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CRITICAL ANALYSIS OF THE COLLEGIUM SYSTEM FOR JUDICIAL APPOINTMENT IN HIGH COURTS AND SUPREME COURT

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ABSTRACT

The Collegium, which was established to prevent any interference with the independence of the judiciary, appoints the judges of the Supreme Court and High Courts. But time has shown that the Collegium system is not the most effective method for choosing judges. The National Judicial Appointments Committee was established by the government to regulate appointments, but it was ruled invalid and illegal by the Constitutional Bench. The Court switched back to the Collegium structure, but the issues with accountability and openness remained. This essay makes an effort to evaluate the issues with judge appointments and offer a fix. The essay is set up in the following order, It illustrates the importance of institutional responsibility in a democracy in the following order. The development of the Collegium system and its issues are then examined in the paper. The next section of the essay discusses the creation of the National Judicial Appointments Commission and the Supreme Court's decision to invalidate it. The establishment of the National Judicial Commission, which may replace the Collegium, is the answer that is finally put out.

Keywords: collegium, appointment, judges.

INTRODUCTION

There has always been discussion around the selection of judges, and tensions between the executive and judicial branches have long been a source of discontent. By Articles 124 and 217 of the Indian Constitution[1], judges of the Supreme Court and High Court may be appointed.

Following Independence, the Chief Justice of India and the law minister were consulted before the president named the judges. The method operated smoothly for a while, but eventually, there were inconsistencies in the selection of judges.

After the ***S.P. Gupta v. Union of India*** [2]case, the issue of judges' appointment was brought to light, and the Supreme Court adopted a new idea of collegium for the appointment of Judges. The collegium was comprised of the CJI and two senior-most judges of the Supreme Court.

In the case of ***SCAOR v. Union of India***[3], the SC was once more asked to take up the issue in 1991. This time, more senior judges from the SC were added, bringing the Collegium's strength from three to five.

In 1993, the respected Supreme Court finally brought order to the turmoil when it decided what exactly qualified as a "consultation" under Articles 124 and 217 of the Indian Constitution.[4] This decision was made in the case of ***Re Presidential Reference***[5]. The Three Judges Cases—a group of three of the Supreme Court of India's own decisions—serve as the foundation for the collegium system, which the court uses to select judges for the country's constitutional courts.

The Chief Justice and a panel of four Senior Most Judges of the Supreme Court suggest appointments and transfers of judges under the Collegium System. The Collegium System was cited by the Supreme Court Bar Association as the cause of the divide between the wealthy and the poor by developing a culture of reciprocity. While politicians and celebrities receive immediate remedy from the courts, the average person still needs to fight for justice over many years.

A constitutional body called the National Judicial Appointment Commission was established to take the place of the Collegium System of Judge Appointment. On August 13, 2014, the Lok Sabha and the Rajya Sabha passed the Ninety-Ninth Amendment Act, 2014, which amended the Indian Constitution to create the National Judicial Appointment Commission. To control the NJAC's operations, the National Judicial Appointments Act was also established by the Parliament. 16 State Legislatures approved both laws and on December 31, 2014, the President provided his approval.

Thus, on April 13, 2015, the NJAC and Constitutional Amendments became effective. The two senior Supreme Court justices, the law minister, and two distinguished individuals will make up the NJAC's six members. They are not eligible for re-nomination and are chosen by a committee made up of the Chief Justice, the Prime Minister, and the head of the opposition in

[1] Constitution of India,1950
[2] S.P. Gupta v. Union of India, 1981 Supp SCC 87
[3] Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441
[4] ibid
[5] In re: Presidential Reference No. 1 of 1998, (1998) 7 SCC 739

the Lok Sabha for terms of three years.4 The National Judicial Appointments Commission Act of 2014 and the 99th Constitutional Amendment Act of 2014 have been ruled invalid and illegal by the Supreme Court. The Supreme Court has now ruled that the collegium System, which was put into place by its earlier decision in the 1993 case for the nomination of judges to the higher judiciary, will continue to be in use.

STATEMENT OF PROBLEM

The Collegium System is promoted as the finest method for choosing judges, but as time went on, problems became apparent, and the government established the National Judicial Appointments Commission, which deemed the Collegium System to be illegal. The paper will not only cover the fundamentals of judge appointment but will also go into greater detail regarding the optimal criteria for judge appointment and strategies to enhance the collegium system.

RATIONALE OF STUDY

The Collegium System is promoted as the finest method for choosing judges, but as time went on, problems became apparent, and the government established the National Judicial Appointments Commission, which deemed the Collegium System to be illegal. The paper will not only cover the fundamentals of judge appointment but will also go into greater detail regarding the optimal criteria for judge appointment and strategies to enhance the collegium system and NJAC.

RESEARCH QUESTIONS

1. How does the process of appointment of judges change from an executive to a collegium system?
2. What are the three – judge's cases?
3. What are the collegium system and its drawbacks?
4. What is the future of the collegium system and what changes are required?
5. What is National Judicial Appointment Commission?
6. Why NJAC is unconstitutional?
7. Is NJAC better than collegium system?

RESEARCH OBJECTIVE

1. To analyse the process of appointment of judges from an executive to a collegium system.
2. To discuss the three-judge cases.
3. To learn the collegium system and its drawback
4. To discuss the future of the collegium system and steps to changes.
5. To learn about the National Judicial Appointment Commission.
6. To discuss the unconstitutionality of NJAC
7. To analyse whether NJAC is better than the collegium system

RESEARCH METHODOLOGY

The methodology that would be applied for carrying out this research is doctrinal research. Primary resources of this research paper are Law Commission Reports and Journal articles and textbooks like DK Basu. Secondary resources such as textbooks, journal articles, and online resources have been used.

APPOINTMENT OF JUDGES FROM EXECUTIVE TO COLLEGIUM SYSTEM

Numerous ideas regarding the best way to nominate justices to the Supreme Court and the High Courts were put forth during the process of drafting the Constitution. The primary goal of the framers was to choose the finest candidate for this important constitutional position while maintaining the independence of judicial appointments from other branches of the government.

According to the constitutional framework, the President can confer with other Supreme Court and High Court justices while appointing Supreme justices. The President must act with the assistance and advice of the Council of Ministers and in "consultation" with the Chief Justice of India. The judiciary's primary responsibility during the appointment process was to advise and provide recommendations to the president.

Article 124(2) of the Constitution of India states that "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 the High Courts in the States as the President may deem necessary for the purpose…"[1]

In essence, the Chief Justice made the suggestion and forwarded it to the Minister of Law and Minister. If the Minister approved of the proposed name, she would recommend it to the President, who would then appoint the person, with the Prime Minister's approval. If the Minister disagreed with the Chief Justice's opinions, she could seek the advice of additional judges, discuss those opinions with the Chief Justice, or offer a different candidate to the Chief Justice to get her opinion. On whom to nominate, however, the Minister of Law and Justice would ultimately advise the Prime Minister and, with the Prime Minister's consent, the President. Thus, the Executive-led Appointment System was used.[2]

The Law Commission of India contended that this appointment process did not allow for the appointment of the greatest talent to the Court and that, frequently, "executive influence exerted from the highest quarters" was accountable for the nomination of some judges. This argument was made in the early months of 1958. The Law Commission also objected to the

[1] Constitution of India,1950
[2] Law Commission of India, 80th Report on the Method of Appointment of Judges 16-17 (1979).

focus given to "communal and regional considerations" while choosing Supreme Court nominees. The system was contested in 1981 because it limits judicial independence. [1]

THREE JUDGES BENCH CASE

- ***S. P Gupta v. Union of India*:** The petitioners stated that the Constitution's relevant sections should be interpreted to mean "concurrence" rather than "consultation" and that the judiciary should have the power to veto judicial appointments. The court determined that the Executive's opinions would take precedence over the Chief Justice's in the case of a disagreement on who should be appointed as a Supreme Court judge and dismissed the challenge.[2]
- ***Supreme Court Advocates on Record Association v. Union of India***: When a new appeal to the prior ruling was launched in 1993, it was determined that the 'ultimate authority' of appointment vested in the executive was being abused and that the current system of appointments had led to merit being neglected as a result of executive involvement.[3] The Court determined that judicial independence is a fundamental value of the Constitution that cannot be changed and that to safeguard this ideal, the Court should have "primacy" over the appointment procedure. The Chief Justice was understood to have to approve the judge's appointment when the term "consultation" with him or her was used. The Chief Justice's conclusion was not her own, but rather the result of discussions with a collegium made up of the two senior-most Supreme Court justices and the senior-most Supreme Court justice from the candidate's High Court. If the government had a different viewpoint, it may send the collegium the suggestion again. The ruling would bind the government, though, if the Chief Justice upheld it. The system of collegium-led appointments was established by this decision.[4]
- ***Third Judge Case:*** The Supreme Court changed and further clarified the appointment process in an advisory decision that was released in 1998. It was decided that the Chief Justice and the four judges with the most seniority on the Court will make up the collegium for appointment to the Supreme Court. The Court further ruled that the inter-se seniority of judges inside their High Court and their all-India seniority should be the main criteria for appointment to the Supreme Court in the 1993 and 1998 judgments. However, there may be occasions when deviating from the seniority standard is appropriate, such as in cases of exceptional merit or to ensure regional or other variety.[5]

There have been many people who have criticized the collegium system. Critics draw attention to the system's lack of openness, particularly the absence of appointment criteria and publicly available explanations for why a person was considered qualified for a position. Furthermore, detractors claim that the system is replete with corruption and nepotism because the appointment process is opaque and without justification.[6]

EXPLORING COLLEGIUM SYSTEM: DRAWBACKS

The Supreme Court ruled in the Third Judges Cases advisory decision that the Chief Justice must contact the Supreme Court's four senior-most judges when making recommendations for the appointment of justices. The Chief Justice and the four senior-most justices of the Supreme Court are now the only members of the Collegium. The views of the Chief Justice and the other four justices should be recorded in writing. It is also necessary to obtain written views from the High Court from which the proposed person is drawn, whose senior-most judge is a member of the Supreme Court.

- **PROBLEM WITH THE COLLEGIUM SYSTEM**

The fundamental goal of the Collegium was to safeguard the independence of the judiciary by keeping the Executive and Legislature out of the process of appointing justices. Particularly controversial were the selections of Justices AN Ray and Beg as Chief Justices of India in 1973 and 1976, respectively. On both occasions, the then-Government broke with tradition by choosing the Chief Justice of India rather than the senior-most judge on the Supreme Court. The court even stated in the PL Lakhanpal v. AN Ray [7]case that Justice Ray would have been selected as the CJI even if the seniority standard had been applied. This was true because Justice Ray's three senior justices had already resigned in opposition to his selection as the CJI.

Although the collegium system was created with the best of intentions, it cannot stand up to it. There have been instances where retired judges have appeared in public forums and claimed that the Collegium is not operating by its founding principles.

- **LACK OF TRANSPARENCY**

By operating in this manner, Collegium neglects transparency in any way. The standards for judge eligibility, selection, and transfer are still unknown to the general public. Transparency, however, turns into an issue of right in rem when it comes to the selection of Supreme Court judges. The public should be aware of the criteria used to appoint Supreme Court justices. The rights of every person in this nation are guarded by the Supreme Court and the High Courts. The judiciary and other democratic institutions are primarily influenced by the public. It is undoubtedly a bad system of government if the people are kept in the dark about the reasons why their judges are chosen. The Collegium has not specified the standards by which judges are chosen. Even the existence of such criteria is debatable, highlighting the collegium's lack of accountability in how it does business. The entire procedure is secretive since it prevents the public from knowing the criteria and qualifications used to appoint judges.

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[1] Law Commission of India, 14th Report on Judicial Administration Volume 1, page 34 (1958)
[2]S.P. Gupta v. Union of India, 1981 Supp SCC 87
[3] Interestingly, in the decade before the judgment, i.e., between 1983 and 1993, only 7 of 547 appointments to the Supreme Court and the various High Courts had been made without the concurrence of the Chief Justice of India.
[4]Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441
[5] In re: Presidential Reference No. 1 of 1998, (1998) 7 SCC 739
[6] Aparna Chandra, William Hubbard and Sital Kalan try (2018). From Executive Appointment to the Collegium System. NOMOS, 51(3), pp.273–289, From Executive Appointment to the Collegium System on JSTOR
[7] P L Lakhanpal v AN Ray AIR 1975 Del 66

- **POSSIBILITY OF FAVOURITISM**

In a system where people make appointments, the likelihood of favouritism or nepotism cannot be reduced; as a result, the probability of preferential treatment or favouritism also hurts the current system. Even for the upcoming four to five years, it is simple to estimate the Collegium's makeup. Because nearly every Supreme Court judge is a product of a certain High Court, that judge invariably has a stronger say in the appointment or elevation of any other judge from that High Court. It is possible that the greatest judges can be disregarded or dismissed, as the late Shri Arun Jaitley noted in his statement in the Rajya Sabha7 when discussing the 99th Constitutional Amendment Act.[1]

NATIONAL JUDICIAL APPOINTMENT COMMISSION: CRITICS

In 2014, the government proposed the 99th Constitutional Amendment and the National Judicial Appointments Commission (NJAC) Act. Article 124(2) of the Indian Constitution [2]was changed by the amendment. The phrase "on the recommendation of the National Judicial Appointments Commission referred to in Article 124A" has been substituted for the words "after consultation with such Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose" in Article 124[3]. According to the Amendment, the Commission would be led by the Chief Justice of India and would include two additional senior Supreme Court judges in addition to the CJI, the Union Minister of Law and Justice, and two eminent individuals chosen by a committee made up of the CJI, the Prime Minister of India, and the Leader of the Opposition in the Lok Sabha. It further stipulated that one of the two prominent individuals must be a woman, a member of a minority group, or a member of a Scheduled Caste or Scheduled Tribe.

The NJAC Act and the 99th Constitutional Amendment were struck down in ***Supreme Court Advocates-On-Record Association v Union of India***[4] by the Constitutional Bench of the Supreme Court with a ratio of 4:1. Justice Chelameswar was the sole dissenter on the bench. The Supreme Court held, "process for appointment of Judges (involving manner of selection and actual appointment), is an integral part of the independence of the judiciary, which is part of the basic structure of the Constitution." [5]The Supreme Court further declared that the Constitution's fundamental framework includes the judiciary's supremacy in decisions regarding the appointment and transfer of judges. The NJAC Bill was contested because no law could conflict with the Constitution at the time it was introduced. After all, Articles 124 and 127[6] were in full force and operation. The two bills have no legal standing.

In the same case, Justice Chelameswar gave the dissenting judgment. According to the learned Judge, "primacy of the opinion of the judiciary in judicial appointments is not the only means for the establishment of an independent and efficient judiciary"[7]. This statement sounds valid as the Court assumed that only Judges can make the best choice in matters of appointment. The learned Judge also said, "Basic structure is not the primacy of the opinion of the CJI (Collegium) but lies in non-investiture of absolute power in the President (Executive) to choose and appoint Judges of the constitutional courts. "Justice Chelameswar was right in the sense that the Constituent Assembly itself deliberately chose not to use the word 'concurrence', as stated above. It was obvious that the Constituent Assembly did not intend to give any one-person precedence in matters about the appointment of judges, and as a result, the Constituent Assembly purposefully chose the word "consultation," but the Supreme Court inserted an entirely different meaning as a part of the fundamental framework of the Constitution.

The 99th Constitutional Amendment Act also provided in Article 124, "….that one of the eminent persons shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women". This was one of the Act's flaws since there should be no room for reservation in any form when it comes to appointing judges. Every segment of society's rights are to be upheld by the judges. The judges are chosen only based on their qualifications and experience, not factors like class, caste, colour, gender, etc. Reservations in the Commission that were intended to nominate judges would have given the impression that even judges who fall under that category are serving as the category's representative, which is unquestionably against the principles of justice. A reservation-based representation that was imposed compulsorily would have been harmful to the blind lady of justice's soul in terms of class, caste, race, gender, etc.

After invalidating the NJAC Act and the 99th Amendment to the Constitution, the Supreme Court switched back to the Collegium system. As a result of this ruling, the Supreme Court ordered the Government to draft a new Memorandum of Procedure (MOP) for the appointment of judges in cooperation with the Chief Justice of India. But there were a few MOP sections where the Collegium and the Government disagreed. The most divisive addition made by the Government was its right to reject the Collegium's decision based on broader public interests and national security. The Collegium rejected this clause since it provided the government the advantage and the power to easily reject any recommendation on this basis. This was a direct assault on the judiciary's independence. Later, the Government stated that while rejecting any Collegium suggestion for reasons of national security, the CJI could be informed of such reasons but not the Collegium or the general public.16 This action would have granted the Chief Justice of India special authority and would have had the effect of annulling any Collegium judgment. Even the Collegium would not be informed of the reasons for the Collegium's suggestion being rejected in this scenario.[8]

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[1]Vansh Bhatnagar (2021). Revisiting the Collegium System. Jus Corpus Law Journal, ISSN 2582-7820

[2] Constitution of India,1950

[3]Durga Das Basu (2020). Introduction to the Constitution of India. Gurgaon: Lexis Nexis Butterworths Wadhwa Nagpur.

[4] Supreme Court Advocates-On-Record Association v Union of India 2016 5 SCC 1

[5] ibid

[6] ibid

[7] ibid

[8] Vansh Bhatnagar (2021). Revisiting the Collegium System. Jus Corpus Law Journal, ISSN 2582-7820

➢ **COMPOSITION OF NJAC**:

The National Judicial Appointments Commission will be a six-member body composed of the following members:

- Chief Justice of India – (will be the exofficio Chairperson)
- Two other senior judges of the Supreme Court, next to the Chief Justice of India – (ex officio members
- The Union Minister of Law and Justice – (ex-officio)
- Two eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination. – (to be nominated by a committee consisting of the Chief Justice of India, Prime Minister of India, and the Leader of opposition in the Lok Sabha or the Leader of the single largest Opposition Party in Lok Sabha), provided that of the two eminent persons, one person would be from the Scheduled Castes or Scheduled Tribes or OBC or minority communities or a woman.

➢ **FUNCTIONS OF NJAC** :

The National Judicial Appointment Commission's duties include recommending candidates for positions such as Chief Justice of India, Supreme Court Judges, Chief Justice, and High Court Judges. The Chief Justice and other judges will be transferred from one high court to another with the help of the NJAC. The major responsibility of NJAC is to confirm the competence and moral character of those suggested. First off, the NJAC unquestionably disproves the earlier claims of unconstitutionality that resulted from the executive branch's opinion having no weight relative to the court. Three judges make up the NJAC, along with the Union Law Minister and representatives from several political organizations. The President would then get the recommendation. As a result, the NJAC grants the administration significantly more precedence than the judicial branch. In some ways, it may also be claimed that the issue of judicial accountability has been resolved because the government will now be held responsible for the judiciary's appointments.[1]

FUTURE OF COLLEGIUM SYSTEM

Collegium System has been fraught with significant problems and provided the court to be self-critical and reflective in addressing the most important challenge of ensuring greater transparency and integrity in the appointment of judges.

a.) **Transparency:** The fact that the appointment of judges has been done in secret with no information available to anybody outside the collegium regarding the procedure leading to their nomination has been the most convincing critique of the collegium system. Simply claiming that the collegium's members would act transparently won't be enough to ensure transparency. The method used by the judiciary to choose judges will have to serve as evidence.

b.) **Diversity:** The lack of gender diversity in India's higher courts is a serious issue that requires immediate addressing. The Supreme Court didn't select a woman justice for 37 years. Four judges were appointed to the Supreme Court during the course of the next 25 years, and two women were recently serving on the Court for the first time in its institutional history.

c.) Competence: To be appointed as judges, people's qualifications must be firmly proven. There is no need for the court as an institution to impose a high bar on itself in this day and age where every exercise of power by every authority is subject to the test of arbitrariness to avoid any criticism of arbitrary exercise of powers. Several quantifiable standards might be developed to establish competencies for judging candidates' suitability for judicial appointments.

d.) Integrity: All public officials must be upright and honest people since the public has higher expectations of judges than of any other institution. As a result, honesty is now a crucial factor to be considered when choosing candidates to be judges. Being the keeper of the Constitution is the judiciary's greatest institutional asset. To read the Constitution and judge whether all institutions have acted by it is the only authority granted to both powers. The Collegium has a higher and more sacred duty when choosing those who would be in charge of using these extraordinary powers because they are extraordinary capabilities.

e.) **Conflict of Interest:** In the judge-selection process, the matter of conflict of interest must be thoroughly established. The collegium must immediately create a thorough set of guidelines that will control how to determine whether any of its members who are involved in the selection of judges have a conflict of interest. If so, what safeguards would the collegium put in place to guard against or stop biases, prejudices, or other types of preferences based on acquaintance or familiarity when choosing judges? Another issue of conflict of interest could be to what extent lawyers who have worked as juniors in particular chambers who have become judges in later years could be involved in the selection of juniors from those lawyers' chambers to be selected as judges.[2]

➢ **NEW APPOINTMENT PROCESS WITHIN COLLEGIUM SYSTEM**

While recognizing the above principles, the process of the selection of judges by the collegium should cover the following to significantly transform the existing mode of appointment of judges. This mechanism may include:

a.) **Criteria for selection of judges:** The formulation of a set of selection criteria for the judges is the first step. Re-examining the criteria is even more crucial at this point because a challenge to the status quo has the potential to result in institutional transformation.

b.) **Application process and rigorous scrutiny of the candidature:** A nominations system may be a part of the application process, which is necessary. Both of these procedures will in some respects guarantee that the selection of judges will have access to the largest pool of candidates. Additionally, there is a need for a more thorough examination of the applications so that the candidates can be judged according to the set standards. Additionally, it is necessary to ensure

[1]Rishika Singh and Akanksha Tiwari (2018). THE DEBATE AROUND NJAC AND COLLEGIUM SYSTEM. SUPREMO AMICUS, 3.

[2] C RAJ KUMAR (2015). Future of Collegium System: Transforming Judicial Appointments for Transparency. Economic and Political Weekly, 3, pp.31–34. https://www.jstor.org/stable/44002895

procedural fairness by making sure the collegium sessions are conducted fairly and transparently with a thorough report of the deliberation's procedures.

c.) **Permanent Institutional Mechanism within the Supreme Court:** Mechanism within the Supreme Court: It is important to create a unique, independent institutional mechanism within the Supreme Court that will only act as the administrative office for managing all issues about judge appointments. This is one of the most crucial actions the Court should take to guarantee procedural fairness and transparency in the appointment of judges.[1]

IS NJAC BETTER THAN COLLEGIUM SYSTEM ?

There has always been discussion around the selection of judges, and tensions between the executive and judicial branches have long been a source of discontent. By Articles 124 and 217 of the Indian Constitution[2], judges of the Supreme Court and High Court may be appointed.

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To replace the collegium system, the National Judicial Appointments Commission was established. The process for appointing judges to the High Court and Supreme Court of India has been improved to resolve the concerns. While the fundamental problems with the collegium system were openness and the judges' continued control over judge appointments, the NJAC adopted a far more pragmatic strategy. The statute served to strengthen the connection between the executive and judicial branches. It gave the President the authority to go back and review the commission's recommendations.

One of the biggest improvements from the collegium system, which was opaque and offered no openness or accountability, was the commission's assurance of greater transparency and accountability. This would guarantee that the executive would be informed about the appointments as well. Another significant advantage that the NJAC promised to offer was that it would eliminate any instances of favouritism and nepotism and only appoint applicants based on qualifications and experience.

When we consider that the collegium system did not always pick judges based on merit, but that some nominations were based on issues like nepotism, favouritism, bribery, etc., we can see why this was seen as a significant step in the interest of justice.

The NJAC Act had several advantages, such as preventing corruption and ensuring that judges for India's High Court and Supreme Court were chosen fairly. The execution of the members' right to veto ensured that the selection was non-arbitrary.

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[1] C RAJ KUMAR (2015). Future of Collegium System: Transforming Judicial Appointments for Transparency. Economic and Political Weekly, 3, pp.31–34. https://www.jstor.org/stable/44002895

[2] Constitution of India,1950

[3] S.P. Gupta v. Union of India, 1981 Supp SCC 87

[4] Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441

[5] ibid

[6] In re: Presidential Reference No. 1 of 1998, (1998) 7 SCC 739

[7] Rishika Singh and Akanksha Tiwari (2018). THE DEBATE AROUND NJAC AND COLLEGIUM SYSTEM. SUPREMO AMICUS, 3.

According to the act, a person will not be considered for appointment if two members of the commission reject a proposal or recommendation. These were some of the NJAC's clearest advantages over the collegium system.[1]

A CRITIQUE OF THE COLLEGIUM AND THE NJAC

The government is in charge of choosing the judges for the Supreme Court and the High Courts, which are covered by Articles 124 and 217, respectively, according to a literal reading of the statutes. Since the Constitution's adoption, nominations have typically been made by the government in compliance with its requirements after consultation with the court. The Supreme Court upheld the identical position in the First Judges case, namely that the executive has priority in choosing judges.[2]

But something was about to change. After a few (heavily criticized) political appointments by the authoritarian government, the procedure began to shift.[3] In the Second Judges case (and later in the Third Judges case, which was a clarification of that ruling), the Supreme Court determined that the judiciary has the major responsibility in appointing judges.[4] According to what was claimed, the Chief Justice of India and the Supreme Court's senior-most justices would have a significant impact on judicial appointment decisions. Rules and procedures for judicial appointments were developed. The executive's influence was greatly reduced, and the judiciary now ruled most of the nation.

This collegium received a lot of criticism. First off, it appears that the Supreme Court interpreted the terms too broadly and even came up with its version. Given the intricate restrictions outlined in the Third Judges case, the procedure is by no means what reading the papers would have you believe. It is very difficult to assume that this was the writers of the Constitution's purpose given the nature of the provisions. If having a collegium was not the framers' goal, the Constitution would have made that obvious, and if it was, the Supreme Court interpreted the document erroneously.

This recruiting procedure has also drawn criticism for a propensity towards nepotism. Several scholars and writers have remarked that a system like this, where the court selects individuals to join the judiciary, is incredibly susceptible to favouritism.[5] In fact, given that just a small number of judges end up making crucial decisions, such as deciding who will serve as these judges, it may even be claimed that this produces a situation of judicial aristocracy.

The executive-based paradigm of judicial nominations is not exempt from these tendencies, nevertheless, as this statement implies. The nominees to the upper judiciary during the pre-collegium era were widely seen as undesirable and nepotistic, as was already established. This viewpoint may be even more problematic than judicial aristocracy because of how important it is for the court to operate as a check on the executive in a society. If the administration makes the picks, the decisions would be politically motivated and biased to the executive's advantage.

The two situations, which are truly two extremes in different directions, were the subject of the NJAC's attempt to achieve balance. The Constitution (Ninety-Ninth Amendment) Act of 2014 and the National Judicial Appointments Commission Act of 2014 were passed by the legislature with the claimed objectives of enhancing transparency in judicial appointments and re-establishing the system's balance. The Supreme Court, however, annulled the Acts because they violated the fundamental tenets of the Constitution.[6]

The NJAC has drawn criticism for not being neutral.[7] The lack of clarity regarding who would comprise the "prominent citizens" in the Commission, the Commission's excessive reliance on the government, and its insufficient representation of the judiciary are some of the qualities that are most frequently criticized. The addition of "procedure as Parliament may, by law, prescribe" to Article 124 is another important aspect. It was argued that this violated the fundamental framework because the procedure could now be changed by a simple majority in Parliament rather than the special majority required for constitutional modification. To strike a balance and determine what should be included in a proper system of judicial selections, however, is raised by this. We must develop some rules and procedures that are as unbiased as possible and refrain from overly favouring one side of the administration over the other.

SUGGESTION FOR A NEW MODEL

The core of the current judicial appointment system is the idea of "Judges appointing Judges." The executive branch shouldn't interfere unnecessarily with the judiciary's capacity to appoint judges, according to the Supreme Court of India's ruling, but there is another school of thought that holds the opposite perspective. While rejecting the NJAC system, the court did agree that the current collegium system had some "serious issues".[8] The collegium system was secretive and concealed. As a result, judges would endeavour to gain the collegium's Favor to progress to higher judicial levels. Collegium appointments of judges could occasionally be perceived as an overtly biased action in contrast to executive nominations of judges, which at least would be made public.[9]

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[1] Rishika Singh and Akanksha Tiwari (2018). THE DEBATE AROUND NJAC AND COLLEGIUM SYSTEM. SUPREMO AMICUS, 3.
[2] S.P. Gupta v. Union of India, 1981 Supp SCC 87
[3] Prime Minister Indira Gandhi had appointed several Judges, arousing criticism and dissent from judiciary as well as from general public.
[4] Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441
[5] See Prashant Bhushan, The Dinakaran Imbroglio: Appointments and Complaints against Judges, 44 EPW 10 (2009); See also Indira Jaising, National Judicial Appointments Commission – A Critique, 49 EPW 6 (2014)
[6] Keshvanada Bharati v. State of Kerala, (1973) 4 SCC 225.
[7] Raj Kumar & Khagesh Gautam, Questions of Constitutionality – The National Judicial Appointments Commission, 50 EPW 42 (2015). See also, Indira Jaising, National Judicial Appointments Commission – A Critique, 49 EPW 6 (2014)
[8] Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1
[9] Insights, Insights into Editorial : Judiciary v. Executive — Judicial Appointments, #INSIGHTSIAS, (22-8-2016), http://www.insightsonindia.com/2016/08/22/insights-editorial-judiciary-vs-executive-judicial-appointments

The most important topic to address when analysing a pro-executive judicial appointment plan is whether the judges' independence will be jeopardized. The ability of judges to make their own decisions is unaffected by having a vote in appointment decisions, even though this may hinder the judiciary from being entirely independent. The major objective of having a separate judiciary from the administrative and legislative departments is to allow judges the freedom to carry out their responsibilities in deciding cases and exercising jurisdiction either directly or through review.[1]

Before 1982, judges were allowed to maintain their independence on a personal and substantive level while carrying out their duties. When rendering judgments and performing their official duties, judges were only governed by the law. Additionally, by having sufficient stability in their judicial terms of office and tenure, judges are also able to keep their sense of independence. Judges' independence is also demonstrated by their capacity for dissent, which allows them to remain independent of both superiors and peers.[2] Therefore, it is clear from the aforementioned points how Judges would continue to be independent even if the executive were involved in their appointment.

Before the collegium, Article 124 of the Indian Constitution stated unequivocally that the President of India, in collaboration with the Chief Justice of India, would appoint any judges to the Supreme Court. This indicated that the constitutional writers themselves thought the appointment of judges required executive intervention. The system was designed to hold the court accountable and provide the requisite checks and balances. In addition to being responsible, the judiciary assumed the role of the sovereign when it declared that no law approved by Parliament will be upheld as constitutional if it conflicts with the fundamental rights protected by Part III, superseding the authority of Parliament. Later, the Supreme Court asserted itself as the defender of the Constitution's fundamental principles while usurping increasing amounts of authority.[3] Thus, a stronger system of checks and balances would be created by having a strong executive representation for judicial selections.

Additionally, the Constitution guarantees independent management of the judiciary, and it is difficult for the executive branch to dismiss judges. The administrative costs are deducted from the applicable State's general fund or the Consolidated Fund of India, and they are not up for debate in parliament. Judges' behaviour is also off-limits to Parliament (except in impeachment trials), and their employment status cannot be changed.[4] This demonstrates unequivocally that judicial independence exists thanks to the administrative oversight of the court that the Constitution has supported.

The Constitution's framers made a conscious effort to keep the executive involved in the appointment of the judiciary to ensure that there is no abuse of power by a single branch of government, even though the entire concept of the separation of powers was established to keep each branch independent of the other.

In this work, a more complex judge appointment paradigm will be developed using Britain as one of the instances. After 2006, the appointment system was modified. It was resolved to establish a different committee with the power to suggest judges. The Lord Chancellor, who acts as the Governor Minister, was the only person who could be appointed under the previous appointment system. The former system was abolished on the basis that judges shouldn't simply be appointed by the government. The completely transparent new paradigm made it possible for a competitive hiring procedure. To increase the number of applicants who are finally selected based on merit, the Commission is mandated by law to encourage diversity in the pool of candidates who are eligible for selection.

The Lord Chancellor does, however, only have a limited degree of veto power. This indicates collaboration between the judicial and executive departments. One feature of the British model that shouldn't be imitated is the Commission being presided over by a layperson rather than a member of the judiciary.

This is because judges should be appointed by someone who is educated about that region's governance. By the strategy outlined in this paper, a commission should be set up that would conduct a transparent selection process from a larger pool of candidates, with the government having "limited veto power" that is to be used by it only when the choice of Judges appears to be highly arbitrary.

The third model that this essay focuses on is the South African one. This strategy makes use of a 23-person Judicial Selection Committee. The Chief Justice is in charge of the Commission. The executive is composed of fifteen people. When matters related to specific High Court Judges, the Province's Premier, and Judge President both sit on the Commission. Judges must meet the requirements of being "appropriately qualified" and "fit and proper" to be appointed. Additionally, there would be a process for interviewing candidates where they would be assessed for their commitment to constitutional principles and their support for any political party decisions they might make as judges. Thorough interviews of candidates become a major role in selecting who will be nominated to the judicial branch, as opposed to a collegium system that acts behind closed doors.

The essay suggests a strong executive engagement paradigm (American model) for judicial nominations. Furthermore, it demonstrates how presidential engagement in judicial choices won't compromise judges' and the judiciary's independence (judicial independence being one of the reasons NJAC was disbanded). The nature and scope of executive participation should be equal. According to the South African and British models, the executive should be granted a limited veto that can only be utilized in unusual situations. Finally, the selection of the Chief Justice and the advancement of judges shouldn't be subject to presidential meddling. Even though the Indian judicial system has come a long way, there are still many things that need to be improved.

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[1] Thomas W. Shelton, The Struggle for Judicial Independence, 10 Virginia Law Review, 214 (1924).
[2] Shimon Shetreet, Judicial Independence: New Conceptual Dimensions and Contemporary Challenges, Judicial Independence: The Contemporary Debate.
[3] Pratap Bhanu Mehta, India's Unlikely Democracy: Rise of Judicial Sovereignty, 2 Journal of Democracy, 70 (2007).
[4] Zia Mody, Ten Judgements That Changed India 161 (2013).

OBSERVATION

It has been noted that the current system of judicial appointments lacks properly established norms and regulations, and if it is to continue operating in the future, it will need to adhere to standardized rules just like other systems already in place. The main cause of many events that shouldn't have happened in the first place is the absence of proper rules. Examples include the improper handling of the appointment process, the failure to provide adequate justifications for judge promotions and transfers, the monopoly in judge selection, the use of numerous selection criteria, etc.

Nobody is aware of a standard procedure addressing the standards that are used when choosing judges. There is the seniority criterion, which frequently conflicts with the other criteria, namely merit. We have frequently seen that many young judges are appointed before senior judges, and when asked why, it is typically stated that the collegium gave the appointed judges the go-ahead based solely on their merit. In other cases, the number of judges from a certain parent High Court or a particular locality is taken into consideration while deciding whether to elevate someone. If there are more judges from one particular parent High Court or community than judges being elevated from that court or community, the transfer of the judge to the higher court may be postponed or fail to occur at the scheduled time. Such concerns cause a lot of uncertainty and difficulties even within the bench. So, it is necessary to consider all of these elements.

It is also noted that contrary to what the bench had promised in the NJAC judgment, the current collegium system has not been changed much. Although there were a few modifications, they weren't sufficient. The system still lacks the transparency and accountability that the public demands.

On the other hand, the NJAC was an executive's last desperate effort to seize control of the judicial nominations. These takeover attempts became the main cause of many disputes between the executive and the judiciary over the years. Additionally, the NJAC was poorly written, revealing numerous gaps and flaws in the entire procedure to be used by the system.

The issue with the entire judicial appointment scenario is that the judiciary is not returning its authority and position to the executive branch because there is a strong likelihood that the executive will always seek to control the judiciary and will abuse it to an extent that is beyond our comprehension. The choices made by hand-selected corrupt judges might jeopardize several fundamentals, including judicial independence and fundamental structure. Favourite judges will uphold executive ideals and opinions rather than the principles of the Constitution.

The ability of judicial review, one of the judiciary's most significant authorities, can also be abused by executives, who have historically attempted to change the law to suit their whims and fancies. This will be a major issue because the judiciary has the power to restrain the legislative and executive branches from acting arbitrarily. It also has the power to monitor governmental actions and prevent them from passing laws that are against the Constitution. However, there would be despotism, and everyone and everything will be doomed if the administration seizes control of the court.

CONCLUSION

The study's findings show that the current system has a lot of shortcomings, and fixing them would require considerable efforts by the government, the judiciary, and other academics and intellectuals. However, if it were to be changed, significant adjustments would need to be made, which would be a time-consuming process overall. It was observed that the memorandum of procedure was delayed, involved numerous consultations, and involved frequent file exchanges between the executive and the judiciary, but very few outcomes were obtained.

And if the NJAC were to be re-proposed, it would also need to have several revisions made to its provisions, which might fundamentally alter the prior system of appointment procedure the NJAC had chosen.

Due to this, a new appointment system that is distinct from the two existing ones should be implemented. This system should be improved upon while taking into account the goals of the two existing ones, the reasons for their failure, and any other factors about how the two systems function.

SUGGESTIONS

The following recommendations are offered to make judicial nominations to the higher judiciary more seamless:

a) A completely new system should be established to allow for the appointment of judges to the higher judiciary.

b) RTI needs to apply to judicial appointments, which can result in a higher overall level of transparency.

c) The requirements for the appointment, as well as other factors like the transfer and elevation process, etc., need to be reviewed. It should also cover the process for appointing ad hoc judges, as well as the process for adding more judges and making them permanent.

d) There needs to be a grievance cell that only deals with complaints about judicial appointments. This is necessary because it has been observed that a large number of complaints from judges of the Supreme Court and High Courts are frequently dismissed or ignored, and because judges are well aware of the number of cases that are pending, they often choose not to take them to court.

e) Records of the circumstances surrounding the elevation or transfer of a judge must be properly and strictly maintained. The Chief Justice and the President must decide whether or not to reveal information in cases of national security.

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