

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 1

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

The Ambivalences of the Collegium System

SYED SUHAIB¹

ABSTRACT

The appointment of judges by the judges has always been an utmost concern for the government and they have consistently criticized the way of these appointments. There is a considerable amount of history to be associated with the appointment of judges, and that extensive history of arguments, judgements and opinions led to the birth of the Collegium System. This system has always been in a point-blank range of criticism not just by the government, by the citizens as well, yet the system is persistent and always prevails. In this article, I have enunciated the concept of the Collegium System, its concise evolution, the grounds on which this system is criticised, the proposed alternative and my coherently articulated opinion on the system and how its ambivalences can be countered to ameliorate the collegium system.

Keywords: *supreme court, chief justice, judges, collegium, appointment.*

I. INTRODUCTION

The judiciary possess a significant and a coherent role in the furtherance of providing justice to the people. For this, it is imperative, that there must be a liberal and a competent judiciary because, the country utterly relies on the judicial system to interpret laws and subsequently provide justice. That is why it is eminently imperative, that the *appointment of judges* should be carried out in such a manner, so that the judges are appointed based on their competency and merit. For the purpose of *appointment of the judges in India*, we have what is called a **Collegium System**. The **Chief Justice of India (C.J.I.)** is in charge of the system, along with four senior **Supreme Court Justices**, provide recommendations for the *appointment and transfer of the judges*. The government is bound by the recommendations of the *collegium*, even if concerns are raised by the government against a particular appointment, the *collegium* possess the final say in the matter, if they reiterate that appointment, the government is bound to follow the recommendation. To abridge, the collegium possesses the supremacy in the appointment. The *collegium system* is not codified in any form of manner, rather it has evolved via the decisions of the *Supreme Court*.

II. EVOLUTION OF THE COLLEGIUM SYSTEM

The conflict between central government and the judiciary has always been consistent, with

¹ Author is a student at UILS, Chandigarh University, India.

regards to the *appointment of judges*. Initially what used to happen was, the executive had the decisive decision in the *appointment of judges*. However, after independence when the *Constitution* came into force, the recommendation of the **Chief Justice of India** was appreciated and rarely there was a disagreement between government and the **CJI** with regards to the appointment. If such a situation arose, where the **CJI** and the *executive* were in disagreement with regards to the *appointment*, the disagreement was sorted out coherently and amicably. Although, the *executive* had the final say and the **CJIs** opinion was never binding on the executive. Because of this, the system was not considered to be cogently balanced. This executive held this power for nearly 12 years as consequence of the ruling in the **First Judges Case**² in 1981. This ruling was reversed in the well-known **Second Judges Case**³. The term '*consultation*' was interpreted by the apex court to be meant '*concurrence*' and as a result, the **CJI's** opinion and perspective with regards to the *appointment of judges* was given priority.

With that justification, the **CJI** may be best qualified to understand and evaluate the *value* of candidates. However, a group of *senior judges* known as the '*collegium*' by the court was the sole group through which the **CJI** could draught the opinion. In the **Third Judges Case**⁴, 1998, the court made it clear that, in nominations to the *Supreme Court*, that the *collegium* would consist of the **Chief Justice** and *four senior-most colleagues*. In the case of appointments to the **High courts**, the **Chief Justice of India** and *his/her two seniors*. The *collegium* would also consult other *senior judges* of the *Supreme Court* who had previously held positions in the relevant *High Court*. The *4 most senior judges*, as a result of this decision were to possess an imperative part in the appointment, even if 2 judges out the 4 did not acquiesce to the same opinion, the **CJI** was not to recommend that appointment to the government. As of now, *Judges of the Supreme Court and High Courts* may be appointed in accordance with **Articles 124 and 217** of the **Indian Constitution**, respectively.

III. THE ACHILLE'S HEAL OF THE COLLEGIUM

The *Collegium system* is criticised mainly on the basis of *lack of transparency, supremacy, nepotism, accountability, favouritism* and *closed-door affairs*. The *Supreme Court* has tried to counter these ambivalences to some extent. The judiciary has opined that on the basis of separating the powers of the government and implying that for the framework of independent judiciary, there must be minimal involvement of central government in the judiciary. With

² S.P. Gupta vs President of India & Or's AIR (1982) SC 149 (India)/

³ Supreme Court Advocates-on-Record Association and Anr. v. Union of India Writ petition No. 1303 of (1987) (India).

⁴ In Re Special Reference Case AIR (1999) SC (1) (India).

regards to the ambivalence of possessing nepotism, favouritism and supremacy, no one knows where the collegium meets and how the decisions are taken by them. Recently, our *Union Law Minister*, **Kiren Rijju**, commented on the collegium system and referring the system as '*opaque*' and was in need of reconsideration. The collegium system works in the shallows so deep which does not bode well with, either the government or the citizens in terms of the accountability. It can be argued that this arcane manner of the *collegium* can have detrimental effects on the nation as the judiciary hails the trust of both the government and the citizens and the *curiosity can kill the cat*. The curiosity of the closed room arcane meetings of the *collegium* is of the utmost concern amongst the other ambivalences. The *Indian Judiciary* has performed quite well over the decade and it has had some of the most competent and finest of *CJI's* and *Judges* and over these years, both citizens and occasionally government has had faith in the decisions formulated and passed by the *collegium* but nonetheless, the concern are still there and the voyage for an alternative to the *collegium system* thus began.

IV. IS THERE AN ALTERNATIVE TO THE COLLEGIUM SYSTEM?

In 2014, the *parliament* passed an act called *NATIONAL JUDICIAL APPOINTMENT COMMISSION (NJAC)*. The appointment of the judges via this act was supposed to take place by *Ex officio* members which included the *Union Minister of Law and Justice*, the *Chief Justice of India*, the *Prime Minister*, and the *Leader of the Opposition* in the *Lok Sabha*. Two eminent members of civil society, one of whom would be nominated by a committee composed of the *CJI*, the *Prime Minister*, and the *Leader of the Opposition* in the *Lok Sabha*. The others would be nominated from the *SC/ST/OBC/minority* communities or women. The *Supreme Court*, however, struck this system down. The opinion of the *Supreme Court* was that this statute allowed politicians equal input in the *appointment of judges*. This is known as the *FORTH JUDGE CASE*⁵. The *Supreme Court* also proclaimed that *collegium system* as the basic feature of the *Constitution*. However, in acknowledgement to the ambivalence's pointed out to the *collegium system*, *Supreme Court* has affirmed to enhance and improve the system which till day has not seen the light of the day.

V. CONCLUSION

The judiciary is of the opinion, that they are right in persisting with the *collegium system*. Even plethora of *CJI's* and *Judges* have reiterated that collegium system is perfect and have fought for it since the beginning. The Judiciary must know that they have to address these ambivalences

⁵ Advocates-on-Record Association v. Union of India (Writ Petition) (C) No.13 of [2015].

coherently for the sake of public tranquillity and the functioning of a sovereign democratic country. The functioning of the independent judiciary is no doubt consequential to provide justice but, that function has to be known as there is no codification of the *collegium system*, no insights to the process and the selection. To borrow the words of venerable & veteran *Senior Advocate Fali S Nariman*: ***“The Collegium system has a lot of drawbacks, there is no doubt about that, but I think the lesser evil is the Collegium system. I am not very happy with it, but it's like democracy - the best of all the worst systems⁶”***. The *NJAC* system provided an optimistic view on the alternatives to the collegium system but nevertheless, was no solution to the *collegium system*. In that manner, the collegium system does feel like a lesser evil and the best of all the worst systems but these should not be sufficient grounds to keep it persistent in this manner. A liberal judiciary is indeed a successive approach towards the rule of law and providing justice, but even judiciary is answerable to the people just like any part of the democratic government. Thus, the judiciary should certainly try to enhance the *collegium system* through codifications and transparency to overcome its ambivalence's because, an independent and impartial judiciary is eventually the cornerstone of the nation and its principles.

⁶ Collegium system is the lesser evil: Fali Nariman no longer regrets winning the Second Judges case, (Jan, 7th, 2023, 5:48 PM), <https://www.barandbench.com/interviews/exclusive-collegium-system-is-the-lesser-evil-fali-nariman-no-longer-regrets-winning-the-second-judges-case-watch-video>