Page 2638 - 2645 **DOI:** *https://doij.org/10.10000/IJLMH.115146*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 3

2023

Constitutionality of the Collegium System in India

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ABSTRACT

The collegium system is a system under which appointments and elevations of judges and lawyers to the Supreme court and high courts, and the transfer of judges from the high court to the apex court takes place. This involves the chief justice and four senior most supreme court judges. This system was created to ensure transparency and impartiality in the selection of judges. This system has been subject to debates and heated discussions and has its own pros and cons. The judiciary's stark silence on arbitrary state action and its failure in protecting citizens' rights shows that the collegium system has been ineffective in maintaining the independence of the judiciary from the government. This research paper deals with the birth of the collegium system, how major cases have shaped this system, and the new simmer between the executive and judiciary that has brought this system to light.

Keywords: *NJAC, 99TH Constitutional Amendment, Constitutional Law.*

I. INTRODUCTION

The word 'collegium' is nowhere mentioned in the constitution, it has come into force by the recommendation traced back to the year 1981 by the Bar Council of India during a national seminar of the lawyers at Ahmedabad.

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II. HISTORY OF COLLEGIUM SYSTEM

The system of appointment and transfer of judges by the collegium was formed as a result of several judgements and not by the legislation of parliament. The cases are collectively referred to as three judges case. In all the three case , the main issue was whether Article 124[3] means congruence with respect to the word consultation being used and whether the consultation was binding on the president.

There were a series of cases on this issue – First judges case of 1980[4] , Second judges case[5] and the third judges case .

In the case of S.P. Gupta v Union of India[6]. In elaborating on the meaning of the word consultation, Bhagwati J endorsed the views of Krishna Iyer J expressed in Union of India v Sankalchand Himmatlal Sheth[7] That 'We agree with what Krishna Iyer, J. said in the Sankalchand Sheth Case that: consultation is different from congruence. 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 choices 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 a 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 recommendations 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.

But in 1993 this judgement was overruled by the nine-judge bench and ruled in favour of granting primacy to the chief justice of India. In another case it held that “consultation” really

[3] Article 124 of the Constitution of India, 1950
[4] S.P. Gupta v. Union of India, AIR 1982, SC 149
[5] Supreme Court Advocate-On-Record Association & Anr vs Union of India, (1993) 4 SCC 441
[6] S.P. Gupta v. Union of India, AIR 1982, SC 149
[7] Union Of India vs Sankal Chand Himatlal Sheth And Anr, 1977 AIR 2328

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meant "concurrence" and that it was not the CJI'S individual opinion but institutional opinion formed in consultation with the two senior-most judges in the supreme court.[8]

In re-presidential reference vs Union of India[9] expanded the collegium to a five-member body, comprising the chief justice of India and his four senior-most colleagues. These are referred to as collegium. This further solidified the collegium system. This decision effectively removed the executive of its role in the appointment and transfer process and gave the judiciary complete control over the process.

III. SEPARATION OF POWER AND INDEPENDENCE OF JUDICIARY

The term "trias politica" or "separation of powers" was coined by Charles-Louis de Secondat, baron de La Brède et de Montesquieu, an 18th century French social and political philosopher. His publication, Spirit of the Laws[10], is considered one of the great works in the history of political theory and jurisprudence, and it inspired the Declaration of the Rights of Man and the Constitution of the United States. Under his model, the political authority of the state is divided into legislative, executive and judicial powers.

He asserted that, to most effectively promote liberty, these three powers must be separate and acting independently. The constitutionality of the aforementioned NJAC has been questioned, and 4:1 He made one decision that the NJAC was unconstitutional. The majority felt that the issue of appointment was directly related to the judicial independence provided for in Article 50 and the constitutional history and functioning of the Republic of India.

J. Kehar saw judicial independence and separation of powers as his two main reasons behind the crackdown on the NJAC. J. Kurian Joseph agreed, arguing that "it should not be doubled unless necessary" - Entia Non Sunt Multiplicanda Sine Necessitate.

J. Chelameswar's dissenting opinion does not consider the 99th Amendment[11] to be unconstitutional. Additionally, the NJAC will prevent worthless candidates from being appointed as long as her two members of the committee deem the candidates incompetent. He went on to say that while the presence of a Minister of Federal Law in no way undermines the legitimacy and independence of the judiciary, his removal significantly undermines the voice of a commonly elected He added that it would destroy the basic features of equilibrium.

In an important step to counter these accusations, the Supreme Court recently upheld the Delhi

[8] Supreme Court Advocate-On-Record Association & Anr vs Union of India, (1993) 4 SCC 441
[9] In re-presidential reference vs Union of India, (1998) AIR 1999 SC 1
[10] Montesquieu, Charles de Secondat, baron de, 1689-1755. The Spirit of Laws. London :Printed for J. Collingwood, 1823
[11] 99th Amendment of Constitution of India,1950

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High Court's ruling in the Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal[12], where the CJI office is declared a public authority under the RTI Act. . The office of the CJI will be the same as that of the Supreme Court.

The Supreme Court has said that transparency does not undermine judicial independence. He also said that judicial independence and accountability go hand in hand. Now, the fears and limitations associated with an irresponsible justice system have been eliminated, as public interest checks and confidentiality checks must be carried out by providing information details about "entries," as characteristic of Justice Khanna.

Although the information was only released after considering many factors, the ruling has put the office of the Supreme Court in the public eye. It's a complete sigh of relief in terms of transparency, but the efficiency and independence of the redesign remains a concern.

Hence we can infer that our democracy is unique and the concept of separation of power is alien to India. To keep check and balance upon the executive and legislature

IV. THE NATIONAL JUDICIAL APPOINTMENT COMMISSION (NJAC)

In 2014, the National Democratic Alliance government attempted to replace the university system with the National Judicial Appointment Commission (NJAC). The National Judicial Appointment Commission (NJAC) was the body that was to be responsible for the recruitment, appointment and transfer of judges and legal professionals in India.[13]

The Commission was established by Amendment to the Constitution of India under the 99th Amendment by the Constitution (99th Amendment) Act, 2014. In addition to the Constitutional Amendment Act, the National Judicial Appointment Board Act, 2014 was also passed by the Indian Parliament to regulate the duties of the National Judicial Appointment Board. A new article, Article 124A (Establishing the Composition of the NJAC), was added to the Constitution.

It was established that NJAC would comprise of - Chief Justice of India, Two Senior Most Judges of Supreme court , Union minister of Law and Justice , Two Eminent Persons Nominated by Chief Justice of India , Prime minister of India And Leaderof opposition .

(A) Constitutionality of NJAC

Supreme Court Legal Representatives Association v. Union of India[14] ,supreme court by that

[12] Subhash Chandra Agarwal & Anr. (AIR 2010 Delhi 159)
[13]https://www.mondaq.com/advicecentre/content/3728/The-National-Judicial-Appointment-Commission-A-Critique
[14] Supreme Court Legal Representatives Association v. Union of India, (1993) SC

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order the National Judicial Appointment Commission Act, 2014 and Constitution (Article 99) Amendment Act, 2014[15] Violation and Nullity. The system of appointing Justices of the Supreme Court, Chief Justices and Judges of the High Court,Transfer of High Court Presidents and Judges from one High Court to another High Court Constitution of 2014 (99th Amendment) Pre-existed and Re-instated Act Collegiate system. Court also ordered listing cases for consideration of introduction of appropriate measures to improve the system of work of the Collegium System, if necessary. All Five judges delivered their verdicts, four judges voted in favor of the change, Judge Chalemeswar Upheld Change

(B) **After 99th Amendment**

Article 124(2) and Article 128 were amended by the 99th Amendment Act. Article 124A, 124B and124C[16] is also introduced. According to Amendment 124(2), judges of the Supreme Court Appointed by a handwritten and stamped order on the recommendation of the president National Commission for Appointment of Judges under Article 124A. rear Amended, amended, the president no longer has to consult Judges of the Supreme and High Courts. Initial Reservation necessary for consultation Chief Justice of the Supreme Court of India if a Judge other than the Chief Justice of the Supreme Court is appointed India omitted.

V. CONS OF COLLEGIUM SYSTEM

Reduced Transparency

The collegium system has certain problems including lack of transparency; the judges inside the system reveal nothing before the completion of the process. Also, its biggest loophole is the question regarding its constitutionality as we know it has evolved from several judgments, not an act passed by the legislature. The basic criterion of appointment of judges in this system is one of the independence of the judiciary which is held to be the paramount value. It is not the most efficient system of appointment, and it was criticized by Justice J.S Verma as well.

Politicization of judiciary

As we have discussed above, the separation of the Judiciary from the executive is the keystone of our democracy, and this idea has been emphasized by the Founding Fathers by including Art. 50 (directive principles of state policy)[17] mentioning that the state shall take steps to separate the judiciary from the executive in the public services of the state. But sometimes the politicians fulfill their self-interest with the help of an opaque collegium system. Nepotism As there is no

[15] Constitution (Article 99) Amendment Act, 2014
[16] Article 124A,124B and 124C of Constitution of India,1950.
[17] Article 50 of the Constitution of India,1950

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transparency, appointments based on preferences are there, and the ones who don't deserve got appointed over deserving candidates.

Absence of Permanent Commission

Lack of permanent commission is causing inefficiency in the process of appointment and the higher judiciary has a huge number of vacant positions. There has been an administrative burden because there is no separate secretariat for the appointment and transfer of judges.

Criticism by the 214th law commission

The 214th law commission said that the word 'collegium' was not used by the constitution originally and the S.P. Gupta case[18] brought about its usage by using it. According to article 74 of the Indian constitution, the president should always act on the aid and advice of the council of ministers. However, the two judges' cases have held that the consultation with the chief justice of India and two or four judges as the case may be. Thus, the cases held that the chief justice should consult the collegiums while the constitution says that the chief justice of India and the judges should consult the president

VI. RATIO DECENDIE OF THE 4TH JUDGES CASE

The Supreme Court gave the following major justifications in the Fourth Judges Case for overturning the Ninety-Ninth Constitutional Amendment Act (and, as a result, the NJAC Act, 2014):

1. That the NJAC's inclusion of the Chief Justice of India and two other senior Supreme Court judges was insufficient to protect the judiciary's authority in appointing judges and did not sufficiently reflect the judicial supremacy. The idea of "independence of the judiciary" was broken here.
2. The supreme court held in the "Kesavananda Bharati case"[19] that the amending power 368 was subject to an implied limitation; a limitation that resulted by necessary implication from its being a power to "amend the constitution." The court ruled by a majority of 7:6 that "art. 368 does not enable Parliament to alter the judiciary's independence or the doctrine of separation of powers.''
3. Reciprocal and feelings of retaliation towards the political executive would significantly reduce the independence of the court.

[18] S.P. Gupta v. Union of India, AIR 1982, SC 149
[19] Kesavananda Bharati v State of Kerala, (1973) AIR SC 1461

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4. The judiciary's institutional engagement is destroyed and the Chief Justice of India is reduced to nothing more than a number in the NJAC by deleting the Chief Justice of India and Judges' mandatory consultations.
5. The initiation for the appointment has been wrested from the Chief Justice of the High Court and only a nomination is sought, reducing him to a position of a mere nominating officer.

VII. RECENT ISSUE

The issue of the collegium system has sparked up again and the executive is taking interest in working. The union law minister Kiren Rijiju said "if judges are involved in identifying the next judges, which is an administrative job, it will definitely have an adverse impact on their duty as a judge." He emphasized the fact that the collegium system is keeping the senior judges extremely busy in picking the next judges. Thus degrading the efficiency. [20]

In the case of PLR Project Ltd. vs Mahanadi coalfields Pvt. Ltd[21], the supreme court had given direction regarding restatement of the names by the collegium to the center to which the court criticized the delay . "Keeping names pending is not acceptable. We find the method of keeping the names on hold whether duly recommended or reiterated is becoming some sort of a device to compel these persons to withdraw their names as has happened."

The bench observed that in the cases of 11 names which have been reiterated by the collegium, the Centre has kept the files pending, without giving either approval or returning them stating reservations, and such practice of withholding approval is "unacceptable". The supreme court said "the collegium system is the law of the land. And it must be followed".[22]

VIII. CONCLUSION

The collegium system is a critical feature of India's judiciary, ensuring some degree of independence to the judiciary, which has also been criticized for its lack of Transparency and Accountability. Alternatives to the quorum system have been proposed, But they also have their own drawbacks and limitations. Debates about the university system and its alternatives raise important constitutional questions Implications for Indian democracy and the rule of law. All mechanisms for appointing judges have some strengths and weaknesses, so no particular system

[20] Sharma, P. (2023) *Supreme Court weekly round-up (27th March 2023-2nd April 2023), Live Law*. Live Law. Available at: https://www.livelaw.in/round-ups/weekly/supreme-court-weekly-round-up-27th-march-2023-2nd-april-2023-225465 (Accessed: April 9, 2023).
[21] PLR Project Ltd. vs Mahanadi coalfields Pvt. Ltd, (2022)
[22] Advocates Association Bengaluru v. Barun Mitra And Anr. Contempt Petition (C) No. 867/2021 in TP(C) No. 2419/2019

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can be considered the best one. Nevertheless, the commission system is probably a very effective mechanism for the appointment of judges, as it maintains public confidence in the appointment system and ensures judicial independence. In our democratic society, The legislative branch is accountable to the people, the executive branch is accountable to the legislature. The legislative and judicial branches are constitutionally accountable to the people. as they say, Total power is completely corrupted. We (Indian citizens) must ensure all three. State institutions operate in a manner consistent with legal compliance have a constitution and mutual control.

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