
IF NOT COLLEGIUM THEN WHAT ELSE?

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Recent speeches delivered by the Hon'ble CJI B R Gavai and SC Judge Suryakant regarding the most censored part about Indian Judicial system, Collegium. Numerous debates have sparked in various spectrums of media, arguing the merits and demerits of collegium. From politicians to bureaucrats to the very lay person it has become talk of the town. For every partisan and functionary outside judiciary this topic is not less than a punching bag, discussing, arguing and analysing credits to drop in their bag of political favouritism. In this match of competency, collegium has become the ball which is kicked and chased by all the stakeholders of state. Some months back the then law minister Kiren Rijiju made a public statement the saying, "*...collegium is opaque, Govt can't be silent forever...*" criticising the collegium system where India being the alone nation around the globe where judges appoint judges.

Evolution of collegium all started with the First Judges case¹ of 1981, the circular sent to various chief ministers of states regarding the appointment of additional judges was challenged before the Supreme Court by an advocate from Allahabad S P Gupta. This case was heard by a 7-judge bench lead by CJI P N Bhagwati, passing the verdict by 4:3 ratio, where primacy to the executive's decision was given on the reasoning of that "Consultation" in Articles 124(2) and 217(1) didn't mean "concurrence" thus the opinion of chief justice was never bidding over the executive. In this system the consultation with CJI and Chief Justice of respective High court was merely a formality due to the constitutional obligation, this created a scenario where it hammered Article 50, independence of judiciary from other 2 organs of democracy. These all unanswered questions lead to the Second Judges case, this case overturned the earlier judgement and made severe changes in the procedure of appointment of judges. This case laid the foundation stone for the Collegium. This case was heard by a 9-judge bench of Supreme Court headed by the then CJI J S Verma, where it was held that the opinion of CJI will be considered of primacy and no recommendation would be considered valid unless the primacy to CJI's opinion is given. This was the first instance where the thought of collegium was born, it was held in this case that CJI cannot individually give opinion on appointment and transfer of judges, his opinion should be backed by the opinion of 2 senior most judges of Supreme Court. Overruling the previous verdict SC held that Consultation means Concurrence under

Articles 124(2) and 217(1). This case surely laid the base for collegium but still there were many questions unanswered and the proportion of ambiguity brainstormed the government machineries over appointment and transfer of judges. Due this puzzling situation, in 1998 President by exercising his powers under Article 143, sought advice of the SC over this issue clarifying the ambiguous parts of the Second Judges case. Supreme Court by widening the scope of consultation gave it a multidimensional touch stating that plurality of judges and their opinion should lead to the opinion construction of CJI which would eventually be sent to the executive on whose aid and advise the President would make the appointment. Establishing the criteria:

1. Appointment of Supreme Court Judges and Transfer High Court Judges

A forum consisting of CJI and 4 senior most judges of Supreme Court would give opinion and formulate the recommendation of CJI. In cases of transfer of High Court Judges, the Chief Justice of the respective High Court would be consulted.

2. Appointment of High Court Judges

A forum of CJI and 2 senior most judges of Supreme Court would give opinion and formulated the recommendation of CJI. Consultation would be made with Chief Justice of the respective High Court and also with the judges whose parent High Court were these High Court.

In this Special Presidential Reference, SC introduced a fresh aspect of judicial review of such recommendation, where it rendered that recommendation made without the procedure as above established would be subject to judicial review unless this base, the recommendation won't be attracting the magnet of judicial review.

These 3 Judges cases established the pathbreaking rules which guided the route of judiciary towards impartiality, fairness and independency.

When we look around the globe and travel to the realms of various judiciaries and their functioning, we get a holistic view on what being suitable and sustainable judiciary for the society. In judiciary hard and fast decisions never make a criterion rather the role of the judiciary is to keep trust of the people and by preventing injustice which can also arise due to hurried decisions. While pulling parallels with the judiciaries of multiple nations, we witness

the merits and demerits of each of them. In the United States of America, judges of the Supreme Court are nominated and appointed by the President and Senate of the state. This clearly showcases how can executive influence judicial appointments and get judges to the bench who are of favouring ideological mindset. This system invites the threat of interpretation which favouring to executive, thus raising the question of judicial independence. We can see how legislature and executive both influence the appointment of judges in the highest tier of judiciary. At an instance in US Supreme Court, when President Eisenhower a republican, nominated Earl Warren for Chief Justice expected him to make conservative decisions, but down to his fate Earl Warren didn't act as expected by President Eisenhower. This alarms towards imposition of political ideologies and expectations on the judicial systems. In United Kingdom, judges of the Supreme Court are appointed by the Crown of the advice of the Prime Minister, the Lord Chancellor recommends the candidature to Prime Minister based on the report submitted by the Selection Commission established under Constitutional Reforms Act of 2005. But though the judicial systems of United Kingdom seem to be independent and transparent, the Lord Chancellor still has power to reject, the report submitted by the Selection Commission which again brings the question of judicial independence and freedom.

Considering the Globe Judicial Appointment Systems and comparing it with Indian Collegium system there are enormous perks of having a Collegium system where there is no interference of executive or legislature in selecting the judges of Supreme Court and various high courts, rescuing the appointees and judges from falling at the mercy of legislature and executive. Collegium appointing judges would eventually lead to new judges coming into forum who would be neutral and not inclined towards any politically motivated ideology as learnt from the American judicial appointment system. In collegium the notion of merit and credibility would be maximum as Judges who are experts would be appointing judges of similar expertise. The sense of responsibility on the shoulders of judges would be increased as their one decision of appointing a wrong judge would put their system of collegium under the scope of questions and criticism.

No system can function without flaws, even in collegium there are number of flaws such as opacity in appointment procedure, no direct or indirect role of people in judicial appointment process, over autonomy to judiciary to take independent decisions, role of Prime Minister and President in judicial appointment procedure only a formality, and etc. But there is no other system in the present realm which can be a replacement to collegium. During one of the

lectures of Justice Rohinton Nariman (Retd.), he described this collegium as “...*this is the best among what we have...*”. Therefore, collegium is that stone which is put at the wheels of car named Indian Judiciary so that the car doesn’t descend it’s position. The ultimate goal being that the system can work at neutral efficiency but decrease in efficiency would lead to catastrophic outcomes. Thus, Collegium system is the best among what we have, thus giving more hall of confidence to the stakeholders of the nation.

Recently the speeches by Hon’ble CJI B R Gavai and Justice Suryakant have reignited the public discourse regarding the India Judiciary’s Judicial appointment system Collegium. Often criticised for it’s opacity, the system is often argued in political as well as legal circles, especially after the fueling comment by Former law Minister Kiren Rijiju that “*the government can’t be silent forever*” on this judges selecting judges model.

The Collegium's evolution had several ups and downs, but it navigated through the *Three Judges Case*. In the *First Judges Case (1981)*, the SC gave primacy to the executive, holding that ‘consultation’ did not mean ‘concurrence’. This undermined the judicial independence under Article 50. However, the *Second Judges Case (1993)* overturned its earlier precedent by establishing that the CJI’s opinion (supported by the 2 senior-most Judges) would hold primacy, and ‘consultation’ meant ‘concurrence’ under Article 214(2) and 217(1). The *Third Judges Case (1998)* clarified via The Presidential Reference that the CJI’s recommendation (backed by 2 senior-most judges) was to hold primacy, ensuring diverse opinions and independence of judiciary. Laying the establishment of the current Collegium system where:

1. For SC appointments and HC transfers, a collegium of the CJI and four senior-most SC judges deliberates.
2. For HC appointments, a collegium of the CJI and two senior-most SC judges consults the concerned HC’s CJ and others.

Across the globe, the executive branch has a lot of say in who gets appointed to the judiciary. In the U.S., the President and Senate choose judges, which could lead to bias based on ideology. The Lord Chancellor in the UK can still say no to suggestions, even though they are more structured. India's collegium, on the other hand, keeps the courts safe from political pressure, making it an effective and efficient system.

But this system does have some problems, such as a lack of openness, a lack of public accountability, and too much independence for the courts. Critics want changes, not the end of the program. Justice Rohinton Nariman said it best when he said that the collegium is "the best among what we have."

So, even though it isn't perfect, the Collegium is still the most reliable way for India to protect the independence of the judiciary and the trust of the institutions, keeping politics out of the courts.