

SC Judges Appointment

August 31, 2021

Chief Justice of India N.V. Ramana recently read out the oath of allegiance to the Constitution to nine new judges of the Supreme Court, reducing the vacancies in the top court to just one. The occasion was historic on several fronts. It was the first time as many as nine judges were sworn in to the Supreme Court in a single stroke. Three of them were women judges. Again, it was the first time the Supreme Court allowed a live telecast of the ceremony. In this context let us know the issues in the judicial appointment process.

In news: Nine new Supreme Court judges take oath

Placing it in syllabus: Governance

Dimensions

- Independence of judiciary as basic structure of Constitution
- Interference of executive in judiciary
- Evolution of collegium system
- NJAC and its quashing

Content:

Independence of judiciary as basic structure of Constitution

- In the Constitution of India, three wings of Government are embodied, and each of these three wings of government has to work independently though they are interrelated with each other.
- The purpose of justice is deeply embalmed in the Preamble of the Constitution.
- The quality of justice indeed depends upon the independence enjoyed by the judiciary. The court must be allowed to perform its function in an atmosphere of

independence and it should be free from all kinds of political pressures.

- Therefore, the founding fathers of the Constitution added a provision in Part-IV of the Constitution which directs the State to make all-out efforts to keep the judiciary out of politics.
- This directive notifies the government for the future since the independence of the judiciary means the independence of the judges also.
- Independent judiciary is a branch of the principle of separation of powers for cooperation as well as coordination, in particular amongst and between the part of the Government.

In 2020, a two-Judge Bench of the Karnataka High Court comprising Chief Justice Abhay Shreeniwas Oka and Justice Ashok S. Kinagi quashed a private complaint against a Judicial Officer, upholding the Independence of Judiciary as part of the basic structure of the Constitution.

The concept of Independence of Judiciary per se comes within the ambit of the basic structure of the Constitution. Thus it is beyond the scope of any amendability and hence the concept of Independence of judiciary will always be enshrined in the Indian constitution.

Independence of Appointments

- The independence of the judiciary is the distinctive feature of the democratic government. The independence of the judicial system starts from the appointment of judges.
- Article 124 of the constitution dealt with the appointment of Judges to the Apex Court and Article 217 dealt with the appointment of Judges to High Courts.
- Articles 124 to 147 in Chapter IV of Part V under the title Union Judiciary deals with the establishment and composition of Apex Court, the appointment of judges and

their powers, jurisdiction, rights and service conditions, etc.,

- Article 214 to 231 in Chapter V of the Part VI under the title The High court's in the states dealt with the composition of High Court, jurisdiction, the appointment and service conditions of a Judges of a High Court, powers, rights, service conditions, which also includes transfer from one High Court to another High court, etc.
- The power to appoint a judge to the Supreme Court or a High Court is entrusted to the President.

Types of Independences of Judiciary:

- Decisional or Functional independence means the independence of judges to come up with their decisions without submitting to any coercion;
- Personal independence means the judges are not dependent on the elective government in any way in which may affect them in deciding specific cases;
- Collective independence means financial independence and institutional administration of the judicial system as a whole in respect to other divisions of the government that is the executive and the legislative; and
- Internal independence means the independence of judges from the superiors in the judicial system and associates. It refers to, specifically, the independence of a judge or judicial officials from any kind of indication, order, or pressure from his superiors and associates in deciding cases.

Major Provisions:

- **Security of Tenure:** Once appointed, the judges cannot be removed from the office except by an order of the President and that too on the ground of proven misbehavior and incapacity (Articles 124 and 217).
- **Salary as Expenses Charged:** The salaries and allowances

of the judges are fixed and are not subject to a vote of the legislature.

- **Powers and Jurisdiction of Supreme Court:** Parliament can only add to the powers and jurisdiction of the Supreme Court but cannot curtail them.
- **No discussion in the legislature** of the state with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties.

Punishing Powers for Contempt: Both the Supreme Court and the High Court have the power to punish any person for their contempt.

Interference of executive in judiciary:

- There were instances where the executive tried to interfere in the judicial appointments.
- In 1973, A.N.Ray was appointed as the Chief Justice of India. This violated the convention formed earlier since Justice A.N.Ray superseded three other Supreme Court judges senior to him.
- Again in 1977, another chief justice was appointed who superseded his seniors.
- This resulted in a clash between the Executive and the Judiciary.
- This led to the evolution of the collegium system

Evolution of collegium system:

The genesis of collegium system lie in the famous “three Judges Cases”, which are:

- SP Gupta Vs Union of India – 1981
- Supreme Court Advocates-on Record Association vs Union of India – 1993
- Article 143 – Opinion of Supreme Court delivered in 1998

Appointment of CJI 1950-1973

- Until 1973, the President appointed the Chief Justice of India and remaining judges of the Supreme Court in consultation with the CJI and other judges as he deemed necessary, in accordance with the provisions of the constitution.
- Until 1973, there existed a consensus between the Government of the day and the Chief Justice of India.
- A convention was formed where the senior-most judge of the Supreme Court was to be appointed as the Chief Justice of India.
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First Judges Case, 1982

- A petition was filed in 1982 in the Supreme Court of India which is known as the S.P.Gupta Case or First Judges case.
- The Supreme Court discussed 2 major points during the proceedings of this case
- When asked, whether the word “consultation” in the constitutional article 124 mean “concurrence”; the Supreme court overruled this and denied saying that Consultation does not mean concurrence. The President was not bound to make a decision based on the consultation of the Supreme Court.
- The court said consultation under Article 124 doesn't mean concurrence (unanimity). Based on this judgement, the President is not bound by CJI's advice.
- Another important point in the discussion, in this case, was the part where the Supreme Court decided that a High

Court Judge can be transferred to any other high court of a state even against his will.

Second Judges Case, 1993

- Another petition was filed in 1993 by the Supreme Court Advocates on Record Association (SCARA).
- In this case, the Supreme court overruled its earlier verdict and changed the meaning of consultation to concurrence. Thus binding the President of India with the consultations of the Chief justice of India.
- Further CJI is required to formulate its advice based on a collegium of judges consisting of CJI and two senior-most SC judges
- This resulted in the birth of the Collegium System.

Third Judges Case, 1998

- In the year 1998, the presidential reference to the Supreme court was issued questioning the meaning of the word consultation in articles 124, 217, and 222 of the Constitution.
- The court expanded the collegium to a five-member body to include the CJI and the four senior-most judges of the court after the CJI.
- The chief justice won't be the only one as a part of the consultation process. Consultation would include a collegium of 4 senior-most judges of the Supreme court. Even if 2 of the judges are against the opinion, the CJI will not recommend it to the government.

The strengths of Collegium System include:

- **Maintains separation of power of the State:** It strengthens the principle of separation of powers i.e. it separates the judiciary from the influence of the executive and legislative and thereby ensures impartial and independent functioning.
- **Avoids Conflict of Interest:** The State is the main

litigant in Indian Courts. About 46% of total cases pending in India pertains to the government. If the power to transfer the judges is given to the executive, then the fear of transfer would impede justice delivery.

- **Brings in Specialization:** The executive organ is not a specialist or does not have the knowledge regarding the requirements of the Judge. Therefore, it is better if the collegium system appoints Judges.
- **Stability in times of political vulnerability:** The government handling the transfers and appointments is prone to nepotism. For example, there is ample evidence where the civil servants were transferred for political gains. This scenario is avoided by the present collegium system. Further, the collegium system provides stability to the judges.

Drawbacks of Collegium System:

The critics of the collegium system list the following as its main drawbacks:

- **Power Asymmetry:** It gives enormous power to judges that can be easily misused. The collegium system has made India, the only country where judges appoint judges.
- **Non-Accountability:** The selection of judges by collegium is undemocratic. Since judges are not accountable to the people or representative of peoples i.e. executive or legislative.
- **Opaque System:** There is no official procedure for selection or any written manual for functioning. This creates an ambiguity in the collegium's functioning. There is no structured process to investigate if a judge who is recommended by the collegium has any conflict of interests. It is a closed door system of appointments having no transparency.
- **Disproportionate Representation:** The collegium system prefers practising lawyers rather than appointing and

promoting “judges of the subordinate judiciary,” which often comprises a diverse pool of candidates. As a result of this, the composition of the high courts becomes, literally, an “old boys’ club” featuring largely male, upper-caste, former practising lawyers.

Allegations of Nepotism: Collegium has been fraught with serious allegations of different types of alleged conflict of interest among the members of the collegium and the individuals they have selected to become judges of the High Courts and the Supreme Court. Sons and nephews of previous judges or senior lawyers tend to be popular choices for judicial roles. Thus, it encourages mediocrity in the judiciary by excluding talented ones and breeds nepotism.

NJAC and its quashing

- In 2014, the Union government tried to replace the collegium system with the National Judicial Appointments Commission (NJAC).
- National Judicial Appointments Commission (NJAC) was a proposed body which would have been responsible for the recruitment, appointment and transfer of judges and legal specialists in India.
- The Commission was established by amending the Constitution of India through the ninety-ninth constitution amendment with the Constitution (Ninety-Ninth Amendment) Act, 2014.
- Along with the Constitution Amendment Act, the National Judicial Appointments Commission Act, 2014, was also passed by the Parliament of India to regulate the functions of the National Judicial Appointments Commission.
- A new article, Article 124A, (which provides for the composition of the NJAC) has been inserted into the Constitution.

It stipulated that the NJAC would consist of –

- Chief Justice of India
- 2 senior most judges of Supreme Court
- Union minister of law and justice
- 2 eminent persons (nominated by CJI, Prime Minister, Leader of opposition in Lok Sabha)
- A person would not be recommended by NJAC if any 2 of its members did not accept such recommendation, making the appointment process more broad-based.

The Fourth Judges Case (2015)

- The Collegium system was reaffirmed in 2015 when the Supreme Court of India struck down The National Judicial Appointments Commission Act, or 'NJAC'
- The Court said that the Act violated the principle of judicial independence since political members of the proposed commission held voting power.
- The Court held that the Act gave the government significant powers to appoint Judges.
- The Court held the Act encroached upon the judiciary's independence and undermined the basic structure.
- The court held that the appointment of judges, coupled with primacy of judiciary and the CJI, was part of the basic structure of the Constitution and that the parliament, through NJAC act, violated this basic structure.

Mould your thought: The collegium system must not see itself as being above the safeguards and measures for transparency, accountability and demographic representation that apply to India's pillars of democracy. Evaluate.

Approach to the answer:

- Introduction
- Introduction
- Define Collegium System

- Discuss its evolution briefly
- Discuss the importance of collegium System
- Discuss the drawbacks of the system
- Conclusion