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APPOINTMENT OF JUDGES IN HIGHER JUDICIARY **WITH SPECIAL REFERENCE TO TOPICAL** **COLLEGIUM SYSTEM IN INDIA**

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ABSTRACT

This paper makes an analysis of appointment of judges in higher Judiciary in accordance with the articles of the Indian constitution and of the existing Collegium system of appointment and the mode of appointment of Judges in the higher Judiciary of some other countries and the Tug of War between the Executive and the higher Judiciary in recent times. This paper also provides an insight what may happen if the executives are given a say in the appointment of Judges in Higher Judiciary.

KEY WORDS

Constitution, Higher Judiciary, NJAC, Executive, Tug of war

INTRODUCTION

Constitution lays down the appointment of Judges for the Supreme Court and High Court Judges in Art. 124¹ and Art. 217². Both the articles expressly note the involvement of executive authority,

¹ Art. 124. Establishment and constitution of Supreme Court:

(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.

² 217. *Appointment and conditions of the office of a Judge of a High Court*

(1) Every Judge of a High 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 in article 124A, and shall hold office, in the case of an additional or acting Judge, as provided in article 22 until he attains the age of sixty-two 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 by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court; (c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

the president, “after Consultation” with Judges, shall appoint Judges to the Supreme Court and the High Court. Political involvement in judicial appointment dipped a controversy of the executive overreaching their authority to shadow Judiciary and ink their control as an active puppeteer. The interpretation of the articles and the constitutional intention behind executive reach gave birth to the Collegium Systems, which later came to be interpreted and debated in four judge cases: S. P Gupta v. President of India³ establishing and reiterating the primacy power of the president over Chief Justice of India and Judges recommendation; reigning for over 12 years until the 9-bench decision in Supreme Court Advocates on Record Association v. Union of India⁴ that overturned S.P. Gupta and conferred the primacy to Chief Justice of India with a stress on the Judicial nature of the appointment, advising the executive to take a step back.

The unanimous 1998 decision in the third Judges case, set the foundation for Collegium – a collegium of collective opinions and consultation of Chief Justice with four senior Judges in SC appointments and two Senior Judges in HC appointments, evolving the principle of Judicial Independence. As desirable it was, the backlash from executive and affiliated authorities echoed volumes on compliance with the Indian constitution and the underestimation of power of executive in multitude. The 99th amendment⁵ attempted to replace Collegium system with NJAC, the NJAC Act was passed by the Parliament in 2014, constituting a commission with increased governmental role in appointment of Judges. The outcry of independence of judiciary, struck down the NJAC in the Fourth Judges case in 2015, upholding the primacy of Judiciary and reinstating the separation of power – the basic structure of the constitution. This welcomed widespread criticisms on lack of transparency, accountability and objectivity. Without optimum transparency set forth, it became difficult to ascertain the credibility and legitimacy of the appointments.

Transparency does not entirely reflect the opinion of public appointments but is demonstrated by an evolved process of selection of judges including the coverage of criteria such as gender, casteism, power and influence. Meritorious selection and appointment of judiciary must have a transparent process with accountability and rationale. The SC set a Memorandum of Procedure to

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and--
(a)has for at least ten years held a judicial office in the territory of India; or(b)has for at least ten years been an advocate of a High Court ' or of two or more such courts in succession;

³ See, S.P. Gupta v. Union of India, 1981 Supp SCC 87, para 31.

⁴ See, Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441.

⁵ Ministry of Law and Justice, Stand of Government on Appointment of Judges, March 2022. “The Constitution (Ninety – Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 w.e.f. 13.04.2015. However, both the Acts were challenged in the Supreme Court. The Supreme Court vide Judgment dated 16.10.2015 declared both the Acts as unconstitutional and void. The Collegium system as existing prior to the enforcement of the Constitution (Ninety-Ninth Amendment) Act, 2014 was declared to be operative.”

the government as a form of agreement with guidelines, that to date remains stuck on the involvement of government in certain sections of judicial appointments. This research studies and examines the intricacies of the composition of the collegium and NJAC, its working structure and functions. The evaluation of both the appointment systems in light of the debatable criticisms in conjunction with the constitution and the intention of the founding fathers of the constitution will be carried through doctrinal research with case laws, news and current events to propose a set of guidelines and propound a system that consonants with the Constitution and its basic structure.

OBJECTIVE

To analyse whether the existing Collegium system is opt for appointing Judges in the Higher Judiciary in India considering the Tug of War between the Executive and Judiciary in recent times.

RESEARCH METHODOLOGY

This article follows the doctrinal research methodology that includes the analysis and interpretation of the secondary legal sources like books, case laws, legal history, Government documents and secondary sources such as articles, news and current events, Newspapers.

METHODS OF APPOINTMENT IN OTHER COUNTRIES⁶

Country	Courts	Number Of Judges/Courts	Appointment of Judges
Canada	Supreme court of Canada	Chief Justice and eight Pusine Judges	Appointed by the Governor General on the advice of the National cabinet
	Federal Court of Canada	12 Judges	Appointed by the Governor General on the advice of the National Cabinet
USA	One Supreme Court	Chief Justice and Eight Associated Judges	Appointed by the President with the advice and consent of the Senate

⁶ Borrowed from the Book, "Appointment, Independence & Accountability of Judges." - (From Collegium – To NJAC – To Collegium) Prof. (Dr.) Ratan Singh & Dr. Shinkha Dhiman, , First edition 2022 Published by Allahabad Law Agency. Haryana

	1 Federal court of Appeal and 12 Regional Circuit Courts of Appeal	179	Appointed by the President with the advice and consent of the Senate
Germany	Federal Constitutional Court	Consists of 2 Senates each subdivided into 3 Chambers each with a Chairman and 8 members	Elected by the Two Chambers of Parliament who votes by 2/3 majority.
	Federal Supreme Court	As regulated by the Federal Legislation	Selected by the Joint Election Committee(JEC)
Australia	High Court and such other Judges	Chief Justice and minimum of two other Justices.	Appointed by the Governor-General in Council
	State Supreme Courts	As many as States in the Country	Appointed from the persons practicing legal profession
South Africa	Constitutional Courts	Chief Justice and Deputy Chief Justice	Appointed by the President after consulting JSC (Judicial Service Commission) and leaders of parties represented in the National Assembly
	Constitutional Courts	Other Nine Judges	Appointed by the President after consulting leaders of parties represented in the National Assembly
	Supreme Court of Appeal	President and Deputy President	Appointed by the President after consulting JSC

	High Court	As determined by Parliament	Appointed by the President after consulting JSC
Japan	Supreme Court	Chief Justice and 14 other Justices	The Chief Justice is appointed by the Emperor while other Judges are appointed by the Cabinet and attested by the Emperor
	High Courts	Differs from one High Court to another	The Judges are appointed by the Cabinet from the list of persons nominated by the Supreme Court.
Sri Lanka	Supreme Court	Chief Justice and not less than Six and not more than ten other Judges	Appointment of Chief and every other Judges is done by President by warrant under his hand with the nomination of Parliamentary Council.
	Court of Appeal	President of Court of Appeal and not less than six and not more than eleven other judges	Appointment of Chief and every other Judges is done by President by warrant under his hand with the nomination of Parliamentary Council
	High Courts	Not less than ten and not more than Forty Judges	Appointment of Chief and every other Judges is done by President by warrant under his hand on the recommendation of Judicial Service Commission and such recommendation is made

			after consultation with Attorney-General
Bangladesh	Supreme Court comprising of Appellate Division and High Court Division	Chief Justice and other number of Judges as President deems it necessary to appointment. As of January 2024, there are 8 Justices in Appellate Division and 89 Justices in High Court Division	Chief Justice is appointed by President alone whereas other Judges are appointed by President after consultation with Chief Justice on Prime Minister's advice.
Switzerland	Federal Supreme Court	38 Federal Judges and 19 Deputy Judges	They are proposed by Judicial Committee and They are proposed by Judicial Committee and elected by the United Federal Assembly(National Council and Council of States)
	Federal Criminal Court	18 Judges	They are elected by the United Federal Assembly(National Council and Council of States)
	Federal Administrative Court	72 Judges	They are elected by the United Federal Assembly(National Council and Council of

			States)
	Federal Patent Court	2 Full time Judges, 25 Technically qualified part time Judges and 11 Judicially qualified part time Judges.	They are elected by the United Federal Assembly(National Council and Council of States)
China	Supreme People's Court	President, Vice President, Chief Judges of divisions and Judges	Appointed by the Standing Committee of the National People's Congress(NPC) at the suggestion of the President of the Supreme People's Court
	Higher People's Court	President, Vice President, Chief Judges of divisions, Associate Chief Judges of divisions.	Appointed by the Standing Committee of the People's Congress at the suggestion of the President of the Local People's Court
Russian Federation	Constitutional Court under Article 125	19 Judges	Appointed by the Federal Council i.e. nomination shall be made by the President then approved by the Upper House of Federal Assembly
	Supreme Court under Article 126	3 Chambers , namely Judicial Chamber on Civil Cases, Judicial Chamber on Criminal Cases and Military	Appointed by the Federal Council i.e. nomination shall be made by the President then approved by the Upper House of

		Chamber	Federal Assembly
	Supreme Arbitration Court	As prescribed under the Constitution	Appointed by the Federal Council
Nepal	Supreme Court	Chief Justice and 20 other Judges	Chief Justice shall be appointed by the President on the recommendation of the Constitutional Council whereas the other Judges of Supreme Court shall be appointed on the recommendation of Judicial Council(JC)
	High Court	In every Province	Chief Justice of Supreme Court shall appoint Chief Justice of High Court on recommendation of Judicial Council.
Pakistan	Supreme Court of Pakistan	Chief Justice and 16 other Judges	Appointed by the President of Pakistan on the recommendation of Judicial Commission of Pakistan
	Federal Shariat Court of Pakistan	8 Muslim Judges	Appointed by the President of Pakistan on the recommendation of Judicial Commission of Pakistan
	High Court	5 High Courts in Five Provinces	Appointed by the President of Pakistan on the recommendation of Judicial Commission of Pakistan

METHODS OF APPOINTMENT IN OTHER COUNTRIES⁷

Austria	14	8 members on proposal by the federal government, 3–3 members on proposal by the two houses of the parliament → the federal president appoints them
Bulgaria	12	3 members appointed by the head of state, 3 by the parliament, 3 by the two supreme courts jointly
Czech Republic	15	the head of state appoints them with the consent of the Senate
Germany	16	8-8 members elected by the two houses of the federal parliament (out of whom 3-3 members have to be former judges of one of the federal supreme courts)
Hungary	15	ad hoc parliamentary committee composed of representatives of all parliamentary parties reflecting the parliamentary strength of the parties → two-thirds majority voting
Italy	15	5 members elected by the two houses of the parliament in joint session, 5 members appointed by the head of state, 5 members appointed by the three supreme courts (2 by the Court of Cassation, 2 by the Council of the State, 1 by the Court of Auditors)
Latvia	7	3 members on proposal by at least 10 members of the parliament, 2 members on proposal by the government, 2 members on proposal by the supreme court → the parliament appoints them
Poland	15	on proposal by 50 members of parliament or the Presidium → the lower house of the parliament (Sejm) elects them by absolute majority
Portugal	13	10 members elected by the parliament, 3 members co-opted by the constitutional court itself

⁷ The table is borrowed from “Appointment of Constitutional Judges in a Comparative Perspective - With a Proposal for a New Model for Hungary Acta Juridica Hungarica, Vol. 54, No. 1, pp. 5-23 (2013)” available below. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229184

Romania	9	3–3 members elected by the two houses of the parliament, 3 members appointed by the head of state
Spain	12	4–4 members on proposal by the two houses of the parliament (by three-fifth majority), 2 members on proposal by the government, 2 members on proposal by the General Council of the Judiciary → the King appoints them
Slovakia	13	the President of the Republic on proposal of the parliament

TOPICAL ARGUMENTS

I myself am servant of law and constitution, says CJI DY Chandrachud on reforming Supreme Court's Collegium system. Lawyer asks Chief Justice of India to reform Supreme Court's Collegium system and system of designating advocates as seniors. CJI responds as a servant of the law and the Constitution, following the position laid down by law. Nedumpara urges CJI to bring reforms to the Collegium system and senior designation process. He has filed pleas against the existing judge's selection mechanism and senior designation.⁸

Chief Justice of India D Y Chandrachud said here on Friday that there is a constant tussle about who will get ultimate control over appointment of judges even as vacancies arise and appointments are kept pending for a long period of time. "Because you do not get judges, when you get judges, vacancies arise which are kept pending for a long period of time... and then there is this constant tussle about who will get ultimate control over appointment of judges." CJI Chandrachud said. He said the members of the bar and bench (lawyers and judges) in Maharashtra should not forget the favourable conditions in which they work as opposed to the rest of the country as there is a culture of governance here. "There is a culture of governance where the government successfully has left the judiciary alone. They do not tinker with the work the judges do. They accept outcomes that are favourable. they accept outcomes that are unfavourable because that is the culture of Maharashtra." CJI Chandrachud said.⁹

Allahabad High Court's Chief Justice Pritinker Diwaker has made an explosive allegation against

⁸ CJI DY Chandrachud on reforming Supreme Court's Collegium system, Times of India 12.10.2023.

⁹ *Id.*

the collegiums in his retirement speech, saying he was transferred out of the Chhattisgarh High Court in 2018 to harass him. On March 31, 2019, I was elevated to the Bench. I discharged my duties as a judge in Chhattisgarh High Court till October 2018 to the satisfaction of one and all, and particularly to the satisfaction of my own inner being. Now, a sudden turn of events descended upon me when then Chief Justice of India Dipak Misra showered on me some extra affection for reasons still not known to me which entailed my transfer to Allahabad High Court, where I assumed my office on October 3, 2018” he was quoted as saying by news agency PTI. “My transfer order seemed to have been issued with an ill intention to harass me. However, as fortune would have it, the bane turned into a boon for me because I received immeasurable support and cooperation from my fellow judges as well as from the members of the Bar,” he added. Earlier this year, Justice Diwaker was recommended for the post of the Chief Justice of Allahabad High Court by the Collegium, currently led by Chief Justice of India DY Chandrachud. He took oath as Allahabad HC’s Chief Justice on March 6, 2023. “I am highly thankful to the present Chief Justice DY Chandrachud, who rectified the injustice done to me,” Diwaker said.¹⁰

It was no surprise that soon after retirement, Justice Sanjay Kishan Kaul termed the collegiums system of selecting constitutional court judges as not the best mechanism even though he had vigorously and successfully pushed many names as part of the Supreme Court and High Court Collegiums. Judiciary insiders said his apparent disillusionment probably stemmed from his failure to push through the appointment of an advocate as judge of J&K HC, elevation of a Madhya Pradesh HC judge to SC, and supersession of the most senior Delhi HC judge for appointment as SC judge or as an HC Chief Justice.⁹

There has to be workable trust between the Centre and the judiciary over the appointment of judges to the higher judiciary. Continuous, the Supreme Court on Tuesday said the government sitting over the collegium’s recommendations and selectively picking and choosing names and appointing them was “troubling” the judiciary, and emphasized that there has to be “workable trust” between the two. A bench of Justices Sanjay Kishan Kaul and Suchanshu Dhulia, which had last month lashed out at the government for not notifying all the recommendations of the collegiums, expressed concern over its selective approach towards names endorsed by the collegiums, called it “troublesome” and reiterated that it affected the seniority of judges. The bench also flagged the Centre not clearing names which were reiterated by the collegiums as well

¹⁰ Allahabad High Court’s Chief Justice Pritinker Diwaker has made an explosive allegation against the collegiums, Hindustan Times, 11.23.2023.

as its recommendation for transfer of HC judges. The court appreciated the Centre for clearing some names and appointing them HC judges but asked why 14 names were left out. Though the bench refrained from passing directions as attorney general R Venkataramani sought 10 days time, it asked him to show progress on the next date of hearing. “Pendency of transfer matters is an issue of great concern as it is being selectively done... Once these people are already appointed as judges, where they perform their judicial duties should not be of concern to the govt. We hope that a situation does not come to pass where this court or the collegiums has to take any unpalatable decision – SC.¹¹

The bench said, “We have expressed our concern to the AG over lack of progress since the last date. Pendency of transfer matters is an issue of great concern as it is being selectively done. The AG submits that the issue is being taken up by him with the government. Once these people are appointed as judges, where they perform their judicial duties should not be of concern to the government. We hope that a situation does not come where this court or the collegiums has to take any un palatable decision.¹² “There are 14 recommendations pending with the government to which there have been no response. In recommendations made recently, selective appointments have been made. This is also a matter of concern. If some appointments are made, while others are not, the seniority is disturbed. This is hardly conducive to persuading successful lawyers to join the bench,” the court added. The bench admitted that the tussle between the two organs of the state had been going on since the 1950s but emphasised that there Ami has to be “workable trust” between the two for smooth functioning the system. The bench also said the Centre should not reject the names of those lawyers who had some political connection with opposition parties, having served as law officers in opposition governed states.

Union Education Minister Dharmendra Pradhan on Thursday addressed the reports of NEET-UG paper leak in Bihar, saying the government won't imperil the future of thousands of aspirants because of a few "isolated incidents".¹³

Addressing the media, Pradhan said, "I want to assure everyone that the government is committed to protecting students' rights. We will not compromise with transparency. We have received inputs

¹¹ Justice Sanjay Kishan Kaul termed the collegiums system of selecting constitutional court judges as not the best mechanism, Times of India (March 12, 2023)

¹² Amit Anand Choudary, There has to be workable trust between government and Judiciary, says SC, Times of India (Nov, 8, 2023)

¹³ Rishabh Sharma, Center on NEET Paper leak: Isolated incidents shouldn't affect future of aspirants, India Today (June 20, 2024).

from the Bihar government about NEET examination. Patna Police is investigating the matter and they will soon send a detailed report to the Government of India.¹⁴

Union education minister Dharmendra Pradhan, on Thursday, said during a press briefing that the University Grants Commission–National Eligibility Test (UGC-NET) examination paper was leaked on dark net, leading to its cancellation. “Soon after it was clear that the UGC-NET question paper on Dark Net matches the original question paper of UGC-NET, we decided to cancel the examination,” he said. “We take responsibility, have to rectify system,” he added.¹⁵

CONCLUSION

Since 1993, India followed the Collegium system of appointment of Judges in higher judiciary. With the present condition of political and other factors it is good to have the collegium system for the appointment of judges in the higher judiciary. The appointment of judges in higher judiciary in other countries have involvement of executives in the selection process. However, it may not be suitable for our country one of the prime reason being almost 46% of the elected members have criminal records and cases still pending against them. Involving them in Judiciary is similar to infecting the truth, justice, democracy and independence of Judiciary. Apart from this, the nation recently witnessed the process of selecting one of the election commission members. It is not also advisable to have All India Judicial Service Exam to select District Judges who will be elevated to higher judiciary in short period than others since at present holding of national level exams lost integrity as witnessed in NEET and UGC –NET. While the existing collegium system of Appointment of judges in higher judiciary functions with all integrity intact, it is advisable to reflect some transparency to refute any involvement of executives and legislature.

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