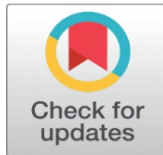


THE INDIAN COLLEGIUM SYSTEM: A CONGRUENCE OR AN ANTAGONISM TO THE DEMOCRATIC REPUBLIC

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ABSTRACT

The word 'democracy', in its true sense and spirit, seeks to have a system of government with wholesome representation in all possible manner. The word 'republic' denotes the process of democracy, wherein the supreme power is possessed by the people and their elected or nominated representatives and doesn't give any prerogative to the monarchy or such other forms of governance. The combination of 'democratic republic' is expected to have a system wherein the people have the privilege to elect their government officials and the head of the state will also be elected by the people. In such a system, is it justifiable, if the justice and pronouncements of the highest judicial authorities, the court system - the Supreme Court and the High Court incumbents, their appointments and transfers rest only with a few top notch officials of the same branch of the Government, i.e. the Supreme Court? If not, what could be the possible and effective alternative structure and establishment to eliminate such lacuna.

Keywords: Collegium System, NJAC, Transparency, Favoritism, Judicial Activism, Nepotism, Accountability, Free and Fair Judgements, Constitutional Provisions, the Supreme Court, the High Courts, Appointments of Judges, Transfer of Judges

1. INTRODUCTION

The questions of 'How far the system of democratic republic with the core objectives of separation of powers and checks-and-balances' between and among the three branches of the Government viz. the Legislature, the Executive, and the Judiciary, could stretch their limits beyond the demarcations of their functions and powers? Can any branch of the government go beyond the provisions of the constitution? Were the framers of the constitution of India unaware of the consequences of the silence in making provisions for judicial appointments and transfers of judges to the highest judicial offices of the country?

Of the three branches of the government, the Legislature is entrusted with the functions of law-making, the Executive with the implementation or execution of the laws that are made by the legislature, and the judiciary, the law interpretation body is entrusted with the task of checking whether the laws made by the legislature are in accordance with the provisions of the constitution and the laws implemented by the executive do not violate any provisions of the constitution. The highest Judiciary of the country, the Supreme Court being the guardian of the Constitution, is expected to be the custodian and protector too.

In an interview with Live Law, on 27th January 2024, the Sr. Advocate Dushyant Dave has reiterated his statement on the improper functioning of the Collegium System in India, as Good Judges are not being appointed. [OLL-01].

In view of the above statement and its validity, the collegium system was supposed to maintain judicial independence in the recruitment and transfer of judges to the Supreme Court and the High Courts by delimiting any undue influences on the part of the executive.

The criticisms that leveled against such a system of collegium are due to the lack of openness, accountability, and efficiency coupled with suspicions of nepotism and opposition to reforms have resulted in widespread ramifications of the system of collegium. In order to get rid of such criticism, it is suggested to have clear and transparent appointments and transfer standards in place.

2. METHODOLOGY

RESEARCH DESIGN: A mixed method design comprising experimental and qualitative design are employed.

Research Philosophy: Pragmatism is being used by combining both positivism (objective observation) and interpretivism (subjective understanding).

Research Approach: A deducting method is applied by analyzing, testing and validating the set hypothesis.

Research Strategy: Besides collecting, collating, and systemic analysis of Secondary Data, the primary data were collected by interviews conducted among senior advocates and a few retired judges of the Supreme Court and High Court and tabulated, analyzed, and interpreted the same subsequently.

Data Collection: Primary data were collected by way of conducting interviews and the secondary data were collected from quality journals and other online repositories.

Sampling: Convenience Sampling method with purposive technique was used to represent the larger population viz: experts in the domain to understand their perceptions.

Data Analysis: Both quantitative (non-parametric, Wilcoxon Rank Order) and qualitative methods of analysis were used.

Validity and reliability were ensured by testing the collected data using statistical tools in MS Excel and SPSS.

Ethical Consideration: Researchers ensured the confidentiality and data security of the collected information from top notch professionals from the Indian Judicial System.

3. PROBLEM STATEMENT

The Collegium System was purely a body created out of Judicial interpretation by the Supreme Court; wherein the provisions of the Articles 124, 217 & 222 of the constitution deal with appointments and transfers of judges to the highest judicial offices, the Supreme Court and the High Courts.

The questions such as 'Whether the collegium system preserves the hallmark of elitism, nepotism, favoritism, and opacity?' Or 'Does it uphold the values of Judicial independence, impartiality, meritocracy, accountability, neutrality, functionality and promoting public trust?' (Vora, Prabha, 2024).

Wasn't the National Judicial Appointments Commission a right choice for the judicial appointments and transfers to the Supreme Court and the High Courts in India?

Hadn't it provided wider representation of the civic society at large, with the composition of such wider representation including the Chief Justice of India, two senior most judges next to the CJI, the Union Minister of Law and Justice, and the nomination of the two eminent persons by a Committee comprised of the Prime Minister, the Chief Justice of India and the Leader of the Opposition?

What was the logic behind striking down of the National Judicial Appointment Commission established by amending the Constitution through the 99th Amendment Act of 2014 and was passed by both the Lok Sabha and Rajya Sabha on 13th & 14th of August 2014 respectively and was also ratified by 16 of the State legislatures in India before assented by the then President of India, Shri Pranab Mukherjee on 31st December 2014, by the Supreme Court?

Since the National Judicial Appointments Commission Act came into force from 13th April 2015, it had life only for six months and two days before its cessation of its functioning on 16th October, 2015, the NJAC was struck down by the Constitutional Bench of the Supreme Court by a 4:1 majority stating the NJAC unconstitutional. While hearing the petition filed by several persons and bodies with the Supreme Court Advocates on Record Association (SCAoRA) being the First and the lead petitioner. Justices J S Khehar, Madan Lokur, Kurian Joseph, and Adarsh Kumar Goel declared the NJAC unconstitutional, whereas Justice Jasti Chelameswar upheld it.

4. OBJECTIVES

- To investigate the effectiveness and efficacy of the appointments and transfers of judges to and from the Supreme Court and the High Courts.
- To explore the reasons for the criticism and allegations leveled against such appointments and transfers of judges and relevance and validity thereof.
- Whether the procedures and methods of appointments and transfers of the judges were acceptable and appreciated before the commencement of the Collegium System.
- To examine the various ways to transform the existing system of appointments and transfers of judges so as to bring a robust system of judicial appointments and transfers to the highest courts in the country - the Supreme Court and the High Courts.

5. HYPOTHESIS TESTING AND VALIDATION:

H_N: The existing Collegium System established for Judicial Appointments to and transfers for the higher judicial offices - the Supreme Court & the High Courts in India has significant impact in the free and fair deliverance of justice to the larger society.

H_A: The existing Collegium System established for Judicial Appointments to and transfers for the higher judicial offices - the Supreme Court & the High Courts in India doesn't have any significant impacts in the free and fair deliverance of justice to the larger society.

Acceptance of the H_A: Findings of the interviews conducted and the subsequent responses obtained from the respondents along with further analysis of the results by way of Wilcoxon Ranked Sum Test for two independent samples (two tailed-non-parametric test) of two sections of judicial professionals - forty eight (48) senior advocates located in and around Bangalore City and five (5) retired judges of Supreme Court and High Courts have revealed that mere involvement of the existing Collegium system in Judicial appointments and transfers would not yield any expected results of transparent, accountable, free and fair appointments and transfers without a drastic modification in the system, processes and methods thereof.

In view of the results of the primary data of the current research, which has adequately been substantiated by the relevant review of related literature (the secondary data) in the domain that the researchers have validated and accepted the Alternate Hypothesis (H_A) and thereby rejected the Null Hypothesis (H_N) taking into consideration of the value of the alpha (.05) and also the accepted level of confidence and statistical significance (95%).

6. RESEARCH FRAMEWORK DESIGN

THEORETICAL FRAMEWORK

The researchers have made a strong theoretical foundation, with the help of available resources of literature on the domain. Various theories and concepts used by various researchers, academicians and experts of the legal fraternity, through their publications including online resources, were taken for use in this research.

Expert views and opinions about appointments and transfers of judges to the Supreme Court and the High Courts were taken into consideration for better understanding the problem statement and the research questions. Thus, theories, concepts, constructs, and perceptions obtained from the secondary data were collected, collated, analyzed and interpreted. Suggestions and recommendations were made in line with those theories and concepts. This framework has helped achieve better analysis of the data and interpretation of the results thereof.

CONCEPTUAL FRAMEWORK

The researchers could find some significant associations of arguments, suggestions and recommendations expressed for and against the Collegium system with valid logical conclusions. The formation of National Judicial Appointments Commission, in between, and just after six month's the striking down of the same body stating the unconstitutionality of the 99th amendment for creating the referred Commission. The excess possession of power or the so-called hegemony of the supreme Judicial body of the country while forming the Collegium System for the judicial appointments (over reaching Article 124, 217, and 222 and again the incorporation of 124(a) and 217 (a). The controversy that arose in Aug 1969, when Justice A.N. Ray became the Chief Justice of India surpassing three senior Judges challenging the validity of the traditional seniority norms.

7. DATA COLLECTION, SAMPLE DESIGN, SAMPLING, AND METHODOLOGY

METHOD: PRIMARY DATA COLLECTION

The current research was carried out at different time periods in between June 08, 2022 and January 17, 2024 (in two phases - June 2022 - Apr, 2023 & May 2023 - Jan 2024), by conducting a few structured interviews with senior advocates and retired judges from the Supreme Court and the High Courts (names are kept confidential as agreed upon) for the sole purpose of this research. These respondents were located in and around Bangalore City and three adjoining districts. The researchers had structured the questionnaire having both closed ended and open ended questions to get the responses of their perceptions about the effectiveness and efficacy of the existing system of Collegium in the Judicial appointments and transfers of judges.

Out of the fifty four (54) advocates whom the researchers had approached for interviewing them by taking prior appointments, forty eight (48) advocates could give their invaluable opinions and expressed their views on the topic. Out of the eight (8) retired judges of the high courts (5) and remaining from the Supreme Court (3), four (4) out of five (5) were from the high courts and one (1) out of three (3) were from the supreme court who had voluntarily participated in the interview. The questions given during the interview conducted for getting their responses have made an integral part of the data analysis and interpretation in this research.

The responses obtained were recorded, collated, analyzed, interpreted, and reported. It is evident from the responses and the results that the existing Collegium System established for Judicial Appointments to and transfers for the higher judicial offices - the Supreme Court & the High Courts in India doesn't have any significant impacts in the free and fair deliverance of justice to the larger society.

SECONDARY DATA COLLECTION

Researchers could make use of an adequate number of related literature. Most of the literatures were archived from open access sources of quality journals indexed in elsevier, science direct, scopus, web of science, research gate, google scholar, and shodhganga, besides a few references obtained from various websites, blogs and other online sources.

This has made the study based on a robust theoretical foundation as a rudiment in initiating the academic pursuit of the research and also connect the findings with the rich lineage of previous researchers that were already carried out on the domain.

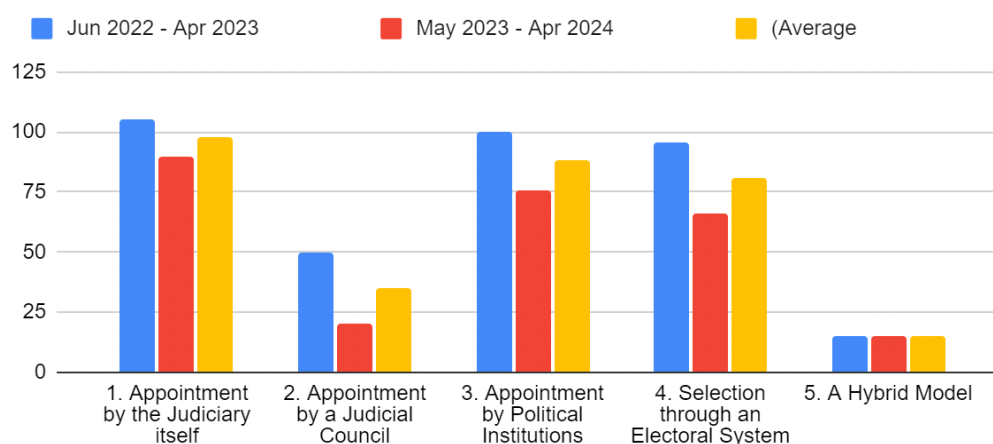
DATA ANALYSIS AND INTERPRETATIONS:

The researchers have made use of the non-parametric tools for the data analysis. The non-parametric tools, as a decision support tool, functions in the sensitive and prudent decision-making process. The Intelligent Data Analysis and Model Interpretation with Special Analysis "Fuzzy Symbolic Modeling" carried out by Alexandre G Evsukoff, Antonio, G.S., Branco, Silvie, Galichet (2011) has been used here.

Results Analysis - Interview Conducted among Senior Advocates and Retired Judges			
Variables (Preferred Model)	Survey (Interview-Phase I)	Survey (Interview - Phase II)	(Average of 2 Phases of Interview)
	Jun 2022 - Apr 2023 (Participants - 34 Nos.)	May 2023 - Apr 2024 (Participants 25 Nos.)	
1. Appointment by the Judiciary itself	105	90	97.5
2. Appointment by a Judicial Council	50	20	35
3. Appointment by Political Institutions	100	76	88
4. Selection through an Electoral System	96	66	81
5. A Hybrid Model	15	15	15

[Table:1 Responses of order of preferences on Ranking Scale (Value and Average) Differences on the variables as reasons of selecting the specific model for the appointment and transfer of judges - collected, collated, tabulated and exhibited by the researchers - Period of Data Collection-June 2022 - April 2024]

Jun 2022 - Apr 2023
(34 Nos.), May 2023 - Apr 2024



Results Analysis - Interview Conducted among Senior Advocates an...

[Chart:1 Responses of order of preferences on Ranking Scale (Value and Average) Differences on the variables as reasons of selecting the specific model for the appointment and transfer of judges - collected, collated, tabulated and exhibited by the researchers - Period of Data Collection-June 2022 - April 2024]

8. PROCEDURE FOLLOWED

The respondents (Senior Advocates and Retired Judges) were asked to respond to the pre-designed questionnaire with multiple variables (their choice of best judicial appointment/Transfer of Judges to the higher judiciaries in India Models under five heads viz, circulated among them:

- Appointments by the Judiciary Itself
- Appointments by the Judicial Council
- Appointments by the Political Institutions
- Selection through an electoral system
- A Hybrid Model (having the elements of all or a few of the above)

The responses on the variables in the questionnaire (as exhibited in the above table and chart were asked to give an order of ranking of their preferences. For computing the value of the responses (ordinal scale), as per their ranking of preferences. The number of respondents was multiplied by their corresponding value for obtaining the aggregate value. Mean Values of the two phases of interview carried out were further obtained. **(Likert Scale Value * number of respondents = n*scale value - preference 1=5 points, 2=4 points, 3=3 points, 4= 2 points, and 5=1 point.** [Sigma Excel, MS Excel & SPSS were used for statistical analysis].

It is evident from the above facts and figures that the respondents mostly preferred

[01] the Model of Appointment by the Judiciary itself [First Phase=105 and Second Phase=90, Cumulative Average=97.5],

[02] Appointments and Transfers by a Judicial Council [First Phase = 50, Second Phase=20, Cumulative Average=35],

[03] Appointments and Transfers by Political Institutions [First Phase=100, Second Phase=76, Cumulative Average=88]

[04] Selectionthrough an Electoral System [First Phase=96, Second Phase=66,

Cumulative Average= 81]

[05] Appointments and Transfers by way of Hybrid Model [First Phase=15, Second Phase=15 Cumulative Average=15]

9. RESULTS and DISCUSSION

In the two phases interview conducted with the Senior Advocates and the judges retired from the Supreme Court and High Courts from June 08, 2022 till January 22, 2024, Majority with maximum values preferred the appointments and transfer of judges by the Judiciary itself with cumulative average value of 97.5, followed appointments and transfers by political institutions with cumulative average value of 88, followed by selection through an electoral system with

cumulative average 81, and the appointments and transfers by a Judicial Council with cumulative average of 35, and the least preferred model is appointment and transfers through a Hybrid Model with cumulative average of 15.

It reflects the trust the legal fraternity and the civic society trust have on the Judiciary in deliverance of fair and impartial judgements; but not exclusively by the judiciary. The enshrined principles of Separation of powers and checks and balances sought to be in place to strike a balance to delimit the Judiciary from Judicial activism and overreaching. The trust and confidence restored on the democratic principles and values as given to the political institutions should not be set aside. Since the Hybrid Model was not clearly defined with which organ the hybrid to be tied up was vague or specified and respondents were seemed to be perplexed (MahimaMakhija & J Lalith Kumar (2017)

10. SUGGESTIONS AND RECOMMENDATIONS

The best procedure, as suggested by various researchers and experts in this domain, for appointing and transferring of judges to the higher judiciary is keeping and striking a balance between judicial overreaching as public trust on the supreme judicial offices should not be compromised for the sake of mere judicial independence. (Vohra, Prabha (Mar-Apr, 2024).

The appointment bodies like the National Judicial Appointments Commission have significant roles to play so as to make the same more inclusive, transparent and accountable to have a speedy process of to eliminate any such stagnation and delay in the judicial appointments and transfer of judges. (Ankit, Veepriya. (Mar, 2024)

The matter of absence of transparency in the process, methods, quality and competence of judges, their expertise with proven track record, good behavior, civic-friendly attitude, fair and impartial judgements, as the appointments and transfers happened behind the curtains and closed

doors. Lack of openness leads to the concern of fairness and impartiality. It is suggested to

Have a well-defined structured process and documentation in place (DasLegal, 2023)

11. CONCLUSION

The Hypothesis testing has reflected the findings of the interviews conducted the responses thereof from the respondents along with further analysis of the results by way of Wilcoxon Ranked Sum Test for two independent samples (two tailed-non-parametric test) of two sections of judicial professionals viz: senior advocates and a few retired judges of the Supreme Court and the High Courts have revealed that mere involvement of the existing Collegium system in Judicial appointments and transfers would not yield any expected results of transparent, accountable, free and fair appointments and transfers without a drastic modification in the system, processes and methods thereof. The results of primary data, thus, strongly and significantly substantiate the review of literature wherein the five models proposed by Plascencia, Iveth A., in the manuscript "Judicial Appointments: A Comparative Study of Four Judicial Appointments Models Used by Sovereigns Around the World" states that none of the single model is apt and gives a complete solution for a robust, fair, impartial, independent, and free Judicial system hence strongly recommends for a Hybrid Model taking the traits of two or three models together to have one such appointment system in place.

In the first model, appointments by the judiciary itself as in the case of China & Saudi Arabia, though it appears that the Judicial appointments are made by the executive branch (the King) but in practice the appointments are done on the basis of the recommendations made by the Judiciary.

In the second model, the appointments by the Judicial Council, as in the case of Argentina (recommended justices are appointed by the President) & Paraguay (appointments are made by the members of the Supreme Court), is composed of the officials from the Legislative, the Executive, and the Judiciary Branches of the Government.

In the third model, Appointments by Political Institutions (as in the case of the American Bar Association (ABA). The countries that follow this model include the USA, South Africa, Australia, Belgium, Brazil and Mexico.

In the Fourth Model, the selection through an electoral system which gained its popularity in the 19th century. Three kinds of electoral systems could be evolved-such as (1) popular election, partisan or non-partisan, (2) election by the legislature as in the case of Cuba, (3) retention election, as in the Case of China. Meanwhile, Bolivia had undergone a transition from a Judicial Council Model to an Election Model through a significant referendum by giving opportunities to the marginalized civic society to strengthen their participation and strong say in the judicial appointments. Cuba does the judicial election.

In nutshell, it is noteworthy to mention that no single system provides a complete solution for free and fair judicial appointments hence a Hybrid Model is proposed as the best option in such scenario thinking of the combination of two or three model so as to have a wider participation and more transparent system in place.

AUTHORS' CONTRIBUTION STATEMENT

Conceptualization of the current research was done on the basis of the theoretical framework by the author. The conceptual framework was designed in line with the problem statement, observations and interviews conducted among the senior advocates and retired judges, besides the adequate secondary sources of data collected by structuring the paper collecting relevant data - the facts and figures. Meanwhile, the analysis, interpretation, and overall modifications were done by the co-author.

FUNDING STATEMENT

No research funding / financial assistance / monetary support was availed by the researchers from any agencies / organizations / institutions / firms / corporate houses of government / public / private or not-for-profit organizations for carrying out this research work. This research was carried out by the researchers themselves on their own costs and expenses.

COMPETING INTEREST STATEMENT:

The authors have not confronted or declared any conflicting interest/s in this paper.

ADDITIONAL INFORMATION, IF ANY.

No additional information is concealed or made unavailable or inaccessible other than those given in this chapter.

CONFLICT OF INTERESTS

None.

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Moreover, the authors express their sincere thanks to those authors, academicians, researchers and bloggers including netizens, whose works and publications were the base upon which the authors relied on for the collection and collation of the secondary data sources for this research, which in turn enabled them to have a robust theoretical framework in place.

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