

COLLEGIUM SYSTEM- THE RISE, THE REMEDY AND THE OUTCOME IT PROVIDES REGARDING THE INDEPENDENCE OF THE JUDICIARY

Vaishnavi Pandey*

ABSTRACT

For a long, there has been a national debate in India regarding the appointment system of Judges in the higher judiciary as there are no clear criteria for appointment provided. Some criticize the process as an opaque one while some support it by claiming that the criteria will create a breach of privacy. From the Indian perspective, judicial appointments and independence are considered the fundamental features of the Indian Constitution forming part of the basic structure. But the emergency brought so many controversies indicating the misuse of power by the executive resulting in the judiciary taking all the powers of appointments in higher courts into its hands by introducing the Collegium System through the 1993 judgement. The Collegium system although became successful in making the judiciary free from direct interference of the executive but has its loopholes in the name of nepotism, castism, favoritism, corruption and so many others. This article substantiates on collegium system in detail covering its meaning mainly the evolution from controversies to the three judges cases triggering its beginning, its critical analysis and reforms and the suggestions for dealing with the loopholes. It also deals with the National Judicial Appointment Commission, its members, the issues and the unconstitutionality.

INTRODUCTION

Collegium is a word that is nowhere mentioned under the Constitution yet plays a prominent role in the appointment of judges in the higher judiciary of India. A word that provides the remedy to remove the disorder yet is said to be the major bone of contention between the judiciary and the executive. The collegium system is said to be one of the biggest changes in the history of the Indian Constitution that too without a single amendment.

This article deals with the Collegium System, its background, its rise, the remedy it provides and the outcome it emanates regarding the independence of the higher judiciary.

*BA LLB, THIRD YEAR, UNIVERSITY OF ALLAHABAD.

In a healthy democracy, the working of the three organs independently is very important i.e., Legislative, executive and judiciary. While talking about the independence of such organs it doesn't mean that there must be unnecessary compartmentalization but what it means is that the role that is necessary for such organs to perform must be performed by them without unjust overlapping. For ensuring the proper functioning of the judiciary it is important to keep it away from political pressure to maintain its independence. This judges-selecting judges process has evolved to deal with the same issue.

The objective of this paper is to see how this judge-selecting-judges system has evolved, how far this method came in achieving its goal of an independent judiciary, its shortcomings and the alternate options to deal with them. This paper also includes the governmental effort to provide a special body dealing with such judicial appointments in the name of the National Judicial Appointment Commission and the reason for its rejection by the Supreme Court.

WHAT IS THE COLLEGIUM SYSTEM?

The collegium system in India is the system including the forum that deals with appointments, promotions and transfer of judges in higher judiciary. While understanding the basic concept behind this system one can find nothing different until they get to know that the system is nowhere mentioned under our glorious constitution. This judges-selecting judges system was introduced in front of the nation by not a legislative act or amendment but by the judgement of the Hon'ble Supreme Court only.

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The Indian Constitution mentions the method of appointment of Supreme Court judges under Article 124(2) which provides –"Every judge of Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of Supreme Court and High Court in the states as the President may deem necessary for the purpose and shall hold office at the age of 65 years."¹

The word consultation in this Article created mischief leading to many controversies as the executive started using excessive power over the judiciary by treating this consultation with the judges, as not of binding nature but as a piece of mere advice that may or may not be taken. As Lord Acton stated – "Power tends to corrupt and absolute power corrupts

¹The Constitution of India, 1949, Art. 124(2).

absolutely"², such acts of the executive ultimately resulted in the higher judiciary taking command in its own hands following the evolution of the 'Collegium System'.

EVOLUTION OF COLLEGIUM SYSTEM-FROM EXECUTIVE LED SYSTEM TO COLLEGIUM LED SYSTEM

Pre-Collegium System-

The Indian Constitution has embodied the principle of independence of the judiciary into it and this independence has a very close relation with the appointment of judges. Appointment by the head of state with the consultation of the Lord Chancellor was essentially the British process and the same was adopted under Article 124 of the Indian Constitution. The judicial appointments under higher judiciary have been left totally upon the President making it an executive-led process.

Controversies-

- The controversy of appointment started with the issue of J. Zafar Imam in 1968 when the vacancy occurred in the office of Chief Justice of the Supreme Court.
- In 1973 Justice A.N. Ray who was fourth in the order of seniority was appointed as the Chief Justice of India bypassing three senior judges (Justice Shelott, Justice Grover and Justice Hegde). These three judges immediately resigned from their posts to show the protest.
- The same story got repeated in 1976 when Justice Beg was appointed as the new Chief Justice bypassing Justice Khanna.

All these controversies made a foundation for all heated discussions and stress between the executive and judiciary arising at the stressful time of emergency following different cases triggering the evolution of the Collegium System as a new beginning.

Cases Triggering The New Beginning

In the case of Union of India v Sankalchand Seth 1977 which was related to the transfer of judges from one high court to another Hon'ble Supreme Court held that the President has the right to differ from the advice given by the consultant. In the words of the court- consultation

²Acton-Creighton Correspondence, April 1887.

implies consultation of 2 or more persons to find satisfactory results and consultation is different from consent.

This case highlighted the word consultation creating a tussle between the judiciary and executive emerging as a bone of contention between the two. After this case, the question arose that- 'whether the opinion of the Chief Justice is even important to the executive or the Judges can get appointed by the opinion of a single individual (President) whose choice may be incorrect or inadequate or sometimes may also be influenced by irrelevant considerations.' This important question had been considered by S.C. in several cases after Sankalchand's case –

First Judges Case (1981)-

In this case, the matter regarding the appointments of judges in the higher judiciary came into consideration for the second time.

Petition- Under the petition, it was argued that the word 'consultation,' in the relevant provision should be read as concurrence.

Judgment- The court with a majority of 4:3 opined that – consultation is different from concurrence as they may discuss but may disagree. The executive is free to take the opinion and is also free to either consider it or not.

But Bhagwati J. expressed his opinion in a total contrast manner disclosing his dissatisfaction regarding the existing mode of judicial appointments. He considered that- "It is unwise to vest all the power of such appointments without any checks and control upon a person who has not a great knowledge about the profession." He suggested the creation of a body to recommend such judicial appointments to the President named Collegium. According to him if the Collegium composed of profound judges who have gained immense knowledge about this field will deal with such appointments it would surely be a great step towards enhancing the independence of the Judiciary.³

The Second Judges Case- The question under this case was- whether the opinion of the Chief Justice regarding the judicial appointments in the higher judiciary as well as transfers was entitled to primacy.

³S.P. Gupta v. Union of India, AIR 1982, SC 149.

Judgement- By a majority of 7:2 a nine judges bench of this court overruled the Judgement given in First Judges Case and held that-

- Judicial independence is an unamendable part of the basic structure of the Indian Constitution.
- The opinion of the Chief Justice must be given primacy.
- The term consultation was interpreted as concurrence in the provision of the Constitution.
- The Collegium System was introduced consisting of the Chief Justice of India + 2 senior-most judges of the Supreme Court

By this judgement, the judiciary took all the power of the executive that it misused in the appointment process of judges and made the judiciary independent established Collegium.⁴

Third Judges Case 1998-

It is not a case but an opinion and clarification delivered by the Supreme Court of India in response to a question of law asked by then President K.R. Narayanan regarding Collegium in July 1998 in the exercise of his power under Article 14 of The Indian Constitution.

Issue- Whether the consultation with other judges is important or is the opinion of the Chief Justice sufficient?

Held- The court held that Chief Justice could only recommend names and the appointment can be done only after getting the approval of the other 4 judges in the majority.

The case led to the expansion of Collegium-

- Supreme Court Collegium consisting of Chief Justice of India + 4 Senior most judges of Supreme Court.
- High Court Collegium consisting of Chief Justice of High Court+ 4 Senior Most Judges of High Court.⁵

These three cases collectively called 'three judges cases' led to the foundation pillar of the Collegium System taking away the power of the executive and vesting it over the Collegium.

⁴Supreme Court Advocates on Record Association v. Union of India, (1993)4SCC 411.

⁵Re- Special Reference No.1, 1998, AIR 1999 SC 1.

THE NATIONAL JUDICIAL APPOINTMENT COMMISSION CREATES HEADLINES

The Parliament introduced National Judicial Appointment Commission by passing the 99th Amendment Act 2014. It was supposed to be an independent commission to replace Collegium System.

The commission would have consisted of 6 members including-

- Chief Justice of India as ex officio chairperson
- 2 senior most Supreme Court Judges as ex officio members.
- The union minister of Law and Justice
- 2 eminent persons from civil society (such persons were to be appointed by a committee consisting of the Chief Justice of India + Prime Minister+ leader of the opposition in Lok Sabha. Among such persons one was to be appointed from S.C./S.T./ O.B.C./ Minority/Women)

The Fourth Judges Case-

Within the days of the 99th constitutional amendment and NJAC Act, 2014 coming into force, the constitutional validity of both was challenged.

Held-

A constitutional bench of 5 Judges with a majority of 4:1 struck down the 99th Amendment Act and consequently, The National Judicial Appointment Commission Act was thereby declared unconstitutional, restoring the collegium system in the higher judiciary.

Reasons for unconstitutionality-

- ✓ The two eminent persons from the civil society needed not to be specialized in law.
- ✓ The veto power by any 2 persons could have resulted in overriding the judicial opinion.
- ✓ Chief Justice of India being the chairperson had no casting vote that could have been useful in avoiding a deadlock due to a split in an even number of votes.
- ✓ Certain terms were left unexplained i.e., Section 5(1) of the NJAC Act required to recommend the senior-most judge of the Supreme Court as Chief Justice of India if he

is considered fit to hold the office. However, the fitness criteria were nowhere provided.⁶

COLLEGIUM SYSTEM - A CRITICAL ANALYSIS

Though National Judicial Appointment Commission Act 2014, was struck down as unconditional, the Supreme Court in the course of hearing, recognized and acknowledged that Collegium System as it existed had its shortcomings. The critical analysis of these judges selecting judges system is as follows-

Significance - It is said that the Supreme Court of India owns the title of the world's most powerful court because of its powers and status. This power got much strengthened after the establishment of the Collegium System in 1993 which gave higher judiciary independence and freedom.

Judicial Independence - It is initially important in a democracy that individual judges and the judiciary as a whole are impartial and independent of all external pressures. The reason why judicial independence is so important is that "a free society exists only as long as it is governed by the rule of law, the rule that binds the governors and the governed in the administration impartially and treating equally all those who seek its remedies or against whom its remedies are sought. On May 23, 1949 KT Shah stated that "I think it is of the utmost importance that the judiciary, should be completely separated from the executive whether by direct or indirect influences".⁷ In the 2016 judgement after striking down the National Judicial Appointment Commission, Supreme Court said that the Collegium System doesn't require any role of the legislature by stating that "it will influence judges politically and create reciprocity and feelings of payback to the political executive".

A barrier in the transfer of judges for political means - There were so many cases before 1993 where the judges were appointed and transferred to higher judiciary only because of the sweet will of the government or for establishing political motives but after the establishment of the Collegium System it became a tough task for the executive to directly interfere in the process.

⁶ Supreme Court on Record Association v. Union of India, AIR 2015, SC 5457.

⁷ The Constituent Assembly Debates, 23 May 1949.

Strengthened the policy of Separation of Power - Separation of power is the tectonic structure of our Indian Constitution. Under our scheme of the constitution, "it does not prohibit overlap of functions but provides for some overlap in parliamentary democracy but the test of the violation of Separation of power is what Justice Khehar stated that the core functions of an organ must not be performed by the other one as if done it will be leading to a lapse in constitutional accountability and the judicial appointments was held to be the core function empowering the concept of separation of power".⁸ Charles de Montesquieu a French philosopher who propounded the theory of separation of power also stated in his book, "Esprit des Lois" (The Spirit of Laws), 1785 that- "If the legislative and executive authorities are one institution, there will be no freedom. There will be no freedom anyway if the judiciary is not separated from the legislative and executive authorities".

Criticism - Though Collegium System came as a solution for various problems that existed under the higher judiciary the point that can not be neglected is – 'at last judges are also human beings having their political ideologies and means and can also get influenced by so many existing factors. This is exactly what the higher judiciary had witnessed in the decade. As former Supreme Court Judge and member of Collegium 2018-2019, Arjun Kumar Sikri said that- "far from a scientific study about a candidate, most times us (the collegium) go by our impressions while appointing judges to High Court and Supreme Court.

Corruption - Not talking about other persons, it is the judges themselves who said that democracy has failed in the Supreme Court. In 2020, the Attorney General of India told the Supreme Court bench consisting of Justices Arun Mishra, BR Gavai and Krishna Murari in the Prashant Bhushan hearing that he has the list of 9 former judges of the Supreme Court who have said that there is corruption in higher judiciary. Justice VR Krishna Iyer, the former judge of the Supreme Court who demanded former CJI KG Balakrishnan's resignation as the Chairperson of the National Human Rights Commission following allegations of corruption wrote an open letter to then Congress General Secretary Rahul Gandhi in 2011 saying, "the judicature, a sacred instrument with great powers to punish corruption, is itself corrupt. Not a single corrupt judge has been caught or punished."

Opaque and unaccountable system - Former Justice Ruma Pal, one of the most respected SC judges, spoke in November 2011 to describe the process of judicial appointments in the higher judiciary as the best-kept secret of the nation. Indeed, the process of judicial

⁸ Bhim Singh v. Union of India, (2010)5 SCC 538.

appointments is not open to the normal public who has faith in the judiciary and considers judges as no less than a God who is there to protect them from all ill acts of others. But the criteria for appointment of judges is the most persuasive criticism of the Collegium System as no one knows on what basis the judges are appointed. Though from 2017 onwards, the collegium started uploading the lists and all information regarding the appointment of judges. But the main issue is that the process of appointment and rejection of candidates still lacks clarity.

In 2009 the Single judge bench of the Delhi High Court held that the post of Chief Justice of India comes under the ambit of the Right to Information Act. Later the Supreme Court approached a bigger bench of Delhi High Court constituting a special three judges bench that also held in January 2010, that the office of the CJI is a public authority and comes under the ambit of the RTI. Later the Supreme Court moved the petition to the Supreme Court where finally in 2019 a bench including Justices NV Ramana, DY Chandrachud, Deepak Gupta and Sanjiv Khanna upheld the ruling of the two subsequent verdicts of the Delhi High Court. The Court while pronouncing the judgement held that – the judiciary should be independent from the executive, not from the common people. The court also added that "nobody wants to remain in the state of darkness or keep anybody in darkness, the question is about drawing a line. But it should also be considered that in the name of transparency, one can not destroy the institution."

The judgement was pronounced keeping the opaqueness of the judiciary in mind.

Growing Nepotism - The collegium system was also attacked by Indian Law Commission in 2009 when it was alleged that nepotism and political privileges were rife in the working of the system. Retired Justice Rang Nath Pandey of Allahabad High Court had written a letter dated 1 July 2019, to P.M. Narendra Modi alleging, "nepotism and castism" in the collegium system. It is sadly the dark reality that even the justice system is also not untouched by biases. There are so many examples of appointments and transfers in which the recommendations were made by showing the priorities to the kith and kin of judges and politicians.

Making the judiciary an old boys club - It is said that the collegium system prefers practicing lawyers rather than appointing and promoting the judges of subordinate judiciary which often comprise a diverse pool of candidates. As a result of this, the composition of

H.C. and S.C. became an "old boys club" featuring largely male, upper caste former practicing lawyers. Based on the data specifically, for 37 years of the Supreme Court's existence, it had appointed only male judges. In 1989, Fatima Beevi became the first woman to be elevated as a judge of the Supreme Court. The share of women judges in the High Court was only 11% as of August 1, 2021. To date, only 11 women Supreme Court judges were appointed in 71 years. Not a single woman Chief Justice of India till now is appointed.

REFORMS AND SUGGESTIONS TO MAKE COLLEGIUM A TRANSPARENT AND ACCOUNTABLE SYSTEM

Though after creating the collegium system as an appointing body the judiciary has tackled lots of problems that existed before but there are many more still prevailing. Vesting all the power in the hands of the judiciary also created many issues such as corruption, nepotism etc. To deal with the existing loopholes, there are a few suggestions that may be considered-

Opacity and unaccountability – To deal with the same the Supreme Court may move to provide the criteria of judicial appointments in higher judiciary clearly in unambiguous terms in front of the general public. The reason for appointment and the reason for rejection of the candidate must be provided clearly in front of the nation. While talking about the reason it is required to mention that no one is asking for the details that are important to be kept as a secret for ensuring National security but only about the reason that made the collegium appoint the person as Chief Justice or a Hon'ble judge of the higher judiciary as "judiciary should be independent of the executive but not from the people of India". This will be a great step in providing transparency in judicial appointments.

NJAC – A better alternative

Many judicial experts, including former judges, have contended that NJAC can be revived by providing the necessary changes to make it a better alternative for judicial appointments.

The changes can be as follows –

- The fitness criteria for judicial appointments must be mentioned.
- The 2 eminent persons from civil society are needed to be related to the law for ensuring the proper functioning of the system.
- The casting vote must be given to CJI to avoid deadlock.

- The judiciary and the executive should cooperate and deal together to find out solutions to the controversial sections of the Act.

INTRODUCTION OF ALL INDIA JUDICIAL SERVICES EXAM

Several experts have argued that a higher judiciary can get a vast range of candidates by introducing the All India Judicial Services Exam. It will help provide equal opportunity to the judges belonging to the lower judiciary who by immense hard work had secured their position but are unable to get the promotions that they deserve because the advocates are getting higher opportunities than the people who have gathered the knowledge of dealing with the work of a judge. It will also help remove the existing nepotism and favoritism in the courts. It may bring a change in the number of female judges in the higher judiciary and can also tackle corruption. The results of the exam must be kept open to the normal public making the appointments transparent and also free from executive interference. Last but not least judges while appointing other judges must keep in mind what M.C. Setalvad had stated- "My lords, there is a heavy burden on your shoulders. One can only hope and pray that you will discharge it to the best of your abilities and in consonance with your constitutional oath."

CONCLUSION

In the end, it can be stated that "collegium, a word that is nowhere mentioned in the Constitution became successful in bringing the biggest change in the process of judicial appointments making judiciary independent from the direct interference of the executive". But from emerging as a solution to the existing problems to creating controversies of its own, this is not the desired outcome everyone expected. Among so many, the biggest reason behind the existence of corruption is that 'absolute power corrupts absolutely' no matter whether it is in the hands of the executive or the hands of the judiciary.

While the system made the judiciary one of the most powerful judiciaries in the world having the tool of judicial activism in its hand, the body of collegium must take some crucial steps to overcome its loopholes making this appointing system transparent and accountable as it is a system constituted by the judges, of the judges, for the judges and for ensuring the welfare of every individual of the nation who in this era of Encounter, punishments hold a firm belief in the judicial justice system. The judiciary and the executive should cooperate to find out the best solutions to the problems by keeping in mind what Dr. Bhimrao Ambedkar had stated in

his final speech in the Constituent Assembly.⁹ "However good a constitution may be, it may turn out bad because those who are called to work it, happen to be a bad lot. However bad a constitution may be, it may turn out good if those who are called to work it, happen to be a good lot."



⁹Constituent Assembly Debates, 25 November, 1949.