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## Revisiting the Collegium System

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*The judges of the Supreme Court and High Courts are appointed by the Collegium which was formed with an intent to avoid any interference with the independence of the judiciary. However, with the passage of time, it has been proven that the Collegium system is not the best one to appoint judges. The government did form the National Judicial Appointments Committee with an intent to regulate the appointments but the same was struck down by the Constitutional Bench as unconstitutional and void. The Court reverted to the system of Collegium, but the questions of transparency and accountability were still unanswered. This paper attempts to analyse and provide a solution to the problems that exist in the appointment of judges. The paper is structured in the following order, firstly, it explains the significance of accountability of institutions in a democracy. Subsequently, the paper analyzes the evolution of the Collegium system and the problems therein. The paper then deals with the formation of the National Judicial Appointments Commission and its striking down by the Supreme Court. Finally, it proposes a solution in the form of the establishment of the National Judicial Commission which can be a possible alternative to the Collegium.*

**Keywords:** *collegium, appointment, judges.*

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## INTRODUCTION

### **Accountability of Institutions in a Democracy**

“Accountability can be understood as an obligation upon the authorities to answer for the performance of their duties, paired with the correlative right of someone else, typically the person for whom the duties are performed, to demand such an answer.” The very essence of democracy, the rule of people, is to make sure that people should know how the institutions are functioning. A mere suspicion about the functioning of institutions, in the minds of people, is a disgrace to democracy. Transparency is a prerequisite for an accountable institution. It is practical, that complete transparency might be a hurdle in the functioning of certain institutions with specific purposes. Absolute transparency might hinder some works, but sheer opacity is certainly not an answer. A balance needs to be maintained in institutions. Complete opacity does not take any institution far from legitimacy, but a mere suspicion in the eyes of people is ought to be avoided for a democracy to function well. Legitimacy in question is equally undesirable, if not more for democracy than non-functional institutions.

The Judiciary in India is regarded as the custodian of people’s rights. The importance of an independent judiciary is unquestionable. But a question arises, who judges the Judge? Judicial accountability refers to when the judges are held accountable for their actions in office, apart from their judgments. It is of no doubt that the author here, by the virtue of the use of the word ‘action’, does not intend to talk about delivering judgements, unless specified, but other official duties including the appointment of judges. The credibility of the actions of judges, keeping aside their judgments, is often questioned. As Late Arun Jaitley rightly said, “To be independent is important, to be credible is more important”. As Justice (Retd.) A.P. Shah writes, “Judicial independence is manifest in our institutions in many ways. Historically, judges have always been exempted from liability for acts that they have performed in the judicial office in good faith. Similarly, under the Indian constitution, terms of appointment, tenure, remuneration, pension, of judges are all secured. But immunity from liability does not

mean that a judge has the extra privilege of making mistakes or doing wrong. All these immunities are given for the express purpose of the advancement of the cause of justice.”<sup>1</sup>

## THE PROCESS OF APPOINTMENT OF JUDGES IN INDIA

“The Constitution does not lay down a definitive procedure for the purpose of appointment of judges as it merely states that the President is to appoint Supreme Court judges in consultation with the Chief Justice and such other judges of the Supreme Court and of the High Court as the President may deem necessary.”<sup>2</sup> Article 124(2) of the Constitution of India states that “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...” The Supreme Court of India was asked to rule on the meaning of the term "consultation" as used in Article 124(2). Prior to 1993, the President's authority to select Supreme Court justices was largely ceremonial, as he would act on the recommendation of the relevant Minister, namely the Law Minister, in this and other issues. The Executive had the ultimate say in appointing Supreme Court judges, and the Chief Justice's opinions were not considered obligatory on the Executive.<sup>3</sup>

The 7-Judge Constitutional Bench of the Supreme Court of India in *SP Gupta v President of India and Ors*<sup>4</sup>, popularly known as the First Judges Case, stated, “...while giving the fullest meaning and effect to consultation', it must be borne in mind that it is the only consultation which is provided by way of a fetter upon the power of appointment vested in the Central Govt. and consultation cannot be equated with concurrence.” Justice PN Bhagwati, who wrote the judgement on the behalf of the Bench, therefore, held that the consultation by the Chief Justice of India is not binding on the Central Government, though it is mandatory to have a ‘consultation’.

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<sup>1</sup> AP Shah, 'A Manifesto for Judicial Accountability in India' (*The Wire*, 2019) <<https://thewire.in/law/cji-ranjan-gogoi-supreme-court-judiciary>> accessed 04 AUGUST 2021

<sup>2</sup> MP Jain, *Indian Constitutional Law* (8th edn, LexiNexis 2018)

<sup>3</sup> *Ibid*

<sup>4</sup> *SP Gupta v President of India and Ors* AIR 1982 SC 149

The judgement in *SP Gupta* was subsequently overruled by the 9-Judge Bench of the Supreme Court in *Supreme Court Advocates On Record Association v Union of India*<sup>5</sup>, popularly known as the Second Judges Case. The Court stated, “that irrespective of the question of the primacy of the Chief Justice of India in the matter of appointments, the Constitutional provisions cannot be construed to read therein the absolute discretion of primacy of the Government of India to make appointments of its choice, after completing formally the requirement of consultation, even if the opinion given by the consultees of the judiciary is to the contrary.” In simple terms, the Supreme Court negated the *SP Gupta* Judgement and held that the government, i.e. the Executive, does not enjoy absolute discretion in terms of appointment of judges of the Supreme Court and High Courts. The Court further added, “the selection should be made as a result of a participatory consultative process in which the executive should have the power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word 'consultation' instead of 'concurrence' was used, but that was done merely to indicate that absolute discretion was not given to anyone, not even to the Chief Justice of India as an individual, much less to the executive, which earlier had absolute discretion under the Government of India Acts.” The Court also suggested that the recommendation should be given by a collegium of judges and not just the Chief Justice alone.

The Supreme Court has issued an advisory opinion on a request filed by the President under Article 143, clarifying certain issues raised by the aforementioned decision (the Second Judges' Case). In that advisory judgement, known as the Third Judges Case, the Supreme Court said that while making recommendations for the appointment of justices, the Chief Justice must consult the Supreme Court's four senior-most judges. As a result, the collegium now consists of the Chief Justice and the Supreme Court's four senior-most justices. All four judges' opinions, as well as the Chief Justice's, should be written down. The opinions of the Supreme Court's senior-most judge, who is a member of the High Court from where the suggested individual comes, must also be acquired in writing.

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<sup>5</sup> *Supreme Court Advocates on Record Association v Union of India* AIR 1994 SC 268

Since then, the collegium has been in charge of appointing judges almost entirely on its own. In this respect, the executive's authority has been effectively revoked. If a lawyer is to be raised as a judge of a High Court or the Supreme Court, the government's involvement is restricted to requesting an investigation by the Intelligence Bureau (IB).

## **PROBLEMS WITH THE COLLEGIUM SYSTEM**

The primary purpose of the Collegium was to keep the Executive and Legislature out of the ambit of the appointment of judges to maintain the independence of the Judiciary. The notorious term 'Sarkari Judges' was to be completely avoided. The controversial appointments in the Supreme Court which took place especially in the 1970s and 80s perhaps led the Supreme Court to take the power of the appointment of its judges into its own hands. The appointments of Justice AN Ray in 1973 and Justice Beg in 1976 as the Chief Justices of India particularly came with a gamut of questions and controversies. The then Government in both the cases departed from the practice of the appointment of the senior-most judge in the Supreme Court as the Chief Justice of India. The appointment of Justice Ray as the CJI was even challenged in the Delhi High Court through a petition for quo warranto under Article 226. The Delhi High Court in *PL Lakhanpal v AN Ray*<sup>6</sup> dismissed the writ holding that the motives of the appointing authority were irrelevant in quo warranto proceedings. The Court even said that Justice Ray would be appointed as the CJI even if the criterion of seniority would have been followed. This was practically true as the three senior judges to Justice Ray had already resigned in protest of his appointment as the CJI.

The Collegium was formed with good intentions, but unfortunately, it did not stand up to the expectations of its framers. There have been instances in around three decades of the formation of the Collegium, which perhaps show that the system is not the best system to appoint the judges. There have been instances when the judges, after their retirement, have come out in public forums and alleged that the Collegium is not working as per the intent of its formation. It is, however, important to understand the principles which lead to the arguments against the Collegium.

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<sup>6</sup> *P L Lakhanpal v AN Ray* AIR 1975 Del 66

## **LACK OF TRANSPARENCY**

The Collegium works in closed doors. Transparency in any manner is neglected by this way of functioning of the Collegium. It is an inevitable fact that transparency brings accountability to the public. The method and considerations by the Collegium are not known. The norms of eligibility of selection and transfer of judges remain out of public knowledge. Confidentiality of some documents has to be maintained for an institution to work effectively. However, in the case of the appointment of the judges of the Supreme Court judges, transparency becomes a matter of right in rem. The public ought to know that on what grounds a judge is appointed in the Supreme Court. The Supreme Court and the High Courts are the custodians of the rights of every individual in this country. People are the main stakeholder of democratic institutions, including the judiciary. If the people are kept in dark regarding the grounds of appointment of their judges, it is certainly an undesirable system of functioning.

It is, however, pertinent that if a judge is not elevated to the Supreme Court from any of the High Courts, the grounds of rejection of elevation should not be made public. The reason stands clear, the judge has to return to the respective High Court if his or her elevation is rejected. If the grounds of rejection are made public, the image of that individual judge, in front of the stakeholders of that particular High Court, especially advocates and public, will be tarnished. This is certainly detrimental for the judge to work independently. The criteria on which the judges are appointed by the Collegium are not defined. Even the question of the existence of any such criteria is unclear and thus points out the lack of transparency in the functioning of the collegium. The whole process is opaque as it does not allow the public to know on what grounds and merits a judge is elevated.

## **POSSIBILITY OF FAVOURITISM**

Chances of favouritism or nepotism cannot be mitigated in a system where individuals appoint individuals, thus, the possibility of preferential treatment or favouritism also causes a setback to the present system. The composition of the Collegium, even to the extent of the next 4 to 5 years, can be effortlessly predicted. An attempt to get into the good books of the judges

who are going to be in the collegium has become a wanted practice. As almost every judge of the Supreme Court hails from a particular High Court, that judge inevitably has a greater voice in the appointment or elevation of any other judge from that particular High Court. As late Shri Arun Jaitley used the term 'Constituency Judges' in his speech in the Rajya Sabha<sup>7</sup> during the discussion of the 99th Constitutional Amendment Act, it is not impossible that the best judges can be ignored or rejected.

### **CONTRARY TO THE INTENT OF THE CONSTITUENT ASSEMBLY**

The present system is also a judgement evolved system. The Constitution does not give any organ, the judiciary or the executive, an exclusive right to appoint the judges. The word 'consultation' was defined by the Supreme Court on a very different line than the usual dictionary meaning. The interpretation gives an exclusive right to the Collegium to appoint the judges. The Constitution speaks about the system of balance of power between the three organs of the government. The system of checks and balances is based on a proposition that no organ can obtain absolute power and be immune to the balance. The Constituent Assembly deliberately chose not to use the word 'concurrence' in Article 124(2). It was an attempt to overthrow the possibility of 'absolutism'. The speech by Dr. BR Ambedkar in the Constituent Assembly certainly proves that the aim of the process of the appointment was not to make it an individual-centric process, whether it be the executive or the judiciary. The role of the Chief Justice as a consultant could be inferred by Ambedkar's words in the Constituent Assembly, wherein he clearly enunciated, "With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all try prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of Judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the

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<sup>7</sup> Rajya Sabha TV, 'Arun Jaitley's Speech on the Constitution (Amdt) Bill, 2013 (*Judicial Appointments Commission*)' <[https://www.youtube.com/watch?v=9wgzFM3d\\_Hw](https://www.youtube.com/watch?v=9wgzFM3d_Hw)> accessed 07 August 2021

President of the Government of the day. I, therefore, think that this is also a dangerous proposition.”<sup>8</sup>

But with the evolution of the Collegium system, it has become a legally sanctioned practice that only judges can appoint judges. The trilogy of the cases related to the appointment of judges establishes that the government, i.e. the Executive, cannot set aside the recommendation of the collegium. The President has to appoint the judges recommended by the collegium. Under Article 74 of the Constitution, the President has to exercise his functions in accordance with the aid and advice of the council of ministers. But in the case of appointment of judges, it was clearly laid down in the Second Judges case, that Article 74 has to be read with Article 124, i.e., the council of ministers cannot reject the recommendation by the collegium on appointment of any judge unless very strong and cogent reasons exist.

## COMPARISON WITH OTHER COUNTRIES

India is the only nation in the world where judges nominate judges. Since 2006, the judges in the United Kingdom have been appointed by an independent Judicial Appointments Commission. The Commission is responsible for recommending the names of the judges to be appointed to the Lord Chancellor. The Lord Chancellor's ability to reject the proposal is restricted. There are judges on the Commission, but they are not in a majority. The Commission's goal is to promote diversity in the pool of people who may be considered for appointments. According to the United States Constitution, Supreme Court justices, the court of appeals judges, and district court judges are nominated by the President and approved by the United States Senate. Senators and members of the House of Representatives from the President's political party often suggest prospective candidates. Each candidate is usually subjected to confirmation hearings by the Senate Judiciary Committee.<sup>9</sup>

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<sup>8</sup> 'Constituent Assembly Debates (Proceedings) - Volume VIII' (*Constitutionofindia.net*) <[https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/8/1949-05-27](https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-27)> accessed 12 August 2021

<sup>9</sup> 'FAQs: Federal Judges' (*United States Courts*) <<https://www.uscourts.gov/faqs-federal-judges>> accessed 12 August 2021



## NATIONAL JUDICIAL APPOINTMENT COMMISSION

### Early Recommendations

“In its 21st Report issued in 1987, the Law Commission advocated the setting up of a Judicial Commission. In 1987, after the case of SP Gupta, the executive came to wield overriding powers in the matter of selection and appointment of judges. The Commission was unhappy with the situation prevailing at the time.”<sup>10</sup> The 121st Report of the Law Commission said, “The present model...confers overriding powers on the executive in the matter of selection and appointment of judges and in dealing with the judiciary. The constitutional mandate was to separate executive and judiciary in all its ramifications. The Constitution aims at ensuring the independence of Judiciary when translated in action, independence from the executive”<sup>11</sup>. The Law Commission, however, did not work on the composition of such a body, but only gave a tentative plan.

“The establishment of the National Judicial Commission was also strongly suggested by the National Commission to Review the Working of the Constitution headed by former Chief Justice of India MN Venkatachaliah. According to the Venkatachaliah Commission Report, the Judicial Commission should consist of the Vice President of India, Chief Justice of India, the two senior-most judges of the Supreme Court, and the Union Minister of Law and Justice.” When appointing a judge in a High Court, the Chief Justice of that High Court should be included in the Commission. The Government, however, attempted to establish such a commission, but it substantially altered the composition recommended by the Venkatachaliah Commission.

### *National Judicial Appointment Commission Act and the 99th Constitutional Amendment Act 2014*

The Government came up with the National Judicial Appointment Commission (NJAC) Act and the 99th Constitutional Amendment in 2014. The amendment was ratified by 16 states.

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<sup>10</sup> Jain (n 2)

<sup>11</sup> Law Commission, *A new forum for Judicial Appointments* (Law Com No 121, 1987)

The amendment amended Article 124(2) of the Indian Constitution. In Article 124, for the words “after consultation with such Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose”, the words, figures and letter “on the recommendation of the National Judicial Appointments Commission referred to in Article 124A” was been substituted.<sup>12</sup> As per the Amendment, the Commission was to be headed by the Chief Justice of India and consisted of two other senior judges of the Supreme Court next to the CJI, the Union Minister of Law and Justice, and two eminent persons nominated by the committee consisting of the CJI, Prime Minister of India and the Leader of Opposition in Lok Sabha. It also provided that one eminent person out of the two should belong to Scheduled Caste or Scheduled Tribe or OBC or minority communities or women.

The NJAC Act and the 99th Constitutional Amendment were struck down in Supreme Court *Advocates-On-Record Association v Union of India*<sup>13</sup> by the Constitutional Bench of the Supreme Court with a ratio of 4:1. Justice Chelameswar was the sole dissenter on the bench. The Supreme Court held, “process for appointment of Judges (involving manner of selection and actual appointment), is an integral part of the independence of the judiciary, which is part of the basic structure of the Constitution.” The Court also said that the primacy of the judiciary in the matters of appointment and transfer of judges is also part of the basic structure of the Constitution.

In the same case, Justice Chelameswar gave the dissenting judgement. According to the learned Judge, “primacy of the opinion of the judiciary in judicial appointments is not the only means for the establishment of an independent and efficient judiciary”<sup>14</sup>. This statement sounds valid as the Court assumed that only Judges can make the best choice in the matters of appointment. The learned Judge also said, “Basic structure is not the primacy of the opinion of the CJI (Collegium) but lies in non-vestiture of absolute power in the President (Executive) to choose and appoint Judges of the constitutional courts.”<sup>15</sup> Justice Chelameswar was right in the sense that the Constituent Assembly itself deliberately chose not to use the word

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<sup>12</sup> DD Basu, *Introduction to the Constitution of India* (22nd edn, Lexis Nexis 2015)

<sup>13</sup> *Supreme Court Advocates-On-Record Association v Union of India* 2016 5 SCC 1

<sup>14</sup> *Supreme Court AoR Association* (n 5)

<sup>15</sup> *Ibid*

‘concurrence’, as stated above. It was quite clear that the motive of the Constituent Assembly was not to give primacy to any individual in the matter relating to the appointment of judges and hence, the Constituent Assembly deliberately chose the word ‘consultation’ but the Supreme Court included a completely opposite meaning as a part of the basic structure of the Constitution.

The NJAC Act, however, had some structural defects. Section 6(6) of the Act stated, “The Commission shall not recommend a person for appointment under this section if any two members of the Commission do not agree for such recommendation.” This indirectly gave the power to veto any recommendation to the members, other than the judges. The power of veto is not desirable as it tends to make appointments with undesirable intentions. There could have been a possibility that the recommendations were vetoed due to the political affiliations of any of the two members. Therefore, the Act was loosely drafted and did not have a mechanism in which the members can give inputs independently. The act also ignored some crucial recommendations by the Venkatachaliah Commission as discussed above. The 99th Constitutional Amendment Act also provided in Article 124, “...that one of the eminent persons shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women”. This was one of the defects of the Act as in matters of appointment of Judges, reservation should not hold a place in any way. The judges are meant to protect the rights of every section of society. The judges are not appointed after looking at their class, caste, race, gender, etc. but strictly on their merits and experiences. Reservation in the Commission meant to appoint the judges would have given an impression that even the judges who belong to that category are acting as the representative of that category, which is undoubtedly against the principles of justice. Class, caste, race, gender, etc. based representation compulsorily imposed by the means of reservation would have been detrimental to the soul of the blind lady of justice.

After striking down the NJAC Act and the 99th Constitutional Amendment, the Supreme Court reverted to the system of Collegium. After this judgement, the Supreme Court directed the Government to finalise a new Memorandum of Procedure (MOP) for the appointment of

judges in consultation with the Chief Justice of India. The difference, however, arose between the Collegium and the Government on several clauses of the MOP. The most contentious clause added by the Government was that the Government could reject the recommendation of the Collegium on the grounds of larger public interests and national security. This clause was rejected by the Collegium as it gave the Government an upper hand and supremacy for the Government could easily reject any recommendation on this ground. This was a sheer attack on the independence of the Judiciary. The Government later said that while rejecting any recommendation of the Collegium on national security grounds, the reasons could be disclosed to the CJI but must not be disclosed to the Collegium or come in the public domain.<sup>16</sup> This step would have given special powers in the hands of the Chief Justice of India and would have tended to nullify any decision by the Collegium. In such a case, even the Collegium would not be made aware of the reasons for the rejection of its recommendation.

There also arose differences in the opinions within the Collegium. The differences between the then Chief Justice Deepak Misra and the four senior-most judges, who included Justices Chelameswar, Ranjan Gogoi, Kurian Joseph, and Madan Lokur came in front of the whole country when these four judges held a press conference alleging that the Chief Justice is not properly discharging his duties. “This is an extraordinary event in the history of the nation, more particularly this nation. It is with no pleasure that we are compelled to call this press conference. But the administration of the Supreme Court is not in order and many things which are less than desirable have happened in the last few months,”<sup>17</sup> Justice Chelameswar said then. Justice Joseph, who was a part of the bench that decided to strike down NJAC later in an event regretted his decision. The honourable former judge said the system of the collegium was “100% defective”. He further added, “How to improve the Collegium system...nothing has been done. The only improvement is that resolutions are uploaded...That is why I regret my NJAC judgment. None of the suggestions for the

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<sup>16</sup> Rajya Sabha TV, ‘In Depth: Who appoints Judges?’ (*YouTube*, 3 May 2018)

<<https://www.youtube.com/watch?v=yVzhdVD6Fug>> accessed 12 August 2021

<sup>17</sup> Ashok Bagriya ‘A year after landmark press conference, little has changed in Supreme Court’s running’ (*Hindustan Times*, 12 January 2019) <<https://www.hindustantimes.com/india-news/a-year-after-landmark-press-conference-little-has-changed-in-supreme-court-s-running/story-ZtTyvwlyFTCJLDxngrOQuL.html>> accessed 12 August 2021

improvement of the Collegium was implemented...I even wrote a letter (in this regard)."<sup>18</sup> All these events clearly express how the Collegium has departed its ways from the intention of its formation. The present system of the Collegium has a gamut of problems and is certainly not the best system.

## **A SOLUTION TO THE PROBLEM**

According to all the points mentioned above, one thing stands clear: a new system of appointment of judges has to be developed with no further delay. The present Collegium system has many drawbacks which have been discussed at length above. The NJAC Act and the 99th Constitutional Amendment Act also had some structural defects. It would be totally undesirable for the independence of the judiciary if we revert to the pre-collegium system in which the Government had primacy in the appointment of judges of the Supreme Court and High Courts. We, therefore, need a system in which the independence of the judiciary is not at all compromised. In the new system, neither the Executive nor the Legislature should have any kind of primacy and power to veto the names of the persons recommended.

The author proposes the following system of National Judicial Commission for the appointment, transfer, and matters related to judges of the Supreme Court and High Courts.

### **Composition of the Proposed Commission**

A 7-member National Judicial Commission (referred to as the 'Commission' from here) shall be formed. The 7-member Commission, headed by the Chief Justice of India should include 3 other judges of the Supreme Court, the Union Minister of Law and Justice, the Leader of Opposition in Lok Sabha, and an eminent jurist. All the members shall be appointed under an oath by the President of India. The Convenor of the Commission shall be the Secretary to the Government of India in the Department of Justice. The Convenor shall not be a member of the Commission. The role of the Convenor shall be to call the meetings and set an agenda for the

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<sup>18</sup> Aditi, 'Regret my decision in the National Judicial Appointment Commission case, Justice Kurian Joseph' (*Bar and Bench*, 10 May 2019) <<https://www.barandbench.com/news/regret-my-decision-in-the-national-judicial-appointment-commission-case-justice-kurian-joseph>> accessed 14 August 2021

meeting. The members can also set the agenda with the majority of the Commission seconding it.

### **Functions and Working of the Commission**

The foremost function of the Commission shall be to lay down some specific criteria on which a judge can be appointed in the Supreme Court. The criteria shall include the parameters on which a judge is to be selected. The present Collegium system, as discussed above, does not have strict criteria on which a judge gets selected. Rather, in most cases, it is just the impression of the person to be appointed on the members of the Collegium. On the contrary, the Commission shall lay down specific criteria which will be known to the public. The working of the Commission shall be decided by the act of its establishment. The working will be altered only with the prior concurrence of at least 2/3rd of the members of the Commission. The Commission will hold at least one meeting every 2 months. Every member shall recommend one name in the matter of appointment in the Supreme Court.

In matters of appointment of judges, every member will give marks to individuals according to the criteria decided by the Commission. The marking shall be done on a sealed cover. The marks given by the members shall not be disclosed to anyone, including the other members of the Commission. All the marks will be compiled anonymously by the Convenor of the Commission. The individual getting the highest aggregate marks will be recommended to the President. If there are 2 or more individuals getting equal marks, the Commission will recommend the name of the individual who gets a vote in favour of a minimum of 2/3rd members. No member will have the power to veto.

In matters of transfer of judges of High Courts, the Commission shall decide the transfer after a discussion in the meeting. The Commission shall call the Chief Justice of the concerned High Court/s in the meeting. In case of transfer of the Chief Justice of High Court, the senior-most judge/s of the concerned High Court/s will be called by the Commission. The Chief Justice or judges of the concerned High Court/s shall not have voting rights and will act only as consultants. Any decision in the matter of transfer of judges shall be taken with the 2/3rd

members voting in favour of the decision. The collective decision shall be submitted in writing to the President.

The role of the Commission would not just be limited to recommending the names of the Judges to be appointed in the Supreme Court and High Courts, but the Commission will also be granted powers to investigate or order an investigation for an act conducted by a judge beyond his judicial powers. In recent years, there have been instances in which the judges were accused of several charges, and no proper investigation was conducted. One of the major instances was the allegation of sexual harassment against a former Chief Justice of India by a staff of the Supreme Court. The way proceedings were conducted without any fair investigation was a blot to the functioning of the Court. The Commission, in such cases, would have the power to investigate or order an investigation. If such an allegation is against any sitting judge, including the Chief Justice of India, who is a member of the Commission, that judge shall not participate in those meetings in which the Commission is discussing or deciding his or her case.

### **Process for Appointment of the Members of the Commission and Rationale Behind their Membership**

#### *The 3 Judges other than the Chief Justice of India*

The 3 Judges, other than the Chief Justice of India, shall be selected on a rolling basis and not just on the basis of seniority. The judges can be selected on a rolling basis by using means like a lottery system, or any such method in which the names are not predictable. The judges shall be selected in the Commission for a 1-year tenure. Only those judges who have served for at least 2 years in the Supreme Court in the capacity of a judge shall be eligible for this process. A judge can only serve in the Commission once and shall not be made eligible for re-appointment. The only exception in which a judge can serve in the Commission more than once is when the same judge becomes the Chief Justice of India in the upcoming period of his tenure as a judge in the Supreme Court. If a judge who is appointed in the Commission becomes the Chief Justice of India during the one-year tenure of his membership in the

Commission, the vacancy for the member should be immediately filled following the same procedure as mentioned above. If the judge appointed in the Commission attains the age of retirement and completes his tenure as a judge in the Supreme Court, the judge shall continue to serve as a member of the Commission for the pending period of his tenure of membership of the Commission. In case of impeachment of a judge who is a member of the Commission, the judge will cease to be a member of the Commission with immediate effect. Any other vacancy, due to any reason will be filled following the same procedure.

This process of appointment of judges in the Commission in an above-mentioned way would ensure that the names of the judges to be appointed in the Commission are not predictable. The chances of favouritism would substantially decrease in this way. This would also ensure that the judges are not treated differently within themselves as the criterion of just seniority will no longer exist. The eligibility of serving in the Supreme Court minimum for 2 years will ensure that the Judges are well-aware of the working of the Supreme Court and what qualifications one must possess.

#### ***Union Minister of Law and Justice***

The Rationale behind the inclusion of the Union Minister of Law and Justice is the representation of the Executive in the Commission. The Collegium system has laid down an un-said principle that only judges are aware of the problems of the people and only they are the real protectors of democracy. This principle is flawed as in a democracy, people get a chance to elect their leaders. The elected government has the mandate of the people and is therefore equally accountable to them. Justice Chelameswar in his dissenting judgment in the NJAC case as mentioned above has rightly said that primacy of the opinion of the Chief Justice in matters of appointment of judges is not a basic structure of the Constitution. As it has been said that no member of the Commission will have the power of veto, the Minister cannot be said to bring his political affiliations in the process of appointments.

#### ***Leader of Opposition of Lok Sabha***



The opposition plays a crucial role in a healthy democracy. The opposition parties represent the diversity of opinions in the Parliament. The inclusion of Leader of Opposition of Lok Sabha will ensure that the Commission is inclusive and represents the diversity of opinions. The inclusion of Leader of Opposition will also mitigate any chances of an allegation against the Commission being biased towards the Government.

### *Eminent Jurist*

An eminent jurist shall be appointed as a member of the National Judicial Commission. The tenure of the jurist shall be of 2 years. The name of the eminent jurist shall be recommended to the President by a committee comprising of a retired Chief Justice of India, the Attorney General and the President of the Supreme Court Bar Association (SCBA). All three members will also be eligible to become members of the Commission if the committee agrees with the majority. This committee will directly submit its report to the President and the President shall be bound to accept it. The experience and knowledge of the jurist will be an asset to the Commission

### **CONCLUSION**

The Collegium system came into existence after the trilogy of the Judges' Cases. The Collegium, though formed with good intentions, failed to serve its purpose. The system needs an urgent check without any delay. The National Judicial Appointments Commission formed by the Government in 2014 was a step further to address the issue. The NJAC, on the other hand, had certain structural flaws. The Supreme Court's Constitutional Bench overturned the NJAC Act and the 99th Constitutional Amendment Act. The Court reverted to the system of the Collegium, but, the question of the working of the Collegium, however, remained unanswered. The 7-member National Judicial Commission proposed by the author addresses most of the issues in order to bring accountability and transparency in the matters relating to the appointment and transfer of judges.