

THE DEBATE AROUND COLLEGIUM SYSTEM IN INDIA

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ABSTRACT

The remark of the current law minister of India, Mr. Kiren Rijju in Rajya Sabha recently that “a new system of appointment of judges in the higher judiciary is much needed as the prevalent collegium system is opaque and inefficient in filling the vacant posts of judges which has led to a huge pendency of cases”, further the remark of the Vice President India “that the striking down the National Judicial Appointment Act was a severe compromise of Parliamentary sovereignty and disregard of the mandate of people” highlights a true debate regarding fight of primacy in the appointment of judges in the higher judiciary. This debate boils down to the fact as to who should appoint the judges, should the primacy lie into the hands of the executive or the judiciary leading us to the question “Who is Superior” whether it is the executive or is it the judiciary, but the answer to it is not who is superior but why should superiority rest with respect to appointment of judges lie in the hands of judiciary. It is because the Indian Constitution follows the doctrine of separation of powers as propounded by Montesquie, its basic spirit is that executive, legislature and the judiciary are superior in their own sphere and no one should usurp upon the powers of another maintaining a system of checks and balances in the governance of the country. Hence the collegium system is responsible to appoint judges to the higher judiciary in India today.

MEANING OF THE TERM “COLLEGIUM”

The meaning of the term collegium according to the Merriam Webster dictionary is “it is a group in which each member has approximately equal power and authority”. The word Collegium is not present in the Indian Constitution. Its origin can be traced in the recommendation of the Bar Council of India made on 17th October, 1981 during a national seminar of lawyers at Ahemdabad . It was recommended that there should be a collegium system for the appointment of the Supreme Court Judges by The Chief Justice of India, Five senior Judges of the Supreme Court and two representatives who would be representing the Bar Council of India and the Supreme Court Bar Association. The recommendation of such a Collegium system would be binding on the President though he can say for reconsideration on certain grounds. Thus the present day collegium system in simple words is a system in which the judges are appointed by an institution comprising judges. The need for this Collegium system is so that judges can deliver judgments free from political pressure and motivation so that faith of the people in the independence of the judiciary is not hampered as Supreme Courts and High Courts are the protector of the fundamental rights of citizens. Hence judicial independence is the basic structure of the Indian Constitution.

This Judicial independence began to corrode when the Union government in power tried to surpass the seniority norm in appointing judges, especially to the Supreme Court. Historically, this happened in 1973 and 1977 under the Congress government during the Indira Gandhi regime. In both cases, the Union government failed to stick to the seniority convention in appointing the Chief Justice of India.

Swami Keshavananda Bharati, head of the Ednir Mutt in Kerala, filed a petition in February 1970 in the Supreme Court under Article 26 of the Constitution. It challenged the Kerala government’s efforts to impose restrictions on the management of monastic property. Three years later in 1973, in this case, the Supreme Court, by a 7-6 margin majority, upheld the basic structural principle of the Constitution. In particular, the main principles of the Constitution and the limitation on Parliament’s power to amend the basic structure were newly underlined. The Kesavananda verdict was disliked by the central government led by Indira Gandhi, which viewed it as a curtailing of its powers. That’s the govt. reacted as on 26 April 1973, Justice Ajit Nath Ray, was appointed to the position of CJI by the President when emergency was declared.

But Ray was not the senior-most judge. He was one of the 6 judges who ruled against the basic structure doctrine in the Kesavananda Bharati case. His elevation was done by superseding three more senior judges three judges who had ruled in favour of the basic structure doctrine that the government disliked. This was a blatant attack on judicial independence by the executive. Supreme Court was now faced with a crisis surrounding both its independence and the securing of its independence in the long-term. Interestingly, the Supreme Court was also filled with new judges when emergency was declared. AN Ray was appointed as the Chief Justice by the President. The seniority of three judges was waived in this appointment. It is noteworthy that Ray did not sign the judgment in the Keshavananda case. A bench of 13 judges headed by him reviewed the important verdict. It is also clear that no review petition was actually filed. This review hearing was held by oral request only. An apparently improper procedure was followed in which the Chief Justice dismissed the ex-parte bench. Despite a committed judiciary at the Centre, the principle of basic structure of the Constitution hardly survives. This historic decision helped strike a balance between dictatorship and democracy in the country.

APPOINTMENT OF JUDGES IN THE SUPREME COURT AND HIGH COURT

The framers of our constitution very well understood that an independent judiciary was pivotal for a living democracy in the country, hence they provided Article 124 and Article 217 in the Indian Constitution which provides for appointment of judges in the Supreme Court and High Court. Article 124 and Article 217 prior to NJAC Amendment in 2014 stated 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 courts in the states as the president may deem necessary for the purpose and shall hold the office until he attains the age of sixty-five years”, “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, and the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, until he attains the age of sixty-two years”.

The interpretation of the word “**consultation**” in the case of *S P Gupta v. President of India and others* case (First Judges Case) was held to be that consultation does not mean concurrence i.e. the process of consultation with the CJI did not require a consensus of recommendation rather it was the Central Government which had the primacy in appointment of judges, simply put in case of a disagreement between the Central government and the CJI, the ultimate supremacy rested in the hands of the Central government. After 12 years of this ruling came the second Judge’s Case “ *The Supreme Court Advocate on Record Association v. UOI*, the court overruled the judgement given the first judges case as it rested the primacy regarding the appointment of judges in the hands of CJI as the word consultation was now interpreted to mean concurrence. The Chief Justice of India would not only have the primacy but would be determinative and this gave birth to the Collegium system. Thus simply put the collegium system of the present day is a system under which appointment and transfer of judges is decided by a forum consisting of the Chief Justice of India and four senior most judges of the Supreme Court, the opinion of the President would only be of an approving authority. This judgement was followed again in the Third Judges case wherein a presidential reference was sent to the Supreme Court in the year 1998 when the President of India exercising his constitutional powers under Article 143 of the Constitution referred a query of the question of law on the collegium system. The Supreme Court reaffirmed its judgment in the Second Judges case and also expanded the strength of collegium making it a five member body i.e. Chief Justice of India and five senior most judges of the Supreme Court.

PROBLEMS IN THE PRESENT-DAY COLLEGIUM SYSTEM

The problem with the present collegium system in appointment of judges are manifold, first aspect is with respect to transparency as the consultation are behind the door dealings of the judicial branch that lacks accountability as data suggests that only people from dominant identities are disproportionately represented higher judiciary, there is also lack of women representation. The collegium system also prefers practising lawyers rather than appointing and promoting judges of the subordinate judiciary As a result of this, the composition of the High Courts has become largely male, upper-caste, former practising lawyers dominated. Needless to say, the same judges will also find themselves within the topmost ranks of seniority

in the Supreme Court, who then decide future appointments to the high courts, creating a self-perpetuating cycle of privilege thus promoting nepotism instead of merit or seniority. Hence it is true that the Collegium System has been subject to much debate since its inception as it lacks transparency and accountability in its functioning as it gives much power to judiciary over the executive in matters of public appointment. This has led to role of nepotism as seen in the higher judiciary today due to which there is lack of diversity in matters of judicial appointments and thus under-representation of certain sections of society. To come out of the shackles of this opaque procedure the National Judicial Appointment Commission came into be.

NATIONAL JUDICIAL APPOINTMENT COMMISSION AMENDMENT ACT OF 2014

In the year 2014, 99th Amendment Act was passed by the Parliament along with National Judicial Appointments Commission (NJAC) Act, 2014, this led to evolution of an independent commission to appoint judges to the Supreme Court and High courts, thus rendering the collegium system as redundant.¹ As a consequence of this change Article 124 (2) and Article 217 (1) of the Indian Constitution were amended, “Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in article 124A and shall hold office until he attains the age of sixty-five years”, “Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in article 124A and shall hold office until he attains the age of sixty-two years” respectively.

This to replace the collegium system, the NJAC Act 2014, introduced three key Articles- 124 A, B, and C and amended clause 2 of Article 124 and clause 1 of Article 217. Article 124A created the National Judicial Appointments Commission (NJAC), a constitutional body to replace the collegium system, Article 124B vested in this NJAC the power to make appointments to both the Supreme Court and the various high courts, and Article 124C accorded express authority to Parliament to make laws regulating the the NJAC’s functioning. The NJAC was to be composed of the Chief Justice of India as the ex officio chairperson, two senior-most Supreme Court Judges as ex officio members, the Union Minister of Law and

Justice as ex officio member, two eminent persons from civil society (to be nominated by a committee consisting of the Chief Justice of India, Prime Minister of India and the Leader of Opposition in the Lok Sabha; one of the eminent persons to be nominated from SC/ST/OBC/minorities or women).

The NJAC Act, meanwhile, prescribed the procedure to be followed by the Commission to appoint judges. The Chief Justice of India and Chief Justices of the high courts were to be recommended by the NJAC based on seniority while SC and HC judges were to be recommended on the basis of ability, merit, and “other criteria specified in the regulations”. The Act empowered any two members of the NJAC to veto a recommendation if they did not agree with it.

PROBLEMS WITH NJAC

The first problem with NJAC was the debate of *merit vs seniority* as in the old collegium system appointments to the higher judiciary was made on the basis of merit but in the manner of appointment of NJAC merit was to be given preference for appointment of judges. This “merit” could be a valid tool in the hands of executive to appoint names of judges and this decision could be politically motivated, further the functioning of NJAC suffered the drawback of secrecy and lack of reasons for its decisions in appointment of judges. This led the Supreme Court to quash the system of appointment of judges through NJAC in the fourth judges case on 16th October 2015 in the case of Supreme Court Advocates-on-record Association & Anr. vs. Union of India. giving the reason that this system hampered independence of judiciary as shortlisting of candidates, their final selection, and the exercise of a veto in respect of certain candidatures could all be done by the NJAC in secret without any reasons being provided.ⁱⁱ

In our country India, the apex court is the custodian of the Constitution and its work in simple terms is to keep executive and legislature within its shackles so that the every organ works within its own boundary and no organ usurps into the ambit of another i.e. the executive if has a primacy in the say of selection of judges then it will hamper the independence of judiciary which is not only a facet of Indian democracy but a “basic feature” of the Indian Constitution. Thus this decision in view of the author of this article is highly appreciated.

SEARCH AND EVALUATION COMMITTEE

The current law minister of India has now sought a clear participation of the executive in the procedure for selection of judges in the higher judiciary by writing a proposal to the Chief Justice of India to amend the memorandum of procedure for selection of judges by forming a search and evaluation committee in which the Union and the State governments are represented during the selection of judges to the Supreme Court and the High courts, respectively. The minister has quoted further that this proposal is a follow up of the Fourth Judges Case that struck down the 99th Constitutional Amendment Act that had brought in the National Judicial Appointments Commission.ⁱⁱⁱ

WAY FORWARD

The collegium system which is prevalent today for the appointments to be made in higher judiciary in India is a system wherein Chief Justice of India and the four senior-most judges of the Supreme Court recommend candidates for judicial appointments to the President of India and the flaw in this process is that the President is under obligation to accept the recommendation making judiciary dominant enough to control the entire process reason being that we follow a system of separation of powers wherein each organ of the government namely the executive, judiciary and legislature have their own well defined system of powers and sphere of governance, and if the executive is given primacy over the selection of judges then it will lead to political interference in the judiciary and compromise its independence, but slowly the process of appointments is becoming lengthy and delayed as recommendations for High Court appointments, as well as elevation to the Supreme Court, if have been disapproved by the government but yet again if Collegium resends the same names again then the government has to give its assent to the names but no time is fixed for replying to the and if the centre decides not to comply with the collegium's recommendation then it will lead to a situation of constitutional crisis.

The debate of Collegium system vs NJAC arose as both the executive and the judiciary want to retain and dominate the process of selection of judges leading to the constant tussle between the Central government and the Supreme Court on disagreements on recommendations for

judicial appointments. Since enough has been debated upon the issues with respect to appointments made in higher judiciary today, but the pertinent question is what is the way forward, first being is the need for a transparent and official procedure on the basis of a written manual for selection of judges in which eligibility criteria is prescribed giving no room to favoritism or nepotism and seniority should be given the first preference, second being elaborate and written reasons should be provided in the public domain for appointment of judges so that transparency is ensured. Apart from introducing such changes for selection process in higher judiciary, the appointments in the subordinate judiciary should also be introduced through implementation of All India Judiciary as its high time that selection procedure is made fair, speedy and efficient enough so that more of young minds come in the field of judiciary and the third pillar of democracy is made more strong enough.

In the upcoming times it is important to see as to which institution should be given primacy or co-operation is the need to make a transparent system for the appointment of judges in the higher judiciary in India striking a balance between preserving the independence of the judiciary and ensuring transparency and accountability in its appointment process.^{iv} The conclusion as to NJAC vs Collegium debate still needs to undergo a lot of deliberation and ultimately, the decision of which system is better for Indian democracy will depend on the specific circumstances and priorities of the country at a given time.^v

ENDNOTES

ⁱ Diksha Munjal, “Explained | Why is the NJAC verdict at the centre of the impasse over appointment of judges?”, available at <https://www.thehindu.com/news/national/explained-why-is-the-njac-verdict-at-the-centre-of-the-impasse-over-appointment-of-judges/article66227448.ece>, (Last Visited on 22nd January, 2022)

ⁱⁱ Krishnadas Rajagopal, “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/article60384480.ece>, (Last Visited on 22nd January, 2022).

ⁱⁱⁱ “DC Edit | Can judiciary stomach govt role in selection of judges?”, available at <https://www.deccanchronicle.com/opinion/dc-comment/170123/dc-edit-can-judiciary-stomach-govt-role-in-selection-of-judges.html>, (Last Visited on 22nd January 2022).

^{iv} Ritansha Laxmi, “DECODING COLLEGIUM SYSTEM: The Debate, its Constitutional Implications, and the Possible Alternatives”, available at <https://thedailyguardian.com/decoding-collegium-system-the-debate-its-constitutional-implications-and-the-possible-alternatives> (Last Visited on 16th April, 2023).

^v Hritik Mishra, “NJAC or Collegium: an unsettled debate”, available at <https://myvoice.opindia.com/2023/01/njac-or-collegium-an-unsettled-debate>, (Last Visited on 17th March 2023).