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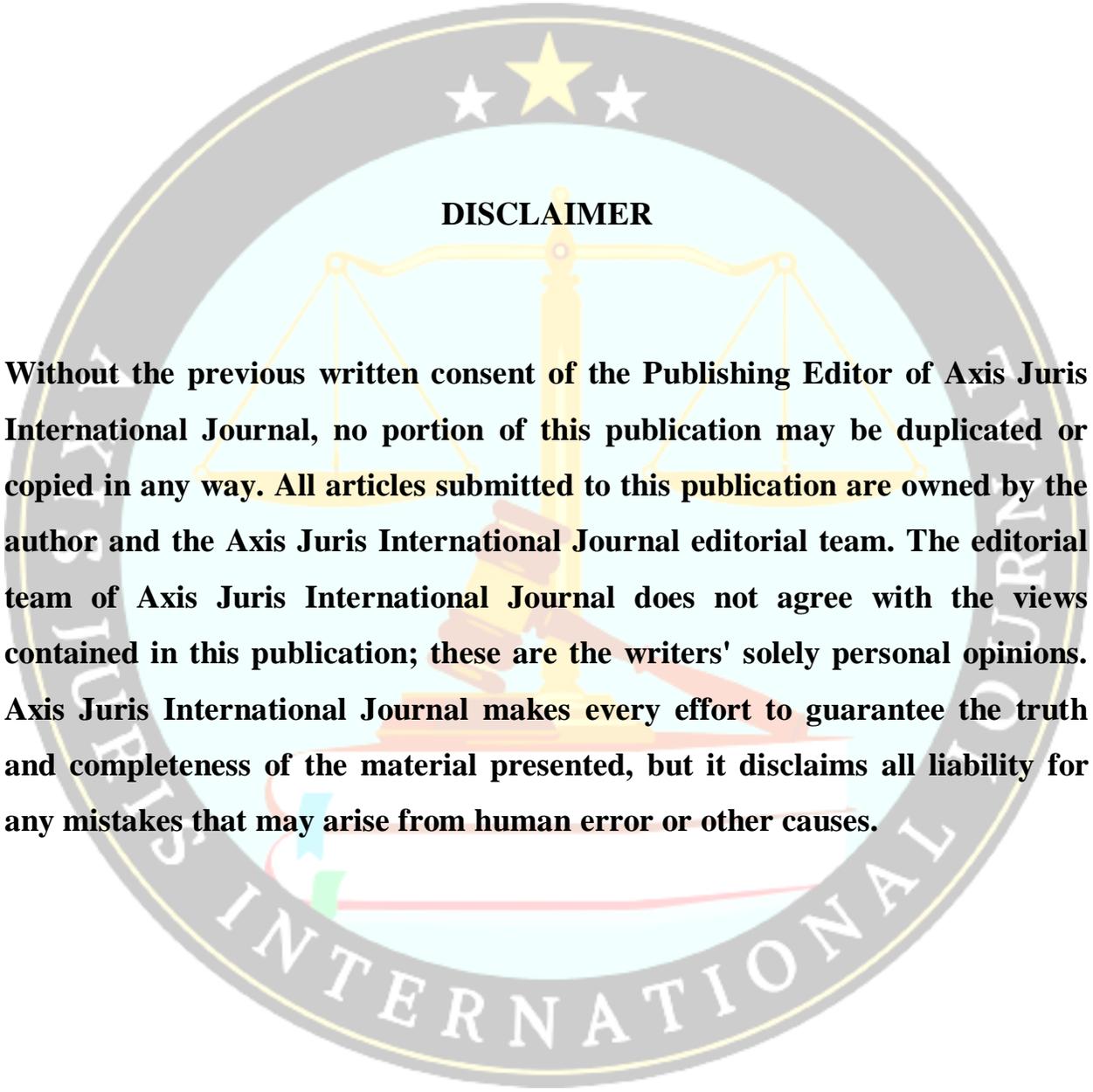
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PRESERVING THE INDEPENDENCE OF JUDICIARY: EXAMINING THE ROLE OF THE COLLEGIUM SYSTEM IN APPOINTING JUDGES

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ABSTRACT

The independence of the judiciary must be preserved in order to sustain the rule of law and protect citizen rights. This independence is mostly upheld through the Collegium system, which in India is in charge of choosing judges for the higher judiciary. The approach makes sure that candidates are chosen only on the basis of their qualifications, not because of their political views or other considerations. Recent news stories have focused on the topic of judicial selections made through the collegium system. In light of the decision from January 2019 to elevate “Justice Khanna” and “Justice Maheshwar” to the Supreme Court, the public is perplexed as to why the resolution from December 2018 to promote “Justice Menon” and “Justice Nandrajog” was revoked. In the infamous Second Judges' Case, a method for selecting judges for the higher judiciary called the Collegium System was developed. The 99th Constitutional Amendment, which intended to alter India's higher judiciary nomination process, was overturned by the SC in 2015. Being a member of the panel in charge of choosing judges was viewed as an intolerable government interference with the independence of the judiciary. The newly established collegium system is the outcome of "judicial activism" and "self-selection." As the guardian of the "rule of law," the Supreme Court has a responsibility to be unbiased and devoid of bias. This essay examines the history of the collegium system up to this point and makes recommendations for further actions in order to promote openness in the appointment of judges to higher courts in India.

Keywords: *Independence, Judiciary, Appointment, Qualifications, Collegium System, Openness.*

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INTRODUCTION

The recent controversy surrounding the nomination of “Justice Khanna” and “Justice Maheshwari” to the Supreme Court (hereafter "SC") has once again brought to light the mystery surrounding higher judicial appointments in India. Ranjan Gogoi, the Chief Justice, presided over the collegium. The collegium gave no explanation as to why the seniority convention should not be followed. This is yet another example of how India's judicial selection process lacks transparency and accountability. The selection of judges for higher courts has traditionally been the subject of many inquiries and worries. It seemed as though the tempest would finally calm down when the SC upheld the Collegium System and declared the "National Judicial Appointments Commission" [hereafter "NJAC"] unlawful in 2015. However, things actually grew worse. The way the collegium functions and the current follies have reignited the discussion over whether or not the collegium should still exist, forcing the nation to reevaluate the confidence it has in its judicial system. In a number of cases, the SC has vehemently defended the collegium structure's protection of the "independence of the judiciary." The Supreme Court is thought of as the Constitution's defender. The SC has been a bit slow to react to a crisis that needs quick attention despite the tasks assigned to it. Justice Lokur acknowledged that the collegium system's operation and openness needed to be improved in the concluding case of the well-known Judges. The shortcomings that have marred this system from its inception are now starting to have an impact on the Indian judicial system as a whole. India's courts are responsible for safeguarding the rights and freedoms of its population, hence they are supposed to be beyond suspicion. In a number of cases, the SC has vehemently defended the collegium structure's protection of the "independence of the judiciary". The fundamental problems with the system are covered in great depth in Part II. Part III lays out the best process to follow for higher court nominations.

COLLEGIUM, CONSTITUTION, AND JUDICIAL INDEPENDENCE

Any democratic society must be built on the core tenet of the judiciary's independence. It makes guarantee that the judiciary can operate without fear or favour. The Collegium system, which is important in the nomination of judges, helps to retain the court's independence. In 1993, the

“Supreme Court of India” issued a ruling in the case of “Supreme Court Advocates-on-Record Association v. Union of India”² that established the Collegium system in that country. A panel of senior judges known as the Collegium system makes recommendations on the appointment and promotion of judges. The Collegium system is made up of the Chief Justice of India and the four senior-most Supreme Court justices. The Indian Constitution mandates that before the President of India assigns a judge to the higher judiciary, he or she must confer with the Chief Justice of India and other senior judges. However, the appointment process has changed for the better since the Collegium system was implemented, making it more accountable and transparent. The Collegium system has come under fire for being untransparent and unaccountable. Critics contend that the Collegium system is an unofficial organisation that operates outside the parameters set down in the Constitution. Defenders of the Collegium system, however, contend that it is essential to maintain the judiciary's independence. The Collegium system, according to them, assures that only capable and deserving justices are selected to the higher judiciary. Additionally, the Collegium system makes sure that seniority and merit, rather than political factors, are taken into account when making nominations. The other arms of government must not exert any pressure or influence over the judiciary. The Collegium system is essential for maintaining the judiciary's independence. In conclusion, the Collegium system is an essential institution for maintaining the judiciary's independence. Although it has drawn criticism for being secretive and unaccountable, supporters contend that it is vital to guarantee that only qualified and meritorious judges are nominated to the higher judiciary. The Collegium system makes sure that seniority and merit, rather than political factors, are taken into account when making selections. Any democratic society must have an independent judiciary, and the Collegium system is essential to maintaining that independence. The concept of an independent judiciary was initially advanced by the renowned French philosopher Montesquieu.

THE JUDICIARY IS NOT PRIMARY IN JUDICIAL APPOINTMENTS JUST BECAUSE IT IS INDEPENDENT

Let's first consider the meaning of the phrase "independence of judiciary" in its actual context. According to Shetreet, the judiciary is a separate branch of government from the administration

²Supreme Court Advocates-on-record Association & Anr. vs. Union of India' (*Privacy Law Library*) <<https://privacylibrary.ccgnlud.org/case/supreme-court-advocates-on-record-assn-vs-union-of-india> > accessed 7 September 2023

and the legislative that serves the primary role of adjudication and is not susceptible to individual, substantive, or governmental restrictions. Therefore, no outside influence is permitted in the adjudication process. Therefore, any prejudices from outside should not interfere with the judiciary's role in upholding the law.

In order to defend the citizen from abuses of executive and legislative power. The establishment of independent courts is the only way. As the foundation of democracy, an independent judiciary is guaranteed by our constitution.

The SC did not provide an explanation for why it combined the two quite different notions in the NJAC³ ruling. None of the majority viewpoints explicitly address this matter or even tangentially consider it. The judgement is jam-packed with outdated rhetoric and misguided ideologies instead.

NUMEROUS FACTORS ENSURE THE JUDICIARY'S INDEPENDENCE

We have a written Constitution, and its drafters were aware early on that it needed a distinct body to properly interpret it. A collegium system is not included in the Constitution's provisions. But ever since it was established, the following clauses have ensured an independent judiciary.

The security of tenure has been given to the judges. Just a majority of the whole membership of both chambers, as well as a majority of at least two-thirds of the members present and voting, are required to remove a judge from the SC. After being appointed, judges' privileges, rights, and benefits cannot be changed to their detriment.

Both the SC and the High Courts have the authority to hire people and create rules. Their pay cannot be subject to a vote in any legislature. In addition, SC judges are prohibited from intervening in court cases after their retirement. The legislature may not debate the actions taken by SC or HC judges while doing their duties, unless it is an impeachment speech. When it comes to providing public services, the state is required to maintain the judiciary and executive branches distinct.

³The National Judicial Appointments Commission Bill, 2014' (*PRINDIA*) <<https://prindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014>> accessed 7 September 2023

Therefore, the court is made independent by integrating a variety of constitutional provisions that collectively ensure the judiciary's ability to function independently. Even in the event that judges relinquish all control over judicial appointments, the institution's independence will still be preserved. Government intervention in judicial nominations is acceptable, as long as judgements are taken while taking the judiciary's viewpoints into consideration, according to the “Universal Declaration on the Independence of Justice”⁴.

Through the collegium system, the judges control the whole field of judicial nominations, and there is no means to challenge their decision. Any constitutionally authorised authority is subject to judicial scrutiny, according to the SC. Despite this, the Chief Justice's actions while sitting on the collegium have not been subject to judicial scrutiny. Accordingly, it would be impossible for a judge to question the Chief Justice's authority if they were denied promotion without offering any compelling reasons. In an effort to preserve its independence, the court has become tyrannical.

A BASIC CONSTITUTIONAL PROVISION IS NOT REQUIRED FOR THE APPOINTMENT OF JUDGES BY JUDGES.

In India, there has been discussion surrounding the issue of judges appointing other judges. Some claim this is a vital aspect of the Constitution and is required to uphold the independence of the judiciary, while others claim this is not the case and that it is open to reform. The judiciary now has a bigger influence in the appointment process thanks to the Collegium system that the Supreme Court created. The Collegium system is criticised for operating outside the parameters of the Constitution and for undermining administration. They argue that both the executive and the judiciary should share responsibility for selecting judges, working jointly to guarantee that only qualified and deserving candidates are chosen for positions in the higher courts. Defenders of the Collegium system contend that it is essential to uphold the judiciary's independence and guarantee that only qualified and deserving judges are chosen to the higher judiciary. They contend that the method prevents political meddling in judge appointments and increases transparency and accountability. The Supreme Court has acknowledged that the executive branch

⁴Draft Universal Declaration on the Independence of Justice : final report / by the Special Rapporteur, L.M. Singhvi' (*United Nations Digital Library System*) <<https://digitallibrary.un.org/record/139884?ln=en>> accessed 7 September 2023

and the judiciary share responsibility for making judicial nominations. Although it is not necessarily a fundamental aspect of the Constitution. To guarantee that only qualified and deserving judges are chosen to the higher judiciary, the appointment process should be open, responsible, and responsive to revision. To guarantee an objective and fair selection process, both parts of government must cooperate. Here, it is important to explore the issue of how the current system of judicial selections has been seen as a fundamental part of the Constitution. The nomination of judges is only one aspect of the judiciary's independence, which is a key tenet of the Constitution. If the executive has sole authority to nominate judges, judges will be influenced to rule in favour of the government in order to appease the deciding party. This will be a roadblock for justice. The appointment process isn't the only condition to keep it, though, as was previously discussed, as there are other factors as well. Only if the executive branch has "absolutely" all the power will the independence be compromised. Due to the NJAC's violations of the Constitution's fundamental principles, it was determined that it was unconstitutional. This commission established a six-person committee to provide recommendations for judges to be appointed. The Chief Justice, the two most senior judges, the Law Minister, and two distinguished individuals made up the body. This "collective concurrence" process was declared unconstitutional because the Chief Justice's judgement was not given precedence; it essentially lacked the collegium's veto. The Chief Justice's primacy, which has been referred to as the lynchpin of the nomination process, is said to ensure the independence of the judiciary, which is a part of the fundamental framework. The nexus presented is absurd. Notably, our SC is renowned for its judicial expertise and has been dubbed one of the most powerful courts in the world.

JUDGES MUST BE FREE FROM THEIR OWN PREJUDICES IN ORDER TO BE INDEPENDENT OF THE JUDICIARY

Notably, the NJAC ruling by the Supreme Court declared that our civil society is "not evolved enough" to make any kind of noteworthy contribution. The comment that both the Law Minister and the civil society may be influenced by unconnected variables meant that no judge is fully immune from any prejudices and personal biases. In this case, it's important to call attention to a comment Justice G made following Navtej Johar.

The author of the Suresh Koushal ruling was S. Singhvi. He claimed that during the discussions surrounding Suresh Koushal, “he had seen a lot of child pornography”⁵, which had caused him to think that all homosexuals were paedophiles. Consequently, his personal convictions influenced how he made decisions. This demonstrates that judges are also human and can succumb to their own preconceived beliefs.

It has been shown that other elements, such as post-retirement appointments, severely compromise the independence of the court. When “Arun Jaitley” served as the Leader of the Opposition in 2012, he made the observation that the desire for a job after retirement affects pre-retirement decisions. However, the SC does not appear to be alarmed by this, and no measures to safeguard the independence of the judiciary in this regard have ever been done.

The judges have been portrayed as reclusive recluses with no ambitions or desires of their own. In “K. Veeraswami v. Union of India”⁶, it was determined by the majority opinion that, “A judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof.” When he said, “A conduct so ideal is not always possible,” B R Ambedkar acknowledged that.

“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 the 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 President or the Government of the day.”

In regards to the collegium system, “J .V.R. Krishna Iyer”, has proclaimed that, “The Nine Judges Bench, in a mighty seizure of power wrested authority to appoint or transfer judges from the top executive to themselves by a stroke of adjudicatory self-enthronement.” Along with

⁵ Oindrilla Mukherjee, ‘Suresh Kumar Kaushal vs. Naz Foundation: A Critical Analysis’ (*Academike* , 21 July 2014) < <https://www.lawctopus.com/academike/suresh-kumar-koushal-vs-naz-foundation-critical-analysis/>> accessed 7 September 2023

⁶ *K. VEERASWAMI VS. UNION OF INDIA* 1991, SCC (3) 655

other factors, the judiciary's independence, impartiality, and integrity are also influenced by the limits they set for the exercise of their judicial authority. Absolute power corrupts completely, and power tends to corrupt itself. When the court abuses its power, there is nothing that can stop it, which has led to such appointment corruption, but it can stop the abuse of legislative and executive authority.

THE COLLEGIUM SYSTEM'S FLAWS

In 2015, the SC reversed the "NJAC" method rather than considering its potential, reclaiming "autonomy" over the whole procedure. Since then, the decision has come under fire, and even the justices who gave the majority decision have challenged the collegium's selection process for judges.

It has been regularly attempted to draw public attention to the clear problems in this system, but with little effect. The SC has given a number of issues considerable deliberation, but nothing has been taken into account. In his book, one of the most senior lawyers who testified in favour of the collegium system in the 1993 ruling expressed remorse for having won the case and claims that judges now misuse this source of unchecked "card or power" as a result. Former attorney general "Mukul Rohatgi" also voiced his discontent with the collegium system by asserting that it is a fallacy that judges choose capable judges. Because we don't have any other options, we must continue using a process that has so many flaws, which will result in systemic failure.

It's time for the legislature, which has up until now only watched from the sidelines, to take the initiative and present the Memorandum of Procedure, which has been under review by the Law Minister since September 2018, at the upcoming assembly, when it will be considered. While it is true that decisions should be made independently, every citizen has a right to accurate information about the qualifications of the judges who will be hearing their cases and acting as vital guardians of their life and liberty. In a piece of writing with the heading "fools rush in where angels fear to tread," Lord Cooke of Thorndon attacked this decision as well. It is important to reform the process of judge appointments in light of the following obvious contradictions in the current collegium structure. The only function of the Law Minister in the Collegium system is that of a Collegium member. The appointments appointed by the Collegium are not subject to the Law Minister's veto. However, the Law Minister is permitted to express his

or her opinion on whether a specific candidate is qualified to be appointed to the higher judiciary. The Law Minister must submit the Collegium's recommendations for appointment to the President of India. The Law Minister is also free to object to the Collegium's suggestions or demand more information. There have been efforts in recent years to give the administration a bigger say in who gets appointed to the upper judiciary. Some have proposed that the Law Minister should play a more active role in the selection procedure and that the executive branch and the judiciary should consult more frequently. The Collegium system's supporters respond that any increase in administrative power might lead to political interference in judge nominations, weakening the independence of the court. In the end, the Collegium system limits the Law Minister's role to that of a Collegium member who proposes nominations to the President. To guarantee that any modifications to this position do not compromise the judiciary's independence, they must be carefully considered.

- **OPACITY**

The collegium's organisational structure has enabled its members to operate in a cabal where they are completely exempt from responsibility. They are not required to provide an explanation for why they ignored the seniority factor, refused a name at one meeting but authorised it at another, or arbitrarily substituted a judge with the lowest seniority number for the names selected earlier. The full exclusion of the people and their representatives from the appointment process is one of the collegium system's most significant flaws. There are no regulations to maintain the collegium's legitimacy or credibility in the slightest. This system, in particular, is well-kept a secret with no stated selection criteria, operational manual, or meeting minutes, giving its members fully unbalanced authority.

- **PERSONAL PATRONISM AND NEPOTISM**

The judiciary is dominated by a small number of families, and the successor is chosen rather than elected on the basis of qualifications. Because no one is aware of the requirements for the hiring process, the judiciary stinks of self-selection and inbreeding as a result of the judges flagrantly abusing their discretion in the subject. Judges' offspring are regularly chosen for posts in the judiciary. Judges can therefore make sure that, in addition to themselves, their family members enjoy the benefits of their profession. Collegium favours are now part of the system, which has

evolved. The freedom to pick anyone one pleases is usually given precedence when making decisions above qualities like honesty, aptitude, and work history. Unjustice is inevitable in the presence of such safeguards. For instance, Justice S.H. Kapadia was unable to serve on the Supreme Court because of his distaste for Justice A.P. Shah.⁷

- **SENIORITY**

This system's fundamental assumption—that a judge's qualifications and ability should be correlated with his or her age—is faulty. The majority of the problems with the collegium system operating that have been reported in India thus far are a result of not adhering to the seniority list. This criterion is, however, making it more difficult to choose young justices who are deserving and qualified to bring stability to the legal system.

A court that determines and influences the law of the nation generally would be adversely affected by frequent personnel changes. This calls into doubt the two fundamental conditions—certainty in the law and consistency in the method—that are necessary for effective judicial administration nationwide. Being a watchdog for the judiciary's independence and responsible for effectively enforcing the law and administering justice in a nation takes more than a year or two to complete.

- **DIVERSITY**

Diversity must be ingrained as a habit and a practise since it has always been a crucial and vital factor in assessing the legitimacy of the system. One of the topics that is frequently discussed and needs an immediate solution is gender diversity. There are no female judges in the current collegium system. In contrast to the situation in nations like the US and the UK, where the appointment process is an open one and the public has the opportunity to examine the representation of women, there is no authenticity left because of the protected nature of these appointments.

- **COMMUNITY BELIEF IN THE SYSTEM**

⁷Justice denied to judge' (*Sunday Times*, 21 February 2010) <https://www.sundaytimes.lk/100221/International/int_01.html> accessed 7 September 2023

In the words of Abraham Lincoln, "Democracy is a government of the people, for the people, and by the people." It is odd that we still have a judiciary in our democracy whose fundamental decisions are made by a clearly undemocratic procedure. The urgency of the reforms stems from the fact that the public's confidence in the system will be restored by the government's involvement in the selection process. The selection process clearly shows the influence of outside factors, which undermines public trust in the judiciary and reduces it to nothing more than a charade. The judiciary shouldn't be kept out of it in a country like ours where democracy is the driving force behind practically everything that affects people's lives.

CONCLUSION

Now it is evident why there has been intermittent commotion over changing the current collegium arrangement. Maintaining the rule of law and safeguarding democracy depend on the judiciary's independence. There has been a great deal of discussion and controversy around the Collegium System, which includes a committee of senior judges selecting judges to higher courts. Others contend that it lacks diversity and can result in nepotism, while some contend that it encourages openness and accountability in the nomination process. We must keep looking for methods to enhance the Collegium System's role in appointing judges while simultaneously making sure that the independence of the judiciary is safeguarded. Ultimately, maintaining justice and defending the rights of individuals depend on an unbiased and fair judicial system.