminent persons to be nominated by a Committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the Lok Sabha, failing which, the leader of the single largest Opposition Party in the Lok Sabha.

The duty of the NJAC, as provided for in Article 124B¹¹ of the Constitution, was to recommend persons for appointment as the Chief Justice of India, judges of the Supreme Court, Chief Justices of High Courts and other judges of High Courts and to recommend the transfer of Chief Justices and other judges of a High Court from one High Court to any other High Court. The NJAC has the duty to ensure that the person recommended has ability and integrity.

Article 124C¹² of the Constitution 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, the Chief Justice and other judges of the High Courts. The Article empowers the NJAC 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.

The NJAC Act provides for recommending the senior-most judge of the Supreme Court as the Chief Justice of India 'if he is considered fit to hold the office' and for recommending names for appointment as a judge of the Supreme Court, persons who were eligible to be so appointed. Interestingly, the NJAC 'shall not recommend a person for appointment if any two members of the Commission do not agree for such a

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.

¹¹ Article 124B. 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 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.

¹² Article 124C. 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.

recommendation.’¹³ A somewhat similar procedure has been provided for recommending the appointment of the Chief Justice of a High Court and a judge of a High Court.¹⁴

The President may accept the recommendation of the NJAC for the appointment of a particular person as a judge, but may also require the NJAC to reconsider its recommendation. If the NJAC affirms its earlier recommendation the President shall issue the warrant of appointment.¹⁵

The officers and employees of the NJAC shall be appointed by the Central Government in consultation with the NJAC and the convener of the NJAC shall be the Secretary to the Government of India in the Department of Law and Justice.¹⁶ The procedure for the transfer of judges from one High Court to another has been left to be determined by regulations to be framed by the NJAC.¹⁷ Similarly, the NJAC shall frame regulations with regard to the procedure for the discharge of its functions.¹⁸ The Central Government was empowered to make Rules to carry out the provisions of the NJAC Act¹⁹ and the Commission may make Rules to carry out the provisions of the NJAC Act.²⁰ The Rules and Regulations framed by the Central Government and by the NJAC shall be laid before Parliament and these may be modified if both the Houses

¹³ Section 5 (1) The Commission shall recommend for appointment the 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.

¹⁴ Section 6 (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.

¹⁵ Section 7. The President shall, on the recommendations made by the Commission, appoint the Chief Justice of India or a Judge of the Supreme Court or, as the case may be, the Chief Justice of a High Court or the Judge of a High Court:

Provided that the President may, if considers necessary, require the Commission to reconsider, either generally or otherwise, the recommendation made by it:

Provided further that if the Commission makes unanimous recommendation after reconsideration, the President shall make appointment accordingly.

¹⁶ Section 8.

¹⁷ Section 9.

¹⁸ Section 10.

¹⁹ Section 11.

²⁰ Section 12.

of Parliament agree to the modification and Parliament may also provide that a Rule or Regulation shall have no effect.²¹

4. Validity of Laws on NJAC

The Constitutional Amendment and the NJAC Act are challenged through a bunch of petitions, which are collectively being heard by Supreme Court in the Supreme Court Advocates on Record Association and another v. Union of India²² (hereinafter called the Fourth Judges' Case). The challenge is on the ground that by virtue of the aforesaid amendment and enactment of the Act, the basic structure of the Constitution of India has been altered and therefore, they should be set aside.²³ However, the Union of India (the respondent) had defended the introduction of the new law saying that the two-decade-old collegium system where judges appointed judges was not free from defects²⁴ and demanded a re-look at the 1993 and 1998 judgments in the Second and Third Judges' Cases.²⁵

The Bench, by a majority of 4:1, rejected the NJAC Act and the Constitutional Amendment as "unconstitutional and void." And the Supreme Court rejected the government's demand to take a re-look at the Second and Third Judges' Cases, which ushered in the collegium system. The Court held that the collegium system, as it existed before the NJAC, would again become "operative." And the Court also rejected the plea of the Central Government that the petitions challenging the NJAC Act be referred to a larger bench.²⁶

Every judge on the Bench, comprising J.S. Khehar, Chelameswar, Madan B. Lokur, Kurian Joseph and A.K. Goel JJ., has written separate judgments explaining the debate, reasoning and individual conclusions they arrived at about the Constitutional Amendment and NJAC Act. While Lokur, Kurian and Goel JJ., agreed with Khehar J.'s 439-page 'Order on Merits' that the NJAC Act and the Constitutional Amendment defeated the primacy of judiciary over the government in the appointment of judges, Chelameswar J. disagreed with his fellow judges and upheld the validity of the Constitutional Amendment.

Khehar J., in his exhaustive judgment approved by the majority on the Bench, attacked the NJAC laws on merits and the majority judgement arrived at the conclusion, that clauses (a) and (b) of Article 124A(1) do not provide an adequate representation, to the judicial component in the NJAC, clauses (a) and (b) of Article 124A(1) are insufficient to preserve the primacy of the judiciary, in the matter of selection and appointment of Judges, to the higher judiciary (as also transfer of Chief Justices and Judges, from one High Court to another). The same are accordingly, violative of the principle of "independence of the judiciary."²⁷ Khehar J. observed that,

"... since the executive has a major stake, in a majority of cases, which arise for consideration before the higher judiciary, the participation of the Union Minister in charge of Law and Justice, as an ex officio Member of the NJAC, would be clearly questionable. In today's world, people are conscious and alive to the fact, that their rights should be adjudicated in consonance of the rules of natural justice. One of the rules of natural justice is, that the adjudicator should not be biased."²⁸ In the NJAC,

²¹ Section 13.

²² W. P. (Civil) No. 13 of 2015.

²³ Pp.115-124, paras.54-59. The Reference order; pp.171-252, paras.5-66. The order on merit.

²⁴ Pp.253-325, paras.67-132. The Reference order.

²⁵ Pp.61-115, paras.20-53. The order on merit.

²⁶ Pp.441-441 of the judgement.

²⁷ Para.158. (per majority by Khehar J.).

²⁸ Para.169. (per majority by Khehar J.).

the Union Minister in charge of Law and Justice would be a party to all final selections and appointments of Judges to the higher judiciary. It may be difficult for Judges approved by the NJAC, to resist a plea of conflict of interest (if such a plea was to be raised, and pressed), where the political-executive is a party to the lis. The above, would have the inevitable effect of undermining the “independence of the judiciary”, even where such a plea is repulsed. Therefore, the role assigned to the political-executive, can at best be limited to a collaborative participation, excluding any role in the final determination. Therefore, merely the participation of the Union Minister in charge of Law and Justice, in the final process of selection, as an ex officio Member of the NJAC, would render the amended provision of Article 124A(1)(c) as ultra vires the Constitution, as it impinges on the principles of “independence of the judiciary” and “separation of powers”.²⁹

Khehar J. asked how future judges appointed under the NJAC can be expected to be independent-minded when the Union Law Minister is one of the six members of the Commission appointing them. They would breed a culture of “reciprocity” of favours between the government and the judiciary, and thus, destroy the latter. Khehar J. observed:

“...reciprocity, and feelings of pay back to the political-executive, would be disastrous to the independence of the judiciary. [With] The participation of the political-executive, the selection of judges, would be impacted by political pressure and political considerations,” He said in a situation where government is a major litigant in the higher courts, this feeling of reciprocity may lead to disastrous consequences.”³⁰

In the present case J.S.Khehar J. arrived at the conclusion, that clause (c) of Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an ex officio Member of the NJAC. Clause (c) of Article 124A(1), impinges upon the principles of “independence of the judiciary”, as well as, “separation of powers”.

The issue on the qualification of the ‘eminent persons’ for selection to the NJAC, J.S.Khehar J. says that,

“ the issue of description of the qualifications (– perhaps, also the disqualifications) of “eminent persons” is of utmost importance, and cannot be left to the free will and choice of the nominating authorities, irrespective of the high constitutional positions held by them. Specially so, because the two “eminent persons” comprise of 1/3rd strength of the NJAC, and double that of the political-executive component, and as such, will have a supremely important role in the decision making process of the NJAC.”³¹

The majority judgement said, Article 124A(1)(d) is liable to be set aside and struck down, for not having laid down the qualifications of eligibility for being nominated as “eminent persons”, and for having left the same vague and undefined.”³² For appointment of two ‘eminent persons’ to the NJAC, J.S.Khehar J. observed that,

“...it is also difficult to appreciate the wisdom of the Parliament, to introduce two lay persons, in the process of selection and appointment of Judges to the higher judiciary, and to simultaneously vest with them a power of veto. The second proviso under Section 5(2), and Section 6(6) of the NJAC Act, clearly mandate, that a person nominated to be considered for appointment as a Judge of the Supreme Court, and persons being considered for appointment as Chief Justices and Judges of High Courts, cannot be appointed, if any two Members of the NJAC do not agree to the proposal. In the scheme of the selection process of Judges to the higher judiciary, contemplated under the impugned constitutional amendment read with the NJAC Act, the two “eminent persons” are sufficiently empowered to reject all recommendations, just by themselves. Not just that, the two “eminent persons” would also have the absolute authority to reject all names unanimously approved by the remaining four Members of the NJAC. That would obviously include the power to reject, the unanimous recommendation of the entire judicial component of the NJAC. In our considered view, the vesting of such authority in the

²⁹ Para.168. (per majority by Khehar J.).

³⁰ Para.165. (per majority by Khehar J.).

³¹ Para.182. (per majority by Khehar J.).

³² *Ibid.*

“eminent persons” is clearly unsustainable, in the scheme of “independence of the judiciary”. Vesting of such authority on persons who have no nexus to the system of administration of justice is clearly arbitrary, and we hold it to be so.”³³

J.S.Kehar J. concluded that inclusion of “eminent persons”, as already stated above, would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary (as also their transfer). For the reasons recorded hereinabove, he held, it is apparent, that Article 124A (1) (d) is liable to be set aside and struck down as being violative of the “basic structure” of the Constitution.³⁴

In the above context, J.S.Kehar J. set aside the Constitution (99th Amendment) Act, 2014, as being ultra vires the provisions of the Constitution and for the validity of the NJAC Act, J.S.Kehar J. observed,

“The National Judicial Appointments Commission Act, 2014 inter alia emanates from Article 124C. It has no independent existence in the absence of the NJAC, constituted under Article 124A (1). Since Articles 124A and 124C have been set aside, as a natural corollary, the National Judicial Appointments Commission Act, 2014 is also liable to be set aside, the same is accordingly hereby struck down. In view of the above, it was not essential for us, to have examined the constitutional vires of individual provisions of the NJAC Act. It was concluded, that Sections 5, 6 and 8 of the NJAC Act are ultra vires the provisions of the Constitution.”³⁵

J. Chelameswar J., in his dissenting opinion, upheld the validity of the said Constitutional Amendment and NJAC Act.³⁶ He observed, “The point sought to be highlighted is that the judiciary is not the only constitutional organ which protects the liberties of the people. Accordingly, primacy to the opinion of the judiciary in the matter of judicial appointments is not the only mode of securing independence of judiciary for protection of liberties.” and the judiciary’s insistence that its voice should have primacy over the other organs of governance is “empirically flawed without any basis in the constitutional history of the nation.” Chelameswar J. wrote in his judgment.³⁷

“There is no accountability in this regard. The records are absolutely beyond the reach of any person, including the judges of this court who are not lucky enough to become the Chief Justice of India. Such a state of affairs does not either enhance the credibility of the institution or good for the people of this country.”³⁸

Chelameswar J., countering Khehar J.’s leading judgment for the Bench that the presence of the Union Law Minister on the NJAC would give rise to “conflict of interest”, wrote:

“The executive, with vast administrative machinery under its control, is capable of making enormous and valuable contribution to the selection process. The Constituent Assembly emphatically declined to repose exclusive trust even in the CJI. To wholly eliminate the executive from the process of selection would be inconsistent with the foundational premise that government in a democracy is by chosen representatives of the people.”³⁹

As far as appointment of two eminent persons to the NJAC is concerned, Chelameswar J. said he did not find anything “inherently illegal” with two members of the NJAC having the power of veto over the others to stall a recommendation.⁴⁰ But interestingly, the Bench admitted that all is not well even with the collegium system of “judges appointing judges”, and that the time is ripe to improve the twenty one year old system of judicial appointments. Khehar J. told the government “Help us improve and better the system. You

³³ Para.185. (per majority by Kehar J.).

³⁴ *Ibid.*

³⁵ Para.167. (per majority by J.S. Kehar J.), paras.222, 223, 224, 229, 242, 244.

³⁶ Para.120, p.571. Chelameswar J. in dissenting opinion.

³⁷ ‘Denial of role for executive in selection of judges not right’ available at [http://www.thehindu.com/news/national/denial-of-role-for-executive-in-selection-of-judges-not-right/article7771659.ece?ref=related News](http://www.thehindu.com/news/national/denial-of-role-for-executive-in-selection-of-judges-not-right/article7771659.ece?ref=related%20News), visited on 20.11.2015.

³⁸ Para 103, pp.553-554. Chelameswar J. in dissenting opinion.

³⁹ Para.104, pp.554-556. Chelameswar J. in dissenting opinion.

⁴⁰ Para.116, p.567. Chelameswar J. in dissenting opinion.

see the mind is a wonderful instrument. The variance of opinions when different minds and interests meet or collide is wonderful,” scheduling further debate for November 3rd on bettering the working of the collegium system.

5. Conclusion

The majority opinions of the court in the NJAC Case primarily proceeds on touchstones of judicial independence, a principle few would quarrel with. The bench, in its opinion, doesn't restrict itself to a criticism of the defects of the NJAC but objects to it on principle itself. Underlying such legal analysis is a premise of judicial independence being absolute. The second major plank on which most of the reasoning is premised are the aberrations which resulted in the past before the existence of the collegium system. The collegium system came to be created from actual controversies where the political executive sought to subvert the independence of the judiciary. The judges who delivered the judgment in the NJAC case also hold the view that an improvement in the working of the collegium system is the need of the hour. R.M. Lodha J. suggested that instead of seeing the NJAC verdict as one that leads to a confrontation between the Parliament and the judiciary in the matter of the appointment and transfer of judges of the superior judiciary, the executive must use this as an opportunity to help the Supreme Court in preparing an institutional design so that all appointments by the collegium meet the tests of fairness and transparency and all selections are made solely on merit with an encouragement provided to the diversity in the persons available for selection. 'Appoint good judges; the rest will follow.'

