

# Collegium System – The Unveiled Darkness

## ABSTRACT

The basis for appointment of Judges has always remained as the most controversial and confused job. Since Independence of our country, several attempts have been made to emerge out some single efficacious method in this regard. Collegium system has been functioning with its full force in respect of appointments to judicial offices. In order to change this stale prevailing system, in 2014 the Government came up with a Commission called as National Judicial Appointment Commission (NJAC) which was to play a frozen role in the appointment of Judges of Supreme Court and High Court for this matter National Judicial Appointment Commission Act has been enforced. Both the bills were overwhelmingly passed by both the Houses of the Parliament without a single opposing vote. The perception of nepotism, opacity and judicial hegemony in appointments was pursued to be undone by a bipartisan NJAC. However, Justice Krishna Iyer also has rightly accepted that “Judges-Judicial Reforms in Indian Context” concerning accountability of judiciary thereby demanding on a serious scrutiny through some commission for the appointment of Judges. Many a times before passing of this NJAC, efforts have been put in order to form some Commission to which, duty of appointment of Judges of higher authority, can be given. Nevertheless, by striking down the NJAC and 99th Constitution (Amendment) Act as unconstitutional and void, the Supreme Court has, again, focused public attention on the procedure of appointment of Judges to the higher judiciary.

**Keywords:** National Judicial Appointments Commission, Judiciary, Judges Appointments.

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## INTRODUCTION:

Collegium system is a system of appointing and transferring of judges, that has developed through various judgments given by the Supreme court of India, which is not influenced by any Act or provision mentioned in the Constitution. The collegium system is also referred to as “Judge – selecting – judge”. The collegium system was brought in by the 99<sup>th</sup> Constitutional amendment by striking down the National Judicial Appointment Commission Act (NJAC) which was declared as void and unconstitutional by the court. The Article 124(1) of the Constitution lays down provisions for the appointment of judges by the recommendation of Chief Justice of India. The appointment of judges for Supreme Court and High Court is done by the collegium which is headed by the Chief Justice of India and consists of four other senior judges with the approval of the President. The constitution gives the president the power to appoint judges for the High Court and Supreme Court under Article 124(2) and 217. The president should undergo a consultation process with other such judges while appointing the new judges. The government’s role is finite and can only come into action when the names are given with the assent of collegium of Supreme Court and Chief Justice of India. It’s role is to conduct an inquiry by the Intelligence Bureau, if a lawyer can be raised as a judge in a court. The government can put forward obligations and ask for explanation concerning the choices of collegium, but if the collegium repeats the same names again then the government is ought to

appoint them as judges.<sup>1</sup> Having collegium system still in practice is of a great benefit because it protects the independence of our judiciary as the other two organs of our government do not have the required legal knowledge to elevate the lawyers as a judge in the Supreme Court or high court.

In the recent years, a few judges have admitted and concluded that the current collegium system needs to be improved. Justice Kurien has said in one of his judgments that the collegium system lacks objectivity, transparency and accountability. Critics contend that this system is non transparent as it does not involve the use of any particular official mechanism, as a result of which the lawyers currently are left in the dark on whether they have been considered for an appraisal to become a judge. The Supreme Court Bar Association has held the Collegium System responsible for making a “give and take” society, generating a rift among the haves and have – nots. Many attempts have been taken by the NDA government to tackle these issues by replacing the collegium system with the NJAC, but they have failed to do so.<sup>2</sup>

### **NEED FOR THE STUDY:**

The central focus of this article is to draw attention towards the socio - legal issues faced by the lawyers in being elevated as a judge by the present collegium system.

### **OBJECTIVES:**

- To know about the socio - legal issues faced by the lawyers and judges due to the non transparent nature of the collegium systems.
- To analyze the evolution of the collegium system and when the Constitution was silent about it.
- To study the merits and demerits of the collegium system.
- To suggest ways to improve the mechanism of the collegium system in India.

### **LIMITATIONS:**

- This article is limited to the fundamental socio - legal issues of the lawyers and judges in India.
- This article is confined to Indian laws formulated for the benefit of lawyers and judges and the possible amendments to enhance their welfare.

### **Evolution of the Collegium System:**

The collegium system has its origin in a sequence of judgments called the “Judges Cases”.<sup>3</sup> This system came into existence through interpretations of relevant Constitutional provisions in the Judges Cases by the Supreme Court. In the following three cases the collegium system has come into being:-

**Judges Case 1:** In the case of *S.P. Gupta vs. Union of India*<sup>4</sup>, 1981, the Supreme Court by a majority decision observed that the notion of primacy of the Chief Justice of India was not established in the Constitution. It held that the suggestion for appointment to a High Court can

<sup>1</sup> <http://jlsr.thelawbrigade.com/wp-content/uploads/2016/06/Neelakshi-Debayan>

<sup>2</sup> [http://www.ijra.in/uploads/42013.3534633912FULLPAPER\\_Abhilasha.S.G.](http://www.ijra.in/uploads/42013.3534633912FULLPAPER_Abhilasha.S.G.)

<sup>3</sup> [journal.lawmantra.co.in/wp-content/uploads/2015/05/181](http://journal.lawmantra.co.in/wp-content/uploads/2015/05/181).

<sup>4</sup> AIR 1982 SC 149

emerge from any of the office – bearer of the Constitution, as mentioned under Article 217 and not inevitably from the Chief Justice of the High Court. The Constitution bench also held that the word “consultation” used in Articles 124 and 217 of the Constitution was not “concurrence” which means that in spite of the fact that the president will consult these officials, his decisions was not ought to be in concurrence with everyone. The judgment of this landmark case tilted the balance of power in favor of the executive in matters concerning the appointments of judges of the High Court. This situation existed for the following 12 years.

**Judges Case 2:** In the case of *Supreme Court Advocates – on – Record vs. Union of India*<sup>5</sup>, 1993, a nine – judge Constitutional bench rescinded the decision of the case of S.P. Gupta and formed a specific procedure called the “Collegium System” for the transfer and appointment of the judges in the higher judiciary. Underlining that the higher courts must function “in protecting the integrity and guarding the independence of the judiciary” the majority verdict granted the primacy to the Chief Justice of India in matters of transfers and appointments while also ruling that the word “consultation” would not decline the prime role of the Chief Justice of India in judicial appointments.

In this landmark judgment the court also held that, the duty of the Chief Justice of India is basic and fundamental in nature, as this being a topic within the judicial family, the executive does not have an equal duty in this concerned matter. Here, in this case the term “consultation” would contract in a minimal form. If the executive has an equal role and be in divergence of many a suggestion, commencement of indiscipline would grow in the judiciary.

Guiding in the collegium system, the court observed that the guidance should be given by the Chief Justice of India with due recommendations of his two senior most judges, and this kind of guidance should be given effect to by the executive of our country. It is further continued that in spite of the fact that it was neutral to the executive to ask the collegium to rethink the matter if it had an objection to the name recommended, if, on re-evaluation the collegium repeated the same recommendation again, then the executive was ought to make the appointment.

**Judges Case 3:** In the year 1998, a Presidential Reference<sup>6</sup> was issued by K.R. Narayanan to the Supreme Court over the interpretation of the word “consultation” under Article 143 of the Constitution of India, that is the advisory jurisdiction granted to the Supreme Court. The debate was on whether “consultation” demands consultation with several judges in making the Chief Justice of India’s opinion, or if the sole opinion of Chief Justice of India could by itself establish a “consultation”. In acknowledgement to this, the Supreme Court laid down 9 guidelines for the working of the coram for the transfers and appointments – this has become the current form of the collegium system, and has been persistent ever since then. This point of view laid down that the guidance should be given by the Chief Justice of India and the other four senior most judges, instead of the usual two judges. It was also declared that the judges of the Supreme Court who hailed from the high court, for which the recommended name came, should also be consulted. It was also observed that even if two judges gave an unfavorable decision, the Chief Justice of India should not send the proposed names to the government.

### **Establishment and Composition of the Commission:**

<sup>5</sup> Writ Petition (civil) 1303 of 1987

<sup>6</sup> AIR 1999 SC 1

The Collegium system commission is headed by the Chief Justice of India and comprises of two other senior most judges of the Supreme Court, the Union Minister for Law and Justice and two eminent people to be put forward by the Collegium. The Collegium System comprises of the Prime Minister, the Chief Justice of India and the leader of opposition of Lok Sabha. The two eminent members will have to serve for a term of three years and are not entitled for re-nomination. The convener of this commission is the Secretary to the Government of India in the Department of Justice.

### **Functions of the Commission:**

The functions of this Commission are as follows:-

- a) Nominating people for the position of Chief Justice of India, Judges of Supreme Court, Chief Justices of all the High Courts and also the other judges of the High Courts.
- b) Recommending the transfer of the Chief Justice or Judges of the High Court, from one High Court to another High Court.
- c) To make sure that the people recommended are of ability, integrity and standing in this legal profession.

The procedure for recommendation with respect to the appointment of High Court judges involves obtaining the views of the Governor, Chief Minister and Chief Justice of High Court of that particular state in a written manner. This should be as per the procedure specified by regulations made by this Commission.

### **Separation of powers in Collegium System:**

After the Supreme Court struck down the National Judicial Appointment Commission Act and the 99<sup>th</sup> Constitutional (Amendment) Act, the people have once again started bringing attention towards the appointment of judges to the higher judiciary. Neither the Executive Appointment model that existed till 1998, nor the collegium system as practiced till now have not been satisfactory enough to safeguard the independence of judiciary.<sup>7</sup> Nevertheless, the majority view of the Constitution Bench which decided on the issue was in favor of keeping the collegium system with the necessary changes and is now hearing views and suggestions from the Government, Bar and civil society on how to improve the process while retaining control of appointment of judges with the judiciary itself. Under the scheme of the Constitution, the ultimate interpreter of law is the Court, and not the legislature or the executive. Judicial Independence is, consequently, central to democracy because it is judiciary that helps in the realization of the Rule of Law and safeguards the human rights. But the concept of independence is an intricate one which subsumes in its idea like impartiality, accountability, efficiency and respect for the Constitution and other institutions of governance. Considering this, one has to differentiate between personal independence from institutional independence, as well as actual independence from recognized independence.

Under Article 50 of the Indian Constitution, the independence of judiciary is separated from the executive. The process of removal of judges is difficult and their terms of service cannot be changed to the disadvantage of judges. At the same time the Executive branch of government decides the extent of the resources that are to be made obtainable to the judiciary for administration of justice. Therefore, it is clear that independence of judiciary is a double concept which covers the independence or impartiality of the individual judge as well as the independence of the judicial branch from the Legislature and Executive branch. These are called

<sup>7</sup> [http://www.jgu.edu.in/sites/default/files/article/Future\\_of\\_Collegium\\_System.pdf](http://www.jgu.edu.in/sites/default/files/article/Future_of_Collegium_System.pdf)



as personal independence and institutional independence correspondingly. Indeed, a judge's personal independence is insufficient unless it is accompanied by the institutional independence of the judicial branch. The concept of separation of powers is in relevance to the later part of independence.

### **Merits of the Collegium System:**

The major benefit given by this system to our country is to protect and safeguard the separation of powers between the three organs of our Government, which is the basic structure of the Constitution. It ensures that the independent nature of the judiciary is not affected by the Legislature or the Executive. Justice Sathasivam is of the opinion that the Collegium System has become a little more transparent and the consultation is made to be broad – based, as a result it will be best suited for the appointment of the judges.<sup>8</sup> He also said that, “we as judges know the capability and character of the persons who are considered for appointment as judges to the Supreme Court and high courts”. This statement by him makes it clear that it would become difficult for people who are not associated with the daily work of courts to shortlist the best people for the required position. On comparing to the Judicial Appointment Commission (JAC), the current Collegium System scrutinizes the shortlisted candidates more accurately for the qualities expected of a judge in the Supreme Court or the High Court.

### **Flaws in the Collegium System:**

The current process adopted by the collegium of judges is beset with its own set of issues of non-transparency and non-accountability apart from excluding Executive completely in the collaborative and consultative exercise for employment of judges to Bench of higher judiciary. Since its deep-rooted deficiencies in the collegium, as many as approximately 275 posts of judges in several High Courts are kept vacant, which have uninterrupted bearing upon justice delivery system and thereby influencing the institutional credibility of judiciary. The working of the collegium has marked the total breakdown of the inter-institutional system provided in Article 124 and Article 217 of the Constitution of India.<sup>9</sup> This system incorporates de facto judicial supremacy over appointments. In spite of the fact that the executive must formally affirm the appointment, the role is limited as its objections can be overridden by the collegium, whose conclusion is determinative in practice. The marginal role of the executive deprives the possibility of an inter-institutional check and balance on the judiciary and also paves way for the public questioning of the executive in relevance to judicial appointments pointless as the executive inevitably pleads helplessness. The collegium system has been criticised on several grounds. Lastly, one other major disadvantage of the collegium system that has been observed over the years recently is that almost thirty per cent seats in different High Courts of the country remain empty due to inefficient working of the collegium.

### **Suggestions to enhance the mechanism of Collegium System:**

On the basis of the criticisms observed and discussed, following are the suggestions to improve the functioning of the Collegium System for elevating the judges of High courts and Supreme Courts:-

<sup>8</sup> /3www.insightsonindia.com/2015/02/27-

<sup>9</sup> ibid

- To ensure the transparency of the system, the documents and audio recordings of the collegiums and candidates should be made accessible to the citizens from the Collegium Secretariat under the Right to Information Act. These records should be routinely uploaded on the website of respective Supreme Court or High Court and must be accessible through a simple net search.
- The collegium Secretariat should be headed by a team consisting members of senior bureaucrats who are sufficiently insulated from pulls and pressures caused by judges, lawyers, ministers, etc. They should support the Collegium in its Decision – making process with all the background data of candidates, along with the objective comparison and analysis of the data along several parameters.
- The secretariat should maintain the eligibility records of each and every candidate or judge of the higher judiciary and the other senior advocates who apply for the post of judge in the higher judiciary.
- Short term promotions to the post of Chief Justice of several High Courts, just for the sake of rendering the eligibility of the candidate for elevation to the Supreme Court, should be expressly forbidden.
- 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. Making the criteria a law would perform as way to protect “moving goal-posts” for favoring a few candidates.
- Appropriate Rules and formats may be developed for receiving complaints against individual judges and combining it into the eligibility criteria.
- Suitable laws may also be laid down to safeguard frivolous complaints against judges by the parties with their personal interests, but also to facilitate the independent investigation of complaints if found have substance.

### **Conclusion:**

The National Judicial Appointment Commission (NJAC) Act and the Constitutional (121st Amendment) Act have been passed in the Parliament with the approval of majority. As most of the states have ratified this Act, it has become a statute which would soon come in to force. The Collegium System was afflicted by problems like lack of transparency, accountability and more than anything else; the basis on which judges were chosen was unclear. The NJAC would be useful in increasing the transparency in the judicial appointments due to the presence of Law Minister and two eminent persons in this commission. The Act leaves a lot to the regulations to be done by the Commission and is heavily inflated of words and phrases like “other criteria”, “Commission can, by regulations, specify such other procedure”, “any other matter” etc. which keeps several aspects of the appointment process subject to the manipulation by the Commission and Union Government. The Act thus, needs re-evaluation in the Composition of commission, procedure and the criteria for appointments. The advantages and the shortcomings of this new system though would conclusively come out only when it comes in operation. Although, this step may prove insufficient in the short run but it is a step in the correct direction.