

"Why has the debate on its functioning, especially on the issue of transfers in the judiciary, been revived?"

The story so far: The recent controversy over the transfer of the Chief Justice of the Madras High Court, Justice Vijaya Kamlesh Tahilramani, to the Meghalaya High Court has once again brought to the fore a long-standing debate on the functioning of the 'Collegium' of judges that makes appointments and transfers in the higher judiciary. Justice Tahilramani has submitted her resignation after her request for reconsideration of the transfer was rejected by the Collegium headed by the Chief Justice of India (CJI), Ranjan Gogoi, and four senior-most judges of the Supreme Court. While sections of the Bar have questioned the transfer as well as the lack of transparency about the exact reason, the Supreme Court (SC) has issued an official statement that the Collegium indeed had cogent reasons and that these could be revealed, if necessary.

How did the Collegium system come into being?

The Collegium of judges is the Supreme Court's invention. It does not figure in the Constitution, which says judges of the Supreme Court and High Courts are appointed by the President and speaks of a process of consultation. In effect, it is a system under which judges are appointed by an institution comprising judges. After some judges were superseded in the appointment of the Chief Justice of India in the 1970s, and attempts made subsequently to effect a mass transfer of High Court judges across the country, there was a perception that the independence of the judiciary was under threat. This resulted in a series of cases over the years. The 'First Judges Case' (1981) ruled that the "consultation" with the CJI in the matter of appointments must be full and effective. However, it rejected the idea that the CJI's opinion, albeit carrying great weight, should have primacy.

The Second Judges Case (1993) introduced the Collegium system, holding that "consultation" really meant "concurrence". It added that it was not the CJI's individual opinion, but an institutional opinion formed in consultation with the two senior-most judges in the Supreme Court. On a Presidential Reference for its opinion, the Supreme Court, in the Third Judges Case (1998) expanded the Collegium to a five-member body, comprising the CJI and four of his senior-most colleagues.

What is the procedure followed by the Collegium?

The President of India appoints the CJI and the other SC judges. As far as the CJI is concerned, the outgoing CJI recommends his successor. In practice, it has been strictly by seniority ever since the supersession controversy of the 1970s. The Union Law Minister forwards the recommendation to the Prime Minister who, in turn, advises

the President. For other judges of the top court, the proposal is initiated by the CJI. The CJI consults the rest of the Collegium members, as well as the senior-most judge of the court hailing from the High Court to which the recommended person belongs. The consultees must record their opinions in writing and it should form part of the file. The Collegium sends the recommendation to the Law Minister, who forwards it to the Prime Minister to advise the President.

The Chief Justice of High Courts is appointed as per the policy of having Chief Justices from outside the respective States. The Collegium takes the call on the elevation.

High Court judges are recommended by a Collegium comprising the CJI and two senior-most judges. The proposal, however, is initiated by the Chief Justice of the High Court concerned in consultation with two senior-most colleagues. The recommendation is sent to the Chief Minister, who advises the Governor to send the proposal to the Union Law Minister.

Does the Collegium recommend transfers too?

Yes, the Collegium also recommends the transfer of Chief Justices and other judges. Article 222 of the Constitution provides for the transfer of a judge from one High Court to another. When a CJ is transferred, a replacement must also be simultaneously found for the High Court concerned. There can be an acting CJ in a High Court for not more than a month. In matters of transfers, the opinion of the CJI “is determinative”, and the consent of the judge concerned is not required. However, the CJI should take into account the views of the CJ of the High Court concerned and the views of one or more SC judges who are in a position to do so. All transfers must be made in the public interest, that is, “for the betterment of the administration of justice”

What is the common criticism made against the Collegium system?

Many have faulted the system, not only for its being seen as something unforeseen by the Constitution makers, but also for the way it functions. Opaqueness and a lack of transparency, and the scope for nepotism are cited often. Retired SC judge Justice Ruma Pal once said: “The mystique of the process, the small base from which the selections were made and the secrecy and confidentiality ensured that the process may on occasions, make wrong appointments and, worse still, lend itself to nepotism.” The attempt made to replace it by a ‘National Judicial Appointments Commission’ was struck down by the court in 2015 on the ground that it posed a threat to the independence of the judiciary. Dissenting judge, Justice J. Chelameswar, termed it “inherently illegal”. Even the majority opinions admitted the need for transparency. In an effort to boost transparency, the Collegium’s resolutions are now posted online, but reasons are not given.

Some do not believe in full disclosure of reasons for transfers, as it may make lawyers in the destination court chary of the transferred judge. Embroilment in public controversies and having relatives practising in the same High Court could be common reasons for transfers.

In respect of appointments, there has been an acknowledgement that the “zone of consideration” must be expanded to avoid criticism that many appointees hail from families of retired judges. The status of a proposed new memorandum of procedure, to infuse greater accountability, is also unclear.

Collegium System

What is it?

- The system of appointment of judges in the courts of the country is called the 'collegium system'. This arrangement was made in 1990 after two decisions of the Supreme Court.
- Under the collegium system, a committee of senior judges, headed by the Chief Justice of the Supreme Court, decides the names and appointments of the judges.
- The collegium also decides the appointment and transfer of judges in the Supreme Court and High Court. The Collegium also decides which judges of the High Court get promoted to the Supreme Court.
- The Collegium system is neither mentioned in the original constitution nor in any of its amendment provisions.

The background

- The system came into effect on October 28, 1998, through the decisions of the Supreme Court in the three judges case.
- In the collegium system, a forum of the Chief Justice of the Supreme Court and 4 senior judges of the Supreme Court recommends the appointment and transfer of judges.
- It is necessary for the government to accept the recommendation of the collegium.
- On August 15, 2014, the UPA government set up NJAC (National Judicial Appointments Commission) to replace the collegium system, but the Supreme Court on 16 October 2015 declared the National Judicial Appointments Commission (NJAC) law unconstitutional.
- Thus, even today, the appointment and transfer of judges is decided by the collegium system of the Supreme Court.

Difference between Collegium System and NJAC?

- NJAC (National Judicial Appointments Commission) is a constitutional body proposed by the government, which was created to replace the collegium system

of appointing judges. At the same time, judges are being appointed through the collegium system for the last 22 years.

- 6 members were proposed in NJAC. The Chief Justice of the country was said to be the head of this commission. There was talk of including 2 senior judges of the Supreme Court, law ministers and 2 eminent personalities from different fields as members.
- A forum of 4 of the Chief Justice and senior judges of Supreme Court in the collegium system recommends for the appointment and transfer of judges.
- There is no mention of collegium system in the constitution. The system came into effect on October 28, 1998, through the decisions of the Supreme Court in the three judge case.
- The 2 celebrities who were said to be included in the NJAC would be elected by the Chief Justice, the Prime Minister and the committee consisting of the Leader of Opposition in the Lok Sabha or leader of the largest opposition party in the Lok Sabha in the event of not being the Leader of Opposition.
- On this, the Supreme Court had the most objection. Those challenging the NJAC had argued that the new law for selection and appointment of judges is non-constitutional. This will affect the independence of the judiciary. The Center, while defending it, said that there were many defects in the collegium system which is more than 20 years old.

Experts argue:-

- The present collegium system persists on 'Making the son fo a Judge a Judge' on the lines of 'making the son of powerful a powerful' .
- Even if more competent judges than these judges are present in the courts. This practice is not healthy for a democratic country like India.
- The collegium system has no constitutional status. Therefore, the government should bring a law to reverse it so that the monopoly of some of the houses held in the judicial system of India ends.

Expected Questions (Prelims Exams)

1. Consider the following statements related to the collegium of the Supreme Court-

1. The Collegium sends a recommendation to the Law Minister, who sends it to the Prime Minister to advise the President.
2. There was an attempt to change the collegium by the National Judicial Appointments Commission.
3. Article-232 of the constitution provides for the transfer of judge, which is recommended by the collegium.

Which of the above statements are correct?

- (a) 1 and 2 (b) 2 and 3
(c) 1 and 3 (d) 1, 2 and 3

Expected Questions (Mains Exams)

- Q. 'The collegium system has been in discussion for some time, although this time it is about transfer.' Explain the jurisdiction of the collegium regarding transfer. Is ending collegium a better option? (250 Words)**

Note: Answer of Prelims Expected Question given on 14 Sept. is 1 (d)

