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CONSTITUTIONALITY OF COLLEGIUM SYSTEM IN INDIA

ABSTRACT

Collegium System is the system of appointment and transfer of judges by the President of India after consultation with the Chief Justice and other judges that has evolved through judgments of the SC, and not by an Act of the Parliament or by a provision of the constitution. The tussle over the collegium system goes on between the judiciary and the executive in India while the judiciary sees it as the independence and integrity of the judiciary in the country, the executive criticises it as it rejects the idea of check and control in the exercise of power and does not involve the executive in the process of the appointment of judges. The concept of the collegium system evolved through the landmark judgments of the Supreme Court in the 1980s and 90s regarding judicial appointments in India. This research article discusses the constitutional provisions regarding judicial appointments and the evolution of the collegium system in India (three judges' case), constitutionality of NJAC and 99th Amendment Act. It throws light on the drawbacks of the collegium system and make suitable recommendations to improve the collegium system.

Keywords: collegium system, judges case, appointment of judges, constitution, article 124, article 217, the National Judicial Appointment Commission, 99th Amendment Act

INTRODUCTION

Collegium System is the system of appointment and transfer of judges that has evolved through judgments of the SC, and not by an Act of the Parliament or by a provision of the Constitution.¹ The appointment of judges is an important aspect of judicial independence which requires that in administering justice judges should be free from all sorts of direct or indirect influence of political or non-political bodies. Appointment by the head of the state with the consultation of the Lord Chancellor was essentially the British method which was adopted in the Indian Constitution provided under Article 124 of Indian Constitution states that:

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 Court 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.

According to this Article, the Judge should be appointed by the President with the consultation of Chief Justice of India and the senior Judges of the Supreme Court. The reason for the consultation with the Chief Justice of India and the Judges of the Supreme Court is that they are well qualified by reason of their long tenure. But in the case *Supreme Court Advocates-On-Record Association V. Union of India*, popularly known as **THREE JUDGES CASE** the concept of collegium system was evolved.

The word 'collegium' is nowhere mentioned in the constitution, it has come into force by the recommendation traced back to the year 1981 by the Bar Council of India during a national

¹ Collegium System, available at: <https://www.drishtiiias.com>.

seminar of the lawyers at Ahmedabad.² It was recommended that there should be a collegium system for the appointment of the Supreme Court Judges by the following authorities:

- a. The Chief Justice of India
- b. Five senior Judges of the Supreme Court
- c. Two representatives who would be representing the Bar Council of India and the Supreme Court Bar Association.

The Indian Collegium System, where existing judges appoint judges to the nation's constitutional courts, has its genesis in, and contained basis resting on, three of its judgments made by Supreme Court judges, which is collectively known as **Three Judges Cases**.

Establishment of Collegium System with Judicial Pronouncement:

The Collegium of judges, as proposed by Bhagwati J, could only be established in India through the passing of an amendment to the provisions of Articles 124(2) and 217(1) of the Constitution. But in 1993, a majority of Nine-Judge Constitutional Bench of the Supreme Court in the Second Judges' Case and in 1998, the unanimous opinion of the nine- Judge Constitutional Bench of the Supreme Court in the Third Judges' Case did accomplish the task of setting up of the collegium of judges.³

Evolution of the System

➤ CONSTITUTION OF INDIA

The Constitution of India gives provisions to appoint the Supreme Court and High Court judges under Article 124 and Article 127.

- **Article 124 (2):** It deals with appointing Supreme Court judges. It states that “Every judge of the Supreme Court shall be appointed by the President by warrant under his land and seal after consultation with such of the judges of the Supreme Court and of

² Devishi Sharma and Shashwat Mishra, “Constitutionality of Collegium System”, available at: <https://www.legalserviceindia.com>.

³ Deepshika Garg, “Collegium System in India”, available on: <https://www.legalservice.com>.

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.⁴

- **Article 217 (1):** It deals with appointing High Court judges. It states that “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 case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office, in case of an additional or acting Judge, as provided in Article 224 and in any other case, until he attains the age of sixty two years.”⁵

1. First Judge Case (1981): S.P. Gupta v. Union of India

I. It is also known as the Judges’ Transfer case. In 1981, a lot of writ petitions were filed by various lawyers and practitioners in different high courts challenging an order of the government on the non-appointment of two judges and their transfer in High Courts for a short term. These writs also challenged the constitutional validity of the procedure followed for the appointment of judges in higher courts.⁶

II. Argument from the side of petitioner:

- Argued the constitutional validity of the order of the Central Government, which indirectly forced the judges to give their consent to the appointment as additional judges or else their permanency in the profession would be affected.⁷
- Another argument was that the President failed to perform his duty efficiently under Article 216 to appoint judges in the court to deal with the pendency of cases effectively, so a writ of mandamus was issued against him.

III. Arguments from the side of respondents:

⁴ INDIA CONST. art. 124, cl. 2.

⁵ INDIA CONST. art. 217, cl. 1.

⁶ S.P. Gupta v. Union of India, AIR 1982 SC 149.

⁷ Monesh Mehndiratta, “SP Gupta v. Union of India: Case analysis “(Sep. 08, 2022), available on: <https://blog.iplayers.in>.

- The respondents took the advantage of Article 74 (2) stating that any advice taken by the President from any of the ministers in the Council of Ministers cannot be challenged and questioned in the court of law.
- They argued that the petition filed by the petitioner must not be maintainable as no harm has been suffered by them. If it had to be filed, then the judges who had been appointed as additional judges must have done so.

IV. Judgment of the Court:

- the judgment was rendered, by a seven Judge Bench, by a majority of 5:2, in the First Judge Case on December 30, 1981
- In this, Justice Bhagwati recommended a collegium in order to recommend the names of candidates to the President for the appointment of judges in the Supreme Court and the High Courts.
- Bhagwati J in the First Judges' Case expressed his dissatisfaction with the existing 'mode of appointment of judges in India in which the authority to select judges has exclusively been vested 'in a single individual' (the President) whose choice 'may be incorrect or inadequate' and 'may also sometimes be imperceptibly influenced by extraneous or irrelevant considerations.'⁸
- While on the other hand, Justice Pathak and Tulzapukar held that the advice of the Chief Justice of India must be given importance and supremacy over the advice given by anyone else.
- A seven judge bench held that the President of India is the final authority to appoint and he need not follow the advice of the judges whom he consults. It means 'consultation is not concurrence'.
- The ruling gave the Executive primacy over the Judiciary in judicial appointments for the next twelve years.⁹

2. *Second Judge Case (1993): Supreme Court Advocates on Record Association v. Union of India*

⁸ Available on: <https://indiakanoon.org>.

⁹ Collegium System, available on: <https://www.drishtiiias.com>.

I. The loop hole in the case of *S.P. Gupta v. Union of India* was cleared in this case. In this, a nine judge bench examined two questions:

- The position of the Chief Justice of India
- The justiciability of fixation of judge strength.

And overruled the ‘First Judges Case’ and held that the advice of the Chief Justice of India is essential and important and must be considered.¹⁰

II. The bench stated that the recommendation made by the CJI in consultation with his two senior-most judges should normally be given effect to by the executive. Thus, in 1993, the CJI got primacy in appointing judges and till this time, it was the government’s job to fill vacancies in HCs and the SC.¹¹

III. In this SC introduced the Collegium System holding that “consultation” really meant “concurrence”. In this Second Judge case, J.S. Verma overruled the majority view in the First Judges Case, Verma J held that the opinion given by the CJI in the consultative process had to be formed taking into account the views of the two senior most judges of the Supreme Court. This would ensure that the opinion of the Chief Justice of India was not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary.¹²

IV. By a majority of 7:2, a nine-judge bench of the Supreme Court overruled the judgment in the First Judge Case.

V. The primacy in the matter of appointment of judges to the higher judiciary, came to be transferred from the executive, to the Chief Justice of India (based on the collective decision, by a collegium of judges).

3. Third Judge Case (1998):

I. It is not a case but an opinion delivered by the Supreme Court of India responding to the collegium system, raised by President of India K.R. Narayanan, under his constitutional powers. This case reiterated the supremacy of the judiciary over the executive in the course of judicial appointment. A nine-judge Bench answered the

¹⁰ Supreme Court Advocates on Record Association v. Union of India, AIR 1993 SC 268.

¹¹ Aaj Sikri and Ayush Lahoti, “Debating the Collegium System: A Comparative Analysis”, (Apr. 2, 2021), available on: <https://articles.manupatra.com>.

¹² Sarthak Awasthi, “Collegium System for Appointment of High Court and Supreme Court Judges” (Nov. 17, 2022), available on: <https://articles.manupatra.com>.

reference unanimously, on October 28, 1998. In this case, the Supreme Court laid down the following points:

- The Supreme Court held that the expression ‘consultation’ with the CJI in Articles 124, 217, and 222 of the Constitution of India requires consultation with the majority of judges in the formation of the opinion of the CJI and the individual and personal opinion of the CJI do not constitute valid consultation.¹³
- The collegium of judges, headed by the Chief Justice of India, has been vested with the final determinative authority for making appointments to the higher judiciary and the President is liable to “concur”, with the recommendations made.¹⁴
- Supreme Court on President’s reference expanded the Collegium to a five-membered body, comprising the CJI and four of his senior-most colleagues.

II. It is important to note that the Third Judges Case modified one important conclusion of the Second Judges Case. The modification was that the ‘collegium’ for appointment of judges in the Supreme Court was expanded to consist of the CJI and four senior-most judges rather than the two senior-most judges as concluded in the Second Judges Case.¹⁵

- ❖ The SC collegium is headed by the CJI and comprises four other senior most judges of the court.
- ❖ A High Court is led by its Chief Justice and four other senior most judges of that court.

The National Judicial Appointment Commission (NJAC)

It was a body which was proposed to make appointments of Chief Justices, Supreme Court Judges, and High Court judges in a more transparent manner as compared to the existing

¹³ Third Judge Case reported in 1998 (7) SCC 739.

¹⁴ Supreme Court of India (Oct. 28, 1998), available on: <https://main.sci.gov.in>.

¹⁵ Third Judges Case (Jan. 2017), available on: <https://www.manoramayearbook.in>.

collegium system and to replace the collegium system.¹⁶ The NJAC came into existence via the National Judicial Appointments Commission Bill, 2014 proposed by the Minister of Law and Justice, Ravi Shankar Prasad. The commission was established by the 99th Constitutional Amendment Act, 2014. The Act proposed that the members of NJAC would be composed of members from the legislative, judicial, and civil society.

In addition to the Constitutional Amendment Act, the National Judicial Appointment Board Act, 2014 was also passed by the Indian Parliament to regulate the duties of the National Judicial Appointment Board. A new article, Article 124A (Establishing the Composition of the NJAC), was added to the Constitution. It was established that NJAC would comprise of - Chief Justice of India, Two Senior Most Judges of Supreme court , Union minister of Law and Justice , Two Eminent Persons Nominated by Chief Justice of India , Prime minister of India And Leader of opposition.

99th Amendment Act

This Amendment established the National Judicial Commission Act in 2014, which creates the National Judicial Appointments Commission. Article 124(2) and 128 were amended. The new Article 124A was also added. Article 124A stated that the Supreme Court of India shall consist of seven additional judges, or a greater number if it is prescribed by the law. It also states that the Supreme Court Justice will be selected by the President through a warrant which bears the signature of the President. Article 124B and 124C were also introduced.¹⁷

Constitutionality of NJAC

- ***Fourth Judge's Case (2016): Supreme Court Advocates on Record Association v. Union of India***

I. The constitutional validity of the NJAC Act and the 99th Amendment Act was challenged through a group of petitions before a five Judge Constitution Bench.

¹⁶ Mohammad Sahil Khan, "National Judicial Appointment Commission", (July. 8, 2022), available on: <https://blog.ipleaders.in>.

¹⁷ Constitution (ninety-nine amendment) Act, 2014, available on: <https://legislative.gov.in>.

- II.** In this case, the Supreme Court by a majority of 4:1, struck down the 99th Amendment and consequently the NJAC Act are unconstitutional and void. Justice Khehar, Lokur, Joseph, and Goel were in majority of the decision and held that the involvement of executive in the appointment of judges impinged upon the primacy and supremacy of the judiciary, and violated the principal of separation of power between the executive and judiciary. The majority judgment revived the collegium system and acknowledged that the system has to be streamlined to make it more responsive and transparent;¹⁸
- III.** Whereas Justice Chelameswar disagreed and observed that the permanent collegium system lacks transparency, accountability, and objectivity and the public has 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. He stated that “Independence of such fora rests on two integers- Independence of the institution and of individuals who man the institution.”

CRITICISM OF THE COLLEGIUM SYSTEM

“The collegium has been dilatory, arbitrary and smeared by favourites and the present collegiate elitism is the vanishing point of democratic values in the justice pyramid”

-Justice Iyer

- Exclusion of Executive: The complete exclusion of executive from the judicial appointment process created a system where a few judges appoint the rest in complete secrecy. Also, they are not accountable to any administrative body that may lead to the wrong choice of the candidate while overlooking the right candidate.¹⁹
- Non-transparency in appointments - It is seen as a closed-door affair with no prescribed norms regarding eligibility criteria, or even the selection procedure. There is no public

¹⁸ Supreme Court on Record Association v. Union of India, (2016) 5 SCC 1, (2016) 2 SCC (LS) 253.

¹⁹ Collegium System, available on; <https://www.drishtiiias.com>.

knowledge of how and when a collegium meets, and how it takes its decisions with no official minutes of collegium proceedings.²⁰

- Nepotism and Favouritism - Allegations of nepotism and favouritism are rampant with judges in the collegium recommending their close relatives. The collegium system does not provide any specific criteria for testing the candidate for the post of CJI because of which it leads to wide scope for nepotism and favouritism.
- Unequal representation – The other area of concern is the composition of the higher judiciary. As per the data available with the Union Law Ministry, out of 537 appointments to High Courts between 2018 and 2022, 424 (79%) were from the general category (upper caste), 57 (11%) were from Other Backward Castes (OBCs), 15 (2.8%) were from Scheduled Castes (SCs), and 7 (1.3%) were from Scheduled Tribes (STs). The absence of an institutional mechanism to ensure diversity on the Bench in the judiciary is a problem. SCs, STs, OBCs, and minorities are grossly underrepresented in the collegium picks.
- Judicial Vacancies: Presently, India has twenty-five High Courts with a total sanctioned strength of 1114 judges, and only 782 judges are working while the remaining 332 judges' posts are vacant.
- Lack of representation of Women: Only 107 judges, or 13% of all HC judges are female. There are currently 4 women justices out of the sitting thirty-three in the Supreme Court.
- Criticism by the 214th report by law Commission: The 214th law commission said the word 'collegium' was not used by the constitution originally and the S.P. Gupta case brought about its usage by using it. According to Article 74 of the Indian Constitution, the President should always act on the aid and advice of the council of ministers. However, the two judges' case have held that the CJI and two or four judges as the case may be. Thus, the cases held that the Chief Justice should consult the collegium while the Constitution says that the Chief Justice of India and the judges should consult the President.²¹

Way Forward

²⁰ Issues in the Collegium (Oct. 18, 2022), available on: <https://www.iasparliament.com>.

²¹ Judicial Appointments in India (Mar. 2023), available on: <https://loksabhadocs.nic.in>.

The subjectivity and the inconsistency of the collegium system highlight the need to relook at the process of appointment of judges:

- A written manual should be released by the Supreme Court which should be followed during the procedure of appointments and records of all meetings should be in the public domain in order to ensure transparency and a rule-based process must be followed.
- Changing the Procedure of Recommendation: Instead of selecting the number of judges required against a certain number of vacancies, the collegium must provide a panel of possible names to the President to appoint in order of preference and other valid criteria.
- Reconsidering the Establishment of Act on Lines of NJAC: The Supreme Court may amend the NJAC Act to have safeguards that would make it constitutionally valid and reorganize the NJAC to ensure that the judiciary retains majority control in its decisions.
- Ensuring Transparency: The collegium members have to make a fresh start and engage with each other. The subjectivity and the inconsistency of the collegium system highlight the need to relook at the process of appointment of judges. A transparent process adds accountability that is much needed to resolve the deadlock.
- Four possible areas of improvement: Transparency, an eligibility criteria, a secretariat to assist the collegium and dealing with complaints against persons being considered for appointment.

To ensure public confidence and credibility, the collegium system of judicial appointments needed to be efficient, transparent and accountable.

Comparison With Alternative Option Of Appointment Of Judges

In Canada: The power to appoint the judges resides with the federal Govt. The Federal Minister of Justice appoints special advisers to gather the information about the potential and the deserving judges and then the list is transferred to the Canadian Bar Association National Committee who check the background of the candidates before pronouncing the candidates qualified or not qualified for judicial office. The final selection is laid before the Cabinet for approval and forwarding to the Governor General, in whose name the appointment is made.²²

²² Canadian Bar Association, (Oct. 2005), available on: <https://www.cba.org>.

In Germany: The appointment of the Judges is made through the process of the election. Half the members of the Federal Constitutional Court are elected by the executive and half by the legislative. Federal judges are picked by a body composed of a Minister of the federal state, federal MPs and ministers of the states. Candidates do not have to be professional judges, but must be lawyers. Anyone who is at least forty years old and qualified to hold judicial office pursuant to the German Judiciary Act may be elected.

In USA: The Supreme Court justices, court of appeals judges, and district court judges are nominated by the President and confirmed by the United States Senate. The names of potential nominees are often recommended by senators or by members of the house who are of the President's political party. The Senate Judiciary Committee typically conducts confirmation hearings for each nominee. Article 3 of the Constitution states that these judicial officers are appointed for a life term. The Federal Judiciary, the Judicial Conference of the United States, and the Administrative Officer of the U.S. play no role in the nomination and confirmation process.²³

In UK: The SC Judges are appointed by a five people's selection commission. That committee consists of SC President, his deputy and one member each appointed by the JACs which consist of lay person, members of judiciary and the bar; of England, Scotland and Northern Ireland. All appointments are made by open competition. The Commissioner recommends candidates to the Lord Chancellor, who has a very limited power of veto. The Commissioner also has a specific statutory duty to encourage diversity in the range of persons available for selection for appointments.²⁴

²³ Judgeship Appointment by President, available on; <https://www.uscourts.gov>.

²⁴ Judicial Appointments, available on: <https://www.judiciary.uk>.

CONCLUSION

According to the constitutional framework, the President is the nominating authority when it comes to judicial appointments, but in consultation with the Chief Justice and other judges. The collegium system which makes recommendations to the President regarding judicial appointments is nowhere mentioned in the Constitution and has entirely developed as a result of how the Supreme Court has interpreted the provisions and directives. The collegium system is a critical feature of India's judiciary, ensuring some degree of independence to the judiciary, which has also been criticized for its lack of Transparency because the process is typically kept secret, and is frequently accused of favouritism and nepotism. However, this is the truth that the collegium of judges has not been performing the task of recommending candidates as judges satisfactorily. There is no criteria and openness followed by the collegium.

Making recommendations for appointments does not require adhering to any particular rules or procedures. Alternatives to the quorum system have been proposed, but they also have their own drawbacks and limitations. All mechanisms for appointing judges have some strengths and weaknesses, so no particular system can be considered the best one. Nevertheless, the commission system is probably a very effective mechanism for the appointment of judges, as it maintains public confidence in the appointment system and ensures judicial independence.

Arguments and debates on the system of appointing judges may be questioned, however, there is no doubt that the judiciary must stay independent and free from pressure.

The essence of democracy lies on its transparency, accountability, and integrity of institutions. Without transparency, justice is an illusion. Hence, an independent body for the whole process of appointing judges is required. The judiciary needs to act independently not exclusively or else it will hurt the faith of coming generations.