

Supreme Court Collegium

October 10, 2022

Manifest Pedagogy:

The collegium system is not rooted in the Constitution or a specific law promulgated by Parliament but has evolved through judgments of the Supreme Court. The collegium system allows judges to appoint and transfer themselves. It has been debated for long, and sometimes blamed for tussles between the judiciary and the executive, and the slow pace of judicial appointments. It's high time to revisit the system to make the judiciary more responsive and accountable.

In News: With two of the five-member Supreme Court Collegium against a proposal to recommend four new judges to the top court through a written note instead of a formal meeting, Chief Justice of India U U Lalit is learnt to have written to them again, seeking reconsideration of their stand.

Placing it in the Syllabus: Polity

Static Dimensions

- The Collegium system
- Role of Government
- What does the Constitution say on the appointment of judges in the higher judiciary
- Evolution of collegium system

Current Dimensions

- More on news
- Importance of collegium system
- Criticism of the collegium system
- ARC recommendations
- Best Practices around the world

Content

More on news

- As per convention, the government writes to the outgoing CJI before his retirement and the CJI recommends the name of the most senior judge as the successor about a month before retirement.
- Once a new name is recommended, the incumbent CJI usually refrains from taking decisions on appointment of judges.
- Despite CJI Lalit's letter, the two judges are firm that the process of "holding a Collegium meeting by circulation" instead of face-to-face deliberations is unheard of and they cannot be party to it.

The Collegium system

- The collegium system is the way by which judges of the Supreme Court and High Courts are appointed and transferred.
- The collegium system is not rooted in the Constitution or a specific law promulgated by Parliament, it has evolved through judgments of the Supreme Court.
- The Supreme Court Collegium is a **five-member body**, which is headed by the incumbent CJI and comprises the four other senior most judges of the court at that time.
- A High Court collegium is led by the incumbent Chief Justice and four other senior most judges of that court. By its very nature, the composition of the collegium keeps changing.
- Judges of the higher judiciary are appointed only through the collegium system, and the government has a role only after names have been decided by the collegium.
 - Names recommended for appointment by a High Court collegium reach the government only after approval by the CJI and the Supreme Court collegium.
- By its very nature, the composition of the collegium keeps changing, and its members serve only for the time

they occupy their positions of seniority on the Bench before they retire.

Role of Government

- The role of the government in this entire process is limited to getting an inquiry conducted by the **Intelligence Bureau (IB)** if a lawyer is to be elevated as a judge in a High Court or the Supreme Court.
- The government can also raise objections and seek clarifications regarding the collegium's choices, but if the collegium reiterates the same names, the government is bound to appoint them.
- Sometimes the government delays making the appointments, especially in cases where the government is perceived to be unhappy with one or more judges recommended for appointment by the collegium.
- Supreme Court judges have sometimes expressed anguish over such delays.

What does the Constitution say on the appointment of judges in the higher judiciary

- **Articles 124(2)** of the Constitution deal with the appointment of judges to the Supreme Court..
 - The appointments are made by the President, who is required to hold consultations with "such of the judges of the Supreme Court and of the High Courts" as he may think is needed.
 - But the Constitution does not lay down any process for making these appointments.
 - Article 124(2): "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of **sixty-five**

years.

- Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.
- **Article 217 says:** “Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, 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.

Evolution of collegium system

- **1st Judges case-In ‘SP Gupta Vs Union of India’**, 1981, the Supreme Court by a majority judgement held that the concept of primacy of the CJI was not really rooted in the Constitution.
 - It held that the proposal for appointment to a High Court could emanate from any of the constitutional functionaries mentioned in Article 217, and not necessarily from the Chief Justice of the High Court.
 - The Constitution Bench also held that the term “consultation” used in Articles 124 and 217 did not mean “concurrence” – therefore, although the President will consult these functionaries, his decision was not bound to be in concurrence with all of them.
- **2nd Judges case-In ‘The Supreme Court Advocates-on-Record Association Vs Union of India’**, 1993, a nine-judge Constitution Bench overturned the decision in ‘SP Gupta’, and devised a specific procedure called the ‘Collegium System’ for the appointment and transfer of judges in the higher judiciary.
 - Ushering in the collegium system, the verdict in the Second Judges Case said that the recommendation should be made by the CJI in

consultation with his two senior most colleagues, and that such recommendation should normally be given effect to by the executive.

- **3rd Judges case**-The Supreme Court laid down that the recommendation should be made by the CJI and his four seniormost colleagues instead of two, as laid down by the verdict in the Second Judges Case.
 - It also held that Supreme Court judges who hailed from the High Court for which the proposed name came, should also be consulted.
 - It was also held that even if two judges gave an adverse opinion, the CJI should not send the recommendation to the government.

Importance of collegium system

- It separates the judiciary from the influence of the executive and legislative.
- 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.
- The government handling the transfers and appointments is prone to nepotism.
- The system has worked well to some extent and has produced some of the finest judges of our times.

Criticism of the collegium system

- The system is non-transparent, since it does not involve any official mechanism or secretariat.
- It is seen as a closed-door affair with no prescribed norms regarding eligibility criteria, or even the selection procedure.
- There is no public knowledge of how and when a collegium meets, and how it takes its decisions. There are no official minutes of collegium proceedings.
- Lawyers too are usually in the dark on whether their

- names have been considered for elevation as a judge.
- The collegium system of appointment and transfer of judges of the higher judiciary has been debated for long, and sometimes blamed for tussles between the judiciary and the executive, and the slow pace of judicial appointments.
 - The collegium system prefers practising lawyers rather than appointing and promoting “judges of the subordinate judiciary,” which often comprises a diverse pool of candidates.
 - 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.

ARC recommendations

- The **2nd Administrative Reforms Commission** recommended that the appointment of judges to higher courts should be through the participation of the executive, legislature and the Chief Justice.
- It should be a process above day-to-day politics.
- The National Judicial Council should be authorised to lay down the code of conduct for judges, including the subordinate judiciary.
- The proposed council should be entrusted with the task of recommending appointments of Supreme Court and High Court Judges.
- NJC should also be entrusted with the task of oversight of the Judges and should be empowered to inquire into alleged misconduct and impose minor penalties along with the power to remove the judge if warranted.
- The President should have the powers to remove a Supreme Court or High Court Judge.
- The council should have the following composition:**The Vice President as Chairperson of the Council, The Prime Minister, The Speaker of the Lok Sabha, The Chief Justice of India, The Law Minister, The Leader of the Opposition**

in the Lok Sabha, The Leader of the Opposition in the Rajya Sabha.

Best Practices around the world

- **UK**-SC judges are appointed by a five-person selection commission.
 - It consists of the SC President, his deputy, and one member each appointed by the JACs of England, Scotland and Northern Ireland. (The JACs comprise lay persons, members of the judiciary and the Bar and make appointments of judges of lower courts.)
- **Canada**-Appointments are made by the Governor in Council.
 - A selection panel comprising five MPs (from the government and the opposition) reviews the list of nominees and submits 3 names to the Prime Minister.
- **USA**-Appointments are made by the President.
 - Supreme Court Justices are nominated by the President and confirmed by the United States Senate.
- **Germany**-Appointments are made by election.
 - Half the members of the Federal Constitutional Court are elected by the executive and half by the legislature.
- **France**-Appointments are made by the President.
 - The President receives proposals for appointments from the Conseil Supérieur de la Magistrature.

Way Forward

- There is a need to think about the collegium system so that appointments in higher judiciary can be accelerated.
- There should be an institutional basis for considering names from the Supreme Court Bar, rather than considering them on an ad hoc basis.
 - It should be done as a rule and not as an

exception.

- The “thought process” of both the government and Collegium should be modulated and the time frame needed to be fixed for both the Collegium and Ministry to complete the appointment process.
- The NJAC should be amended to make sure that the judiciary retains independence in its decisions and re-introduced in some form or the other.
- A written manual should be released by the Supreme Court which should be followed during appointments and records of all meetings should be in the public domain in order to ensure transparency and rule-based process.
- Apart from reforming the collegium system, the quality of judges can also be improved through the implementation of All India Judicial Services

Mould your thoughts

1. Supreme court collegium system is majorly responsible for huge pendency of cases in Indian court's and its high time to revisit the system. Critically discuss.(250 words)

Approach to the answer.

- Introduction about the issue of pendency
- SC collegium and delayed appointments
- Importance of the system
- Issues with the system.
- Suggestions and best practise comparison
- Wayforward and Conclusion.