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A Critical Study on Collegium System and Four Judges Case with special reference to Recent Contemporary Developments

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ABSTRACT

The collegium system of judicial appointments in India is one of the most contentious mechanisms for selecting judges, primarily due to its lack of explicit constitutional foundation and allegations that it undermines the principles of separation of powers, judicial accountability, and independence. The system's evolution has been shaped by key judicial decisions, including the landmark three judges' cases, which expanded the scope of "consultation" under Articles 124(2) and 217, effectively reinforcing the collegium system.

This paper critically analyses the history of the collegium system in India, examining the usage of the word "consultation" in the Constitution. It further explores the most recent NJAC (National Judicial Appointments Commission) case, or the fourth judges' case, which represents the latest confrontation between the executive and the judiciary. This case reflects ongoing tensions over judicial appointments and the potential encroachment of legislative authority into the judicial domain. Additionally, the paper discusses the reasons for the failure of both the NJAC and the collegium system and provides suggestions for improving the judicial appointment process by the collegium system.

***Keywords**: NJAC, Independence of Judiciary, Judges case, Collegium System.*

I. INTRODUCTION

The collegium system remains one of the most controversial appointment systems both on account of being not an explicit part of the Indian constitution and on account of it being alleged to be a system that violates the fundamental and basic structure of the Indian constitution with respect to separation of powers, judicial accountability and judicial independence. On the other hand, the collegium system has its own share of defenders on account of its inherent independence from executive and legislative powers. The concept of independent judiciary gained prominence after the national emergency proclaimed by the then Prime Minister Indira Gandhi immediately after disqualifying her election victory.

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Since then, by the active efforts of various jurists, judges', and legal practitioners the independent judiciary has gained prominence and any criticism on the collegium system by the ruling party at the centre was criticised as an attack on the judiciary and a violation of the "*Lakshman Rekha*." The role of Justice. V.R. Krishna Iyer has to be certainly discussed as a person who by various judgements has established firm standards for judicial and legal systems. As a proponent of the Collegium system and independent judiciary it has become impossible for a judge to go against such great minds and visionaries who has witnessed the consequence of a centre-controlled judiciary.

The three judges' case is particularly visible in terms of the evolution of the judicial appointments and the gradual establishment of collegium system by expanding the scope of the word "Consultation" as provided in Articles 124(2) and 217 of the Constitution. The second and third judges' cases are attributed to the fact that the scope of the term "Consultation" is expanded in such a way that the president would not be able to reject or return for reconsideration of the Chief Justice of India. The NJAC case or the fourth judges' case as it has come to be called, is the latest and the final ultimatum between the centre and the judiciary in terms of judicial appointments and gradual attempt of the legislative to encroach into the judicial domain or an attempt to hold judiciary accountable as the constitution originally envisioned depending on the person who is asked the question.

The critics of the collegium system are not inherently criticising the system in place with an intend to strip the judiciary of its independence. The collegium system has its own share of critics even in the supreme court. Several retired Supreme Court judges have publicly expressed dissent and dissatisfaction over the actions of the collegium from time and time again. The various criticisms also include the crucial issue of nepotism and inadequate representation of female judges and judges from backward communities. The collegium system has been for a long time, criticised for allegedly, intentionally not appointing qualified judges who were identified to be from backward communities creating a society of elitism violative of the basic structure and the constitutional structure, philosophy and intend.

(A) Review of literature

1. ***Revisiting the Collegium System***[2] *by* ***Vansh Bhatnagar*** says that, the Collegium system came into existence after the trilogy of the Judges' Cases. The Collegium, though formed with good intentions, failed to serve its purpose. The system needs an urgent check without any delay. The National Judicial Appointments Commission formed by the Government in 2014

[2] Vansh Bhatnagar, Revisiting the Collegium System, Jus Corpus L.J. (2021).

was a step further to address the issue. The NJAC, on the other hand, had certain structural flaws. The Supreme Court's Constitutional Bench overturned the NJAC Act and the 99th Constitutional Amendment Act. The Court reverted to the system of the Collegium, but, the question of the working of the Collegium, however, remained unanswered. The 7-member National Judicial Commission proposed by the author addresses most of the issues in order to bring accountability and transparency in the matters relating to the appointment and transfer of judges.

2. ***National Judicial Appointment Commission and Collegium System in India: Comparative Analysis***[3] by ***Lipika Sharma and Aprajita Singh*** enunciates that, hat constitution has maintained a wonderful balance between all the pillars of democracy. If we talk about independence of judiciary specifically than the provision related to expenditure which is a charge on the consolidated fund is not required to be voted by the Lok Sabha. Similarly, no discussion can take place in Parliament on the conduct of judges except when an impeachment motion is under discussion. The Constitution of India thus insulates the judiciary against any pressures from the executive and the legislature. Admittedly, there is no rigid separation of powers under the Indian Constitution. We have a flexible scheme, which is accommodative of a little tinkering around the edges. If Parliamentary control is structurally consistent with the constitutional scheme, then clearly, the manner in which the 99th Amendment redistributes power cannot be held to violate the separation of powers. It merely redistributes power within permissible contours.

3. ***Judicial Independence and Collegium system in India***[4] by ***Sunita Kaler*** says that, the separation of powers is a fundamental guarantee of the independence of the judiciary. In the decision-making process, judges should have freedom to decide cases impartially, in accordance with their interpretation of the law and the facts. They should be able to act without any restriction or improper influence. 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 interference or influences. The principle of the independence of the judiciary seeks to ensure the freedom of judges to administer justice impartially, without any fear or favour. This freedom of judges has a close relationship with judicial appointment because the appointment system has a direct bearing on the impartiality, integrity and independence of judges independence. Collegium system in India is the system by which the

[3] Lipika Sharma & Aprajita, National Judicial Appointment Commission and Collegium System in India: Comparative Analysis, 5 Int'l J. Pol. Sci. & Soc. 12 (2021)
[4] Sunita Kaler, Judicial Independence and Collegium System in India, 5 Int'l J. Res. & Analytical Revs. 2018.

judges are appointed by the judges only also referred to as "Judges- selecting- Judges". It is the system of appointment and transfer of judges that has evolved through judgments of the Supreme Court, and not by an Act of Parliament or by a provision of the Constitution.

4. ***From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court***[5] by ***Aparna Chandra, William Hubbard, and Sital Kalantry*** who have found that, while the collegium is focused on certain forms of diversity, it is not focused on other forms of diversity. They also suggest that the path to the SCI in the collegium period is more rigid than it was pre-collegium. Today's judicial candidates are more likely to have spent a longer time in private practice, as a sitting judge, and more likely to be a chief justice of a high court before their appointment to the Supreme Court. This article further informs the debates about merits of collegium system. The pre-collegium system is different from the NJAC or another similar system that might be adopted in place of the collegium system so the comparison between the pre-collegium system and the collegium system has its limitations. However, the results do suggest that the collegium has not done a lot to make the court more gender balanced. Advancing gender diversity might require outside influence.

5. ***Judicial Appointments, Collegium System, and Unresolved Constitutional Enigmas in India: Proposing an 'Emergency Collegium' and the 'Automatic Elevation Alternat*****ive'**[6] by ***Anujay Shrivastavaa and Abhijeet Shrivastava*** says that, The state of constitutionalism in India has already been in a steep decline in the past decade, and such an exigency would hold immense potential for exploitation by an Executive which has a history of being known to abuse (un)constitutional loopholes for its interests. That coupled with COVID-19, justice administration in India has suffered many blows in recent times. Our thoughts and prayers remain with the Judges, the Bar, and all the members of the Indian legal fraternity, that are relenting to sustain the system, notwithstanding the crisis. We hope that the Parliament takes cognizance of the constitutional enigma highlighted in this article and devises the best constitutional amendment necessary to resolve the existing lacunae in law governing judicial appointments. In this regard, a careful study of comparative jurisprudence on judicial appointments from other countries could be beneficial to devising an ideal solution. Alternatively, we hope that the Supreme Court takes the initiative to deliberate on this constitutional enigma and devise a way forward, culminating in a potential Fifth Judges' Case.

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[5] Aparna Chandra, William Hubbard & Sital Kalantry, Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court, Verfassung und Recht in Übersee/Law in Global Context 2018.

[6] Anujay Shrivastavaa & Abhijeet Shrivastava, Judicial Appointments, Collegium System, and Unresolved Constitutional Enigmas in India: Proposing an 'Emergency Collegium' and the 'Automatic Elevation Alternative', Jus Corpus L.J. (2021).

(B) Research Problem

Despite the constitution establishing separation of powers and a system of accountability in for of appointments being only made by the executive namely the President of India, the collegium system became the need of the hour. Whether the collegium system has softly replaced the constitutional machinery in the name of judicial independence at the cost of judicial accountability?

(C) Hypothesis

Based on the above research problem, the following hypothesis have been framed:

"The collegium system has evolved in need of an independent judiciary and has gotten free from accountability and needs an immediate and strict change in course in such a way that the constitutional philosophy of separation of powers and Lakshman Rekha is preserved and not at the cost of accountability. A reasonable and prudent balance has to be determined and cannot be done so without replacing the existing collegium system."

(D) Research Questions

i. Whether there is any ambiguity or scope left in the Indian Constitution that allows for establishment of the Collegium system?

ii. Whether the system of Collegium system that is currently established satisfies the aim and objective as envisioned by the earliest jurists, judges and constitutional experts?

iii. Whether the interpretation of the word "Consultation" as made in the four judges case the actual intention of the Constituent Assembly?

iv. Whether there is a lack of accountability on account of collegium system?

v. Whether there is an objectively superior or better judicial appointments system in any other country at tackling judicial independence and judicial accountability

II. CONTEXT AND EVOLUTION OF COLLEGIUM SYSTEM

Articles 124 and Article 217 establish the appointment procedure for appointment of judges in the Supreme Court and High Courts respectively.

Article 124(2) says: "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 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."

Article 217: "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 the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court."

(A) Constitutional Appointment Procedure

As seen in the provisions, the appointment procedure is not exhaustive which provides the role of the Chief-Justice of India and the President of India beyond the words consultation and appointment. The constitution can be clearly seen establishing Judicial accountability in form of the President being the authority at appointing the judges. During the Constitution framing process, many different proposals were mooted for the appropriate method to appoint judges to the Supreme Court and the High Courts.

The framers were concerned that the appointment process should ensure that the best candidate was appointed to this high constitutional office, while at the same time ensuring that judicial independence from the other branches of government is maintained. They discussed and discarded proposals such as the President appointing judges on his own initiative, without the aid and advice of the Council of Ministers, appointments being confirmed by one or both Houses of Parliament, setting up a panel of members from various branches of government to select judges, or giving the Chief Justice of India a veto over judicial appointments.

The word Collegium is not mentioned in the Constitution, yet it has come in force as per Judicial Pronouncement. The origin of the concept for establishment of the system may be attributed to the recommendations of the Bar Council of India made on 17 October 1981, during a national seminar of the lawyers at Ahmedabad.

(B) First Judges' Case

In 1981, the Supreme Court was forced to assess the appointment system when this system of appointment was challenged on the ground that it impedes judicial independence. In S.P. Gupta v. Union of India[7], petitioners argued that the word "consultation" in the relevant provisions of the Constitution should be read as "concurrence," and that the judiciary should exercise a veto over judicial appointments. The challenge failed and the Court held that in the event of a disagreement between the Executive and the Chief Justice on whom to appoint as a judge of the

[7] 1981 Supp (1). SCC 87

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Supreme Court, the views of the Executive would prevail.

The Supreme Court with a majority verdict of 4:3 also held that,

"it is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government."

Bhagwati Judge of the Supreme Court focused on the necessity of establishing collegium system in India in the case S.P. Gupta v Union of India. In elaborating on the meaning of the word consultation, Bhagwati J endorsed the views of Krishna Iyer J expressed in Union of India v Sankal Chand Himatlal Sheth[8] that 'We agree with what Krishna Iyer, J. said in Sankalchan Sheth Case that: "consultation is different from consentaneity. They may discuss but may disagree; they confer but may not concur'. This is reminiscent of the views of Dixon CJ of Canada who had said, '[The Prime Minister and the Minister of Justice with whom the final choice on appointment rests] feel free to consult me, I feel free to give views which they are free to take or not to take."

However, 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.'

Therefore, he considered it unwise to entrust power particularly to make crucial and sensitive appointments, such as judicial appointments, to single individual (the President) without putting checks and controls on the exercise of such a power. Accordingly, he suggested that: "there must be a Collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be more broad-based and there should be consultation with wider interests."

If the Collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and this

[8] 1977 AIR 2328

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last requirement is absolutely essential- it would go a long way towards securing the right kind of Judges, who would be truly independent.

(C) Second Judges' Case

The second Judges Case[9] ruled that "consultation" means concurrence, binding the President to the Chief Justice's consultations. The court held that the Chief Justice of India, in consultation with 2 senior judges, should make recommendations. The executive should normally give effect to such recommendations. In the Second Judge case, J. S. Verma overruled the majority view in the First Judges Case, giving primacy to President in the matter of appointment of Judges to superior courts. 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 seniors 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. Overturning its previous decision, the Court, in Supreme Court Advocates on Record Association v. Union of India, held that the 'ultimate power' of appointment vested in the executive was being abused, and the existing system of appointments had resulted in merit being overlooked due to interference by the executive.

(D) Third Judges' Case

In the advisory opinion issued in 1998 which came to be called the third judges' case[10], the Supreme Court modified and further clarified the appointments system. It held that the collegium for appointment to the Supreme Court would comprise the Chief Justice and the four senior-most judges of the Court. In the 1993 and the 1998 judgments, the Court also stated that the inter-se seniority of judges within their High Court and their all-India seniority should be the primary ground for appointment to the Supreme Court. However, other considerations, such as outstanding merit and ensuring regional and other diversity, would be grounds to depart from the seniority norm.

The actual creation of the collegium system can only be attributed to this case and also thereby reducing the role of the President and making the recommendation of the Chief Justice binding on part of the appointments. This system is not inherently worse or better to the constitutional mechanism. But it is starkly different from that of the constitutional mechanism. A far greater independence has been placed on the judiciary and the Supreme Court has the responsibility thereby to protect this power from unlawful, improper and arbitrary exercise of such power.

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[9] Supreme Court Advocate on Record Association v. UOI AIR 1994 SC 268

[10] AIR 1999 SC 1

III. Interpretation of the word consultation and independence of judiciary

The interpretation and meaning of the term Consultation determines whether the judiciary is independent in terms of its appointment power and whether its recommendations are binding on the President. The Supreme court over time has reduced the scope of the term and thereby increasing its prominence and role.

(A) Role of the President and the Chief Justice of India

The Supreme Court in the first judges' case held (with regard to power and role of the President) that,

"The question of policy is a matter entirely for the President to decide. Even though the Chief Justice of India is consulted in that behalf by the President since the policy relates to the High Courts, his opinion is not binding oft the President. It is open to the President to adopt any policy which is subject only to the judicial review by the Court. Under Article 222 of the Constitution the Chief Justice of India has to be consulted on the question whether a particular Judge should be transferred and where he should be transferred while implementing the said policy. If the Government requests the Chief Justice of India to give his opinion on a transfer to implement the said policy which is really in the public interest he cannot decline to do so. Even though the Chief Justice was opposed to the 'wholesale transfers' of Judges there is no bar for the Government treating the recommendation for transfers made by the Chief Justice of India as a part of the implementation of its policy."

(B) Judicial Accountability and Independent Judiciary

A Judge should be independent of himself. A Judge is a human being who is a bundle of passions and prejudices, likes and dislikes, affection and ill-will, hatred and contempt and fear and recklessness. But with all these measures being there still a Judge may not be independent. It is the inner strength of Judges alone that can save the judiciary. Judiciary may never be truly independent and it is ultimately the integrity of the appointed judge on whose shoulders the judiciary ultimately holds on.

The judiciary cannot stand aloof and apart from the mainstream of society. This will ensure its broad accountability to injustice ridden masses and therefore it is not unnatural that the status quoits can enter their caveat to value packing but which does not commend. While appointing each individual the constitutional philosophy of each individual ought to be a vital consideration and if this is labelled as value packing, it is neither unethical nor unconstitutional nor a weapon

to strike at independence of judiciary.

IV. Recent socio-political and contemporary development in the collegium system

As early as 1958, the Law Commission of India argued that this system of appointment did not allow for the best talent to be appointed to the Court, and that in many cases "executive influence exerted from the highest quarters" was responsible for the appointment of some judges. The Law Commission was also critical of emphasis being placed on "communal and regional considerations" in making appointments to the Supreme Court.

The role of the judiciary in the appointments process was to provide inputs and advice to the President. The President was not bound by the advice of the Chief Justice or any other judge. In practice, recommendations were initiated by the Chief Justice and sent to the Minister for Law and Justice. If the Minister agreed with the suggested name, she, with the concurrence of the Prime Minister, would so advise the President, who would make the appointment. If the Minister differed from the views of the Chief Justice, she might seek the views of other judges and consult with the Chief Justice on such views or suggest another name to the Chief Justice to secure her opinion. Ultimately however, the Minister of Law and Justice would advise the Prime Minister and with the Prime Minister's concurrence, would advise the President on whom to appoint. This was thus the Executive-led appointment system.

The acting and retired Supreme Court judges have insisted that although collegium system is flawed it is far superior to a system that relied on the parliament or the executive powers that puts independent judiciary, rule of law and constitutional machinery in jeopardy.

(A) Failure of NJAC

In the landmark case of Supreme Court Advocates-on-Record -Association and another versus Union of India[11] held that,

"The veto power with the Law Minister or with a non-judge members, as against a Supreme Court Judge who is the member of the collegium, may involve interference with the independence of judiciary. Similarly, requirement of special majority in any other ordinary situation was not comparable with the scheme of appointment of judges which is sui generis. Similarly, the plea of giving vital inputs does not justify participation of the non-judge members with the Chief Justice and the Judges in discharging their functions of initiating a proposal or taking a final view."

[11] Supreme Court Advocates-on-Record -Association and another versus Union of India 2016 (5) SCC 1

The issue of non-judicial members holding veto power became the final straw in holding the Constitution (Ninety-Ninth Amendment) Act, 2014 and National Judicial Appointment Commission Act, 2014 unconstitutional and thereby striking it down. It is highly probable that more judges may have swayed and convinced if at all a proper replacement of the collegium system was established by balancing independence of judiciary and accountability on hands of the Supreme Court. But the proposed VETO powers placed on the hands outside the judiciary poisoned the well for making arguments in a constructive manner.

(B) Failures and criticisms of Collegium system

The collegium system has come in for its fair share of criticism. Critics point to the lack of transparency in the system, especially the lack of criteria for appointments and the absence of publicly disclosed reasons for why a person was found suitable for appointment. Further, critics contend that the opaqueness and lack of reasons in the appointments process has meant that the system is rife with corruption and nepotism.[12]

Since October 2017, the Supreme Court has started uploading the resolutions of the collegium onto the Supreme Court website. These resolutions are broadly worded and give some indication of why a person is being recommended for appointment to the Supreme Court. However, they do not discuss the material on the basis of which the recommendations are made. For example, in January 2018, the collegium recommended that Justice K. M. Joseph, then the Chief Justice of the Uttarakhand High Court, be appointed to the Supreme Court. The collegium resolution noted that Justice Joseph was not the senior most Chief Justice or High Court judge (he was number 42 in the all-India seniority list at that time) but deemed him to be “more deserving and suitable in all respects” than all other high court judges. The collegium did not explain the basis on which it had reached this conclusion. In May, the then President rejected the recommendation.

The government reasoned that Justice Joseph was not the senior most high court judge, his parent High Court (Kerala) already had a judge in the Supreme Court and two high court chief justices while many other high courts had no such representation, and that there was no representation from Scheduled Caste and Scheduled Tribe communities in the Supreme Court. In July, the Supreme Court reiterated its recommendation stating that the government had not made any adverse comments against Justice Joseph’s suitability for the post. Since the recommendation was reiterated unanimously, as per the decision in Judges II and Judges III,

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[12] Supra 11.

the President appointed Justice Joseph to the Supreme Court.[13]

V. Conclusion and suggestions

The issue of non-judicial members holding veto power became the final straw in holding the Constitution (Ninety-Ninth Amendment) Act, 2014 and National Judicial Appointment Commission Act, 2014 unconstitutional and thereby striking it down. It is highly probable that more judges may have swayed and convinced if at all a proper replacement of the collegium system was established by balancing independence of judiciary and accountability on hands of the Supreme Court. But the proposed VETO powers placed on the hands outside the judiciary poisoned the well for making arguments in a constructive manner. The hypothesis that was proposed has been proven by the fact that eminent jurists and the judges part of the bench deciding the verdict in the landmark NJAC case have turned against the collegium system.

Based on the findings of this study, the following recommendations are proposed for improving the current situation of judicial appointments and the Collegium System:

1. The collegium system places far more independence than what was intended by the Constituent Assembly.
2. The collegium system has to be replaced by a constitutional mechanism that allows the Judges their prominent role in appointment of judges as provided by the constitution.
3. However, the accountability has to be ensured by providing the President the right to return or reject the recommendation of the Supreme Court collegium system on well-established and proper reasons in the interests of justice, equity, fairness and good conscience.
4. The issues of nepotism and lack of proper representation of eligible and qualified female judges and judges from backward communities must stop.

Likewise, the political nature of rejection of recommendations of the Collegium on account of a judge having expressed an opinion against the government and sexual orientation of judges must also stop.

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[13] Aparna Chandra, William Hubbard & Sital Kalantry, Supra, at

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