International Journal of Research
Available at https://edupediapublications.org/journals
e-ISSN: 2348-6848
p-ISSN: 2348-795X
Volume 05 Issue 04
February 2018

"National Judicial Appointment Commission for Collegiums Reformation in India"

Kshirod Kumar Moharana
Designation- Faculty Of Law, Biraja Law College, Jajpur, Odisha

(Research Scholar, P.G Department Of Law Sambalpur University, Odisha)

At/Po- Samantarapur, Via- Kabirpur P.S-Jajpur Sadar Dist- Jajpur

Pin-755009 Odisha

MAIL ID- kshirod.moharana77@gmail.com

MOB- 9090864157

ABSTRACT

Collegium is a system under which appointments and transfers of judges are decided by a forum of the Chief Justice of India with four senior-most judges of the Supreme Court. Article 124 of Indian constitution says that, the appointment of judges should be made by the President after consultation with such judges of the High Courts and the Supreme Court as the President may deem necessary. Article 217 says a judge should be appointed by the president after consultation with the chief justice of India and the Governor of the state. In 99th Constitutional Amendment replaced the collegiums system for the appointment of judges as invoked by the Supreme Court via judicial fiat by a new system. On 16th October 2015 the Supreme Court upheld the collegiums system and struck down the NJAC as unconstitutional after hearing the petitions filed by several persons. Supreme Court declared that NJAC is interfering with the autonomy of the judiciary by the executive which amounts to tampering of the basic structure of the constitution where parliament is not empowered to change the basic structure.

The collegium system has its genesis in a series of three judgments that is now clubbed together as the "Three Judges Cases". In the case of S P Gupta v. union of India, Supreme Court declared that the primacy of the CJI's recommendation to the President can be refused for cogent reasons and it will bring a paradigm shift in favour of the executive having primacy over the judiciary in judicial appointments for the next 12 years. In Advocates-on Record Association v. Union of India case, justice J S Verma said "justifiability" and "primacy" required that the CJI be given the "primal" role

in judges appointment and supreme court held that, the role of the CJI is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter. In the third Judges Case, only opinion delivered by the Supreme Court of India responding to a question of law regarding the collegium system, raised by then President of India K. R. Narayanan, in July 1998 under his constitutional powers. This paper basically analyzed the collegium reformation under national judicial appointment commission in Indian context.

Key Words- Collegium, Judiciary, Parliament, Constitution, Amendment

INTRODUCTION

Collegium is a system under which appointments and transfers of judges are decided by a forum of the Chief Justice of India with four senior-most judges of the Supreme Court. Article 124 of Indian constitution says that, the appointment of judges should be made by the President after consultation with such judges of the High Courts and the Supreme Court as the President may deem necessary. Article 217 says a judge should be appointed by the president after consultation with the chief justice of India and the Governor of the state. In 99th Constitutional Amendment replaced the collegiums system for the appointment of judges as invoked by the Supreme Court via judicial fiat by a new system. On 16th October 2015 the Supreme Court upheld the collegiums system and struck down the NJAC as unconstitutional after hearing the petitions filed by several persons. Supreme Court declared that NJAC is interfering with the autonomy of the judiciary by the executive which amounts to tampering of the basic structure of the constitution where parliament is not empowered to change the basic structure.

The collegium system has its genesis in a series of three judgments that is now clubbed together as the "Three Judges Cases". In the case of S P Gupta v. union of India,[1] Supreme Court declared that the primacy of the CJI's recommendation to the President can be refused for cogent reasons and it will bring a paradigm shift in favour of the executive having primacy over the judiciary in judicial appointments for the next 12 years. In Advocates-on Record Association v. Union of India[2] case, justice J S Verma said "justifiability" and "primacy" required that the CJI be given the "primal" role in judges appointment and supreme court held that, the role of the CJI is primal in nature because this being a topic within the judicial

[1] AIR 1982 SC 149
[2] In The Supreme Court Of India Civil Original Jurisdiction Writ Petition (Civil) No. 13 Of 2015

family, the executive cannot have an equal say in the matter. In the third Judges Case, only opinion delivered by the Supreme Court of India responding to a question of law regarding the collegium system, raised by then President of India K. R. Narayanan, in July 1998 under his constitutional powers.

In Indian constitution there is no provision for collegiums. In 99th Amendment, Article 124A inserted in Indian constitution says for appointment of judges in supreme court and high court. Regarding this, NJAC are responsible which consists the Chief Justice of India as ex-officio chairperson, two other senior judges of the Supreme Court, the Union Minister of Law and Justice and two eminent persons to be nominated by a committee consisting the Chief Justice of India, the Prime Minister, the Leader of opposition in the Lok Sabha or where there is no such Leader of opposition, then the leader of the single largest opposition party in Lok Sabha. The eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination.

The Collegium system was in consonance with the trend of judicial activism undertaken by the Supreme Court in the late 1980s. The system got concrete shape in 1998 in three Judge Case wherein Supreme Court laid down elaborate selection process of judges of higher judiciary.[3] Under the Collegium system, the Chief Justice of India would consult the four senior most judges of the Supreme Court for Supreme Court appointments and two senior-most judges for high court appointments. The judiciary, in fact, rewrote the constitutional arrangement enumerated in Article 124 and Article 217 of the Indian Constitution which provided for a plurality of functionaries by ensuring plurality of functionaries only within the judicial system.

ROLE OF NJAC FOR COLLEGIUMS-

National Judicial Appointments Commission act came into existence from 31 December 2014. Both Houses of Parliament have accorded their legal imprimatur to the 99th Constitution Amendment Bill. This amendment[4] provides that, NAJC shall comprise the Chief Justice of India as its ex officio chairperson, the two senior-most judges of the Supreme Court following the Chief Justice, the Law Minister, and two 'eminent persons' to be nominated jointly by the Prime Minister, the Chief Justice of India and the Leader of the Opposition. The NJAC will be responsible for making binding

[3] S. P. Gupta v. Union of India AIR1982,SC 149, S.C.Advocates on Record Association v. Union of India, A.I.R.1994 S.C. 268. *In re* Special Reference 1 of 1998
[4] 99th amendment of Indian constitution

recommendations to the President for appointing judges to the Supreme Court and to various High Courts.[5] Besides, one eminent person should belong to the SC, ST, women or minority community, preferably by rotation and will have tenure of three years. The NJAC will recommend to the President for the appointment and transfer of judges of higher judiciary, i.e. Supreme court and High Courts. NJAC also make recommendations for the appointment of Chief Justice of higher court.

The role of NJAC is vital for appointment of judges of Supreme Court and High Court in proper manner. But judiciary is independent body, In a historic ruling that the primacy of the judiciary in judges' appointments was embedded in the basic structure of the Constitution,[6] the Supreme Court declared unconstitutional an amendment to validate the National Judicial Appointments Commission (NJAC) Act, which had contemplated a significant role for the executive in appointing judges in the higher judiciary which is now becomes challengeable in India.

Article 124C[7] gives Parliament powers to govern the functioning of the NJAC by making ordinary laws in the future. In this arguments by it does not affect the separation of powers. Historically, Parliament has always had power over the judiciary without compromising the separation of powers. Even with the separation of powers, it is considered normal to redistribute the powers in favour of one of the pillars of democracy from the other. Parliament has been given "legislative supremacy" under the Constitution, which is why it could pass the 99th Amendment that created the NJAC in the first place.

Article 124 C[8] empowers the legislature to freely change the powers governing the NJAC through the ordinary law-making process. This obviously violates the theory of the separation of powers. It[9] basically gives the legislative pillar massive powers, which can lead to an elected dictatorship by Parliament and ultimately the suppression of democracy. So even if the Supreme Court held that the NJAC is valid, Parliament should not be able to change the laws related to the Constitution or governance of the NJAC so easily.

[5] Available at- http://www.thehindu.com/opinion/lead/national-judicial-appointments-commission-bill-safeguarding-judicial-autonomy/article6347268.ece
[6] Available at- http://indianexpress.com/article/india/india-news-india/sc-strikes-down-njac-revives-collegium-system-of-appointing-judges/#sthash.2JzdNXOx.dpuf
[7] Constitution of India
[8] Inserted in 99th amendment of Indian constitution
[9] Article 124C of Indian constitution

Conventions are only a supplementary system of enforcement of the basic structure of the Constitution. Changing the convention of the collegiums system does not change the basic structure if the independence of the judiciary is maintained. In the second judges case[10] the court said that "once it is established to the satisfaction of the Court that a particular convention exists and is operating, then the convention becomes a part of the constitutional law of the land and can be enforced in the like manner". The second judges case[11] decision gave the CJI main power in appointments to ensure the independence of the judiciary, which has now become part of the basic structure of the Indian Constitution. Applying the English law doctrine of convention, the collegiums system has already developed into a constitutional convention and should not be tampered with any form of it.

Article 124A states that a Commission known as National Judicial Appointments Commission is formed consisting of Chief Justice of India, 2 Senior Judges of Supreme Court, Union Minister in charge of Law and Justice, 2 persons nominated by committee of PM, CJI and Opposition leader and 1 person is nominated among SC, ST and OBC, Minorities or Women and such eminent person to be nominated for a period of 3 years cannot be re-nominated again. Actions of NJAC cannot be questioned on the ground of existence of error in the constitution of the Commission.

The eminent person for NAJC would represent the people and civil society, which would increase the confidence of the people in the judiciary. Their presence on the NJAC ensures that the judges who are selected would remain sensitive to the people's interests. The presence of eminent persons will bring diversity in the NJAC and by extension in the judicial appointments. Eminent persons facilitate a participatory appointments process and bring in plurality of viewpoints. Eminent persons will act as a check against arbitrary exercise of power by any of the other members on the NJAC. They would be truly independent individuals who approach the appointments process from a detached standpoint. The eminent persons would not be able to determine the capability of a judge if they have no experience in the field.

The Indian judiciary has recognised three situations in which this common law stand does not apply.[12] These three exceptions collectively form what is known as The Doctrine of revival. These three exceptional situations are – Firstly when the lack of legislative competence

[10] Advocates on Record Association v. Union of India, A.I.R.1994 S.C. 268
[11] ibid
[12] Available at-https://thelawblog.in/2016/09/13/doctrine-of-revival-within-the-njac/

causes an Amendment to be struck down. Secondly when such an amendment violates a Fundamental Right of the citizens of India, which is guaranteed by the constitution itself and thirdly when any amendment corrodes or works against the basic essential values of the constitution.

Thus the doctrine of revival holds that if an amendment is struck down on the basis of any of the three.[13] If the NJAC were struck down, the doctrine of revival would re-instate the collegium system and make the whole NJAC and the 99th constitutional amendment invalid. On the other hand, the doctrine of eclipse would call for the Supreme Court to tinker with the process of NJAC carefully so that the current portions of the law that are unconstitutional are removed and the NJAC can then function properly. the opacity of the collegium system has been bothering many people, even those opposed to the NJAC. The Supreme Court has said in the past that striking out a law is a "grave step" and a "measure of last resort" and its most common response is not to strike down the unconstitutional law, but to interpret it in a way that it is consistent with the Constitution.

JUDICIAL INTERPRETATION FOR REFORMATION OF COLLEGIUM-

Article 124[14] deals with the appointment of Supreme Court judges. It says the appointment should be made by the President after consultation with such judges of the High Courts and the Supreme Court as the President may deem necessary. The CJI is to be consulted in all appointments, except his or her own. Article 217[15] deals with the appointment of High Court judges. It says a judge should be appointed by the President after consultation with the CJI and the Governor of the state. The Chief Justice of the High Court concerned too should be consulted. The collegiums system has its genesis in a series of three judgments that is now clubbed together as the "Three Judges Cases".[16] The S P Gupta[17] case is called the **"First Judges Case".** It declared that the "primacy" of the CJI's recommendation to the President can be refused for "cogent reasons". This brought a paradigm shift in favour of the executive having primacy over the judiciary in judicial appointments for the next 12 years.

[13] Available at-https://thelawblog.in/2016/09/13/doctrine-of-revival-within-the-njac/

[14] Indian constitution
[15] Constitution of india
[16] Available at-http://salamuddinansari.blogspot.in/2013/01/what-is-collegium-system.html
[17] S. P. Gupta v. Union of India AIR1982,SC 149

In 1982 S.P. Gupta[18] laid down that the recommendation for appointment made by the Chief Justice of the India is not to have primacy though his recommendation can be turned down by the ruling politicians at the Centre only for ``cogent reasons''. None of the succeeding Chief Justices of India demanded from the ruling politicians the ``cogent reasons'' when their recommendations were turned down. None of the successive Presidents exercised his power of calling for information from the Prime Minister under Article 78(b) of the Constitution to find out in which cases the recommendation for appointment of a high court judge had been turned down by the ruling politicians and the ``cogent reasons'' for it.

But in 1993, all this changed happened when a nine-judge bench of the Supreme Court in Advocates on Record Association v. Union of India[19] overturned. The majority laid down guidelines including a time schedule for the selection of judges for appointment even though this question had not been referred to it and there were no arguments at the Bar on this issue. In this manner the appointment of high court judges, including additional judges, became a Supreme Court monopoly of the Chief Justice hemmed in by two of his senior most colleagues. Between 1993 and 1998 several successive Chief Justices of India did not bother for their two senior colleagues. Ruling politicians and the President kept quiet about this violation of the 1993 judgment. Then in 1998 the entire judgment went for a toss when Chief Justice Punchhi's recommendations were effectively checkmated by resorting to the device of a Presidential reference.[20]

The reference was decided without examining or making public relevant documents concerning the candidates proposed by Chief Justice Punchhi for elevation to the Supreme Court. Like the 1993 majority judgment the reference bench went beyond the terms of reference to know them in the Chief Justice of India by four of his senior most colleagues. The judicial fortress of selection and rejection, of appointment as additional or permanent, of renewing an additional judge as additional or making him permanent became a secret operation of five Supreme Court judges with no judicial review whatsoever.

The S.P. Gupta case[21] had laid down that two year contractual appointment can only be made if there are arrears or a temporary increase

[18] S. P. Gupta v. Union of India AIR1982,SC 149
[19] A.I.R.1994 S.C. 268
[20] Available at- http://salamuddinansari.blogspot.in/2013/01/what-is-collegium-system.html
[21] S. P. Gupta v. Union of India AIR1982,SC 149

in work and no permanent posts in a high court. Justice E.S. Venkataramiah had tellingly pointed out that ``an additional judge concerned will not be able to deal with matters as independently as a permanent judge can because the conduct of an additional judge would become the subject of scrutiny by the Chief Justice of high court, the Governor, the Chief Justice of India and the President in connection with his reappointment after two-years." As his term comes to a close ``it is natural that he would not be able to deal with matters without fear of incurring the displeasure of anyone of them." Now his renewal is subject to the secret whim and fancy of five Supreme Court judges.

In the Supreme Court Advocates-on Record Association v Union of India[22] case — the **"Second Judges Case".** This was what ushered in the collegium system. The majority verdict written by Justice J S Verma said "justiciability" and "primacy" required that the CJI be given the "primal" role in such appointments. It overturned the S P Gupta judgment, saying "the role of the CJI is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter. Here the word 'consultation' would shrink in a mini form. Should the executive have an equal role and be in divergence of many a proposal, germs of indiscipline would grow in the judiciary."[23]

The case[24] is based on independence of Judiciary as the part of basic structure of Constitution. This case is famously known as "second judges case". To secure the 'rule of law' essential for the preservation of the democratic system, the broad scheme of separation of powers adopted in the Constitution, together with the directive principle of 'separation of judiciary from executive' The case was decided on 6 October, 1993. After 1993, judgment on second judges case the collegium system was adopted in appointment of judges of Supreme Court and High Courts. Nine Judges to examine the two question referred therein, namely, the position of the Chief Justice of India with reference to primacy, and justifiability of fixation of Judge strength. A nine judge bench of the Supreme Court by 7-2 majority overruled its earlier judgment in the S p Gupta v. Union of India[25] and held that in the matter of appointment of the judges of Supreme Court and the High Courts the Chief Justice of India should have primacy means most important.

[22] A.I.R.1994 S.C. 268

[23] ibid

[24] Supreme Court Advocates-on Record Association v Union of India, AIR 1994 SC 268

[25] AIR1982,SC 149

Under article 124[26] for the Establishment and Constitution of Supreme Court. –

(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and until Parliament by law prescribes a larger number, of not more than seven (now "twenty-five" vide Act 22 of 1986) other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years :

(3) Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted

(4) Provided further that - a judge may, by writing under his hand addressed to the President, resign his office and a large may be removed from his office in the manner provided in Clause (4).

Article 216[27] describes about the Constitution of High Courts. i.e Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint. Article 217 [28]says that (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two year: Provided that –

(a) A Judge may, by writing under his hand addressed to the President, resign his office ;

(b) A Judge may be removed from his office by the President in the manner provided in Clause (4) of Article 124 for the removal of a Judge of the Supreme Court;

[26] Indian constitution

[27] Indian constitution
[28] Indian constitution

(c) The office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

Further, if any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

Article 222[29] says about the Transfer of a Judge from on High Court to another.- according to this article

(1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.
(2) When a Judge has been or is so transferred, he shall during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.

For Primacy of the opinion of the Chief Justice of India in regard to the appointments of Judges to the Supreme Court and the High Court and in regard to the transfers of High Court Judges/Chief Justices; and Justiciability of these matters, including the matter of fixation of the Judge-strength in the High Courts, Sarvashri F.S. Nariman, Kapil Sibal, Ram Jethmalani, P.P. Rao and Shanti Bhushan argued for reconsideration of the majority opinion in S.P. Gupta,[30] contending that the role of the Chief Justice of India in the matter of appointments to the Supreme Court and the High Courts and transfers of the High Court Judges and Chief Justices has primacy, with the executive having the role of merely making the appointments and transfers in accordance with the opinion of the Chief Justice of India.

On the question of primacy, the court concluded that, the role of the Chief Justice of India in the matter of appointments to the Judges of the Supreme Court is unique, singular and primal, but participatory vis-a-vis the Executive on a level of togetherness and mutuality, and neither he nor the Executive can push through an

[29] Indian constitution

[30] S. P. Gupta v. Union of India AIR1982,SC 149

appointment in derogation of the wishes of the other. The roles of the Chief Justice of India and Chief Justice of the High Court in the matter of appointments of Judges of the High Court, is relative to this extent that should the Chief Justice of India be in disagreement with the proposal, the Executive cannot prefer the views of the Chief Justice of the High Court in making the appointment over and above those of the Chief Justice of India. In the matters of transfers of Judges from one High Court to another, the role of the Chief Justice of India is primal in nature and the Executive has a minimal.

Third Judges Case of 1998 is not a case but an opinion delivered by the Supreme Court of India responding to a question of law regarding the collegium system, raised by then President of India K. R. Narayanan, in July 1998 under his constitutional powers.

The Indian Constitution, like many other constitutions, creates a separation of powers between different wings of the state i.e. Executive, Legislature, and Judiciary. all three wings remain accountable to each other in some form or the other. The central and state executives are directly accountable to Parliament and state legislatures respectively. The judiciary is independent of the Legislature and the Executive in most aspects, the power of appointment vests with the Executive and the power of removal rests with Parliament. This system is designed to enable the judiciary to remain accountable to the democratic process in some measure.

According to the CJI Venkataramaiah[31]

"...such judges are appointed, as are willing to be 'influenced' by lavish parties and whisky bottles...in every High Court, there are at least 4 to 5 judges who are practically out every evening, wining and dining either at a lawyer's house or a foreign embassy...practically in all 22 High Courts, close relations of judges are thriving. There are allegations that certain judgements have been influenced though they have not been directly engaged in lawyers in such cases."

Though a number of past judgements had interpreted the respective powers of constitutional functionaries regarding the transfer and re-appointment of judges, the case of Supreme Court Advocates-on-Record v. Union of India[32] is responsible for moving towards the present system of appointment of judges. According to the court,

[31] Seervai's *Constitutional Law of India* ,4th Ed., Vol. 3.
[32] A.I.R.1994 S.C. 268

1. The process of appointment of judges is an integrated participatory consultative process. All constitutional functionaries must perform this duty collectively to reach an agreed decision.

2. The proposal for appointment of a judge must arise from the CJI (for appointment of a Supreme Court judge) and from the Chief Justice of a High Court (for a High Court judge).

3. In the event of conflicting opinions, the opinion of the CJI has primacy. No appointment can be made without the concurrence of the CJI.

4. A collegium system of appointment must be initiated.

Under Article 143(1) of the Constitution of India, Supreme Court further evolved this doctrine and created a system wherein judges would be appointed by a collegium consisting of the four senior-most judges of the Supreme Court. Though the Executive would make the actual appointment, it would have no other role in the appointment of judges to the High Court or Supreme Court.

In Alternative Mechanisms, the law commission of India in the 80th report (1979), 121st report (1987) and 214th report (2008) recommended establishment of a national judicial service commission. The CJI would be the chairman and there would be three senior most judges of the supreme court, three senior most CJs of the high courts, the minister for law and justice, the attorney general of India, the outgoing CJI and a legal academic in the commission, additionally, while deciding a vacancy in a particular high court, the CJ of the high court, the chief minister and governor of that state must be co-opted into the deliberations of the commission.

All the reports above emphasize the need for a broad-based consultative framework for the appointment of judges. Significantly, all these reports have also been informed by practices in other countries, most of which allow for some sort of a consultative process between members of the judiciary, executive, legislature, and civil society. The process being proposed by the Central Government at present also aims to create a broad-based consultative process.[33]

The Law Commission in its 214th Report on 'Proposal for Reconsideration of Judges cases I, II and III' recommended two solutions: To seek a reconsideration of the three judgments before the Supreme Court.[34] A law to restore the primacy of the Chief Justice of India and the power of the executive to make appointments but

[33] https://polityinindia.wordpress.com/tag/in-re-presidential-reference-under-article-1431-of-the-constitution-of-india/
[34] ibid

e-ISSN: 2348-6848
p-ISSN: 2348-795X
Volume 05 Issue 04
February 2018

in 99th amendment collgeium system reformed to national judicial appointment commission Act.

CONCLUSION-

Judiciary is independent body. The work of judiciary is to say whether the statute made by parliament is right or wrong. But appointment of judges of Supreme Court and high court by avoiding collegeium system is political superior of legislature. Judiciaries are very transparent and believable by citizen of India from independence. Millions of people are governing by judicial decision with traditionally and faithfully, if NJAC Act circulates for appointment of judges, it my wrong for the people and people will not get pure justice in matter related to political field and now National Judicial Commission for Collegiums Reformation becomes challengeable in India There is a great need to reform the present system of appointment, in order to make it more transparent, and to achieve other social and economic ends. However, we need to think through the available alternatives for meeting our goals, and ensure that the legislative measures we take actually help in the realization of those goals.