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A CRITICAL ANALYSIS OF THE COLLEGIUM SYSTEM IN INDIA: THE NEED OF THE HOUR

AUTHORED BY - TARUN S LUNAWAT

ABSTRACT

The judges should be unbound from the influence of political and non-political bodies, either directly or indirectly. Therefore, the nomination of judges is an essential aspect of regulating justice. The word Collegium is not mentioned anywhere in the Constitution. Still, the case Supreme Court Advocates-On-Record Association Vs. Union of India, which is prominently known as the "Three Judges Case," introduced the notion of the collegium system. An advisory committee of the Chief Justice of India and four senior-most Supreme Court judges determine on nominations and promotion of judicial officers to the High Courts and the Supreme Courts and transferring of judges to the High Courts and the Federal court under this legal structure. Article 124 of the Indian Constitution states that the President should appoint the Judges with the assistance of the Chief Justice of India and the senior Judges of the Supreme Court. Still, there are no constitutional provisions regarding the appointment of judges under this system. Currently, the Collegium is following no procedures in letting out its responsibilities and tasks. In this paper, the goal of this study is to examine and scrutinize how practical and effective the current collegiums system for nomination of judges is at sustaining independence and impartiality and public support and belief in the court and an analysis of the alternative method of appointing the judges in the 99th Constitution Amendment Act that involved the National Judicial Appointments Commission. Lastly, an understanding of the severe and unusual problems of the collegium system is very much needed, along with the need for the reform of the system.

Keywords: Chief Justice of India, Collegium System, Indian Constitution, National Judicial Appointments Commission, Supreme Court.

RESEARCH PROBLEM:

1. Whether the Collegium System established in conformity with the provisions of the Indian Constitution?
2. Is it necessary to alter the Collegium System in order to increase certainty and compliance?

INTRODUCTION:

According to the democratic way, all three pillars of representative democracy are fundamental. However, proper justice is seen as the most crucial. Not only should justice be carried out, but it should also be perceived to be carried out. In conformity with the doctrines of the sovereign state and Legislature, the Indian Constitution incorporated many provisions to safeguard judicial independence. In India, the procedure of judicial appointments also assures judicial sovereignty and independence. On January 28, 1950, India's Supreme Court was created. It succeeded the Supreme Court of India, founded under the Government of India Act, of 1935.¹ The "Collegium System" refers to the process of appointing and transferring Supreme Court/High Court judges."² The Collegium system, wherein the Chief Justice of India and the Supreme Court of India make recommendations for the nomination and transfer of justices.

The Federal Government receives advice and referrals from the Collegium for legal professionals or judicial. Accordingly, the State Authority presents the Collegium with most of its preferred choices. The Federal Government checked and investigated the terms, providing the document to Collegium. The Collegium reviews the Federal Government's selections or ideas before submitting the documentation to the parliament for review and confirmation. The authorities should authorize these identities if the Collegium reverted back to that identity. However, there is no time limit for responding. This is why appointing judges takes such a long time.

The Constitution of India does not explicitly state a condition. It says that the President should designate Supreme Court judges in discussion with Chief Justice as well as additional

¹ The Government of India Act,1935.

² Hemanth Singh, What is the collegium system and how it works, available at <https://www.jagranjosh.com/general-knowledge/what-is-the-collegium-system-and-how-it-works-1525257473-1>.

Supreme Court justices. and the Supreme Court states that "the President may deem it necessary." It was unclear in this provision what ideas among the people involved should be given priority. The Supreme Court has considered this important question in several cases. The Legislature has acted on the 14th Law Commission's guidelines, which criticized the practice of assigning senior magistrates as Chief Justice of the Supreme Court, arguing that perhaps the Chief Justice ought to be a proficient and experienced judge, as well as a credible administrator, and as such the administration succession must not be governed by age.³

OVERVIEW OF THE COLLEGIUM SYSTEM:

The controversy over the appointment of judges begins with the case of J. Zafar Imam in 1968 when a vacancy arose in the office of SC Chief Justice, the then chief judge J. Zafar Imam was not appointed as the Chief Justice of SC because of his physical and mental weakness and in 1973, Justice A.N. Ray, who was fourth in a row, was appointed Chief Justice of India. The government has used the recommendation of the 14th Law Commission which criticized the practice of appointing senior judges as Chief Justice of the Supreme Court on the grounds that the Chief Justice should not only be a competent and knowledgeable judge but also a competent administrator⁴, so office sequence should not be controlled by age. The same story was repeated in 1976 when the Government appointed Justice Beg as Chief Justice in the absence of Judge Khanna, who was older than him at the time. This time the main reason for this appointment as given by Justice Khanna in his autobiography was his descending opinion in the case of Habeas Corpus. He also said in his nightly history that before the night he issued his decision, he would never be appointed as Chief Justice. After the legal retirement of Beg, the Chief Justice, Judge Chandrachud was appointed Chief Justice. Since then, the law of elders has been followed in the case of the appointment of the Chief Justice of India.

In 1977, in the case of Union of India vs. Sankalchand Seth, was related to the transfer of a judge from one Supreme Court to another.⁵ Under Article 222, the Supreme Court ruled that the President

³ Available at <https://lawcommissionofindia.nic.in/1-50/report14vol1.pdf>.

⁴ Available at <https://lawcommissionofindia.nic.in/1-50/report14vol1.pdf>.

⁵ Union of India vs. Sankalchand Himatlal Sheth and Anr. (1977) 4 SCC 193

has the right to differ from the advice given by the overseers.⁶ The Constitution of India does not explicitly state a condition as it simply states that the President must appoint judges of the Supreme Court in consultation with the Chief Justice and other judges of the "Supreme Court" and the Supreme Court states that "the President may deem it necessary". It was unclear in this provision what ideas among the people involved should be given priority. This important question has been considered by the Supreme Court in several cases after the Sankalchand case.⁷

HOW DOES COLLEGIUM SYSTEM WORK?

The collegium submits recommendations for the names of lawyers or judges to the Central Government. Similarly, the Central Government is also submitting some of its proposed names to the Collegium. The Central Government checks and investigates the names and distributes the file to Collegium. The Collegium considers the names or proposals made by the Central Government and submits the file to the government for final approval. If the Collegium reverts to that name and the government should approve those names. But the time limit is not set for responding. This is why the appointment of judges takes so long. It is important to note here that the data released on October 1, 2020, indicates that the Supreme Court has the powers allowed by 34 judges, of which there are currently four vacancies.⁸ Making judicial appointments to the Supreme Court requires compliance with three constitutional prerequisites:

1. First, candidates who are eligible for advancement to the position of President of India must be recommended by the "Collegium" of the Supreme Court, which is presided over by the Chief Justice of India. In reality, prior to suggesting such names, the Supreme Court Collegium discusses the High Court Collegiums, which are made up of the three senior-most Judges. The Chief Justice of India and the four senior-most serving Supreme Court judges make up this Collegium. If the President confirms the replacement CJI's appointment and the outgoing CJI later calls for a Collegium meeting before retiring, the replacement CJI (also known as the CJI Designate) must also be included.

2. In order to authorize the nomination of the candidates suggested by the Supreme Court

⁶ Article 222. The Constitution of India

⁷ Supra note 9

⁸ Available at <https://theprint.in/opinion/one-third-judges-posts-lie-vacant-in-12-high-courts-so-much-for-collegiums/532266/>.

Collegium, the President must secondly offer their approval, seal the notification of appointment, and issue it.

3. Thirdly, the President may, in a handful of instances, refer suggestions to the Collegium for reconsideration while providing persuasive arguments against the nominee. The President, subsequently, must abide by the Collegium's decision-making and provide respect to the recommendations when both the CJI and the Collegium unanimously reiterate their support for the proposed candidate's appointment.

The Supreme Court constitutionally interpreted the aforementioned conditions into Article 124 in order to safeguard the interconnected and fundamental constitutional values of the "rule of law," "separation of powers," and "independence of the judiciary."

According to the Constitution, presided over by a three-judge court (1982, 1993, 1998), a judge by the President appoints the candidate based on the advice of the council/college, which includes the Chief Justice of India's authorized entity, the four constitutional court justices, and the top court jurist from the nomination. The following are three cases:

1. S. P. Gupta vs. Union of India - 1981 (also known as Judge's Transfer case)⁹
2. Supreme Court Advocates-on Record Association Vs. Union of India - 1993¹⁰
3. In re Special Reference 1 of 1998.¹¹

FIRST JUDGES CASE:

In S P Gupta Vs. Union of India, 1981, the Supreme Court, by a majority decision, held that the concept of the supremacy of the Chief Justice of India could not be found in the Constitution.¹²

It said that any legislative power alluded to within Article 217 might make an approach to the Federal Court for nomination, not only the Chief Justice of the Federal Court.¹³ The Judicial Bench further determined that the phrase "discussion" employed in Articles 124 and 217 did

⁹ S P Gupta Vs Union of India 2000 IIIAD (DEL) 297. See also at MANU / SC / 0080 / 1981.

¹⁰ Supreme Court Advocates-On-Record Association V. Union of India (1993) 4 SCC 441.

¹¹ Re: Special Reference 1 of 1998 (1998) 7 SCC 739.

¹² Supra note 3.

¹³ 1990 SCR Supl. (2) 433 (Subhash Sharma vs. Union of India).

not indicate "concurring opinion," implying that, while the President might confer on these activities, his choice must not be unequivocal. When it came to Supreme Court appointments, the ruling preserved the political balance in favor of the Government.

SECOND JUDGES CASE:

The Apex Court's Division Bench overruled the judgment in the suit of S P Gupta in Advocates-on-Record Association Vs. Union of India in 1993.¹⁴ Also, it established the ' Collegium System framework for the selection and relocation of jurists to the tribunals. A majority authorized the CJI in aspects of nomination and financial transaction, thereby deliberating that the word "consultation" will not minimize the CJI's original position in judicial appointments, asserting that perhaps the apex court should indeed perform "to ensure the rights and supervise the judicial independence." Even though this is a judiciary issue, the CJI's role is paramount. The administration cannot have an ultimate say on the subject. The court held whether the CJI must provide suggestions after consulting with two of his most experienced jurists, and the officials must approve those specific proposals under the collegium system. However, the Executive and Legislature can ask the Collegium to evaluate the subject as a challenge to the chosen nominee, and the Executive will bind the selection if the authority keeps repeating the suggestion in review.

THIRD JUDGES CASE:

President K R Narayanan filed a Presidency Order in the Constitutional Court in 1998, clarifying the definition of the phrase "consultation" as defined by Article 143 of the Constitution¹⁵ (advisory authority).¹⁶ The question was whether "consultation" required consultation with multiple judges in formulating the CJI vision or whether a single CJI concept itself could be a "consultation."¹⁷ In response, the Supreme Court set out nine guidelines for the operation of the Chamber for the appointment and transfer of these have become the current

¹⁴ Supra note 4.

¹⁵ Article 143, The Constitution of India, 1950.

¹⁶ In Re: Special Reference No. 1 of 1998, MANU/SC/1146/1998: (1998) 7 SCC 739.

¹⁷ Available at <https://thelogicalindian.com/story-feed/awareness/collegium/>.

standard of the Collegium and have since become prevalent. This view states that recommendations should be made by the CJI and its four most senior colleagues rather than two.¹⁸ It also ruled that Supreme Court judges should be consulted by the High Court, from which the nominee is named. Also, it was stated that the CJI must not submit suggestions to the administration if two judges disagree. The Collegium has been providing suggestions for judicial appointments and transfers ever since then.

NATIONAL JUDICIAL APPOINTMENT COMMISSION ACT, 2014 - THE FOURTH JUDGES CASE:

The National Judicial Appointment Commission (NJAC) was established by a statute enacted by Parliament in 2015 to supersede the collegium system.¹⁹ This was dismissed as it was considered unconstitutional by the Supreme Court in the case of a fourth judge as the new system would undermine the independence of the judiciary.²⁰ The National Judicial Appointments Commission (NJAC) is a recommended legislative authority to substitute the present Collegium system of judiciary nomination. The Constitutional amendments created the NJAC [Constitution (Ninety-Nine Amendment Act), 2014].²¹ The Apex Court, to the surprise of the legislative branch, invalidated the 99th constitutional amendment²² and the NJAC Act as constitutionally questionable and invalid on October 16, 2015, in the fourth Judges Case Supreme Court Advocates-on-Record-Association and Ors. Vs. Union of India (UOI)²³ is trying to restore the collegium system only for judicial appointments to federal courts.

The Constitutional Amendment and the National Judicial Appointments Commission (NJAC) Act were enacted to substitute the collegium system for appointing judiciary to the Superior Courts, which developed following the second judge's case.²⁴ "Judicial Appointments to the Supreme Court, judges and CJ of the High Court, and the relocation of judges and CJ of the High Courts

¹⁸ Available at <https://www.jatinverma.org/collegium-system-of-india>.

¹⁹ National Judicial Appointment Commission Act, 2014.

²⁰ Krishnadas Rajgopal, SC Bench strikes down NJAC Act as 'unconstitutional and void', available at <https://www.thehindu.com/news/national/supreme-court-verdict-on-njac-and-collegium-system/article7769266.ece>.

²¹ 99th Constitutional Amendment Act-2014.

²² Id.

²³ Supra note 14.

²⁴ Supra note 13.

which constituted preceding to the change," the court has ruled. The court examined the bar association for suggestions on enhancing the collegium system's functioning.

APPOINTMENT PROCEDURE IN THE COLLEGIUM SYSTEM:

India's judicial system plays a crucial role in maintaining the independence of the judiciary. The Supreme Court is the highest court of justice. After that, there are High Courts and District Courts in all provinces or every state. Then there are the People's Courts known as Lok Adalats. The President appoints the Supreme Court and High Court judges under Articles 124 (2) and 217 of the Indian Constitution. The President needs to hold consultations with those judges in the Supreme Court and the High Court as far as possible.

According to Article 124(2) of the Indian Constitution,²⁵ "Almost any Judge of the Federal Courts will therefore be selected by the President by authorization under his side and wrap upon discussions with all this of the Supreme court judges and the High Courts in the Jurisdictions as the Head of state could consider essential for the particular reason, and must also stay in power unless he reaches the age of sixty-five years: Provided, however, that when a Judge apart from the Chief Justice is assigned, the Chief Justice of India will always be taken into account:

- A judicial may quit their position by having written to the President from their hand;
- A judicial could be dismissed of their position in the ways indicated under clause (4).

When a judicial except for the Chief Justice of India is appointed, the Chief Justice of India is often reviewed timely." Article 217 of the Indian Constitution²⁶ states: " Almost any Judge of a High Court will henceforth be selected by the Government by authorization under his side and wrap after discussions with the Chief Justice of India, the Governor of the State, and, in the particular instance of Judicial Appointments other than the Chief Justice, the Chief Justice of the High Court, and will stay in power unless he reaches the age of sixty-two years in the particular instance of an

²⁵ Article 124(2), The Constitution of India, 1950.

²⁶ Article 217, The Constitution of India,1950.

additional or acting Judge, as stipulated in Article 224, and every other case unless he reaches the age of sixty-two years provided that

- A Judge might also step down from his workplace by having written to the President under his hand;
- A Judge could be taken down from his workplace by the Head of state in the provisions laid down in clause (4) of Article 124 for the discharge of a Supreme Court Justice;
- The office of a Judge must also be cleared by his appointment by the President to the Supreme Court or through his relocation by the Head of state to some other High Court only within the territorial jurisdiction of India.²⁷

CRITICISMS OF THE COLLEGIUM SYSTEM:

The fundamental goal of the Collegium was to safeguard the independence of the judiciary by keeping the Executive and Legislature out of the process of appointing justices. It was advised to absolutely avoid using the infamous term "Sarkari Judges." The Collegium was established with the best of objectives, but ironically, it fell short of the outcomes its architects were striving upon. In the roughly three decades after the Collegium was founded, there have been certain occurrences that may indicate that the method is not the best one for choosing judges. There have been situations where retired judges have appeared in public forums and claimed that the Collegium is not operating in accordance with its founding principles. The collegium system need not be considered exempt from the precautions and requirements that apply to India's cornerstones of democratic values in terms of transparency, morality, and diversity participation.²⁸ "The most significant critique of the collegium system is the uncertainty about the judicial appointments, especially the grounds depending on which the justices make their decisions."²⁹ The collegium system will lack the validity and reliability to be recognized by all entities in the judicial framework without the need for a fair method for appointing judges. Transparency would not be maintained simply by claiming that the Collegium's members would behave transparently. The lack of clarity

²⁷ Article 224, The Constitution of India, 1950.

²⁸ Ayush Pratap Singh, "Appointment of Judges in Supreme Court in India: A Review of Collegium System" Published in International Journal of Trend in Scientific Research and Development (ijtsrd), ISSN: 2456-6470, Volume-2 | Issue-5, August 2018, pp.946-950, URL: <https://www.ijtsrd.com/papers/ijtsrd17004.pdf>.

²⁹ Ibid.

and the lack of established parameters have several alarming consequences.

- Unlawful and authoritarian: The term "collegium" appeared nowhere else in the legislative framework and was coined by the court to preserve control over the selection of judges.
- Anti-democratic: federal judges have not been chosen by the public and are therefore not answerable to them or others; hence collegium system is undemocratic.
- Non-transparency and opaqueness: There is no formal and transparent mechanism and no published usage conditions, limited posting of the consultation process, and no application procedures for judges is opacity in collegium systems.
- Encourages favoritism: Children and relatives of prior justices or prominent professionals are frequently chosen for judicial positions. As a result, it promotes incompetence in the courts by rejecting skilled individuals.
- Ineffective: The Collegium seems to be unable to limit an increase in the number of judicial appointments and lawsuits. Upon the court struck down the NJAC Act, the ruling did nothing else to alter it or add provisions to something that might have restored it constitutionally lawful.

SUGGESTIONS TO REFORM THE COLLEGIUM SYSTEM IN INDIA:

The appointment of Judges is a crucial process in a democratic country like India and should be done very carefully and with caution. Executive management has come to an end, and the Collegium is the only way left after the Fourth Judge case. But now, the Collegium is also subject to many allegations, and people continue to raise questions about the collegium system's performance. The Collegium system is accused of being secretive and unable to respond to and be charged with corruption.³⁰

- All Collegium meetings should be recorded with the good audio-quality video. Collegium decisions must reflect good processes and good practices.
- The Central Government supports this change to include the Collegium, the existing High Court judges, senior lawyers, the Attorney General of India, and the Advocate General (for the

³⁰ Available at <https://www.thehindu.com/specials/in-depth/njac-vs-collegium-the-debate-decoded/article10050997.ece>.

appointment of HC), thereby creating a democratic and transparent Collegium system.

- All nominations and elevations must be made independently, reducing the size of the preferences, electoral positions, political appointments, nepotism, favoritism, etc.
- Any collegium judge who shows a tendency to overemphasize or temporarily rotate due process should be barred from further participation in Collegium.
- The Collegium should provide applicable laws, rules, and regulations that may be amended to obtain complaints against individual judges, include appropriate procedures to prevent baseless complaints against judges by interested parties, and conduct an independent investigation into complaints if available.

CONCLUSION:

While disregarding the constitutional amendments and the NJAC Act, the majority on the Constitutional Bench expressed grave concern about the shortcomings of the Collegium system in appointing the judges and, therefore, views and opinions on much-needed malaise and transparency in the implementation of the collegiums. In the case of the fourth judge, a prayer for reconsideration of the second case of the Judges - and the third judge in the hands of the constitutional bench was rejected. The Constitution establishes a consultation and participation process among constitutional functions to nominate or appoint the best person to judge HC and SC.

India is the only country where judges actually have the liberty to use their own names in the name of judicial independence and the fundamental framework of the Indian Constitution. The founders of our Constitution have decided not to give the judges final power. Since 1993, the Collegium has enjoyed the power to appoint judges in both the Supreme Court and the High Court. Until then, the Executive Council had enjoyed the right to do so. The Supreme Court had dismissed the NJAC for doing so somehow and violating the fundamental principles of India's Constitution and democracy. Strictly speaking, the team of the top five judges who makeup the Collegium is the final decision as they do not take any advice from the Executive as elected by the people of India. In the case of the fourth judge, the Supreme Court has asked for suggestions from Bar Council members and other stakeholders. Changing the Collegium system to increase

the number of judges is also an hour requirement. The Central Government supports this change to include the Collegium, the current judges of the Supreme Court, the senior lawyers, the Advocate General, and the Attorney-General of India, thus forming a democratic and transparent Collegium system. As a result, India must reestablish the federal court's legitimacy by following a system of judicial appointments that is transparent and accountable. The caliber of jurists could also be increased and alter the Collegium system.

