

COLLEGIUM SYSTEM IN INDIAN HIGHER JUDICIARY: AN ANALYTICAL STUDY

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<https://doi.org/10.61410/had.v18i2.159>

Abstract

The Indian judiciary is the protector of the Indian Constitution, 1950. It's declared by the constitution itself on the basis conferred power for its protection and justice administration under the providing constitutional provisions. That is the important thing, the theory of Montesquieu's Separation of power adopts in the constitution as law making power vest in the legislature, executive power vest in the administrator and power of justice vested in the Judiciary. Article 50 of the Indian Constitution expressly imposed responsibility upon the State to separate from the judiciary to the executive. Judiciary is specifically distinguished from both the executive and the legislative. According to Article 124(2) of the Indian Constitution the appointment of judges to the High Courts and the Supreme Court is completed by the President through the collegiums. At present, the collegium system for the appointment of judges in the Supreme Court is a burning issue before the country and is being taken up by the country's executive.

This article will provide and extend the knowledge about the collegiums system and its applicability in the appointments of judges in higher judiciary and also analyze, who is the organ of government, empowers and enjoys the power of appointment of judges truly.

Key words: Judiciary, Separation, Constitution, Collegiums, Appointments, High Courts and Supreme Court

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INTRODUCTION-

An independent judiciary is the main feature of the Indian Constitution. The framers of the constitution wanted a strong judicial system to dispense justice without fear, coercion and interference from other organs including the government. These are some of the Articles of the Constitution which are designed by the framers to strengthen the Supreme Judiciary such as Article 129 establishing the Supreme Court as the Court of Record and giving it the power of contempt¹, Article 141 states that all subordinate courts are bound to act in accordance with the law made by the Supreme Court¹ and Article 144 binds all civil and judicial officers acting in aid of the Supreme Court¹.

¹ Singh Mahendra Pal, *V.N. Shukla's Constitution of India*, 510, 12th Ed. Lucknow: Eastern Book Company publishing (P) Ltd, 2013.

Upadhaya Jai Jai Ram (Dr.), *CLA'S Bare Act the Constitution of India*, 67, Diglot Ed. Allahabad: Central Law Agency, 2010

Pandey Jai Narayan (Dr.), *The Constitutional law of India*, 499, 43rd Ed. Allahabad: Central Law Agency, 2010

In light of the ongoing dispute between the government and the Supreme Court regarding the collegium system, many see it as a new attempt by the government to meddle in the appointment of judges to the higher judiciary.¹

On January 16, reports claimed that Union law minister Kiren Rijiju had written to the Chief Justice of India (CJI) requesting the inclusion of a government representative on the search-and-evaluation committee.¹

The news of this letter created a stir among lawyers and the general public alike. Many saw it as a renewed attempt by the government to interfere in the appointment of judges to the higher judiciary amidst the ongoing tussle between the government and the Supreme Court on the collegium. Previously, the government's attempts to place its representative in the judges-only collegium were shot down by a Constitution Bench in its National Judicial Appointment Commission (NJAC) judgment in 2015.¹

Subsequently, the law minister took to twitter to clarify that his suggestion was being made in line with the observations and directions of the Constitution Bench. He added that the Constitution Bench had sought to restructure the Memorandum of Procedure (MoP) and the search cum evaluation committee is envisaged for preparation of a panel of eligible candidates.¹

The MoP is an agreement between the judiciary and the government with a set of guidelines on making appointments to the higher judiciary. It was first framed in 1999, pursuant to the decisions in the judges cases. Thereafter, the appointments were made in consonance with it.

In the NJAC judgment, the court observed that the MoP must be revisited to avoid any complications. Subsequently, the government drew up a new draft of the MoP in 2017 and sent it to the Supreme Court. However, the parties have not been able to reach a consensus on the 2017 draft.

The law minister, in his tweet, suggested that the letter was an attempt to restructure the existing MoP.¹

In the US, judges of the Federal Court are appointed by the President with the advice and consent of the Senate. The candidates are assessed by a committee of the American Bar Association and reviewed by the Senate Judiciary Committee before a vote in the Senate. There is no set retirement age for judges in the US as they continue to hold office for "good behavior".¹

In the UK, it is the independent Judicial Appointments Commission (JAC) that oversees the process of judges' appointments. The JAC consists of 15 members; three of these are judges, while 12 members are selected through a process of open competition.¹

In France, judges are appointed by the President on the recommendation of the Higher Council of the Judiciary. The judges are appointed for three-year terms, which are renewable on the recommendation of the Ministry of Justice.¹

In South Africa, there is a 23-member Judicial Services Commission (JSC) that advises the President to nominate the judges.¹

<https://www.moneycontrol.com/news/trends/legal/collegium-controversy-what-does-the-law-ministers-suggestion-mean-9892531.html>

[https://theprint.in/judiciary/rijiju-writes-to-cji-wants-panels-with-govt-reps-to-advise-collegium-on-judges-appointments/1317404/;](https://theprint.in/judiciary/rijiju-writes-to-cji-wants-panels-with-govt-reps-to-advise-collegium-on-judges-appointments/1317404/)

<https://twitter.com/LiveLawIndia/status/1617518668044460038>

Writ Petition (civil) no. 13 of 2015 Supreme Court Advocates-on-Record - Association and another versus Union of India

<https://twitter.com/KirenRijiju/status/1615073042643976192?lang=en>

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<https://www.uscourts.gov/faqs-federal-judges>; <https://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president>

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In most Latin American countries like Argentina and Brazil, the President nominates the judges, subject to the approval of the respective Senates.

THE COLLEGIUM SYSTEM AND ITS CONSTITUTIONAL PROVISIONS-

The freedom of judges has a close relationship with judicial appointment as the appointment of Judge by the head of the state is followed in most of the countries of the world. Appointment by the head of the state with the consultation of the Lord Chancellor was essentially the British method¹ which was adopted in the Indian Constitution provided under Article 124 (2) of Indian Constitution 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 of the High Court 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.*¹

According to this Article, the Judge should be appointed by the President with the consultation of Chief Justice of India and the senior Judges of the Supreme Court. The reason for the consultation with the Chief Justice of India and the Judges of the Supreme Court is that they are well qualified by reason of their long tenure. But in the case Supreme Court Advocates-On-Record Association V. Union of India,¹ popularly known as THREE JUDGES CASE the concept of collegium system was evolved.¹

The Collegium System of Supreme Court is one of the very important topics in understanding the appointment of the Supreme Court judges and the judicial system. It is the system of appointment and transfer of judges that has evolved through judgments of the SC, and not by an Act of Parliament or by a provision of the Constitution. The Collegium System of Supreme Court is headed by the CJI (Chief Justice of India) and comprises four other senior most judges of the court.¹ A High Court collegium is led by the incumbent Chief Justice and two other senior most judges of that court. Judges of the higher judiciary are appointed only

through the collegium system and the government has a role only after names have been decided by the collegium.¹

Procedures for Judicial Appointments

Chief Justice of India:

The President of India appoints the CJI and the other SC judges. As far as the CJI is concerned, the outgoing CJI recommends his successor. In practice, it has been strictly by seniority ever since the supersession controversy of the 1970s.¹

Supreme Court Judges:

For other judges of the SC, the proposal is initiated by the CJI. The CJI consults the rest of the Collegium members, as well as the senior-most judge of the court hailing from the High Court to which the recommended person belongs. The consultees must record their opinions in writing and it should form part of the file. The Collegium sends the recommendation to the Law Minister, who forwards it to the Prime Minister to advise the President.¹

<https://www.indiatoday.in/law/story/centre-vs-collegium-how-judges-are-appointed-in-india-us-uk-and-other-countries-2326456-2023-01-25>

Supra note 10

Supra note 2

AIR 1982 SC 149

Basu Durga Das (Dr.), *Bharat ka Samvidhan -ek parichay*, 295-296, 8th Ed. Nagpur: Wadhva and company, 2002 Re print 2008.;

<https://www.legalserviceindia.com/legal/article-3681-collegium-system-in-india.html>

Supra note 1, P. 505

Ibid P.644

Supra note 3, P.467

Supra note 19, P. 504

Chief Justice of High Courts:

The Chief Justice of the High Court is appointed as per the policy of having Chief Justices from outside the respective States. The Collegium takes the call on the elevation. High Court judges are recommended by a Collegium comprising the CJI and two senior-most judges.¹ The proposal, however, is initiated by the outgoing Chief Justice of the High Court concerned in consultation with two senior-most colleagues. The recommendation is sent to the Chief Minister, who advises the Governor to send the proposal to the Union Law Minister.

INCIDENTS'/ JUDICIAL PRONOUNCEMENTS ON COLLEGIUMS SYSTEM-

Appointment of CJI 1950-1973

Until 1973, there existed a consensus between the Government of the day and the Chief Justice of India. A convention was formed where the senior-most judge of the Supreme Court was to be appointed as the Chief Justice of India.¹

In 1973, A. N. Ray was appointed as the Chief Justice of India. This violated the convention formed earlier since Justice A. N. Ray superseded three other Supreme Court judges senior to him.¹

Again in 1977, another chief justice was appointed who superseded his seniors. This resulted in a clash between the Executive and the Judiciary¹.

S. P. Gupta Vs. President of India and Others known as the First Judges Case, 1981. In the case it declared that the “primacy” of the CJI’s (Chief Justice of India) recommendation on judicial appointments and transfers can be refused for “cogent reasons.” The ruling gave the Executive primacy over the Judiciary in judicial appointments for the next 12 years.¹

In the case **Supreme Court Advocates-on-Record Association and Anr. Vs. Union of India**, which are known as the second judges case, 1993. Another petition was filed in 1993 by the Supreme Court Advocates on Record Association (SCARA). In this case, the Supreme Court overruled its earlier verdict and changed the meaning of consultation to concurrence. Thus binding the President of India with the consultations of the Chief justice of India. This resulted in the birth of the Collegium System.¹

In Re: Under Article 143 (1) of The ... v. Unknown known as the third Judges Case, 1998. In the year 1998, the presidential reference to the Supreme Court was issued questioning the meaning of the word consultation in articles 124, 217, and 222 of the Constitution. The chief justice won’t be the only one as a part of the consultation process. Consultation would include a collegium of 4 senior-most judges of the Supreme Court. Even if 2 of the judges are against the opinion, the CJI will not recommend it to the government.¹

The Collegium System faced a lot of criticism not only from the government but also from civil society due to its Lack of Transparency and Accountability. This led to the
Ibid, P. 664

Supra note 17, P. 295

Sharma Brajkishor, *Bharat ka Samvidhan ek parichay*, 249, 9th Ed. New Dehli: PHI Private Limited, 2012.

Ibid, P. 250

S.P. Gupta v. President of India and Ors. on 30 December, 1981: AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365: <https://indiankanoon.org/doc/1294854/>

Supreme Court Advocates-on-Record Association and Anr. Vs. Union of India [1993] Supp 2 SCR 659, <https://indiankanoon.org/doc/753224/>

In Re: Under Article 143(1) Of The ... v. Unknown on 28 October, 1998: AIR 1999 SC 1, RLW 1999 (1) SC 168, 1998 (5) SCALE 629, 1998 Supp 2 SCR 400:

<https://indiankanoon.org/doc/543658/>

99th Constitutional Amendment Act, 2014 the National Judicial Commission Act (NJAC) to replace the collegium system for the appointment of judges.¹

National Judicial Appointment Commission Act, 2014

The 1993 judgment was the basis on which a five-judge Constitution Bench declared the National Judicial Appointments Commission Act (NJAC) and the Constitutional (Ninety-Nine Amendment) Act, 2014 unconstitutional in October 2015.¹

CONCLUSION-

When we come to the conclusion on the above fact mentioned and after the analysis, our study finds that the collegiums system originate through the interpretation of Supreme Court of India in the case *Supreme Court Advocates-on-Record Association and Anr. v. Union of India*, 1993. The two historical incidents was happens in Apex judiciary of the country first in

1973 the A. N. Ray was appointed as the Chief Justice of India violated the convention formed earlier since Justice A. N. Ray superseded three other Supreme Court judges senior to him and second Again in 1977, another chief justice was appointed who superseded his seniors. This resulted in a clash between the Executive and the Judiciary. The third Judges Case, 1998. In this case described the meaning of the word consultation in articles 124, 217, and 222 of the Constitution. The chief justice and collegium of 4 senior-most judges of the Supreme Court are part of the consultation process. If two of the judges are against the opinion, the CJI will not recommend it to the government. The collegium system faced a lot of criticism from both the government and civil society for its lack of transparency and accountability. Then the government enacted the National Judicial Commission Act, 2014 (NJAC) to replace the collegium system for appointment of judges. It's declared unconstitutional a five-judge Constitution Bench on the basis of second judges' case 1993 in 2015 case.

Recently law minister Kiran Rijju wrote a letter to CJI and demanding the representation of the executive/government in the search-and-evaluation committee of judges of Supreme Court. And they subsequently clarify that he wants to the changed Memorandum of Procedure. Article 124 (2) and 217 of the Indian Constitution provides procedure of Appointments of the judges in the Supreme Court and the high courts. Entry No. 95 of the Seventh Schedule, List -I of the Constitution gives power to the Central Government to make laws, which mentions that "Jurisdiction and powers of all courts, **except the Supreme Court**, with respect to any of the matters in this List; admiralty jurisdiction." As per this entry, the Central Government is expressly prevented from interfering in the matters described herein relating to the Supreme Court. The end of conclusion it is clarify that appointment of the judges of high court and the Supreme Court followed the collegiums system and judiciary enjoyed this power.

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