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Collegium System in India: Criticism, Comparison and Future

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ABSTRACT

In India, there has been a national debate about how judges of the Supreme Court and High Court are chosen. Prior to the establishment of the Indian Supreme Court, judicial appointments were primarily the responsibility of the executive. The collegium system, which the Chief Justice of India and senior judges of the Supreme Court use to make new appointments to the Supreme Court and the High Courts, was established by the Supreme Court in 1993. The Indian Supreme Court declared the law unconstitutional after Parliament amended the Constitution in 2014 and passed a bill to establish a commission to select judges. The collegium method of choosing and transferring judges in the higher courts has been the topic of much criticism, and it has been blamed on disagreements between the judiciary and the administration, as well as the slow pace of judicial appointments. Critics have pointed out that the system is opaque because there is no formal procedure or public accountability.

Keywords: *Constitutional Law, Collegium System, NJAC.*

I. INTRODUCTION

According to our Constitution, the Supreme Court and High Court justices in India are selected by the President through a consultative process. The processes for appointing judges to the Supreme Court and High Courts are outlined in Articles 124 and 217, respectively. Before the President of India can appoint any Supreme Court or High Court judge, the Chief Justice of India (CJI) and any other Supreme Court or High Court judges that the President of India thinks essential for the purpose must be consulted, according to these Articles. After speaking with the CJI, the Governor of the concerned state, and, if a Judge other than the Chief Justice is appointed, the Chief Justice of the High Court, each judge of the High Courts is appointed by the President by warrant under his hand and seal.

There has been a nationwide controversy in India concerning how Supreme Court and High Court justices are chosen. Prior to the founding of the Indian Supreme Court, judge nominations were mainly the executive's responsibility. The Supreme Court created the collegium system in

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1993, which is used by the Chief Justice of India and senior Supreme Court judges to make fresh appointments to the Supreme Court and High Courts. Parliament modified the Constitution and enacted a bill to change the appointment method in 2014. However, the Supreme Court declared in October 2015 that both the constitutional modification proposed by Parliament and the new nomination system were unconstitutional. One of the key reasons the Supreme Court rejected the proposed committee was judicial independence. The collegium system, on the other hand, was resurrected by the Court. However, critics of the collegium system argue that it is undemocratic since the Court fails to present a rationale for its selection of candidates.[3]

II. BACKGROUND

(A) Current system

The Supreme Court established the Collegium of Judges. It is a system in which the Chief Justice of India and four of the Supreme Court's most senior justices act as the appointment institution. The original Indian Constitution, as well as any later changes, include no reference of the Collegium. The Collegiums System was established as a result of the "Three Judges Case," which interpreted the constitutional provisions. Because only the judiciary has the ability to appoint future judges, a basic knowledge of the collegium system might be misleading. It is, however, a method of distancing the court from politics. By eliminating the legislative and executive branches from the process, it is hoped that the method would prevent outside meddling from affecting the appointment of future judges. It maintains the seniority of candidates and conforms to the separation of powers principles enshrined in the Constitution. Many people are afraid that the participation of the government would force the judiciary to give up some of its independence. The Collegium system's lack of openness and closed-door shutters have been criticized. When both chambers passed the NJAC law, it appeared that these new measures had forgotten about the long-standing desire for openness and accountability. The administration wishes to be transparent while interfering with the independence of the courts[4].

a. The First Judges' Case:

S.P. Gupta vs. Union of India[5] was the first controversy, in which a writ under Article 32 of the Constitution was used to challenge a letter or circular sent by the Union Law Minister to the

[3] IJALR, https://ijalr.in/2020/10/judicial-appointment-njac-vs-collegium.html, (last visited Oct. 15, 2022)
[4] Aparna Chandra , William Hubbard, and Sital Kalantry, From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court, OSF.
[5] AIR 1982 SC 149

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Governor of Punjab and the Chief Ministers of all other states and addresses. The letter advised the recipient, among other things, that "one third of the judges of the High Court should as far as possible be from outside the state in which the High Court is situated." and asked them to obtain the consent of all additional judges working in the High Courts to be appointed as permanent judges in any other High Court in the nation. Numerous additional judges consented to be appointed outside their parent state in response to the letter. With a 4:3 vote, the majority agreed that the executive had priority. In the First Judges Case, which is known for its stance on the judiciary's independence and the meaning of the word "consultation,". According to the Supreme Court, the phrases "consultation" and "concurrence" in Articles 124(2)[6] and 217(1)[7] of the Constitution do not pertain to the appointment of Supreme Court or High Court justices. In the event of a disagreement, the Union Government, not the CJI, will have "ultimate power." As a result, the First Judges Case demonstrated the Supreme Court acting in its own self-interest.

b. The Second Judges Case:

The petitioners in the Second Judges Case, also known as the Supreme Court Advocates on Records Association vs. Union of India[8], claim that the government failed to fulfil its responsibilities to fill judicial appointments in the High Courts in a timely and qualified way. The Chief Justice of India formed a court of nine justices to investigate two questions. First, whether the Chief Justice of India's view on the transfer of judges and High Court chief justices, as well as the appointment of judges to the Supreme Court and the High Courts, was entitled to priority. Second, was it acceptable to place emphasis on the strength of judges in High Courts? This court's nine-judge bench overturned the First Judges' ruling by a 7:2 vote.

c. Third Judges' Case:

In Re Special Reference Case, 1998[9] (Third Judges' case) the Supreme Court specified the collegium's objective and laid down rules on how it should operate. The court held that the Chief Justice of India and the four senior-most judges of the Supreme Court will make up the collegium and the CJI cannot send recommendations to the government without 'consultation of plurality of judges'. The court ruled that the government is not bound by the Chief Justice of India's recommendation if it did not adhere to the guidelines and criteria of the consultation process as his sole opinion is not insufficient.

[6] INDIA CONST. art. 124, § 2.
[7] INDIA CONST. art. 217, § 1.
[8] (1993) 4 SCC 441
[9] Re Special Reference Case, (1998) 7 SCC 739.

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d. National Judicial Appointments Commission Act 2014:

The National Judicial Appointments Commission Act, 2014 (NJAC), which was established through the 99th Constitutional Amendment, was enacted by Parliament in 2014. The Act sought to replace the collegium with a commission chaired by the CJI and made up of the SC's two most senior judges, the Minister for Law and Justice, and two eminent persons (selected by the CJI, Prime Minister and the Leader of the Opposition). It was intended to restrict the judiciary's power and include non-judicial individuals in the appointment procedure.

e. Forth Judges' Case:

However, the NJAC was challenged in the Supreme Court Supreme in Court Advocates-on-Record-Association and another v. Union of India,[10] and in 2015, the Bench ruled that the NJAC Act and the Constitutional Amendment were "unconstitutional and invalid" by a 4:1 majority. As a result, the collegium system was revived, and it became operational once more. India continues to be the only constitutional democracy in which the judiciary selects its own judges. Strangely enough, the Bench acknowledged that despite the collegium system of "judges appointing judges," things are not perfect and that it is time to revamp the 21-year-old judicial appointment process. Despite the fact that this round of selections went without a hitch, India's collegium system always leaves open the prospect of a clash between the Executive and the Judiciary.

III. ANALYSIS

On April 13, 2015, the 99th Constitutional Amendments Act of 2014 established the National Judicial Appointments Commission. The National Judicial Appointments Commission modifies the collegium structure while simultaneously ensuring accountability and openness. It ends the judiciary's hegemony and opaque procedure. It has no effect on the judiciary's independence, which is viewed as a separation of powers amongst organs. It merges the executive and judicial branches into one. The NJAC is non-arbitrary since it has a veto on the appointment of important individuals. NJAC will put a stop to the rising corruption and nepotism in the courts. In contrast to the collegium method, NJAC selections will be made on merit. In the fourth Judges Case, Advocates-on-Record-Association and Others v. Supreme Court. In the case of Union of India (UOI), the 99th amendment to the constitution and the NJAC Act were declared invalid and unconstitutional, reestablishing the collegium system for appointing judges to the higher judiciary. The NJAC Judgment revealed a few significant

[10] Supreme Court Advocates-on-Record-Association and another v. Union of India, (2016) 5 SCC 1.

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holdings. First, the Court ruled that the Constitution requires judicial primacy in appointments. Second, based on the text of the Constitution and long-standing practice, the Court ruled that judicial primacy is essential to the independence of the judiciary and is not only constitutionally required, but also part of the unchangeable basic structure. Third, the NJAC was ruled unconstitutional because it violated the requirements of judicial independence and judicial primacy.[11]

(A) Flaws in NJAC

The NJAC judgement had two major flaws: First, the judgment fails to demonstrate, in terms of constitutional law, that the Constitution mandates judicial primacy in appointments. Second, the reasoning behind why judicial primacy fosters or protects judicial independence is not provided in the judgment. Articles 124, 217, and other constitutional provisions governing the appointment and transfer of judges are unlikely to require judicial primacy. In any case, the assertion that judicial primacy is a fundamental part of the Constitution and cannot be altered by Parliament is doubtful. A survey of constitutional democracies all over the world reveals empirically that political actors consistently play a role in judicial appointments, frequently one that is decisive.

Transparency is a crucial aspect of public accountability. Making the process of selecting judges more democratic is one way transparency is encouraged. However, the NJAC's new structure is not only undemocratic, but it also runs the risk of causing a constitutional crisis if two members exercise their veto power. The lack of transparency in the appointment process is one of the major drawbacks of the collegium system, in which judges have absolute authority to appoint judges. Outside of the system, no one is aware of the reasons why some judges were appointed and others were rejected. By granting veto power to any two Njac members, the new framework has virtually eliminated the opportunity for transparency in the process. Any effort to reform the collegium system cannot legitimize an undemocratic system that grants veto powers to a few members for rejecting nominees without assigning a reason. Democratic governance expects a higher level of transparency in the appointment of judges. Unfortunately, the new law governing judicial appointments goes against the "basic structure" of the Constitution. It also undermines the independence of the judiciary and establishes a procedure that will result in the arbitrary exercise of powers.[12]

[11] Rehan Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective*, 49 GEO. WASH. INT'L. L. REV. 569 (2017).
[12] C. RAJ KUMAR, and KHAGESH GAUTAM. "Questions of Constitutionality: The National Judicial Appointments Commission." *Economic and Political Weekly*, vol. 50, no. 26/27, 2015, pp. 42–46.

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Rehan Abeyratne in his article *Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective*[13] said that the cases that led to India's collegium system were part of a larger institutional struggle between the executive and judiciary for control over judicial appointments. By establishing the collegium and giving it priority over appointments, the Second and Third Judges' Cases appeared to significantly shift the balance in favour of the judiciary. Because only three of its six members would be judges, the NJAC would have taken authority away from the judiciary. The union minister of law and justice and two "eminent persons" would be the remaining members. As a result, the NJAC decision can be understood in the larger context of the judiciary's efforts to protect its institutional autonomy from political interference like that in the 1970s and 1980s. Since the 1980s, the Supreme Court has developed into a powerful and independent institution, as is well documented. While some commentators have focused on its adoption of public interest litigation and self-proclaimed role as the "people's court," others have documented its rise in broader terms. However, the NJAC Judgment suggests a more significant institutional prerogative. The Supreme Court has blatantly asserted its supremacy while ensconced within the Constitution by overstretching the law and disregarding empirical evidence to the contrary. The NJAC Judgment is most easily understood in terms of institutions: It exemplifies the unwillingness of the Indian judiciary to yield its supremacy to the executive and legislative branches. It remains to be seen whether the political branches will be able to legitimately reassert their authority to legislate on judicial appointments.

(B) Flaws in the Collegium system

The collegium has been under criticism from a variety of perspectives, and for good cause. It operates in virtual anonymity and without transparency.[14] Important parties like the Bar were left out of the process and were thus ignorant of the names being considered as well as the criteria used to choose and reject candidates. Even though this institution was created with the best of intentions to safeguard judicial independence, it had nothing in the way of constitutional parentage, which made it difficult to sustain. Unfavourable nominations and incomprehensible exclusions only made matters worse. It is notable that, despite opposition from a portion of the bar, the NJAC Act was supported by important bar associations. Even those renowned attorneys who spearheaded the opposition to the NJAC made it apparent that they opposed the collegium. The Court predicated its ruling on the idea that allowing the NJAC would endanger judicial

[13] Rehan Abeyratne, *supra* note 5
[14] C Raj Kumar, *Future of Collegium System: Transforming Judicial Appointments for Transparency*, 50 ECON POLIT WKLY 31, 31-34 (2015).

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independence, and that this threat stemmed from the body's structure. The law minister was not permitted to participate in the selection of judges since he represented the government, which was the largest litigant in the nation. The eminent persons were vague and might not have any connection to the legislation. Any two of them may prevent an appointment that the Chief Justice, the two senior-most Supreme Court justices, and the CJI wanted. It is clear that the judiciary is reluctant to engage in equal dialogue with the other NJAC members because they would object to well-thought-out suggestions, which would force a compromise. According to the government's track record of appointing and dismissing officials from cultural and educational organisations, loyalty to the party is more important than concerns of fitness for office.

The judiciary has been almost paranoid about judges who are dedicated to the governing party and those who are hoping to be appointed to such positions ever since the days of Indira Gandhi, the Emergency, and Justice A N Ray. There have been benches of nine, eleven, and even thirteen judges in significant constitutional issues. However, here there were only five. The Court was confronted with a challenge to its authority as a result of the problems at hand, and in reaching its decision, it took on all sides of the political spectrum. The number of judges involved in this case should have been significantly higher; this would have increased the decision's legitimacy. And while having more judges would have been ideal, having five judges who have individually offered their opinions on the matter makes for a lot of judgements from the bench. It is evident that a separate judgement expressing dissent is required, but the abundance of affirmative opinions makes it challenging to link the debate to the justification for the decision.[15] Regardless of how intelligent and well-informed an individual statement may be, the majority speaking via one judgement is always preferred.

Presently, judges are not appointed in accordance with the procedure envisioned in the Constitution but rather in accordance with the procedure developed via the judicial process in the second and third judges' cases.[16] To select judges, they have established a group known as the collegium, which is not explicitly recognized in the Constitution. Unfortunately, the issue has thus far focused mostly on who should have the competence to select judges rather than what traits, qualities of character, and levels of ability should be required of a candidate for appointment as a judge. Even the selection procedures used to choose the judges are not

[15] *Court vs Government: Independence of the judiciary is not the issue in the current stand-off; it is control over appointments*, 50 ECON POLIT WKLY 8, 8 (2015).
[16] P. Puneet, *Reviewed Work: THE INFORMAL CONSTITUTION: UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA (2014) by Abhinav Chandrachud*, 57 JILI 270, 270-273 (2015).

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expressly mentioned. There is no question that the Constitution specifies a few fundamental requirements for choosing Supreme Court judges. It states that an Indian citizen may be appointed as a judge if they have five years of experience as a high court judge, five years of experience as a high court advocate, or are otherwise renowned jurists in the President of India's view. They are only the minimum requirements, and many Indian citizens already meet them. It is unknown how individuals are selected for appointments from among them. What is known is who is officially engaged in the appointment process and not how the choices are made.

The tenure of the Chief Justice of India is not specified by the Constitution of India. However, it is considered that a Supreme Court judge may continue to serve in that capacity until the age of 65. By writing to the President, a judge can also resign from his position. A Supreme Court justice is often not dismissed from his position. Only a presidential order approved by a majority of all members of both houses of parliament and not by a majority of no less than two-thirds of the members of the house present and voting may remove a judge from their position following an address by both houses of parliament. Misbehavior or incompetence are frequently used as reasons for dismissal. Many people think that the Chief Justice of India's contradictory rulings make it impossible for the collegium and the Supreme Court to function properly. Additionally, it has been noted that the Chief Justices of India frequently postpone judicial changes due to their brief mandates or irregular appointments. Therefore, a Chief Justice of India with a longer-term aids in boosting the country's judicial department's management and administrative systems. The Chief Justice of India, however, typically does not have enough time during a shorter term to consider the other subject after dealing with the pressing ones at hand. The Chief Justice of India's term has been inconsistent, according to the Law Commission's findings. The nomination of the Chief Justice of India should also need to be reviewed. According to the Law Commission's chairman, if the Chief Justice of India's term as CJI is shorter than two years, they should be given a fixed tenure of two years. Since India's independence, it has been noted that the Chief Justice of India has served for an average of about 17 months. The former Chief Justice K N Singh had the shortest term of just 17 days. Even in the case of Justice UU Lalit, his tenure was for only 74 days before Justice DY Chandrachud.

(C) Process in other Countries

Macdonald, Roderick A., and Hoi Kong. In their book "Judicial independence as a constitutional virtue." In *The Oxford handbook of comparative constitutional law*[17] talks about

[17] Macdonald, Roderick A., and Hoi Kong. "Judicial independence as a constitutional virtue." In *The Oxford handbook of comparative constitutional law*. 2012

how different countries institutions work and what changes can be brought. They said that there are a plethora of institutions serving as courts in many states. These include administrative tribunals, which are created by the state, central government agencies like inspectorates and licensing bodies, and even low-level decisionmakers like justices of the peace and referees for small claims courts. Additionally, a wide range of consensual arbitrators who perform state-recognized judicial functions can be found in a variety of fields, including international law, private law, commercial law, and labour law. International courts like the European Court of Human Rights, the International Criminal Court, and the International Court of Justice must be added to these. On the other hand, if we were to concentrate on the institution's decision-maker, we would examine the entire range of activities carried out by anyone referred to as a judge, regardless of the institutional setting in which the tasks were carried out. In some states, for instance, judges are frequently asked to lead inquiry commissions or even oversee the distribution of benefits under ad hoc compensation programs.

In some states, the nature of the decision being made is the primary criterion for defining judicial power. It is believed that courts have the authority to hear and decide cases and controversies. Even though they may be routine activities of a judge in many states, advisory opinions, political decisions, and hypothetical reference cases are not governance functions of a judicial nature. Finally, in some states, the nature of the tasks performed defines the judicial function. Adjudication is a judicial function that involves deciding the rights and responsibilities of the parties to a dispute by making a decision after the facts and legal arguments have been presented. Allocative decisions, such as awarding a license to a large number of applicants, legislative acts, such as the promulgation of rules of practice, family dispute mediation, or purely managerial decisions, such as the design and ongoing administration of school districts, are not properly considered judicial decisions even when performed by a judge and in a courtroom setting.

IV. CONCLUSION

Indeed, the judiciary's reputation is on the line, and it needs to get its act together in order to respond to some of the key issues that all parties involved in the judicial system are posing. What actions will the courts take to change the current collegium system? What steps will the Supreme Court take to guarantee that the collegium system undergoes a fundamental transformation in order to introduce procedurally justice and openness into the selection of judges for the High Courts and the Supreme Court? How can the judiciary win back the confidence of all stakeholders in the legal system that judicial appointments would be made

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through a procedure that will hold up under legal and constitutional scrutiny? As they try to restore the integrity of the judicial recruitment process, the members of the collegium ought to ask these questions just as much as other Supreme Court judges.

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