

SYSTEM UNDER THE MICROSCOPE

Written by Aakanksha Pathak

*3rd Year BBA LLB student, OP Jindal Global Law School, OP Jindal Global University,
India*

ABSTRACT

Appointment of judges has undoubtedly been one of the most debated and the most controversial subject in the country. There have been numerous attempts made since Independence to create an efficient method for the same. The collegium system has been in work concerning the appointment of judges. In the year 2014, the Indian government introduced a commission to play a role in the appointment of judges in the Supreme Court and the High Courts, known as the National Judicial Appointment Commission, which led to the enforcement of the National Judicial Appointment Commission Act. Both the bills were passed comfortably in both the houses of the Parliament and did not record a single opposing vote. The intention behind floating the NJAC was the perception that nepotism, judicial hegemony and opacity in the appointment process would be eradicated. The Supreme Court striking the NJAC and the 99th Constitutional Amendment as unconstitutional and void, has again refueled the discussion concerning the appointment of judges.

INTRODUCTION

The discussion revolving the appointment of judges has always been a subject of conflict between the judiciary and the executive organs. The Indian Constitution holds the provisions for the appointment of judges of the Supreme Court under Article 124ⁱ and that of the High Courts under Article 217ⁱⁱ. Post-independence, the appointment of judges was done by the President of India on recommendation and consultation by the Chief Justice of India. The system was recorded to function properly for a few years, however, later gave rise to numerous discrepancies.

In the landmark case of *S.P. Gupta v. Union of India*ⁱⁱⁱ, the subject of appointment of judges gained public interest, wherein the Supreme Court introduced a new concept of Collegium. At this stage, the Collegium for appointment of judges consisted of the Chief Justice of India and two senior most judges of the Supreme Court. The case *SCAOR v. Union of India*^{iv} again discussed the subject of appointment of judges and the collegium, wherein the strength of the collegium was further increased from 3 judges to 5 judges of the Supreme Court. The Supreme Court finally laid the subject matter to rest in 1993, in the celebrated case of *Re Presidential Reference*^v, wherein the court divided into the true meaning of the term ‘consultation’ given provided under Article 124 and Article 217 of the Constitution of India.

The Collegium system of the Supreme Court of India can trace its origin to the three judgments mentioned above. The collegium continues to use these cases as the base and rests upon them, and these three judgments collectively are known as the Three Judges Cases.

The Collegium system essentially consists of the Chief Justice of India and four of the most senior judges of the Supreme Court. The bar association of the Supreme Court has blamed the Collegium system and alleged them for creating and promoting a ‘give and take’ culture, thereby creating a rift among the haves and have nots. Essentially signaling, the politicians and the actors gaining instant reliefs from the courts while the common man must struggle for justice.

The Government introduced a constitutional body known as the National Judicial Commission which was set to replace the Collegium system in the country and take over the role of appointment of judges. This commission was introduced by the virtue of the 99th Constitutional Amendment Act, 2014 passed in both the Lok Sabha and the Rajya Sabha. With this, the

Parliament also enforced a National Judicial Appointment Act with an intention of regulating the dealing and functioning of the NJAC. Both the bills passed were then ratified by 16 state legislatures and finally gained Presidential consent in December of 2014.^{vi}

The NJAC came into force in April of 2015 and the commission would comprise 6 members – namely, the two senior most judges of the Supreme Court, the Indian law minister and two eminent persons. The chief justice of India, the Prime Minister and the leader of opposition in the Lok-Sabha were given the task to nominate such eminent persons, who were further not eligible for re-nominations.^{vii}

Later, the Supreme court held the National Judicial Appointment Act of 2014 and the 99th Constitutional Amendment Act of 2014 to be unconstitutional and void. The court declared that the role for the appointment of judges will remain with the Collegium System.^{viii}

CONSTITUTION REGARDING APPOINTMENT OF JUDGES

One cannot point towards the mention of the term ‘collegium system’ in the Indian constitution or even in its numerous amendments. However, the Constitution does lay certain guidelines concerning the appointment of judges in the Supreme court and the High courts. As per Article 124 (2) and Article 217 of the Constitution of India, the power to appoint judges to the Supreme Court and High Courts is given to the President. The President then requires consulting the judges of the Supreme Court and High courts as and when it may be necessary.

ORIGIN OF THE COLLEGIUM SYSTEM

The evolution of the Collegium system can be understood by reading a series of three judgments, often known as “three judges’ case”

The first judge case, *SP Gupta v. Union of India*, often known as the Judge’s Transfer case. It was held in the majority decision that; primacy of the Chief Justice of India is not embedded in the Indian Constitution. The bench further stated that the word “consultation” given under Article 124 and 217 of the Indian Constitution is not synonymous to the term “concurrence”.

Essentially meaning that even though the President shall consult the stated parties, it is not necessary that the decision of the President should be in concurrence with all.

The second judge case, *Supreme Court Advocates-on Record Association v. Union of India*, this was a nine-judge bench who overruled the judgment laid down in *SP Gupta v. Union of India*. This case introduced the concept of “Collegium System” which would function for the appointment and transfer of judges in the higher judiciary.

The bench held that the ruling under *SP Gupta* to be flawed and conferred primacy to the Chief Justice of India. The judgment further held that, the existence of the term “consultation” shall not weaken the CJI who holds a primary position concerning judicial appointments. To guide the Collegium system the court opined, CJI along with his two most senior judges must make the recommendations, which ideally would be given effect by the virtue of the executive.

The third judge case, *Re Special Reference 1 of 1998*. In the year 1998 a Presidential Reference was issued to the Supreme Court by K.R Narayan concerning the interpretation of the term “Consultation” given under Article 143 of the Indian Constitution. Essentially, the major question to be addressed was if the term “consultation” denotes consulting number of judges of the Supreme Court forming the opinion of the Chief Justice of India or if “consultation” can be established on the sole opinion of the Chief Justice of India. To address this situation, the Supreme Court laid down a 9-point guideline for the operation of the Collegium system for appointing and transferring of judges and such has been persistent ever since. It was laid down that the recommendation must be given by the Chief Justice of India along with 4 other judges of the Supreme Court. It was further stated that the supreme court judges who originally came from High Court from where the recommended name came from, must be consulted. Further it held that in the scenario when, unfavorable decisions are given by two judges, the Chief Justice of India is bound not to send such a proposal to the government.

The system due its non transparency has often been critiqued, furthermore because there does not exist concrete norms or criteria to be fulfilled for eligibility. The NDA government has made numerous efforts to replace the Collegium system to address the ever-growing concerns. However, such efforts have reaped no benefits as they have always failed with the Collegium system prevailing in the country.^{ix}

WHAT ARE SOME STEPS THAT CAN BE UNDERTAKEN TO IMPROVE THE FUNCTIONING OF THE COLLEGIUM SYSTEM?

Firstly, the lack of transparency has always been one of the most debated topics when it comes to judicial appointments. The Collegium works behind closed doors, and the reasons why a judge is appointed and his eligibility for the position has never been disclosed. The public has the right to know the grounds for which the appointment of the judge has been made. Thus, to tackle this issue, and uphold the concept of Right to Information, certain necessary conversations between the collegium and the candidate perhaps could be recorded which would then be made available to the public eye. Such must be a routine exercise, where in the databases are updated frequently. This would give the common man a sense of trust and faith that the delivery of justice is indeed in capable hands. However, this shall not mean that the grounds for rejection must be made public as it poses a huge risk of tarnishing the individual identity of the judge in question.

In a system wherein the individuals are to be appointed by individuals, the odds of favoritism cannot be neglected. Further to tackle this, bureaucrats shielded from the pressures of the judges, lawyers and the ministers must be included in the collegium, who would further assist the collegium in the decision-making process. The role of such members would be to ensure that the process involving analyzing and comparing the candidates has been done in a fair and just manner without any bias thereby avoiding favoritism and nepotism in the judiciary.

The most important step to further enhance the collegium system is that a concrete eligibility criterion must be drafted and given to the Supreme Court. Such guidelines should be passed by both the houses of the Parliament thereby cementing them as laws which should be strictly implemented by the collegium system and the law ministry. It is a Right in Rem for the general public to be aware of the criteria on which officials are appointed to the higher judiciary. To further this agenda, the eligibility records of every candidate must be preserved and made available on demand.

COLLEGIUM SYSTEM OR THE NJAC?

The citizens of the country have bestowed the judicial institution with utmost credibility and thus it is imperative that the judicial institution must be respected and trustworthy. There have been numerous questions and criticisms which have been raised pertaining to the lack of transparency and genuineness of the Collegium System which is responsible for appointing the judges for the Supreme Court and the High Courts. In the words of *Justice Rumpa Pal*, “the process of appointing judges is one of the nation’s best kept secrets.”

To tackle such issues the government introduced the Judicial Appointments Commission Bill to be the successor and replace the prevalent Collegium System in the country.

The NJAC took an approach which encouraged the interactions between the judiciary and the executive in the decision-making process. As per the Act, the President was given the authority to re-evaluate the recommendations made by the commission. This step was taken in order to ensure that the executive was kept in the loop in the appointment duties.

Furthermore, it was believed by the government that the NJAC would tackle the issue of transparency which was created by the Collegium System and further stated that the concepts of nepotism and favouritism which are prevalent in judicial appointments would come to an end with the establishment of the NJAC.

The Act also brought about the concept of veto powers wherein if two members of the commission were against a certain recommendation or a proposal, such recommendation would not move forward, thereby it was believed to ensure non-arbitrary selections.

Such reforms can be taken to be some major steps and recorded as merits for the NJAC, due to which it is often believed to be better than the Collegium System. However, it is pertinent to note that even though the NJAC corrects the flaws brought out in the Collegium System, the implementation of the NJAC brings about discrepancies of its own.

ISSUES WITH THE NJAC

It is imperative that the governments interference over the Judiciary must be resisted. Such opinions can be found in the legal fraternity when renowned lawyers such as Harish Salve and

Fali Nariman and others have argued the new formed constitutional body of NJAC to be unconstitutional. In the words of *Advocate Shahid Ali*, “interference in the independence of judiciary via the implementation of the NJAC will have fatal consequences for the democracy and would be harmful for the fundamental rights guaranteed under the Indian Constitution.”

One of the major merits of the collegium system of the country is that it gives the right to protect and safeguard the concept of separation of powers among the three organs of the Indian government, thus upholding the basic structure of the Indian Constitution. The system ensures that the judiciary is independent in nature and its functioning's and operations are not influenced by the Executive or the Legislature. It has also been found that the procedure to appoint judges is imperative to uphold the concept of Judicial independence and thus is imperative that the process lies in the hands of the Judiciary.

Furthermore, the NJAC gives the non-jurists the authority to decide the fate of the judiciary. Placing non-jurists in a position to make such crucial decisions regarding the judiciary can be harmful to the functioning of the Indian judiciary as a whole. In the opinion of *Justice Sathasivam*, the working of the Collegium system is becoming more and more transparent as years go by and this system is the only way to move forward concerning the appointments to higher judiciaries, “we as judges can judge the capability and character of the people who are being recommended for the appointment of judges to the Supreme Court and the High Courts.”^x From this statement, it can be concluded that the people who are not aware about the day-to-day functioning's of the courts and are not well versed by their daily operations are not in the best position to determine who would be best for the positions.

Thus, on comparison it can be said that the Collegium system can more accurately shortlist the candidate as they are well aware about the qualities a judge of the Supreme Court and the High Court are expected to have.

Coming to the introduction of the concept of veto power, there is an extreme possibility that the two members due to unwarranted bias and to further their personal gain and agenda abuse the provision of veto power and strike out a recommendation who would otherwise be a competent and a valid recommendation.

As per the Indian Constitution, the ultimate interpreter of the law is not the executive or the legislature but the Court.

The majority decision of the Constitutional bench has been to continue the working of the Collegium system by addressing the issues by making the necessary alterations in the working of the system with an aim to enhance the operations of the Collegium system, which would be done by taking into account suggestions given by the Bar association, the governments and importantly the society.

It has been re-iterated that Judicial independence is a central feature of democracy as it is an important principle safeguarding laws such as Human Rights.

Thus, the provisions which have been deemed to be the merits of the NJAC, causes threat to the Indian Constitution and interferes with the functioning of the Judiciary. Further the broad powers given to the NJAC can be misused for the personal gains of the executives which there again poses threats to the judicial institutions. It cannot be said that the NJAC is a full-proof alternative to replace the Collegium system and can cause more damage than good.

THE JUDGEMENT WHICH STRUCK DOWN NJAC AS UNCONSTITUTIONAL

The landmark judgment in the Supreme Court of India, *The Advocates- on Record Association v. Union of India*, struck down the 99th Amendment to the Indian Constitution establishing the NJAC, holding it to be unconstitutional.

Previously numerous writs had been dismissed by the Supreme Court which questioned the validity of the NJAC. After the matter was referred to the Constitution Bench at the court, the 5 judge Constitution bench decided to strike down the NJAC and the 99th Amendment.^{xi} As per the court it would harm the Judicial independence guaranteed by the constitution and further held that the executives to further their agendas and personal gain would compromise the appointment of judges and influence the same. Further, the Amendment was held to be unconstitutional based on the principles of “judicial independence” and “separation of powers”. The majority judgment asserted that the important concepts of judicial independence included the anonymity feature to judicial appointments and that this concept along with the principle of separation of powers is an integral part of the basic structure of the Indian Constitution. Thus, holding that the 99th Constitutional Amendment has failed Constitutional scrutiny and

thereby reinstated the Collegium system for the role of judicial appointments to constitutional courts.

SOLUTION TO THE PROBLEM

As per all the points mentioned above it can be effortlessly concluded that reforms have to be curated in order to appoint judges to higher judicial positions. Currently as discussed, the Collegium System has been faced with numerous criticisms and has numerous flaws and drawbacks. The National Judicial Appointment Commission which was formed to replace the Collegium System is seen to have defects which can prove to be harmful in numerous ways.^{xii}

It would be unwanted for the Judiciary to revert to functioning as they were prior to the Constitutional Amendment as by doing so the issues raised of transparency and lack of structure are not eradicated. It is also not advisable for the NJAC to operate as it compromises the basic structure of the Indian Constitution and has various other structural defaults.

Thus, it is of utmost importance that a system be curated wherein the independence of the judiciary is intact and wherein the Executive and the Legislature do not have primacy over the decision-making process.

Instead of proposing a new commission and amending the Constitution yet again, the Collegium System must be evolved keeping in mind certain suggestions which have been mentioned above. As discussed above, the Collegium system ensures Judicial independence which is one of the most important principles in the Indian Constitution and if the system is further corrected by eradicating all the flaws and by ensuring proper implementation, can be used as the operative tool for the appointment of judges in the higher judiciary. Such will ensure that the judiciary remains separate of the executive and the legislature, which is an essential step to avoid the phenomenon of “sarkari judges.”

CONCLUSION

The appointment of judges to the higher judiciary is a prime procedure for a country like India and should be performed with utmost sincerity and care. In India wherein the judiciary is the

only organ which can provide justice to the needy without any bindings and fear, it is imperative that the judges be free from political influence and pressures.

The Indian Constitution under articles 124 and 217 hold provisions for the appointment of judges into the judiciary, however these articles are not deemed to be enough due to the arbitrary actions wherein the executives made non competent appointments in the past as per their whims and fancies and for their personal gains and benefits. To rectify these and avoid such arbitrary actions, the judiciary has further settled such circumstances via interpretations of these articles which led to the introduction the collegium system thereby putting an end to executive interference over judicial appointments.

However, over the years the Collegium system too was faced with extreme criticism over its operations lacking transparency and claims of non-accountability were also levied. The government without much deliberation and dialogue, in haste established the National Judicial Appointment Commission Act, wherein their intentions to monitor and control the judiciary by putting it under political influence and pressure were clear. The principle of judicial independence was disregarded and neglected in passing of the bill and the Supreme Court by rightly identifying the same, struck down the 99th Constitutional Amendment.

It cannot be denied that the Collegium system comes with its own flaws, but in comparison, it can be said that currently is the lesser evil and a better option to operate as a tool to appoint judges. The common saying, “when a problem in construction, do not demolish the entire structure, find a way to fix the problem” must be applied in this scenario. The flaws in the Collegium system must be acknowledged and dealt with, the government hand in hand with the judiciary must work to figure out ways to make the Collegium system better by eradicating the major flaws and issues by making it the proper tool for appointment of judges in the higher judiciary.

Instead of breaking down the entire judicial appointment system, the Collegium System must be redesigned into being an efficient and effective tool for the job.

ENDNOTES

-
- ⁱ Article 124, Constitution of India, 1950
ⁱⁱ Article 217, Constitution of India, 1950
ⁱⁱⁱ 1982(2)SCR365
^{iv} Writ Petition (Civil) No. 13 of 2015
^v AIR 1991 SC 1
^{vi} "National Judicial Appointments Commission Act, 2014 (40 of 2014)" (PDF). Gazette of India
^{vii} The People's Chronicle | www.thepeopleschronicle.in Imphal, Thursday, February, 09, 2017 Retrieved 21july 2018
^{viii} "SC Bench strikes down NJAC Act as 'unconstitutional and void'". The Hindu. 17 October 2015
^{ix} http://www.ijra.in/uploads/42013.3534633912FULLPAPER_Abhilasha.S.G.
^{x8}. "No need to change collegium system : Justice Sathasivam". NiTi Central.
^{xi} "The Constitutions (Ninety-ninth) Amendment) Bill, 2014" (PDF). Govt, of India
^{xii}http://www.jgu.edu.in/sites/default/files/article/Future_of_Collegium_System.pdf

