

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 3

2023

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Pre and Post Implications of Collegium System in India: A Need of Policy Reforms

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ABSTRACT

Collegium System in India is a kind of system which can be seen in India and nowhere else in the entire world and it has been originated with some landmark Judgement in the past year. Earlier, it was seen that India used to have NJAC System to appoint the judges which has its drawback too because of which it got abolished and after a landmark judgement the collegium system was introduced which is also not considered as a fair system of appointment of judges and it creates a hegemony of the Supreme court Judges only. So in this research paper, we will be discussing upon the Drawbacks of collegium system and try to find out that what is the status of other countries when it comes to appointment of judges and which country reassembles to India and at last the discussion will be upon the Policy change which is required for the appointment of Judges in India and we will try to find out that what is the best alternative to solve the present existing problem of Collegium in India.

Keywords: Collegium, Judges, Appointment, India, Other Countries.

I. INTRODUCTION

Before getting into the large discussion, it is important to understand that what is collegium system and before that what was prevailing in India and why it was substituted. Collegium is basically a system for appointment of Judges or a system that have the power to even transfer the Judges of High Courts, now the irony is that this power is confined to 5 Judges of Supreme Court including CJI of India, and executive will only check upon the exercise of power on CJIs, so by this way executives Intervention was reduced in the judicial system. It is important to note that there are two landmark judgements which changes the system of appointment of judges, as earlier We had NJAC, who used to appoint the judges wherein President, 2 eminent knowledgeable person in Law, and CJI was present in the Appointment Committee but it was argued that there is huge intervention of the Executives in the Judiciary, as there were many drawbacks in the appointment procedure which was creating the hegemony of the government

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or the ruling party wherein politics was getting involved in the Judiciary so to make judiciary more independent, the new collegium system was introduced which was made with a good intention to reduce the intervention of executives but it did not work out in that manner as still government's intervention is prevailing .

(A) Literature Review

- *Need for a national judicial commission: the struggle for primacy and unconstitutionality of the collegium system by Adarsh Ramakrishnan and Prakhar Bhardwaj*-The authors in this Article Critised the present Collegium System and recommended some policy change and tried to Explain the history or origin of Appointment Procedure of Judges in India and also discussed the appointment procedure of other countries.
- *From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court By Aparna Chandra, William Hubbard and Sital Kalantry*- In this Article authors tried to draw an analogy between NJAC and Collegium system and explained the changes which occurred from the transition from NJAC to Collegium in which positive as well as negative changes are involved in a very detailed manner.
- *An empirical assessment of the collegium's impact on composition of the Indian supreme court By Rangin Tripathy and Soumendra Dhanee*-In this Article the authors conducted the Empirical Study and conducted the Interviews of many judges in India and then concluded several points and explained that how the collegium impacted Judiciary in India .

(B) Research Question

1. What are the Drawbacks of Collegium System and why there is a need of policy Change?
2. What is the Procedure of appointment of judges in Other Countries?
3. What Changes occurred After the Implementation Of collegium System?
4. Which Alternative Procedure for Appointment should be Adopted In India?

(C) Research Objective

1. To find out the drawbacks of Collegium System and its Implication in Future of Judiciary in India.
2. To find out the best possible way for the appointment of Judges in India rather than Collegium System.

3. To find out the changes i.e. before collegium and after collegium.

(D) Hypothesis

Collegium in India is the body that appoints the judges and these judges are normally those judges which are eminent lawyers and who has the long experience in the litigation, they are appointed as the judge of High Court or then elevated to Supreme courts as well. Now the appointing body are the Judges only who are senior judges of supreme court. So they are not some independent body who is appointing the judges because of which nepotism, Biased Decision, Favoritism, Politics, etc are creating the problem in appointment procedure which is discriminatory to those judges who are coming from entry level because they usually never gets the chance to get promoted in such a higher level even if they possess exceptional talents, this is because there is a need of new policy which will reform the appointment system in judiciary and will make the process more transparent.

(E) Research Methodology

The Method of research used for this research paper is Doctrinal Research, as it is not possible to do Non Doctrinal research in the present topic because it would include the question of policy change which can be answered with the analytical and qualitative approach of research in a better manner rather than empirical and because of shortage of time, interacting with the judges would not be possible for this research paper hence doctrinal research is adopted which would include Research Articles, Journals, Newspaper Article, E-libRARY Resource etc.

II. PROCEDURE OF APPOINTMENT OF JUDGES IN INDIA VIS A VIS OTHER COUNTRIES

(A) Process of Appointment of Judges in India

a. Status before 1993

The Supreme court judges were appointed by the president of India in consultation with the Chief justice of India, so the thing which should be noted is that earlier, it was the president who has the greater authority or who used to have upper hand in the appointment of judges. Even this thing can be found out in Article 124(2), which says that every judge should be appointed by president i.e., under his warrant and seal and they will be appointed after taking consultation with the judges of H.C in states, relevant ministers and some experts in this field plus the chief justice of India.⁴

⁴**Explained Desk**, CJI sends 2nd note over naming new judges: What is the Supreme Court Collegium, how does it work? Express, October 8, 2022

b. Post 1993-Current Scenario

After 1993, in the case of *S.P Gupta V President of India*⁵ which is also popularly known as first judges case wherein the Word “Consultation” was interpreted by 7 judges bench and it was said that the consultation from CJI is not binding on Central government and it was said that it must be noted that, it is only consultation which is being provided By way of fetter upon the power of appointment vested in the central Government and this consultation cannot be equated with the concurrence. After this, in the case of *Supreme court Advocated on Record V Union of India*,⁶ which is popularly known as the *2nd judges’* cases, it was said that the constitutional supremacy of CJI in the appointment should not be ignored and the government should not be given discretionary or absolute power in the appointment of judges. In simple words, the Supreme court in this case overruled the *1st judges case* by 9 judges bench of Supreme court and held that executive should not enjoy the absolute power in the appointment of judges in S.C & H.C. Furthermore the court here suggested that it should not be the CJI only who should give the Recommendation but it should be collegium of judges who should appoint the judges and later on Supreme court had issued advisory opinion on request filed by president which is known as the *3rd judges case*⁷ wherein it was advised by S.C that while making recommendation for appointment of judges, the CJI should consult with the Senior Judges of Supreme court as a result the formation of collegium is done wherein CJI and 4 other senior judges of S.C is added for the appointment of Judges in S.C & H.C. So Since then the Involvement of Government is Restricted.⁸

c. Other Countries

1. United Kingdom-In U.K the judges are since 2006, being appointed by the Judicial Appointment Commission. So this commission is responsible to appoint judges wherein they have to recommend the name of the judges to Lord Chancellor and then Lord chancellor appoints the judge and his ability to reject the proposal of Commission is restricted Now it is important to note that, the commission includes “15 Commissioners, including the Chairman.”⁹

⁵ S.P. Gupta vs President Of India And Ors. AIR 1982 SC 149

⁶ Supreme Court Advocates-on-record Association & Anr. vs. Union of India (2016) 5 SCC 1, (2016) 2 SCC (LS) 253

⁷ In re Special Reference No 1 of 1998, AIR 1999 SC 1

⁸ Adarsh Ramakrishnan and Prakhar Bhardwaj, NEED FOR A NATIONAL JUDICIAL COMMISSION: THE STRUGGLE FOR PRIMACY AND UNCONSTITUTIONALITY OF THE COLLEGIUM SYSTEM, *NLIU Law Review*, Vol. 2, Issue 2 (November 2011), pp. 242-270

⁹ Judicial Appointments Commission (October 10, 2022, 11.00AM), <https://www.judiciary.uk/judicial-appointments-commission/>.

2. United State of America -Here the Judges i.e. the judges of S.C, the Court of Appeal and district courts are nominated by president and approved by U.S senate .So we can clearly see the exclusive power of appointment of judges in U.S on the hands of Government .¹⁰

3. France-In this country the judges are appointed by 12 members committee i.e. known as Conseil Superior De la Magistrature, in this committee, there are 5 judges, one public prosecutor, one Counselor of state, 3 jurist and President and ministers of Justice, it sounding more like NJAC of India which India used to follow before Collegium.¹¹

4. Nepal-In Nepal also similar practice of appointment can be seen, as it was seen in France, here also Minister of Justice, Jurist, Senior Advocate and senior most Judges of Supreme court are present in the Committee to appoint the Judges.¹²

III. DRAWBACKS OF PRESENT COLLEGIUM

It cannot be denied that there were events which led the formation of collegium like the controversial appointment of **Justice AN Ray in 1973 and Justice Beg in 1976** as the CJI, in these appointments the excessive involvement of Government was seen because of which many question were arose. The appointment of Justice A.N Ray was even challenged in the case of **PL Lakhanpal V AN Ray**¹³ in which would dismissed the case by citing the reason that the intention of appointment authority is irrelevant in quo waarranto Proceedings and also said that even if the motive is present then also as the A.N Ray justice was the Senor, most judge of S.C so by that rule also it will be him only who would be appointed. Even the Recent appointment of Justice DY Chandrachud is also being questioned on the ground of Nepotism or favoritism in the collegium and Supreme court is reviewing this matter and it taking the question of Existence of collegium into Consideration and debates are going around that what else policy India can adopt. So let's discuss that what are the Drawbacks of collegium.¹⁴

1. Lack of transparency

Now the biggest question is that, the Collegium works very secretly means the decision of making the CJI to the transfer or appointment of judges are made among 5 judges only and the

¹⁰Judicial Appointments and Judicial Independence (15 Oct, 2022, 5.30 PM), <https://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf>

¹¹ The French legal system, (20 Oct, 2022, 2.30PM), https://www.justice.gouv.fr/art_pix/french_legal_system.pdf

¹² Appointments to the Supreme Court of Nepal: A New Beginning, Appointments to the Supreme Court of Nepal: A New Beginning (16 Oct, 2022, 12.00AM), <https://academic.oup.com/book/35197/chapter-abstract/299616135?redirectedFrom=fulltext>

¹³ P.L. Lakhanpal vs A.N. Ray And Ors. AIR 1975 Delhi 66, 11 (1975) DLT

¹⁴Aparna Chandra, William Hubbard, and Sital Kalantry, From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court, Vol. 51, No. 3, Special Issue, Nomos Verlagsgesellschaft mbH (2018), pp. 273-289

reasons of their selection to a particular judge would not be disclosed and even no one can question them upon the decision which itself shows that there is no transparency in the collegium system.

2. Possibility of favoritism

The possibility of Favoritism or nepotism cannot be ignored as it is the judges who are being appointed by judges only so they may favor a particular judge and may try to provide that person some privileges over the other. So, this another setback of Collegium. And it can't be ignored that most of supreme court judges have the family background in the judiciary.

3. Contrary to the intent of the constituent assembly

The principle of Checks and balances are to be followed everywhere which is basic principle of constitution in India but this basic principle is not being followed in the collegium because there is no one to check the powers of the judges and they are creating there hegemony in this regard should be noted that when the NJAC was made, the legislatures intently or purposefully not used the word concurrence in the substitution of consultation, if that word would have been used then it would have given the judiciary absolute power but as the judiciary interpreted it in different sense and formed the Collegium which is still not given in the Constitution means the legislature has not amended the previous appointment procedure, it is just the judiciary evolved new system of collegium for their selves. Now it has become the era where Judiciary is deciding the manner or the working procedure for themselves only then how we could not say that there is the presence of absolute power and the basic principle of Constitution is getting Infringed Examine thoroughly then we can find that, when it come to appointment of any Civil Servant or Ministers, even, President or P.M then nowhere the absolute power can be found out, as the appointment are either done by commission or by the advice of Counsel of Minister .¹⁵

IV. NEED OF POLICY CHANGE

First of all it should be kept on mind that when if India has the Separation of power between its 3 organs but still we have seen that the amalgamation of Executive into Legislature or vice versa so presuming this that in judiciary there should be no intervention of executives or legislator would be very wrong because that was the main reason of shifting from NJAC to Collegium system and the whole purpose of shift got destroyed ultimately.

1. Caste Diversity

As when we start seeking towards the result or the difference towards our earlier policy shift

¹⁵ Supranote-12

i.e. from NJAC to Collegium then it can be seen that, it was though done with very good intention but it do not change the statistically difference between the share of judges from SC if we compare it from pre collegium to post collegium, this would be better understood while we do comparison in the comparative analysis chapter. It has also been seen that in most of the cases Supreme court judges are from higher Caste only and as the favoritism is prevailing in collegium, it is near to impossible to break that hegemony.¹⁶

2. Female Judges

The Gender gap between male and female judges in India sadly still prevailing, as we have expected that this new system of appointment would change that gender gap or fill that gender gap as the participation of women has increased in the Bar and Social Changes recognizing Women's Right but when it comes to calculate this change in the Judicial system then it would not affected this area much, one reason could be the hegemony of male dominance in the judiciary, that the reason that since the independence we did not got our 1st female chief justice of India .

3. Proportion of Appointees from Different Professional Backgrounds

It is very important to note that the judges who gets appointed by the judicial services exams i.e. from Entry Level 1 exam, they are very few in Number that are being appointed in the higher judiciary the maximum they can be seen usually to be elevated to district Judges and very few of them can get opportunity to go to H.C and in general if we see that those judges who are appointed as S.C judges they are the Judges who are getting appointed from the Bar in the H.C(HC cadre-Bar) and there proportion are also very .On the other hand, in its twenty-six years of functioning, the collegium has made five such appointments.¹⁷

V. TRANSITION FROM EXECUTIVE TO COLLEGIUM-COMPARATIVE ANALYSIS

S. N	Variable	Pre Collegium	Post Collegium
1.	Elevation of judges From H.C to S.C	12%	10%
2.	Elevation from Lower Judiciary to H.C Cadre	20%	2%

¹⁶ Supranote-12

¹⁷ Supranote-12

	Service		
3.	Share of S.C Judges	4%	1%
4.	Contribution of Female Judges	1%	4%
5.	Tenure of Judges in S.C(HC & BAR)	2337 & 2816 Days Respectively	1853 & 2244 days Respectively
6.	Regional Representation in S.C	45% (Bombay, Calcutta, Madras, Allahabad)	10% (Bombay, Calcutta, Madras, Allahabad)

Table 1.1

Almost in all the variables in this table, it is the Pre collegium which used to perform better than now. Only in respect of female a little amount of participated has got increased in Collegium but that is also not very significant change because more than this, we can see the changes in the participation of Women in Bar which has increased the participation of women drastically but in judiciary it has not improved the situation yet.¹⁸

VI. CONCLUSION & POLICY RECOMMENDATION

1. To secure Transparency, audio or Video Recording of Collegium should be made available to the citizens under the Right to Information Act.

2. The short term elevation of H.C judges to the post of Chief Justices of H.C to make them eligible to get elevated to Supreme Court should be Strictly Avoided.

3. The judges Should be elevated not because of seniority only but on the basis of there past records and the Excellence also.

4. Formation of proper complaint mechanism against the judges should be made to check that if any judges is not working in their personal interest or biasness.

5. Appropriate criteria must be given by the Collegium of Supreme Court, made into an enactment after passing through the houses of Parliament and carefully implemented by the Collegium Secretariat and Ministry of Justice.

¹⁸Rangin Tripathy and Soumendra Dhanee, AN EMPIRICAL ASSESSMENT OF THE COLLEGIUM'S IMPACT ON COMPOSITION OF THE INDIAN SUPREME COURT, 32 Nat'l L. Sch. India Rev. 118 (2020)

6. Collegium should be reformed wherein Judges, Advocates(Independent) and experts should be present in the committee for appointment of Judges.

So it can be concluded by saying that the present policy of appointment of Judges is inadequate and it would if continued for long would create more discrimination and disparity in our Judicial system which itself guarantee the people of India to secure Justice, equality and Discrimination against a person.

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