
DEMYSTIFYING THE COLLEGIUM SYSTEM: EXAMINING JUDICIAL APPOINTMENTS IN INDIA

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The appointment and transfer of High Court and Supreme Court judges in India is done by the President of India after the recommendations by the Collegium of the Supreme Court of India which consists of the Chief Justice of India along with the other four senior most judges of the Supreme Court. The collegium system has always been subject to controversy for various reasons. The critics of the collegium system argued that it lacks transparency and accountability which might lead to favoritism and undermining the independence of the judiciary. India which is considered to be the largest democracy of the world is the only country where judges are authorized to appoint judges compared to United States which is the oldest democracy of the world, the Supreme Court judges are primarily appointed by the President of the United States after the approval of the U.S. Senate.

The arguments which are put in favor of the collegium system is that the collegium system safeguards the judicial independence of the judiciary from political interference by giving the judges a significant say in the appointment and transfers. The Doctrine of Separation of Powers which is considered to be part of the basic structure of the Indian Constitution which mentions the division of powers between the legislature, executive and judiciary to ensure proper checks and balances in powers which is essential in a democracy. As per Article 50 of the Indian Constitution, the judiciary is considered to be separate from the executive as per the Directive Principles of State Policy and it is considered to be a fundamental feature of the Indian Constitution.

The constitutional provisions regarding the appointment of judges in Supreme Court is mentioned in Article 124 of the Indian Constitution where the President of India is authorized to appoint the judges after the consultation with the Chief Justice of India. The collegium System evolved over time by the four judges cases in the Supreme Court of India which are mentioned in detail down below:

1) S.P. Gupta vs Union of India (1981)

- This is known as the first judges case which set an important precedent. It was heard by a seven judge division bench which was headed by Hon'ble Justice P.N. Bhagwati who became the 17th Chief Justice of India in the year 1985. Several writ petitions were filed in the Hon'ble Supreme Court and one of them was filed by S.P. Gupta who served as an attorney in the Allahabad High Court at that point of time under Article 32 of the Indian Constitution challenging the order of the Government in non-appointment of two judges and their transfer. The main issue, in this case, was the constitutional validity of the order of the Central Government on non-appointments and transfer of judges in High Courts for a short term, the independence of the judiciary and the procedure for the appointment of judges in higher courts of the country.
- After hearing both the petitioner side and the respondent side, the Hon'ble Supreme Court in its judgement mentioned that the President of India in consultation with the Hon'ble Chief Justice of India and other senior Supreme Court judges had the authority to appoint judges in the higher judiciary. The Supreme Court in its judgement also mentioned that the Chief Justice of India did not have primacy in the appointment of judges, instead it affirmed the role of the executive in appointment of judges.

2) Supreme Court Advocates-on-Record Association vs. Union of India (1993):

- This is known as the Second Judges Case. The main issue involved around this case was whether the independence of the judiciary is part of the basic structure of the Constitution or not.
- In this case, a nine judge bench of the Hon'ble Supreme Court gave a historic verdict which established the Collegium System comprising of the Chief Justice of India along with four senior most Supreme Court judges. The Supreme Court ruled that the Chief Justice of India along with the collegium should have the primary say in the transfer and appointment of judges and as a result the role of the executive was reduced considerably. The judgement mentioned that the appointments should be based on merit and integrity rather than political favours and Quid Pro Quo.

3) In Re: Special Reference, 1998:

- This is known as the third judges case. In this case, the Supreme Court reaffirmed the judgement given in the second judges case and mentioned that the recommendations made by the Collegium was binding on the President of India. The term “concurrence” was established which meant that the Collegium had the final say and the decisions of the collegium can’t be challenged in the court.
- The criteria of appointing judges in the higher judiciary based on merit and integrity was reaffirmed by the Supreme Court and the judgement also gave emphasis to transparency in the functioning of the Collegium and also mentioned that certain due aspects of the Collegium must be kept confidential.

National Judicial Appointments Commission (NJAC)

The National Judicial Appointments Commission was the judicial body proposed by the Government of India to replace the existing Collegium System. In August 2014, Mr. Ravi Shankar Prasad who was the Law Minister of India at that point of time introduced the NJAC Bill, 2014; in Lok Sabha at that point of time. The National Judicial Appointments Commission was established subsequent to the passing of the bill which is known as the 99th Amendment to the Constitution of India. Article 124(A) was added to the Indian Constitution which laid down the composition of the NJAC. The NJAC comprised of the following:

- Chief Justice of India;
- Two Senior most judges of the Supreme Court;
- The Union Minister of Law and Justice;
- Two eminent persons who would be nominated by the committee comprising of the Chief Justice of India, the Prime Minister of India and the leader of opposition in the Lok Sabha.

The establishment of the Constitutional Validity of the NJAC was challenged in the Supreme Court in 2015 subsequently. The case related to NJAC was formally known as Supreme Court Advocates of Association vs Union of India which is commonly known as the NJAC case.

A five judge constitutional bench consisting of Justice K.S. Khekar, Justice Kurian Joseph,

Justice Madan B. Lokur, Justice A.K. Goel and Justice J. Chelameshwar heard the case. The Supreme Court while delivering its judgement on the NJAC Act, declared it, unconstitutional and as a result the 99th Amendment of the Indian Constitution was struck down by the Supreme Court in a 4:1 judgement. The Supreme mentioned that the NJAC Act violates the basic structure of checks and balances in the Indian Constitution which was established in the Kesavananda Bharti case in 1973 as it gave the executive more power in appointment and transfer of judges and it might ultimately lead to biasness and political favours.

Justice J. Chelameshwar was the only dissent voice in this judgement as he mentioned that the collegium system had its own fault lines and lacked due transparency which is essential in the constitutional process.

Criticism of the Collegium:

As it's mentioned above, the Collegium System is known to be opaque and lacks transparency and unlike the executive, the judiciary is not answerable to the public. In India, if someone questions the authority of the judges or criticizes them then that person might be charged with criminal contempt of court. In the Second judges case, the power to appoint and transfer judges was completely transferred to the judiciary from the executive. Several eminent jurists including Harish Salve, Dushyant Dave and many others have pointed out that India is the only country in the world where the judges are said to be appoint judges and have termed the Collegium System as absolutely dysfunctional. Even Justice Kurian Joseph who was part of the 5 judge bench that favoured declaring NJAC as unconstitutional later on regretted his decision of striking down NJAC after seeing the situation later on. Whether any good alternative comes out in the foreseeable future to the Collegium System might be an interesting development that definitely would shape the dynamics of the checks and balances between the three organs of the Indian democracy.