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REVISITING CRITICAL JUDGEMENTS



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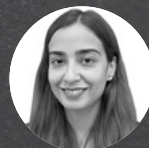


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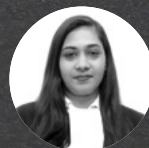


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YOUR WITNESS PLEASE!

Judges Appointing Judges

■ Somesh Tiwari & Luv Tripathi

Recently Supreme Court bid farewell to U.U. Lalit and welcomed Justice D.Y. Chandrachud as the 50th Chief Justice of India. The process by which we select and appoint judges is what we call the collegium system.

Former CJI N.V. Ramana is one the biggest proponent of the Collegium system. During one the talks in April while defending the collegium system of judges he asserted that the collegium system of selection process 'could not be more democratic than this'. So, what is this collegium system that appoint and elevate our judges? Let's discuss the origin and evolution of this system.

EMERGENCE OF THE COLLEGIUM SYSTEM

After independence, India adopted the Constitution in 1950. According to the Constitution, up to 1973, the President appointed the Chief Justice of India and remaining judges of the Supreme Court in consultation with the CJI and other judges as he deemed necessary. Until

1973, there existed a consensus between the Government of the day and

the Chief Justice of India. A convention was formed where the senior-most judge of the Supreme Court was to be appointed as the Chief Justice of India but in 1973, A.N. Ray was appointed as the Chief Justice of India. This violated the convention formed earlier since Justice A.N. Ray superseded three other Supreme Court judge's senior to him. To the surprise this happened again in 1977, another chief justice was appointed who superseded his seniors resulting in a clash between the Executive and the Judiciary.

Perhaps as a result of the prevalent situation during the 1970s, the first proposal for the establishment of a collegium-styled system emerged from a seminar of the Bar Council of India in Ahmedabad on 17th October, 1981. The recommendation made at the time by the BCI was for an appointment committee consisting of the Chief Justice of India, five senior most judges of the Supreme Court, and two individuals who would represent the Bar Council of India and the Supreme Court Bar Association. Then came the judgments which, over time, cemented the collegium system as the law of the land.

1. FIRST JUDGES' CASE, (S.P. GUPTA V. UNION OF INDIA)

- During the course of this case's



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hearings, the Supreme Court spoke about two key issues.

- In response to a query on whether the phrase “consultation” in article 124 refers to “concurrence,” the Supreme Court of India overruled the question and denied that it did. The Supreme Court’s advice was not required for the President to base his or her judgement.

- The Supreme Court’s ruling that a High Court Judge may be transferred to any other high court of a state, even against his will, was another crucial point in this case’s discussion.

2. SECOND JUDGES CASE, (SUPREME COURT ADVOCATES-ON-RECORD ASSOCIATION VS UNION OF INDIA) 1993

- Another petition was filed in 1993 by the Supreme Court Advocates on Record Association (SCARA).

- In this case, the Supreme court overruled its earlier verdict and changed the meaning of consultation to concurrence. Thus, binding the President of India with the consultations of the Chief justice of India.

- This resulted in the birth of the Collegium System.

3. THIRD JUDGES CASE (SPECIAL REFERENCE NO. 1 OF 1998)

- In the year 1998, the presidential reference to the Supreme court was issued questioning the meaning of the word consultation in articles 124, 217, and 222 of the Constitution.

- In a unanimous decision, the Supreme Court’s nine-judge bench expanded the Collegium System of



judicial appointments to include the Chief Justice and four of the most senior judges, as opposed to the two stated in the Second Judges Case (Collegium). The Supreme Court ruled clearly that the phrases “consultation with the Chief Justice of India” in Articles 217(1) and 222(1) of the Constitution call for a plurality of judges to be consulted in order for the Chief Justice of India to form an opinion.

4. FOURTH JUDGES CASE (SUPREME COURT ADVOCATES-ON-RECORD ASSOCIATION & ANR. VS. UNION OF INDIA) NATIONAL JUDICIAL APPOINTMENT COMMISSION

- The National Judicial Appointments Commission (NJAC) Act was a legislation passed by the Indian Parliament in 2014 that aimed to reform the process of appointment and transfer of judges to the Supreme Court and High Courts in India. It sought to replace the existing system of appointment, which was based on the recommendation of the Chief Justice of India and his colleagues, with a new system in which a commission comprising of judges, politicians and civil society representatives would select candidates for appointment as judges.

- However, the NJAC Act was challenged by various legal organizations and individuals, who argued that

it violated the independence of the judiciary and diluted the role of the Chief Justice of India in the appointment process. In 2015, the Supreme Court of India struck down the NJAC Act, stating that it was unconstitutional and violated the basic structure of the Indian Constitution. The court held that the Chief Justice of India and his colleagues must continue to play a central role in the appointment and transfer of judges, and that the NJAC Act was an attempt to undermine the independence of the judiciary.

THE CURRENT WORKING COLLEGIUM SYSTEM

Currently, the Supreme Court and High Court appoint judges using a collegium model. This approach was developed by the courts through Judicial precedents and is not given under the constitution, as it was previously discussed.

SUPREME COURT

The Chief Justice of India consults the four senior-most Supreme Court judges while appointing Supreme Court judges under the collegium format. The Union Minister of Law and Justice receives recommendations from the Chief Justice of India and forwards them to the Prime Minister. The President will then get advice from the prime minister.

HIGH COURT

The collegium for High Courts is made up of the Chief Justice of the High Court and the two senior High Court justices. The Chief Minister of the State and the Governor of the State receive the Chief Justice of the High Court’s recommendation, which they then communicate to the Union Minister of Law and Justice. The Union Minister

of Law and Justice then puts up the same to the Prime Minister who will advise the President in the matter of appointment.

When a judge is elevated to the position of Chief Justice or is appointed to that position, seniority is a key factor. Inter-seniority does count for individuals from the lower judiciary seeking first appointment as judges in the High Court, and relative merit matters for those seeking elevation to the position of advocate from the bar. With reference to their rulings and cases, the Collegium model weighs the relative merits of those Judges/ Advocates in the zone of consideration for elevation.

NATIONAL JUDICIAL COMMISSION BILL, 2022: A NEW ATTEMPT IN TAKING AWAY THE JUDICIAL INDEPENDENCE?

In December 2022 National Judicial Commission Bill has been introduced in the upper house of the Indian parliament i.e., Rajya Sabha. The bill has met with huge criticism and opposition from not just the Members of the parliament but from all of the legal fraternity. The bill, just like its predecessors, seeks to regulate the procedure to be followed by National Judicial Commission for the appointment, elevation, transfer and removal of Chief Justices and Justices of Supreme Court and High Court.

This tussle between the executive and the Judiciary has also grown serious after remarks by the current law minister which fuelled the ongoing debate. Law minister Riju said "Never say that the government is sitting on the files, then don't send the files to the government, you appoint yourself,

you run the show..." Describing the Collegium system as "alien" to the Constitution, he had said, "You tell me under which provision the Collegium system has been prescribed."

The Executive is pointing fingers at the Judiciary and Collegium system alleging it to be an inefficient and opaque body which is failing to perform its duty of appointing justices of Indian courts.

On the other hand, eminent jurists of the country have spoken out against National Judicial Commission bill, 2022 and view this bill as just another attempt by the Executive branch of the government to dismantle the independent sanctity of the Judiciary.

CONCLUSION

The independence of the judiciary is related to its function as a watchdog in a democracy. It keeps an eye on and upholds the system of checks and balances over the other branches of the government. Therefore, when any government organ exhibits "over power" that tends to go against the wider societal or personal interest, the judiciary steps in as the mediator.

The collegium is one of the most crucial ways which ensures that judiciary has been protected from outside pressures in order to guarantee that constitutionally given liberties, such as the freedom to speak in public or the freedom to congregate in peace, that are interpreted in accordance with the genuine constitutional philosophy. This two-decade long debate among these two organs of the government has still not settled yet and with this new bill on the table the discussions are unlikely to come to an end. 



Mr. Somesh Tiwari has been practicing before the Hon'ble Supreme Court of India and the Hon'ble Delhi High Court in matters focusing on Arbitration, Banking, Company Law, Prevention of Money Laundering Act. He is also advising clients on Corporate Advisory and other General Corporate Work. Mr. Tiwari has been appointed by the State Government of Uttar Pradesh and the State Government of West Bengal as panel counsel to represent the State Governments before the Hon'ble Supreme Court and the National Green Tribunal. Mr. Tiwari has also been appointed by the Agra Development Authority as their nodal counsel to represent the Authority before the Delhi High Court and all Tribunals including the National Green Tribunal.



Luv Tripathi is an undergrad student pursuing law degree from the Faculty of Law, Jamia Millia Islamia, New Delhi. He is very intrigued by branches of law such as the Law of Crimes and Money Laundering. He has also worked with NGOs, State and District Legal Service Authorities. He is currently a trainee Para legal at Vardharma Chambers and assisting the firm with various cases. He also writes articles on LinkedIn about the current happenings in the Judiciary.