

# LEGALFOXES LAW TIMES

## JUDICIAL APPOINTMENTS: A MANDATE TO BE RECONSIDERED

### ABSTRACT

*India, being a democratic country, like other democracies has three most important pillars. Out of them, the judiciary is supposed to play a vital and most important role. For the efficient working of the other pillars of democracy, it is important to have an independent judicial system. Independency from external interference is one of the most important features that a judicial system must have for the administration of justice. Indian constitution possesses the feature of separation of powers between the executive, legislature and judiciary and thus Indian judiciary enjoys the complete independence from external interference. India is the only country where even the judicial appointments are done by judges themselves through the procedure of collegium system which is nowhere mentioned in the constitution on the other hand when NJAC (National Judicial Appointment Commission) bill was passed to ensure the transparency in the appointment and transfer of judges of the Supreme Court (SC) and High Court (HC) it was not favored by the collegium of the supreme court.*

*The present paper depends upon the secondary sources of the research methodology and deals with the origin, development and flaws and strengths of the collegium system. This paper also deals with the NJAC and its perfections and imperfections.*

*Keywords: Independence, Judiciary, Collegium, NJAC, Development*

### INTRODUCTION

Appointment and transfer of judges had always been a crucial issue in India and the reason behind is the procedure for the appointment and transfer of judges of the SC and HC. The judges are appointed through the collegium system in India. The collegium system is an opaque method

for the appointment of judges. Lack of transparency in the working of collegium makes it a more vital issue. Several recommendations were made to ensure transparency in the working of the collegium system one of those recommendations is the National Judicial Appointment Commission (NJAC). This act was introduced to ensure the transparency in the method of appointment and transfer of judges of SC and HC and to turn the imperfections of the collegium system into perfections but the act was struck down and declared unconstitutional by the apex court in fourth judge case. After the fourth judge cases a new clash between the collegium and NJAC and became a highlighted issue. However, the collegium system still prevails which is a process that needs to be reviewed. Although both the procedure for the appointment and transfer of judges of SC and HC have their own imperfections which are to be discussed in this paper onwards. Whether the NJAC is better than the collegium system or vice versa is still an issue to be discussed further in the paper.

### **HISTORICAL TIMELINE**

The evolution of the collegium system, as well as NJAC, has a long history to discuss upon. After the independence of India from British colonial rule. The constitution of India came into force in 1950 and the framers of the constitution were very clear about the concept of separation of power between the executive and the judiciary and thus constitution of India came up with three important provisions incorporated in it dealing with the appointment and transfer of judges of the Supreme Court and high court. Despite having these provisions since the origin of the Indian constitution 1950 the procedure for appointment and transfer of judges went through several modifications.

The timeline can be discussed as follows

- **1950-1973**

After the independence of India, the process of the appointment and transfer of judges was as per the provision of the Indian constitution. The appointment and transfer of judges done by the president of India who represented the executive and works on the aid and advice of the council of ministers and president shall work in accordance with them and Chief Justice Of India (CJI) who represents Judiciary. The president shall consult with the CJI. Thus it can be said that however the appointment and transfer was done by

the president but the real power rested with the council of ministers. Until 1973 there was coordination and consensus between the executive and the judiciary and the senior-most judge of the Supreme Court was to be appointed as CJI.

- **1973**

In 1973, the real story began with the verdict of **Keshavanand Bharti v. State of Kerala**<sup>1</sup> by honorable Supreme Court. In the above-mentioned case, the doctrine of basic structure was opined by the apex court which states that the government can amend the whole Indian constitution but cannot destroy the basic structure of the Indian constitution. This verdict led to the cold war between the executive and the judiciary. The judgment was disliked by the government which was led by Indira Gandhi. The judgment in the case of **Keshavanand Bharti v. State of Kerala**<sup>2</sup> was delivered by 7-6 majority and in reaction to that, on 26 April 1973, Ajit Nath Ray superseded the three senior judges and appointed as CJI. A.N. Ray was in the minority of judgment and those senior judges had ruled in favor however in defense of this the government said that the executive had followed the guidelines of the report of law commission of India 1956 which states that it is not necessary to appoint the CJI on the sole criteria of seniority rather than other criteria such as merit.

- **1977**

In 1977 again the executive elevates M.U. Beg and appointed him as CJI. M.U. Beg also superseded his senior Justice Khanna and the reason behind was **ADM Jabalpur v. Shivakant Shukla**<sup>3</sup> case views and this led to a clash between the executive and judiciary.

- **1981 – First Judge Case**

- **S.P. Gupta v. UOI**<sup>4</sup>

The question before the bench, in this case, was whether the word ‘consultation’ referred to the ‘concurrence’ under Article 124<sup>5</sup> of the constitution which states and whether the

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<sup>1</sup>AIR 1973 SC 1461

<sup>2</sup> Ibid.

<sup>3</sup>AIR 1976 SC 1207

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

president is bound by the advice of CJI. In the above-mentioned case, it was held that the 'consultation' doesn't mean 'concurrence' under Article 124<sup>6</sup> of the constitution and the president is not bound by the advice of CJI.

Somewhere this judgment established the supremacy of the executive over the judiciary and took away the independence of the judiciary. The judgment given by 4:3 majorities was highly criticized.

- **1993 – Second Judge Case**

**Supreme Court Advocates-On Record Association (SACRA) v. UOI<sup>7</sup>**

A PIL was filed in the apex court seeking the vacancies of the HC to be filled up. In this case, the collegium took its origin and it was held that the final say in concern with the appointment and transfer of judges will rest with the CJI along with the two senior-most judges of the SC in case of SC and in case of HC, the CJI and two senior-most judges of the HC concerned and in case of transfer of the judges of HC final say will be of CJI and thus the president is said to be bound by the advice of CJI. This judgment somehow harmonized the working mechanism between articles 74(1)<sup>8</sup>, 124(2)<sup>9</sup>, 217(1)<sup>10</sup> of the

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<sup>5</sup> 124. Establishment and constitution of Supreme Court

(1) There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges

(2) 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.

<sup>6</sup> Ibid.

<sup>7</sup> AIR 1993 (4) SCC 441

<sup>8</sup> 74. Council of Ministers to aid and advise President.-

(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

<sup>9</sup> 124. Establishment and constitution of Supreme Court.-

(2) 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.

<sup>10</sup> 217. Appointment and conditions of the office of a Judge of a High Court.-

(1) 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, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years.

Indian constitution, the judgment was celebrated at large as it overruled the verdict of the case of **S.P. Gupta v. UOI**.<sup>11</sup>

- **1998 – Third Judge Case**

- President’s Re reference Case**<sup>12</sup>

In the above-mentioned case, President K.R. Narayanan made a presidential reference to honorable supreme court regarding the collegium system and the issue in front of the SC was that whether the word ‘consultation’ mentioned under article 143 of the Indian constitution meant to consult with several judges of the SC. In this case, the apex court laid down several guidelines for the working of the collegium and its constitution. In this case, no of judges in the collegium was raised from two to four senior-most judge.

- **2015 – Fourth Judge Case**<sup>13</sup>

The president gave its consent to the NJAC bill on 31<sup>st</sup> December;2014 and became an Act. The NJAC was brought to replace the collegium system and ensuring transparency in the procedure for appointment and transfer of judges of the SC and HC. However, this act was declared ‘unconstitutional and void’<sup>14</sup> on several grounds by the honorable supreme court. It was said by the apex court that these acts destroy the feature of independence of the judiciary, it also infringes the doctrine of separation of power. After this, the collegium system for the appointment and transfer of judges of the SC and HC prevailed again.

### **MEMORANDUM OF PROCEDURE**

The NJAC was struck down by the honorable Supreme Court in 2015 and the collegium system was restored and the Supreme Court welcomed several suggestions from legal,civil and governmental fraternities for ensuring the transparency and efficient working of the collegium system.

The Memorandum of Procedure (MOP) is the criteria for the working of the collegium and there are following points which were proposed by the government:

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<sup>11</sup> Supra note (4)

<sup>12</sup> AIR 1998 (7) SCC 739

<sup>13</sup>16 October, 2015

<sup>14</sup> Ibid.

- **Seniority Subject To Excellence**

The government proposed consideration of seniority and excellence in the promotion of high court chief justice or a judge to the Supreme Court. The judiciary responded that seniority is a factor that is subject to 'merit and integrity'.

The collegium promoted two Delhi high court judges by superseding three senior judges. This decision was questioned by the people. The collegium responded by saying that, seniority chief justices all over India were considered, apart from their excellence.

- **Record Reasons For Overlooking The Chief Justice**

Another proposal by the government was, to record the reasons for leaving out the senior Chief Justice. This will discourage nepotism and encourage transparency. The judges replied, in return that, it may affect the prospects of promotion and duties of the Chief Justice. The recorded reasons can be a "permanent blot on her/his career".

- **Committee And Secretariat**

The government proposed a committee as an additional consultation for the selection of judges, for the Collegium. This committee is essential for broader consultation in the selection of the best-suited candidates. It also recommended the position of the secretariat that maintains records for schedules of Collegium meetings, recommendations, and complaints related to postings of the judges and other related duties. The judges' opinion, however, considers the former as unnecessary. The judiciary wants to be left to the decision of the CJI, furthermore, it prefers that secretariat should come under the registrar of the apex court as opposed to the government's preference. The government wants it to be under the Law Ministry for unbiased selection of the candidates.

- **Veto Power In The Name Of National Security**

The government also recommended the criteria of 'national security' and 'public interest' for dismissing the application of the candidates. The government insists on "veto power" against the candidates, in the name of national security and public interest.

- **Representation Of Judges In Appointments**

The government suggested the appointment of three judges from the Bar or from outstanding jurists with a meritorious track record. It also said that all Supreme court judges should be allowed to recommend names for the posts.

However, the judiciary dismissed the "quota of three judges" as limiting the representation of the Bar. This recommendation does not adhere to the provisions of the constitution. The government after considering agreed and proposed fixing to be unnecessary as long as judges' representation is ensured.

### **NATIONAL JUDICIAL APPOINTMENT COMMISSION: STRUCTURE AND WORKING**

NJAC bill was brought for the appointment and transfer of judges of the SC and HC. The collegium system has several flaws and allegations upon it and to rectify these imperfections of the procedure for the appointment and transfer of judges NJAC bill came up. The bill was introduced to ensure transparency in judicial appointments and to improve the working mechanism of judicial appointments and transfer. NJAC was brought through the ninety-ninth constitutional amendment act. This bill was passed in order to replace the collegium system and the NJAC act ensured that it will rectify the defects that the collegium system had suffered.

The proposed structure of NJAC consists of-

- Chief Justice of India.
- Two other senior-most judges of SC.
- Central law minister
- 2 eminent personalities (selected by the selection committee including CJI, PM, leader of the opposition).

The working mandate of the appointment and transfer of judges through commission was mentioned in the NJAC bill. According to which the senior-most judge of the SC shall be appointed as CJI if he is deemed to 'fit' to hold the office. The NJAC shall recommend the

names of the judges on the basis of their ability however if any two people of the commission do not agree upon the recommendation then it will not be considered.

The NJAC Act was challenged before the apex court in the Fourth Judge Case and struck down by the Supreme Court as the act was infringing the basic structure of the Indian constitution.

### **MERITS OF NJAC**

- **Transparency And Accountability**

NJAC act ensures transparency and accountability in the judicial appointments which were a major drawback of the collegium system. NJAC provides a proper mandate of a working procedure for the appointment and transfer of judges. It ensures to end the opaque mechanism of judicial appointments through the collegium.

- **Representation Of Executive**

The NJAC provides a proper representation of the executive in the procedure for judicial appointments which is missing in the collegium system.

- **Established Working Mechanism Of Judiciary And Executive**

NJAC was an attempt to establish the mechanism of working between the executive and judiciary and acts as a blender between the executive and judiciary for the judicial appointments so that there must be least chances of clash between these organs.

- **Check On Corruption And Nepotism**

NJAC act was an attempt made by the lawmakers to keep a check on the corruption and nepotism as there is an allegation on the collegium that it promotes nepotism and thus corrupted. The NJAC was supposed to eradicate corruption and nepotism in the judicial appointments.

### **DEMERITS OF NJAC**

- **Infringes Independence Of Judiciary**



NJAC harms the independence of the judiciary which is the basic feature of the Indian constitution. To impart fair justice it is important to have the independent judicial system and this stands to be one of the major drawbacks of the NJAC act.

- **NJAC Bends Towards Executive**

NJAC act somewhere gave more representation to the executive in the judicial appointments rather than to the judiciary. NJAC has more members who represent the executive and thus it was more influenced by the executive and bends towards it.

- **Arbitrariness Of Executive**

The executive has more representation in the NJAC Act and thus it can exercise its arbitrariness in judicial appointments and can also exercise veto power against the judiciary.

- **Infringes The Doctrine Of Separation Of Power**

There must be a separation of power between the legislature, executive and judiciary. NJAC act involves the executive in the working of the judiciary and thus destroys the doctrine of the basic structure.

### **COLLEGIUM SYSTEM: ITS CONSTITUTION AND WORKING MECHANISM**

The collegium system consists of CJI and four senior-most judges of the apex court. The CJI is the head of the collegium. Presently the collegium system consists of-

- Sharad Arvind Bobde (CJI)
- N.V. Ramana (Judge)
- Arun Kumar Mishra (Judge)
- Rohinton Fali Nariman (Judge)
- R. Banumathi (Judge)

Independence of the judiciary is one of the important features of the Indian constitution. The collegium system ensures the complete independence of the judiciary. The appointment of judges is made as per the Article 124(2) which states: “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.”<sup>15</sup> And article 217 (1) which says “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, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224<sup>16</sup>, and in any other case, until he attains the age of sixty-two years”.<sup>17</sup>

In the appointment of judges, the president is required to consult the CJI and is bound by the recommendation of CJI. However, the senior-most judge of the apex court is appointed as CJI and the recommendation for the appointment of new CJI is made by the outgoing CJI to the president of India. For the appointment and transfer of judges other judges the collegium recommends the name of lawyers and judges to the executive and in the same way, some names are recommended to the collegium by the executive. The executive makes its investigation and sends the reply to the recommendation made by the collegium for the re-acknowledgment but if the collegium sends and considers the same name again the executive is bound to give assent to it this is how the collegium works.

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<sup>15</sup> 23<sup>rd</sup> edition; Introduction of Constitution; D.D. Basu.

<sup>16</sup> 224. Appointment of additional and acting Judges.-

(1) If by reason of any temporary increase in the business of High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

(3) No person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of sixty-two years.

<sup>17</sup>Supra note (15).

### **MERITS OF COLLEGIUM SYSTEM**

- **Ensures Separation Of Power**

The collegium system ensures the doctrine of separation of power. There must be a separation of power between the pillars of the democracy naming the executive, legislature and judiciary for the efficient working of the judiciary. The other organs such as the executive and legislature do not interfere in the working of the collegium and thus the doctrine of separation of power preserves.

- **Independence Of Judiciary**

The independence of the judiciary is the basic structure of the Indian constitution as the members of the constituent assembly were well versed with the fact that for the fair working of the Indian judicial system the judiciary must be independent. The collegium system ensures the independence of the judiciary from all external interference.

- **No Political Control**

The judiciary can only work freely if there is no political control over it as if there will be political interference in the judicial proceedings then it may influence the decision in its favor and act as a hindrance in the path of imparting fair justice. Thus the collegium system ensures that there must be no political control over the judiciary.

- **Judges Have Knowledge About The Qualities Needed**

For the judicial appointments, judges are well versed about the attributes and behavior and aspirants shall have to be a judge and thus they can choose candidates who possess such qualities that are essential for being a judge.

### **DEMERITS OF COLLEGIUM SYSTEM**

- **Promotes Nepotism**

Collegium system promotes nepotism as many of the judges are the product of nepotism and it can be seen that sons and relatives of the judges are the preference for the judges.

Due to this the deserved candidates somewhere lacks behind and did not get fair selection results.

- **Unconstitutional**

The Constitution does not mention the collegium system. Hence, it is unconstitutional. This practice has been evolved by the judiciary to take matters in its own hands.

- **Lack Of Accountability**

The lack of accountability is seen as there is no official procedure for selection, written records are selectively published and no merit-based selection of judges.

- **Undemocratic**

Judges are not elected by people and are not accountable. Therefore, the selection of judges through the collegium is undemocratic.

- **Lack Of Transparency**

The procedure for the appointment and transfer of judges through the collegium is an opaque system and thus lacks transparency.

- **Supersession Over The Convention Of Seniority**

The Second Judge Case 1993 laid that: seniority amongst judges crucial for appointments until there is a strong reason to justify. The 'supersession' ignores and renounce of the convention of seniority. It creates space for subjectivity and individual bias in appointments.

## CONCLUSION

The members of the constituent assembly were very clear with the fact that the feature of independence of the judiciary is essential for the impartial delivery of justice. The Indian judicial system is the only judicial system in the world that is completely independent of any external interference. However, the original constitution was incorporated with the provisions for appointment and transfer of judges of the SC and HC but the system of collegium for judicial

appointments was developed by the judiciary after several decisions and verdicts of the apex court who is said to be the guardian of the constitution of India. The collegium system is suffering through several major defects. While on the other hand NJAC act for the judicial appointment was a failed attempt by the NDA government to interfere with judicial procedures. NJAC would have reduced the ability to question the malpractice of the executive by the judiciary. It was harming the doctrine of separation of power. Both the procedure for the judicial appointments namely collegium and NJAC has their own limitations which are the major drawback of the Indian judicial system. The procedure for the appointments of judges of the Supreme Court and the High Court needs to be reviewed again as for the efficient working of the judiciary the judicial appointments should be one of the major concerns. The solution must be such that it can create a proper blend between the executive and the judiciary. Neither the doctrine of judicial independence nor the doctrine of separation of power shall be infringed by that. Transparency in the procedure should be the concern but without political involvement. The mandate of working shall be such that the executive and the judiciary can check each other's malicious acts in judicial appointments.