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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

## **COLLEGIUM SYSTEM IN INDIA: ANALYZING EFFICACY IN CONTEXT OF INDEPENDENCE OF JUDICIARY**

AUTHORED BY - DR. JASDEEP KAUR\* & MS. HARSIMAR KAUR\*\*

### *Abstract*

Ever since the independence, Indian Judiciary has served the nation and been a pillar for equitable justice. While framing the Constitution, one of the main aim of the Constitution makers was to create a stable judiciary which could function without the control or pressure from any other organ of the government. However, there has been always a core concern with regard to appointment of judges. In the year 1993, Supreme Court evolved a new system called the Collegium System in the Second Judges Case, which is being followed since then. Collegium system is a system relating to the appointment and transfer of judges which ensures the adaptability of principle of Independence of Judiciary which is part of the basic structure of Indian Constitution. However, this system has been in qualms due to criticism by different executive functionaries. National Judicial Appointment Commission was an attempt to end this system. The research has tried to critically analyze the Collegium System while analysing that whether there is actually a need for changing the present system of Collegium.

**Keywords:** Collegium System, National Judicial Appointment Commission, Independence of Judiciary, Judicial Review

### **1.1 Introduction:**

Indian Judiciary has undergone a great change with the evolving times and has its own broad history. Law and Justice have always been a central topic throughout the ages and history has made various attempts in order to develop the same. The concept of law and judiciary is not a new one or has not recently developed, it has emanated centuries ago and has undergone numerous developments since the ages. The concept of law in India was actually persuaded by the Vedas, which accommodated in itself the rules of conduct and various other directions relating to how an individual is supposed to conduct himself in the society.<sup>1</sup> The Vedas

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<sup>1</sup>Mukund Sarada and Basim Akhtar, "Concept of Dharma, Justice and Law: A Study" Bharti Law Review 181(Jan-Mar 2017).

prescribed the various duties as well as the rights of an individual and the power related to the judicial matters was vested with the king, he was entrusted with heading the administration as well as the judiciary. These rules of conduct further laid the foundation of Hindu law. Kautilya's Arthashastra was one of the earliest sources which highlighted the theory of jurisprudence and the governance in the ancient times. Further in the Mughal times, the emperors also started giving utmost significance to the judiciary and generally Qazis and Moulavis were appointed by king to look after the matters relating to law but King reigned as the ultimate authority. The whole history of Indian Judiciary however, shifted after arrival of Britishers. In the British Era, common law system was introduced wherein Privy Council was regarded as the highest Court of Appeal. From Mayors Court in the late 18<sup>th</sup> century to establishment of Federal Court through the Government of India Act, 1935 the Indian Judiciary has evolved outrightly during colonial times through various charters as set in motion by the British Government. The lifelong hard work of the freedom fighters and various Indians finally paid off when India finally attained independence in the year 1947. Now it was time for India to formulate its own constitution and the said task was duly handled by the Constituent Assembly. One of the main contentions of the ones who were laying down the foundation of the Indian constitution was to separate the three standing pillars of the democracy: The Executive, The Legislature and The Judiciary, hence the Article 50 which dealt with Separation of Powers was instituted and Article 124 and 217 dealt with the task of appointing the judges in the Apex Court and the concerned High Courts of respective states subsequently.<sup>2</sup> Before the Collegium system was adopted within Indian territory, the classification of hiring the judges in the Apex Court as well as the other judges was led by President, who made the appointments, but he only functioned on the advice of the Council of Ministers, hence executive had a direct role in the judiciary and judges' appointments. However, this situation changed when an innovative system for selection of the judges known as the Collegium System was adopted in India in the year 1993.<sup>3</sup> Although the separation of powers was envisaged as the basic feature of the Indian Constitution under Article 50, the implementation of the Articles of the Indian Constitution, Article 124 and Article 217 raises a question mark on the independence of judiciary as the appointment of judges was to be made on the advice of the Council of Ministers.

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<sup>2</sup> Constituent Assembly Debates on December 10, 1948 *available at*: [https://eparlib.nic.in/bitstream/123456789/762994/1/cad\\_10-12-1948.pdf](https://eparlib.nic.in/bitstream/123456789/762994/1/cad_10-12-1948.pdf) (last visited on September 23, 2024).

<sup>3</sup> Aparna Chandra, William Hubbard, and Sital Kalantry "From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court" 51 *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 273–89 (2018).

## 1.2 Origin of Collegium System:

The terminology collegium in itself is not actually mentioned in Constitution, the collegium system has been a sole result of the judgments of highest Court in three judge's case. In the year 1993, Supreme Court evolved a new system called Collegium System in the 'Second Judges Case', which is being followed and is in practice since then. "As per the Collegium System in case of appointment of judges in Supreme Court, The Chief Justice of India generally serves as the head of the Collegium System and is assisted by other four senior-most justices of the Apex Court and in the case of High Courts the system is led by the Chief Justice of the concerned High Court as well as other two elder most judges of the same High Court." The Collegium System was functioning in well in India up till the year of 2014 when an effort was initiated to displace the system with NJAC, the National Judicial Appointment Commission was made. NJAC was based on a rather direct approach, it provided the provision for direct recommendation of the judges. As per NJAC the CJI would be the senior most judge of the court and the other judges were to be appointed with due regards to their ability and merit. However, the validity of the same Commission was before Supreme Court wherein National Judicial Appointment Commission was held unconstitutional.<sup>4</sup> The landmark judgment elaborated on how the involvement of the executive would weaken the principle of independence of judiciary. The judgment upheld the collegium system but also highlighted the need for scrutiny of the same system. The evolution of law and judiciary in India has indicated the need for judicial independence as history has been a witness of continuous efforts for controlling the judiciary for own political as well as economic gains. The Collegium was further elaborated in the 'second judges case', herein the chief justice is entrusted with the task of bringing names forward for the appointment as a judge keeping in mind Article 124 and 217 of the Indian Constitution which is further discussed with the other judges forming the share of the collegium, afterwards the Collegium refers its report ahead to the respectable law minister in the case of Apex Court and to State Chief Minister in case of High Courts. Collegium System was in fact set down in 'second judges' case' but the decision of the 'first judges' case' proved to be the cause behind it. In the case of S.P. Gupta v. Union of India, a serious question was raised regarding if the judgement of CJI may have pre-eminence over the decision of the executives. This case was observed by a bench of seven judges and dissenting opinions were formulated but by a majority of 4:3 it was laid down that the verdict of Chief

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<sup>4</sup> C. Raj Kumar "Future of Collegium System: Transforming Judicial Appointments for Transparency." 50 (48) *Economic and Political Weekly* 31 (2015).

Justice of Apex Court won't be overruling that of the executives.<sup>5</sup> Nonetheless in the judgment of Subhash Sharma v. Union of India<sup>6</sup>, judges of three bench were of the opinion that the ruling laid down in the 'first judges' case' ought to be reconsidered via a bigger bench, after which a bench of nine judge was formed to address the issue. Thereafter, the bench comprising nine overruled the verdict and laid down the base of Collegium System. Further in the ruling of 'third judges' case', the composition and working of Collegium System was examined and elaborately by the Hon'ble Court.<sup>7</sup>

### **1.3 Separation of Powers as a Basic Criteria to Adopt Collegium System:**

Article 50 of the Indian Constitution lays a very important principle that is of Separation of Powers, it lays the emphasis on state to split up the three organs of the government. This phenomenon stands for the basic principles of democracy and ensures there is no absorption of power in single hands. The policy of Separation of Powers is a very old one and dates back to the times of Plato and Aristotle. Through this system, the three organs of the government can keep checks on each other as well as they can be free from the control of each other. Various thinkers in the past have advocated for the need of division of powers between the three organs of the government. As far as India is concerned the principle was highly debated in the Constituent Assembly before finally finding its place in the Indian Constitution. In the Constituent Assembly, K.T. Shah was the first to emphasise on the same, he even proposed that the policy in this regard should be added in the Indian Constitution in the form of Article 40-A and insisted that the three organs of the state should be wholly separated. This led to numerous debates and disagreement between the Constituent Assembly's members. One of the other member of the Constituent Assembly named Shri K. Hanumanth Iya asserted that wholly separating the three organs would lead to disharmony in the nation. Dr. B.R. Ambedkar was also of the strong opinion that executive should be separated from the judiciary but he was also averse to the rigid separation of powers among the principal structures of the state. The policy making authority of the state is vested in a single body that is of the President, but this is not the case for legislature and judiciary. Although Article 50 separated the executive from judiciary, but executive still withheld influence in the judiciary in the form of employment of the judges and the misuse of the same can be seen various times in the post-independence

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<sup>5</sup> Supra note 3.

<sup>6</sup> Subhash Sharma v. Union of India AIR 1991 SC 631.

<sup>7</sup> Varun Chhachhar "Appointment of judges in India through Collegium System: A Critical Perspective" 1 Shimla Law Review 208-217 (2018).

history. It is no wonder that there has to be some sort of separation for proper working of a nation and constitution makers has ensured the same. If Parliament has the power to frame laws then the Courts have been granted power under Article 142 and 145 to check their constitutionality and declare the laws which are beyond the principles of the constitutional void and President has also been granted pardoning power under Article 72.<sup>8</sup>

### **1.4 National Judicial Appointment Commission:**

National Judicial Appointment Commission Bill which was presented in 2014 was an attempt to end the Collegium System in India. Commission Bill of 2014 was introduced for the purpose of forming a constitutional body regarding appointment of judges. “The Bill was introduced with the intent for the creation of National Judicial Appointment Commission (NJAS) regarding the employment of the judges was to be made by President and Article 124A was to be added in the Constitution for the purpose of the same. It was supposed to be a body comprising of six members which included Chief Justice of India, further two most elder judges of the Apex Court, Union Minister for Law and Justice as well as other two renowned persons nominated via a committee comprising of the Chief Justice of the Supreme Court, Prime Minister of India and Opposition leader in the Parliament.” The main objective of commission was advising appropriate candidates for the positions and transfers of the different judicial heads. NJAC Act was set up with task of recommending the Supreme Court judge who has adequate experience as well as is fit enough to be the Apex Court Chief Justice. The Highest Court of Appeal marked National Judicial Appointments Commission Act, of 2014, in October of 2015 as unconstitutional. The Court held that the Act desecrated the principle of independence of the judiciary. It was further emphasised that it was against the part of administration in the selection of the judges.<sup>9</sup> It also held that such a process provided no accountability and transparency in the choosing of judges. However, again the efforts were made to influence the appointment of judges by the government through introduction of the National Judicial Commission Bill again in the parliament in the year of 2022. The power of the same as per the Bill rest in NJAC. It was also supposed to deal with the removal and transfer matters in matters of the selection of the judges.

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<sup>8</sup> Tej Bahadur Singh “Principle of Separation of Powers and Concentration of Authority” 4 *J.T.R.I. Journal* 4 (1996).

<sup>9</sup> Indira Jaising “National Judicial Appointment Commission: A Critique” 49 *Economic and Political Weekly*, 18 (2014).

### **1.5 Criticism of the Collegium System:**

Although the collegium system enshrines belief of Judiciary's independence, but still it is being criticised at various instances by many. One of the main points of criticism for collegium system is the lack of transparency within the system.<sup>10</sup> It is often argued that the system is not opaque enough and the doubts and concerns have been always raised about the fairness in the selection process. It is also said that there is a limited representation within the system and plenty of loopholes. There are only exclusive number of judges who are given the responsibility and who shall decide on the appointments and transfers of others. The other points of criticism include inefficiency and lack of consultation in the system<sup>11</sup>. The arguments have been made by the critics stating how there is an inbuilt favouritism and nepotism in the system. Furthermore, it is said that the contradictory view within the collegium members is hindering the working of the collegium system. It has been criticised on various points, and attempts have always been made by the Supreme Court to debunk the same. The 214th Law Commission Report on Proposal for reconsideration of three judges case also indicated the lack of transparency within the selection procedure. The judgment of 'second judges' case' has also been criticised. It has highlighted that the government should either get the three judges case judgments reconsidered or shall pass a law which will grant power to India's Chief Justice and Executives to formulate the appointments in case of judges. Critics argue that the main focus of the judges should only be looking after the laying down of justice, and all the administrative work like appointments should be left with the Parliament. Since, the Collegium System is at no place cited within the constitution and nowhere expressly stated it becomes one of the factors due to which the system is challenged as well as criticised. However, despite all the criticism and efforts being made to end the system of Collegium it still continues to function till date. The continuous conflict between the judiciary and legislatures on the issue however highlights the need for making a stronger law on the issue.

### **1.6 Collegium System through the lens of Basic Structure Doctrine:**

Although the doctrine of basic structure is nowhere being mentioned in the Constitution of the India, it has been deeply followed in the history of India ever since it was laid down by Apex Court of India. In the historic case, 'Kesavananda Bharati', the doctrine was formulated in

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<sup>10</sup>Arghya Sengupta "Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment" 48 *Economic and Political Weekly* 28 (2015).

<sup>11</sup>C Raj Kumar and Gautam Khagesh "Questions of Constitutionality: The National Judicial Appointments Commission" 50 *Economic and Political Weekly* 42 (2015).

order to protect basic principles of the constitutional document of the country. It truncated the power of parliament in terms of making laws and amendments in respect of the basic feature of the Indian Constitution. It was apprehended that no law can abridge the basic construction of the country's Constitution. Although the doctrine was finally laid down in Kesavananda case, it took variety of the other cases like Sajjan Singh and Golaknath case to reach onto the final conclusion. Judiciary over the years has tried to interpret the term basic structure and has included various aspects into the same, Independence of Judiciary being one of them.<sup>12</sup> The term has been encompassed within the basic structure of the constitution, henceforth the implementation of any such commission like National Judicial Appointment Commission will be curtailing the value of Independence of the Judiciary. Over the ages, there has been various attempts to curtail the power of judiciary, in such a stance giving power to parliament regarding the nomination of judges is a clear risk to the independence of the judiciary. It also is one of the major reasons behind the declaration of National Judicial Appointment Commission as unconstitutional.<sup>13</sup> The basic structure principle has over the time aided in a way to avoid legislative excesses which existed prior to the laying down of the doctrine of basic structure. The doctrine of Basic Structure is needed in order to act as a shadow against protection from an omnipotent parliament, which can make the overuse of Article 368 in relation to making amendments in the law of the nation. Hence, the doctrine holds the constitution together and sets certain limits on the acts of the parliament.

## **1.7 Judicial Approach in relation to Collegium System in India:**

### *1.7.1 First Judges Case:*

The judgment came by a ratio of 4:3 from a seven-judges bench, on day of the December 30th, 1981 in the decision of *S.P. Gupta v. Union of India*. Prior to this, authority in relation to selection of judges was wholly bestowed with India's President. In this ruling, it was observed by the Apex Court that in certain matters the "consultation" do not comprise "concurrence", as well as when it comes to the control of choosing of Judges provided in the Article 124 of the constitution, was conferred to the Nominal Head, and it was held, that the President has the right to supersede opinions of the consulters. It was stated that the importance of the Chief Justice of India reference on judicial transfers and selections could also be declined for "cogent" explanations.

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<sup>12</sup> M.P. Singh, "Securing the Independent Of the Judiciary -The Indian Experience", 10 *Ind. Intl. & Comp. L.Rev* 252 (2000).

<sup>13</sup>*Id.*, 257.

### *1.7.2 Second Judges Case:*

The judgment of the decision of the 'First Judges' Case' was questioned through a bench led by three apex court judges in the instance of *Subhash Sharma v. Union of India*, in which it stood forward that the opinion of majority, in the 'First Judges Case', shall be taken into consideration via a higher Bench. The Chief Justice of Apex Court hence, constituted a Bench comprising of nine judges, to inspect two main queries. Primarily, if the view of Chief Justice of Supreme Court in respect to the selection of judges to the Highest Court and High Courts, also in relation to, transmission of Chief Justices' and judges of High Courts, was eligible for prevalence? Furthermore, if the fixing of the number of judges of High Courts, was justiciable? The bench of judges in the Supreme Court overturned the ruling of the First Judges Case by a huge ratio of 7:2. The judgment was given on the date of October 6, 1993. The dominance in the position of selection of judges was shifted from the executive, to the India's Honourable Chief Justice and this case laid the foundation of System of Collegium for the selection of benches in India in the judgment of *Supreme Court Advocates-on-Record Association and Anr. v. Union of India*.<sup>14</sup>

### *1.7.3 Third Judges Case:*

Resulting upon worries which arose in minds of the Administration of India, in relation to the explanation in the 'Second Judges' Case', the Honourable President of India, exercising the authority given to him under the Article 143 of the Indian Constitution, raised nine different questions in front of the Highest Court, for its view. A nine-judges bench was formulated to answer the situation, on the 28<sup>th</sup> October, 1998 in the 'third judges' case'. The collegium comprising of the judges, supervised by the Chief Judge of the SC, was conferred through the concluding decisive power of making selections in the higher courts, the President of India is responsible to "concur", with the references prescribed. The bench of the Apex Court distinguished that the term of "consultation with the Chief Justice of India" given under Article 217(1) of the Constitution of India needs discussion per the variety of justices for the formulation or the creation of the opinion of the Highest Court's Chief Justice. The only, specific view of the CJI will not institute "consultation" as set under the Article 217 of the Indian constitution. CJI should give a reference to assign a justice to the Apex Court of India as well as to transfer a judge or High Courts Chief Justice in discussion with the other four

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<sup>14</sup> Indrasish Majumder, "Appointment of Judges in India: Analysis of the 4 Judges Case and the Collegium System" available at: <https://www.lawctopus.com/clatalogue/clat-ug/appointment-of-judges-in-india-analysis-of-the-4-judges-case/> last Visited on 3<sup>rd</sup> November, 2023.

elder-most judges of the Highest Court. The CJI shall not be allowed to perform exclusively in his distinct authority, deprived of discussion with additional senior judges of the Apex Court.

#### *1.7.4 Fourth Judges Case*

In the said case, the Apex Court through a ratio of 4:1 struck down the NJAC Act, 2014 and therefore the 99<sup>th</sup> amendment as void as well as unconstitutional. Although the majority rejuvenated the collegium system,<sup>15</sup> it recognized that the same process had to be updated to make it more receptive and translucent as well as accountable. It is also known as the fourth judge's case<sup>16</sup>.

### **1.8 Conclusion:**

The history of Indian judiciary has clearly indicated the need for the individuality of the Judiciary as well as the need for the Judicial Review. Vesting of power in relation to selection of the judges in the hands of the administrative division is very risky and there is a subtle chance of that power being misused for their own gains and to suppress the judiciary. The policy relating to the judicial independence is a portion of the basic organisation of the Indian Constitution, hence implementation of NJAC would clearly be the violation of the principle. But some transparency and accountability should also be made on the part of the judges who are appointing the other judges. But the Independence of Judiciary is necessary to maintain a balance between the three organs of the administration, hence the power of employing judges should be vested with the judiciary as it will ensure that there is no biasedness and well qualified judges are working in the system. The continuous attempts to control has indicated the need for the safeguarding of judicial autonomy. Hence, it can be settled that there is a need for conservation of the independence of judiciary as well as incorporating steps for more accountability and transparency in the selection of the judges.

### **1.9 Suggestions:**

Researchers would like to provide the following suggestions in respect of Collegium System in India:

1. Adequate steps shall be taken to safeguard the policy of independence of judiciary in India, as there had been continuous attempts to threaten the same.

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<sup>15</sup> Supreme Court Advocates-on-record Association & Anr. vs. Union of India (2016) 4 SCC 1.

<sup>16</sup> Surendra Malik, Judges Appointment Case, Eastern Book Company, 2016 Edition (2016).

2. Appropriate steps should be taken by the Collegium to guarantee that the process of selection is more transparent and accountable.
3. Appointment of judges should be a fast process as there are plenty of cases pending in the court, it should be given more importance and shall not be made a far stretched process.
4. The steps should also be taken regarding bringing more transparency within this system, ensuring and proving transparency within the system would end many worries and doubts surrounding the same.
5. The loopholes in the system which has been pointed in the fourth judges case should also be dealt with immediately and steps should be taken to make this system better and more effective.

