

Transfer of high court judges

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Manifest pedagogy: The issue of transparency and accountability of judiciary has been a burning topic since many years. It has got renewed focus because of many recent issues like RTI and Judiciary, Master of the Roster issue, Public conference held by judges, Sexual harassment allegations against CJI and now the transfer issue. Either a generally question on accountability can be asked or a specific topic can be picked up.

In news: On August 28, 2019, the Supreme Court collegium consisting of five senior-most judges recommended the **transfer of Madras High Court Chief Justice VK Tahilramani to the Meghalaya High Court.**

Placing it in syllabus: Functioning of the judiciary

Static dimensions:

- Constitutional provisions on transfers
- Important Supreme court decisions on transfer of judges

Current Dimensions: Problems involved in the present issue and Solutions

Content:

- The collegium, headed by Chief Justice Ranjan Gogoi, recommended transfer of Justice Tahilramani, from Madras High Court to the Meghalaya High Court.
- She spent almost 17 years as a judge in the Bombay High Court and has been its acting chief justice.
- She was transferred to the Madras High Court in August 2018.
- There has not been any controversy about her functioning

and hence it is unclear why her transfer to a smaller High Court was necessary.

- The **collegium resolution has merely stated that it is being done for better administration of justice.**
- After the collegium resolution she had made a representation, requesting it to reconsider the proposal for transfer.
- However on September 3, 2019, collegium did not accede to her request and reiterated its recommendation and uploaded the resolution on the SC website.
- Justice Tahilramani has **submitted her resignation** after her request for reconsideration of the transfer was rejected.
- Legal luminaries have criticised Justice Tahilramani for resisting the transfer, arguing that no High Court is lesser than another.
- Many have pointed out that Tahilramani in 2017, had upheld the conviction of the accused in the **Bilkis Bano case** linked to the 2002 Gujarat communal riots.
- However, she was made a chief justice of a High Court much after this judgement, so the attempt to link her transfer to the Gujarat case is weak.
- While sections of the Bar have questioned the transfer as well as the **lack of transparency** about the exact reason, the SC issued an official statement that the Collegium indeed had cogent reasons which could be revealed if necessary.

Constitutional provisions on transfers of high court judges:

- **Article 222** of the Constitution makes provision for the **transfer of a Judge (including Chief Justice)** from one High Court to any other High Court.
- The initiation of the **proposal** for the transfer of a Judge should be **made by the Chief Justice of India(CJI)**.
- The opinion of the CJI **“is determinative”**.
- Consent of a Judge for his first or subsequent transfer

would not be required.

- In the formation of his opinion for the transfer of a Judge, other than the Chief Justice, the CJI is expected to **take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred and Chief Justice of the High Court to which the transfer is to be effected.**
- The views of one or more Supreme Court Judges who are in a position to offer his/their views are also taken into account.
- In the case of transfer of a Chief Justice, only the views of one or more knowledgeable Supreme Court Judges need to be taken into account.
- The **views on the proposed transfer** of a Judge or a Chief Justice of the High Court should be expressed in writing and should be **considered by the CJI and the four senior most Judges of the Supreme Court.**
- The proposal should be referred to the Government of India.
- Then the **Union Minister of Law, Justice and Company Affairs** would **submit a recommendation to the Prime Minister** who will then **advise the President** as to the transfer of the Judge concerned.
- After the **President approves the transfer**, the notification will be gazetted and the judge remains transferred.

Important Supreme court decisions on transfer issues:

The **Collegium of judges is the Supreme Court's invention** and is **not mentioned in the Constitution.** 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, there was a perception that the independence of the judiciary was under threat. This resulted in a series of following cases:

-> 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 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.

Problems involved in the present issue:

The **lack of information** in the transfer resolution has led to a barrage of criticism against the collegium and its opaque process of appointments and transfers. While this is true given that all high courts have similar powers under the Constitution, a **transfer without delineating proper reasons** has an inherent danger to be seen as a punishment.

Tahilramani is the senior-most among the High Court judges currently holding office. The Madras High Court considered a prestigious court with a long history has a sanctioned strength of 75 judges compared to just three in the Meghalaya High Court. Hence the immediate question that has arisen is when Justice Tahilramani had just over a year of service left, was it necessary to "**demote**" her?

Common criticism made against the Collegium system:

The norm of the Supreme Court collegium **not to make public, the reasons for transfers** and maintaining **opaqueness** are contributing to an erosion of the judiciary's credibility and its image of being independent in its functioning from the

executive. This also invariably makes the High Court judges look subordinate to the Supreme Court collegium.

Collegium, which is not a constitutional body has **monopoly over transfer of judges**. The small base from which the selections are made and the secrecy and confidentiality ensured, on many occasions lead to **wrong appointments** based on past favours instead of merit or seniority as well as **nepotism**.

The attempt made to replace it by a '**National Judicial Appointments Commission**' was struck down by the court in 2015 on the grounds that it posed a threat to the independence of the judiciary. **Dissenting judge, Justice J. Chelameswar, termed it "inherently illegal"**.

In an effort to boost transparency, the Collegium's resolutions are now posted online, but the reasons are not given.

The consultative process that had been put into place to guard the judiciary against arbitrary transfers has been criticised for itself becoming **arbitrary**. The case of Justice Tahilramani fits into this framework where the public is left with no information on why the transfer was made.

Solutions:

- In the **Union of India v SankalChand Sheth case (1977)**, the actual transfer of the judge was withdrawn and Justice **PN Bhagwati**, had stated that to **transfer without consent was inimical to the independence of the judiciary**. Henceforth, Justice Bhagwati's view of no transfer without consent needs to be followed.
- To make the system more transparent and declare the reasons for transfer of the judges.
- Merit and seniority should be given an upper hand while making transfers rather than personal interests.

