NJAC AND COLLEGIUM SYSTEM: RETROSPECT AND PROSPECT

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Abstract

The debate regarding the appointment of judges has been going on for a long time and has had a long and controversial history of deliberation and judgments. The collegium system that has been going on for a while was sought to be replaces by the National Judicial Appointment Commission Act of 2014, which was declared unconstitutional by the apex court in October, 2015.

But the debate regarding the appointing body continues. This paper seeks to highlight the divisive background of the debate and delve into the matter of competence and legitimacy of the Collegium System and also, suggest reforms in the same.

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THE RECENT LANDMARK DECISION

The Supreme Court of India, on October 16, 2015, in the case *Supreme Court Advocates-on-Record-Association and Anr*. v. *Union of India*, passed a historic judgment that clearly laid down that National Judicial Appointments Bill, passed in November, is unconstitutional and that the ongoing 'Collegium System' was to continue.

NJAC, originated by the NDA government, had sought to replace the more than two decades old Collegium system, a system followed by the Indian Judiciary to appoint CJI and other judges of the Supreme Court and High Courts. Apart from this, the apex Court declared unconstitutional the 99th Constitutional Amendment that was to bring this Act and replace the Collegium System. Central government's plea for a review by a larger bench was also rejected.

This landmark judgment was passed by a five judge bench of Justice J. S. Kheher, J. Chelameswar M B Lokur, Kurian Joseph and A K Goel.

This case, which is now being called the second landmark case after the *Keshawananda Bharati Case*, had a 31 days marathon hearing and constitutes an interestingly controversial history, and at the same time, an significant background. This will go deep into the historical background and also the prospective effects of his judgment, and would suggest alternatives to the ongoing dispute regarding appointment of judges.

THE DEBATE

The judiciary is one of the vital pillars for the country's social and political development. Not only does it upholds the rights of the citizens and administers justice to them, but also keeps a check on the law making body and the implementers. In such circumstances, of course, appointment of judges in the judiciary, who are the upholders and protectors of its principles, is a crucial matter. It acts as the interpreter and the guardian of the Constitution.

According to the Centre, there are discrepancies and opaqueness in the Collegium system. This appointment body only consists of existing members of judiciary- CJI and two senior judges of the Supreme Court- and has fallen deep into corruption, bias and favouritism. Hence, it needs revision and improvement. Centre got the support of the Supreme Court Bar Association and twenty state governments that ratified the Act, in this matter.

The judiciary, on the other hand contends that the results of handing over the appointment of judges to non-judicial authorities will be disastrous and the appointment process should remain within the domain of the judiciary.

THE CONTROVERSY

The hullabaloo regarding appointments of judges started in 1982, from the case *S.P. Gupta v. Union of India*. The major issue in this case was whether the opinion of the Chief Justice of India had predominance over other authorities and if CJI's advice was binding on the

President of the country while he made appointments. The decision did not favour the judiciary.

Justice P.N. Bhagwati clearly stated that the judges are merely constitutional functionaries and appointment of judges was a matter purely in the domain of the central government.[1] Like him, according to many in the legislature and executive, it was merely 'consultation with the Chief Justice' that was provided in clause (1) of Article 217 of the Indian Constitution. Ironically, when he became the President of India, his own recommendations were not accepted by the centre, relying on his own judgment.[2]

Also, in this decision, it was laid down that the President's decision regarding judicial appointments could not be questioned, not even on the questions of mala fide intentions or abuse of constitutional powers. This legislation was, hence, called the 'New Year gift of the Executive.'

Noted jurist, H.M. Seervai, has criticized this judgment for not following the provisions of Article 145(4) and (5).[3]

This decision proved problematic for the judiciary. Issues of bias and interference soon began to surface in the political tissue of the country. Judicial independence started to be hindered. One such instance could be seen during the time of emergency in 1970s, when Justice A.N. Ray ordered transfer of certain judges from one court to another, on the sole ground that they had decided some cases that were politically against the central government of the time.

It was due to this unwarranted interference and nepotism that another case regarding the appointment of judges came up before the judiciary- *S.C.Advocates on Record Association v. Union of India*[4], popularly known as the *Second Judge Case*, when a writ petition was filed in the Supreme Court by Lawyers Association that put forward some grave issues regarding the appointments of judges.

The two important issues were- whether the Chief Justice had a binding opinion over judicial appointments and whether these matters were justifiable.[5]

The majority in this case decided that Chief Justice was in a better position to know which judges should be appointed and he, along with the senior most judges of the Supreme Court, should decide the appointments of the judges and the deciding collegiums need not give regard to the government's view.

However, the constitution nowhere provides for the collegiums system.

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[1] Abhishek Sudhir, Restoring the judiciary's credibility, The Hindu, (Nov. 15, 2014), http://www.thehindu.com/opinion/lead/restoring-the-judiciarys-credibility/article6242504.ece

[2] Extracted from the autobiography of F S Nariman 'Before Memory Fades An Autobiography' Chapter 16, Hay House, 2010.

[3] H.M.Seervai, Constitutional Law of India (Silver Jubilee Edition 4th ed. Vol 1, 1991).

[4] S.C.Advocates on Record Association v. Union of India , A.I.R.1994 S.C. 268.

[5] Abhinav Chandrachud, The Informal Constitution-Unwritten criteria in selecting judges for the supreme court of India 121-122 (Oxford University Press 1st ed. 2014).

This collegiums system has been criticized for its nepotism, impracticality and lack of transparency.[6] The discussions and deliberations of the collegiums are secret. The quality of the appointed judges was deteriorating and their characters were repeatedly coming into question. As a result, favouritism, casteism, sexism, corruption, medeocrity and nepotism ruined the selection process of the judges.

Fali S Nariman also stated that "If there is one important case decided by the supreme court of India in which I appeared and won, and which I have lived to regret, it is the decision that goes by the title – Supreme Court Advocates on Record Association v. Union of India."[7]

Again the issue came before the court in 1998, during the Vajpayee government, when a presidential reference was made to the Supreme Court due the issues that had arisen after, and because of, the Second Judge Case judgment. This came to be known as the *Third Judge Case*. The judgment of this case was not as the government wished it had been. It was not only in judiciary's favour, but also enlarged the scope of its powers.

There has been a lot of criticism of the Third Judge case, which can in no way be discredited or disregarded. The collegium works without any king of transparency. The criteria on which it selects and appoints judges is not concretely decided. It favours superiority in age over that of wisdom and knowledge. It has led to an inherent corruption, bias and preferential treatment in the selection process.

OBJECTIONS AND ISSUES TO BE ADDRESSED

Now that the collegium system has been upheld, there are several objections against NJAC that need to be relooked upon and several issues regarding the collegium system that need to be addressed.

The *judiciary was never consulted* while framing the NJAC bill. *Opinions and advice of the judiciary was not sought* and considered. Although the Indian Constitution has no mention of collegium, the Constitution, without any doubt, upholds the principle of '*independence of judiciary'*, which, as the political history dating back to the period of emergency proves, is necessary and indispensable. The provision of *veto power* limits the power of the judges in deciding appointments, which leaves a high probability that the vote of the two members of legislature and the eminent person can override the wishes and opinions of the members of the judiciary.

But, the collegium system is by no means free of defects. The apex court, while deciding the recent decisive case, has agreed to the fact that it needs reconsideration and amendment. The fact that the deciding bench of the case met again on November 3, 2015, to discuss and suggest reforms in the collegium system, proves that it is in grave need of reformation.

REFORMS IN THE COLLEGIUM SYSTEM

[6] N H Hingorani, Collegium System of Judicial Appointments: Constitutionally Invalid, (Oct. 28, 2014), http://www.lawyersupdate.co.in/LU/1/1591.asp.
[7] Supra note 2.

After the recent judgment declaring NJAC null and void was passed, the same bench that decided this case called a meeting on 3rd November, 2015, to suggest reforms and improvements in the collegiums system. Even in the landmark judgment in question, the constitutional bench has admitted that the ongoing system needs reform. This proves that the collegiums system is not free from evils and desperately needs restructuring and alteration.

As the legislative and executive history of India proves, we cannot do away with the Principle of Suppression of Powers and cannot afford interference in the judicial appointments.

Following are some *suggestions* for the reformation of the collegium system:

1. The criteria for the selection of judges should be pre decided and the collegiums of judges should be obligated to respect and follow the criteria that are laid down.
2. The discussions, deliberation and reason of appointments of the collegiums should not be secret, but should be made public.
3. Seniority of the judges who appoint other judges should not be based on age, but on knowledge, wisdom and their previously decided cases.
4. More participation of women in the collegiums, as there is a shocking difference between the number of male and female judges in the judiciary.
5. The President should have the power to ask the collegiums to reconsider a particular appointment, though, this advice should not be made binding on the collegium.

CONCLUSION

As legislative and executive history of India proves, NJAC is not an acceptable reform in the appointment process, but the shortcomings of the collegiums system cannot be overlooked. The system has become biased, opaque and secretive, and needs immediate reforms, like- a pre decided criteria for selection and more transparency in the decision process. If not done so, and the current system is allowed to continue, the future result can be an opaque, discriminatory and whimsical selection system that has the ability to infringe on the basic rights of the citizens and hamper legislative operation and competence.