

Debating the Collegium System: A Comparative Analysis

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The judges' appointment to the Supreme Court of India ("SC") and High Courts ("HC") has been a subject of extensive debates vis-à-vis the role of Executive in these appointments. Recently, the SC laid down a landmark judgment in *Supreme Court Advocates-on-Record Association v. Union of India*.² ("**NJAC Judgment**") This judgment was a response to the Constitution's 99th amendment, which established the controversial National Judicial Appointments Commission.³ It was created to abolish the pre-existing collegium system in which the power rested with the senior SC judges to appoint judges at the higher Judiciary.⁴ In the first part of this post, the authors critically analyze the debate on judicial appointments and India's collegium system by tracing its judicial history. In the second part, we refer to some foreign jurisdictions and draw a parallel to the collegium system to critically reflect its working. At the outset, it is outside the scope of this article to suggest an alternative for the existing collegium system but to only highlight the problems.

The First Judges' Case - S.P. Gupta v. Union of India⁵

This was the first case that arose in the apprehension of the weakening of judicial independence. Several PILs were filed, challenging the appointment of several Justices to the HCs by the President under Article 223 of the Constitution. The petitioners contended that the Chief Justice of India ("CJI") *should be given the veto power in appointments to strengthen the notion of Judicial Independence*.⁶ This required interpreting the word 'consultation' in Articles 214 and 217, for which the court referred to several Constituent Assembly Debates.⁷ The Court ruled that the word 'consultation' does not mean 'concurrence' and the 'last say' rested with the Executive. This case added to the insecurities of achieving judicial independence. The aftermath of the *First Judges' Case* led to the matter being referred again to the SC in *Supreme Court Advocates-on-Record Association v Union of India*.⁸ ("**The Second Judges' Case**")

The Second and the Third Judges' Case

The nine-judge bench largely overruled the First Judges' case and held that the power to appoint judges rested with the CJI, and he would have the 'last say'.⁹ The Court effectively gave the Judiciary the primacy to achieve Judicial Independence and tried to save the process from political manipulation. This decision led to the birth of the '*collegium system*.' Now, the presidential recommendations were deemed non-binding, and the appointments were to be decided by two puisne SC Judges led by the CJI and two most senior judges of the HC vis-à-vis appointment of the SC Judges and the HC judges, respectively.¹⁰ It created a state of a conundrum in terms of the modalities of the collegium system's functioning. Hence, the court was compelled to give an advisory opinion in the Third Judges' case through a special reference.¹¹

The court herein reaffirmed the Second Judges' case, but it made some procedural modifications. It ruled that not two but four puisne judges of the SC were to be consulted by the CJI in appointments, and the *majority's decision* would be binding.¹² This compendium of judgments warranted the safeguard of judicial independence. However, the authors argue that even though judicial primacy was achieved, the system

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² Supreme Court Advocates-on-Record Association v. Union of India, MANU/SC/1183/2015.

³ *Id.*

⁴ Arghya Sengupta, *Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment*, 48 ECON. & POL. WKLY. 27 (2015).

⁵ S.P. Gupta v. Union of India, MANU/SC/0080/1981.

⁶ *Id.*, 632.

⁷ *Id.*, 713.

⁸ Supreme Court Advocates-on-Record Association v. Union of India, MANU/SC/0073/1994.

⁹ *Id.*, 385.

¹⁰ *Id.*, 478.

¹¹ In re Special Reference 1 of 1998, MANU/SC/1146/1998.

¹² *Id.*, 22.

was not free from '*judicial manipulation*.' This challenged the collegium system's very existence. Two events can be highlighted to substantiate this claim: One is related to a writ petition filed by Shanti Bhushan challenging the judges' transfer since the CJI did not consult the collegium. Thereafter, he also filed an affidavit showing at least 8-10 judges appointed were corrupt, but it was of no avail.¹³ Another instance relates to the appointment of Justice Dinakaran. An inquiry led to a conclusion that he had allegations of corruption and misconduct. Nevertheless, he was appointed a judge by the CJI after which Justice Chelameshwar expressed that, "*this [incident] certainly exposed the shallowness of the theory propounded by this Court [that] the Collegium are the most appropriate authorities to make an assessment of the suitability of candidates for appointment as judges.*"¹⁴

As a response to criticism, the Parliament had to intervene, and through the Ninety-ninth amendment, it established the NJAC. It consisted of CJI, two senior judges, two 'eminent persons', and the Union Minister of Law and Justice. This intervention was deemed necessary by the Parliament to achieve accountability and transparency. Interestingly, the court in *the NJAC Judgment*¹⁵ ruled this amendment to be unconstitutional.

NJAC Judgment

The Court relied upon the constitutional text vis-à-vis Article 124 and 217 to conclude that it envisages judicial primacy in appointments.¹⁶ However, the Court went one step ahead and ruled judicial primacy to be part of the basic structure of the Constitution, thus making it unamendable.¹⁷ At the outset, Khehar J., in the majority opinion, held that a person who is considered worthy of an appointment by the CJI and his colleagues may still be rejected by other commission members, thus hindering judicial primacy. This argument's premise was based on the interpretation of the word 'consultation' in Articles 124 and 217, for which the Court placed reliance on Constituent Assembly Debates. Khehar J, overstated the logic behind the word 'consultation' to 'shield' against the Executive and political will, instead of 'curtail' the free will of the Executive; the latter being the intention of the drafters.¹⁸ This implies that Khehar J, synonymized the word 'consultation' as 'concurrence.' He ignored the fact that the word 'concurrence' was specifically debated several times in the assembly, and the assembly members specially included the word 'consultation'.

Khehar J's proposition is contradictory because he based his inference on Constituent Assembly Debates. However, there is nothing in those debates that supports his proposition, *instead*, it goes against it. Dr. Ambedkar specifically rejected the proposal, which required CJI's concurrence, as he stated that any single actor must not be given a veto on appointments.¹⁹ Moreover, the drafters wanted to include multiple actors and not vest power with a government's single branch.²⁰

The court added to the problem as they failed to justify why judicial primacy is a part of the basic structure of the Constitution. The closest premise to this was Khehar J's argument of judicial primacy being an *integral constituent* of Articles 124 and 217.²¹ However, this falls short of being a part of the basic structure of the Constitution. Much of the problem roots from the *Second Judges' Case*, which essentially ruled judicial primacy to be a part of the basic structure without cogent reasons.²² Further, a comparative analysis shows that political actors' involvement is often considered determinative in the process, and most of the democracies have functioned smoothly with it.²³

¹³ Rehan Abeyratne, Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective, 49 GEO. WASH. INT'L. L. REV. 608 (2017).

¹⁴ *Id.*, 609.

¹⁵ Supreme Court Advocates-on-Record Association v. Union of India, MANU/SC/1183/2015 at 505.

¹⁶ *Id.*, 380 (per J.S. Khehar J.).

¹⁷ *Id.*, 1036.

¹⁸ CONSTITUENT ASSEMBLY DEBATES, Volume VIII, May 24, 1949, speech by B.R. Ambedkar 258.

¹⁹ *Id.*, 259.

²⁰ *Id.*, 259.

²¹ Supreme Court Advocates-on-Record Association v. Union of India, MANU/SC/1183/2015 at 510.

²² Supreme Court Advocates-on-Record Association v. Union of India, MANU/SC/0073/1994.

²³ ABEYRATNE, *supra* note 12, 569.

Judicial Appointments in the United States of America

The President in America can nominate judges to the federal Judiciary, and the House of Senate must confirm these nominations.²⁴ This highlights the process's politicization as it is likely that the President will nominate pro-government judges that tend to rule in their favor.²⁵ For example, the appointment of Judge Amy Barrett was confirmed by President Trump, who was also the first time in 150 years that a judge was selected without the support of a minority member. Over the years, several American states have warranted a better judicial appointment process. This has been achieved by allowing the senators to give recommendations to the President.²⁶ In fact, senators rely on several commissions for these recommendations in most cases.²⁷

Judicial Appointments in the United Kingdom

The appointment process in the UK went through a change in 2005 when the UK Supreme Court replaced the House of Lords.²⁸ The power was shifted from the Lord Chancellor to the Judicial Appointments Commission²⁹ that consisted of barristers, judges, laypeople, solicitors, and magistrates.³⁰ However, the residual power rested with the Lord Chancellor to reject candidates based on merit. The idea has been to include people from different qualifications and backgrounds to promote selections based on merit.³¹

Judicial Appointments in South Africa

The Judicial Services Commission in South Africa is made responsible for judges' appointments to the higher Judiciary.³² The commission includes people from both political and judicial backgrounds.³³ The commission's role is to recommend nominees to the President, who is *bound* to follow these recommendations.³⁴ The President also has to consult the Chief Justice and political leaders vis-à-vis appointment for constitutional courts. Here, the word of the commission is final and binding.³⁵

From the perusal of the above-cited jurisdictions, the main difference between India and them lies in the fact that different government branches control judicial appointments. That is to say, Executive and Legislature in America, and all three government branches in South Africa and the UK, has a different scheme that involves less political patronage but involves people from different backgrounds. The commonality in these systems can be highlighted that power is not vested with one single authority. However, the unique thing about the collegium system in India is that power rests *solely* with the Judiciary.

Primarily, the reasons for adopting a completely different system lie in India's judicial history, which separates it from other jurisdictions. During the 1970s and 80s, the country saw some of the darkest days of democracy. Then, the Executive not only battled against the Judiciary by making laws contrary to the SC rulings but also challenged the institutional autonomy. For instance, right after SC's ruling in Kesavananda Bharti, the President, on the Prime Minister's advice, nominated A.N. Ray for CJI. (a pro-government nominee) He was nominated ahead of the three most senior judges, who ruled against the government in Kesavananda Bharti.³⁶ Another incident was when Justice Beg (pro-government nominee) was appointed instead of the senior Justice Khanna, who ruled against the government several times.³⁷ Therefore, one

²⁴ The Constitution of the United States of America, Art. 2.

²⁵ Mark Tushnet, *Judicial Selection, Removal and Discipline in the United States*, JUDICIARIES IN COMPARATIVE PERSPECTIVE 134, 136 (2011).

²⁶ *Id.*, 134.

²⁷ *Id.*, 136.

²⁸ Kate Malleon, *Appointment, Discipline and Removal of Judges: Fundamental Reforms in the United Kingdom*, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 117, 118 (2011)

²⁹ *Id.*, 121.

³⁰ *Id.*, 123.

³¹ *Id.*, 123.

³² The Constitution of South Africa, 1996, § 174.

³³ *Id.* at § 178, cl. 1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ ABEYRATNE, *supra* note 12, 591.

³⁷ *Id.*, 591.

justification of India's unique system was the apprehension of these political interventions. However, this fails to be adequate justification for resting power *solely* with a single branch. In fact, resting power *solely* with either the Judiciary or Executive is not only problematic, but also against what our framers intended. The comparative analysis further shows how democracies do not have judicial primacy in appointments and the same has no nexus with independence of the Judiciary.