

## ON THE COLLEGIUM QUESTION: The Supreme Court Must Engage With Other arms of the State

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### In Context

The basic question of whether the Collegium system is essential to preserving the basic structure of the Constitution cannot be answered by the Supreme Court alone through a judicial verdict. It requires a wider conversation

### College system

- The collegium system is the system of appointment and transfer of judges that has evolved through judgments of the SC, and not by an Act of Parliament or by a provision of the Constitution.
- The Supreme Court Collegium is headed by the Chief Justice of India and comprises four other senior Judges of the court.
- The High Court collegium is led by the incumbent Chief Justice and two other senior judges of that court.

### How does the collegium system work?

- The Collegium, on its part, sends recommendations of names of lawyers and judges to the Central Government. Similarly, the Central Government also proposes some names to the collegium on its behalf.
- The Central Government factually checks the names sent by the collegium and then returns the relevant file to the collegium.
- The Collegium then considers the names and suggestions sent by the Central Government and then sends the file back to the Government for final approval. When the collegium sends the same name again, the government has to give approval to that name. But now there is no time limit for when the government will give its approval. This is the reason why the appointment of judges takes a long time.

### Issues in the Collegium system

- The process for appointments and transfers of judges of the Supreme Court and high courts is one of the system's dark areas.

- The complete exclusion of the executive from the judicial appointment process created a system where a few judges appoint the rest in complete secrecy.
- There are no specific criteria for testing the candidate for the post of Chief Justice of India which leads to wide scope for nepotism and favoritism.
- It is a close door mechanism as there are no official minutes of collegium proceedings.
- Collegium has not been able to prevent the increasing cases of vacancies of judges and cases in courts.

### Basic Structure doctrine

- The basic structure doctrine in constitutional jurisprudence evolved over time in a process that culminated with the Kesavananda Bharati verdict in 1973. It has been reiterated and expanded upon in various judgments since then.
- Its central feature continues to be the view that the power of Parliament to amend the Constitution under Article 368 is not absolute and it shall always be subject to the power of judicial review vested in the Supreme Court, especially under Articles 32 and 142, as well as to the restrictions imposed by Article 13 of the Constitution.
- The power of judicial review is explicitly established in almost all constitutional democracies around the world. Even the basic structure doctrine is now acknowledged by many countries

### Basic Structure doctrine and Collegium System

- However, the courts in India added a twist to the tale in 1993 by creating the Collegium system of appointments to the higher judiciary.
- The underlying argument was a novel take on the basic structure doctrine. The argument ran as follows. Protecting the basic structure was essential to preserving the rule of law under the Constitution.
- Protecting the power of judicial review was essential for preserving the basic structure doctrine. The power of judicial review could not be meaningfully exercised without an independent judiciary.
- The Collegium system was essential to preserving the independence of the judiciary. Hence, the Collegium system was required for no lesser purpose than protecting the Constitution of India.

### Constitutional Provisions and the Role of Government

- Article 124(2) of the Constitution of India provides that the Judges of the Supreme Court are to be appointed by the President after consultation with such number of Judges of the Supreme Court and the High Courts of the States as the President may consider necessary for the purpose.
- According to Article 217, the appointment of a Judge of a High Court shall be made by the President in consultation with the Chief Justice of the Supreme Court and 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 shall also be consulted.
- If a lawyer is elevated as a judge in a High Court or the Supreme Court, the role of the government is limited to conducting an investigation by the Intelligence Bureau (IB).
- It can raise objections about the Collegium's choice and seek clarification, but if the Collegium reiterates the same names, the government is bound to appoint them as judges under Constitution Bench decisions.

## Efforts to change the collegium system

- The collegium system has been the center of criticism for several reasons. That's why the government wants to remove it and make a system that does not have autocracy and opacity like the collegium system. In this context, the Parliament passed a law related to the establishment of the National Judicial Appointments Commission in 2015, but on October 16, 2015, the Supreme Court rejected the proposal saying that it was unconstitutional and would harm the independence of the judiciary. And judicial appointments should be kept away from the control of the executive.

## Current Scenario

- As things stand today, especially after the 2015 judgment, the Collegium system is the law of the land. And unless the Supreme Court itself is persuaded otherwise, it is likely to remain so.
- However, 30 years is a long enough period to evaluate its impact on the composition and performance of the Indian judiciary, the quality of justice delivery on the civil and criminal side, and its larger impact on democracy and civil society.
- Perhaps what is required is a comprehensive survey of all the above-mentioned parameters by the Ministry of Law and Justice.

## Conclusion

- The basic question of whether the Collegium system is essential to preserving the basic structure of the Constitution cannot be answered by the Supreme Court alone through a judicial verdict. It requires a wider conversation.
- There's no doubt that the credibility of the Supreme Court as the defender of our fundamental freedoms and protector of constitutional values would be enormously enhanced if it constructively engaged with other branches of the state on the above issues. After all, along with the judicial review, the separation of powers and checks and balances are also important features of the basic structure of the Constitution as elucidated by the Supreme Court.

## Three-judges case

- **First Judge Case:** SP Gupta vs Union of India, In 1981, the Supreme Court judgment held that consultation does not mean consent and only means exchange of views.
- **Second Judges Case:** Supreme Court Advocates-on-Record Association v. Union of India In 1993, a nine-judge constitution bench overruled the judgment and devised a specific procedure called the 'collegium system' for appointment and transfer of judges to higher of.
  1. The majority judgment in the Second Judges case gave primacy to the CJI in matters of appointment and transfer, while also ruling that the word "consultation" would not undermine the CJI's primary role in judicial appointments.
  2. The role of the Chief Justice of India is fundamental in nature as it is a subject within the judicial family, the executive cannot be equal in this matter.
- **Third Judges Case:** In the Third Judges Case (1998), the Court held that the consultation process adopted by the Chief Justice of India required 'consultation of a plurality of judges'.
  1. The sole opinion of the Chief Justice of India does not constitute a consultative process.
  2. He should consult the collegium of the four senior-most judges of the Supreme Court and if even two judges give an adverse opinion, he should not send a recommendation to the government.
  3. The court said that a recommendation made by the Chief Justice of India without following the norms and requirements of the consultative process is not binding on the government.

### Expected Question

**Que. Consider the following statements:**

1. The 44th Amendment to the Constitution of India introduced an article making the election of the Prime Minister immune from judicial review.
2. The Supreme Court of India struck down the 99th amendment to the Constitution of India as a violation of the independence of the judiciary.

Which of the statements given above is/are correct?

- (a) 1 only
- (b) 2 only
- (c) Both 1 and 2
- (d) Neither 1 nor 2

**Answer : B**

### Mains Expected Question & Format

**Que.:** "Although at present the collegium system in India ensures the appointment of competent judges, there is a dire need for reform in this appointment process."  
**Discuss in detail.**

**Answer Format :**

- ❖ Explain how judges are appointed at present.
- ❖ State the need and shortcomings of the collegium system.
- ❖ Give a balanced conclusion.

**Note:** - The question of the main examination given for practice is designed keeping in mind the upcoming UPSC mains examination. Therefore, to get an answer to this question, you can take the help of this source as well as other sources related to this topic.