

COLLEGIUM SYSTEM FOR JUDICIAL APPOINTMENT IN HIGH COURT AND SUPREME COURT – THE INTERFERENCE OF EXECUTIVE AND LEGISLATURE

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Abstract

There has been a nationwide debate going on in India about the system of appointment of Judges for High Courts and Supreme Courts. The exclusive power vested in the executive to appoint the judges through the recommendations made by the Collegium. In 1993, the Supreme Court created a new system for appointment of judges is called as "Collegium System. Whereas the Chief Justice Of India and Senior Judges of the Supreme Court make new appointments to the Supreme Court as well as High Courts. In 2014, parliament amended the constitution and passed the bill to form a commission to appoint new judges, but the Indian Supreme Court declared the law unconstitutional. In this article, we ascertain whether the executive interference is necessary when the constitution given provision of independency of judiciary. In present scenario recommendations made by the judiciary amounts to refusal by the executive that amounts procedure impacts the biographical and other characteristics of the judges that eventually selected.

Even we compare the biographical characteristics of judges appointed by the executive – appointments system prior to the 1993 and on the other hand the judges appointed by the collegium on or after 1993 to the Supreme Court of India. Appointment of judges to the Supreme Court of India and High Courts is provided for in Article 124(2) and Article 217(1) of the Constitution, respectively. These articles provide that power of appointment for a Supreme Court judge vests with the President, in consultation with the Chief Justice of India. We also found that procedure functioning in appointing judges of Supreme Court and High Court judges that both pre-collegium and post- collegium system maintain the diversity in the gender that are appointed. But both have failed to focus and work on the object in appointing judges. By tracing the history of appointment procedure before independence, we can see that crown had the discretionary authority in appointing Judges under the government of India Act 1919 and Act 1935.

Still the collegium doesn't have independency and discretionary in appointing judges for Higher Judiciary. In this article we will analyses the independency of judiciary and collegium system in appointing judges for higher judiciary. It is facing lot of difficulties in appointing, transfer. More of all the questions raised by the law ministry in many recommendations made by the collegium.

Keywords: Supreme Court, High Court, Independency of Judiciary, Executive, Appointment of judges, Constitution of India, Collegium System

Introduction:

Collegium system in India has unique system for appointing and transferring the judges that has established through various judgments delivered by the supreme court of India which is not based on Act or provision mentioned in the constitution. The collegium system is also known as “judge –selecting–judge”. The collegium system was established by the 99th constitutional amendment by striking down the National Judicial Appointment Commission Act (NJAC) which was declared as void and unconstitutional. National Judicial Appointment Commission was established in 2014 by the Government of India for appointing Judges. The appointment of judges for Supreme Court and High Court is done by the collegium which is headed by the Chief justice of India and Other four senior most Judges of the Supreme Court under the provisions of Constitution with the approval of the president. The constitution provides the president the power to appoint judges for the Supreme Court and High Court under Article 124(2) and 217.³⁶ The president should undergo a consultation process with other judges while appointing the new judges. But it always the controversial subject matter and challenge to the collegium System in appointing judges.

The present scenario a few judges have expressed their opinion that the collegium system needs to be improved. Justice Kurien has stated in one of his judgments that the collegium system is lacking with objectivity, transparency and accountability. The Supreme court Bar Association has also opined that the collegium system responsible for making a “give and take” society, and also executive or the Law minister interference making the collegium controversial matter in today’s perspective. NDA government has made many attempts to change the view of the society but they too failed to do so.

Need for the study:

The main focus of this article is to draw the attention towards the interference of the executive in appointing judges and lawyers in being elevated as a judge by the present collegium system.

Evolution of the collegium system:

The collegium system came into existence in sequence of cases called “judges case” prior to the collegium system there establishment of National Judicial Appointment Commission by the Government for appointing judges to the higher judicial but government failed to act accordingly. The collegium system came to existence with relevant interpretations of constitutional provisions in the judges cases.

Judge case 1:

In the case of *S. P. Gupta vs. Union of India*, 1981, It is one of the first cases of the ‘Three judges Cases’ now referred to as the ‘Four Judges case’ after 2015, which played an important role in introducing a collegium system for the appointment of judges in the Supreme Court and High Courts. The Court, with the help of these cases, set a precedent for the principle of independent jurisdiction, which means that no other organ of the government except the judiciary itself will interfere in the election of judges. It is the first case known as ‘judges transfer case’ established a precedent for collegium system. The supreme court by a majority decision noticed that the concept of supremacy of the Chief Justice of India was not established in the constitution.³⁷

It held that the suggestion for appointment to a High Court can emerge from any of the office bearer of the constitution as mentioned under Article 217 and not naturally from the chief justice of the High Court. The Constitution bench also held that the word “consultation” used in Articles 124 and 217 of the constitution was not “concurrence” which means that in

³⁶ M.P. Jain, Indian Constitutional Law, 8th edition, LexisNexis, 2018.

³⁷ Dr. J.N .Pandey , Constitutional Law of India, 59th edition, Central Law Agency,2022.

spite of the fact that the president will consult these officials, his decisions was not ought to be in concurrence with everyone. The judgement of this landmark case titled the balance of power in favour of the executive in matters concerning the appointments of judges of the High Court. This situation existed for the following 12 years.

Judge case 2:

In this case *Supreme Court Advocates -on - Record vs. Union of India* 1993, a nine judge constitutional bench revoked the decision of the S.P. Gupta and formed a specific procedure called the “collegium system” for the transfer and appointment of the judges in the higher judiciary.

The bench held that the recommendation in that behalf should be made by the Chief Justice of India in consultation with his two senior-most colleagues and that such recommendation should normally be given effect to by the executive. Thus, in 1993, the Chief Justice of India got primacy in appointing judges, and till this time, it was the government’s job to fill vacancies in High Courts and the Supreme Court.

The matters relating to the appointment of the judiciary have afflicted and puzzled the judicial mind ever since the establishment of the constitution. This matter has to be resolved by the interpretation of the constitutional provisions relating to the appointment of judiciary. The worldwide effecting every pronouncement is the independence of the judiciary. A delicate balance had to be struck between democratic control of an essentially undemocratic institution and impartial arbitration. The matter came up for adjudication in *Sankal Chand vs. Union of India*, where the court upheld the transfer of the Chief Justice of Himachal Pradesh. However, by 1982, the debate had reached high note. These matters took solid form in a batch of writ petitions questioning the move to transfer the judges challenging the affected transfer of

some judges and expecting the justifiability of judge strength.

The Supreme Court, while disposing of the matter, entrusted the ultimate control with the Central Government. At this point, a bill was introduced in the parliament seeking to amend the Constitution (67th Amendment) Bill 1990 seeking to amend articles 124(2), 217(1), 222(1) and 231 (2) (a). This bill brought to empower the president to set up a judicial commission known as National Judicial Commission. The state objective was to implement the 121st Law Commission Report. This report recommended that a judicial commission is set up to oversee the appointment of the judiciary. However, nothing came of this as the bill lapsed with the dissolution of the 9th Lok Sabha. The writ petitions seeking a review of S.P Gupta case were heard by a three judge bench, namely Chief Justice Ranganath Mishra and Justices MN Venkatachaliah and MM Punchhi, which recommended reconsideration.³⁸

Judges case 3:

In the year 1998, a presidential reference was issued by K.R. Narayanan to the Supreme Court over the interpretation of the word “consultation” under Article 143 of the constitution of India, which is the advisory jurisdiction granted to the Supreme Court. The debate was whether “consultation” expects consultation with the several judges in making the Chief Justice of India’s opinion or the individual opinion of Chief Justice of India could by itself create a “consultation”. This point of view laid down that the chief justice of India and other four judges should give guidance, instead of the usual two judges, the elevation from the High Court recommended names should be also be consulted, in case any two senior most Judges gave unfavourable decision it should be considered by the CJI.³⁹

³⁸ V.N. Shukla, Constitution of India, 14th edition, 2022, reprint in 2023.
³⁹ Ibid.

Recent Impact on collegium system:

Since from 2013 there is a complications in appointing, transferring the judges as well seniors Lawyers to the higher Judiciary by the legislature and the executive. In recent appointments i.e. in 2022-23 judiciary will be made controversial and debatable subject matter by the legislature. Justice. Dr. D.Y Chandrachud present Chief Justice of India as a part of collegium system recommended one senior lawyer for appointing as Delhi High court Judge who will be India's First Gay judge but centre refused and denied the recommendation on ground that his is open about his sexual orientation but this the reply and objection by the collegium is that his openness about sexual orientation doesn't make unsuitable, rejection his candidature as judge is unconstitutional when the lawyer has integrity , competence and intellect and his appointment will add value and diversity to the high court Bench.

The constitution under Article 14 clearly states no discrimination on the bases of sex and as characteristics of constitution having independence of Judiciary but still legislature interferes and make the decisions of collegium system as more complications and controversial. The same has happened in one more judge elevation to the Supreme Court which was recommended by the Collegium. Law minister has the different opinion and perception towards the judiciary and collegium System. Many recommendations have been pending before the centre since from long period and also many names have been rejected on the unusual justifications.

Conclusion:

The constitution of India had provided the diversity in all the fields especially judiciary has its different ideology and independence of judiciary should exist as provided by the constitution that collegium system as separate body to maintain and to protect the respect, diversity and transference in appointing,

elevation and transfer of Judges of High Court and the Supreme court with the involvement or interference of legislature as well as executive.

