



SC Strikes Down NJAC: Logic and Implications

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1 Appointment of Judges in India: Current Scenario

The judges of Supreme Court and High Court are appointed by the President on the recommendation of Collegium.

1.1 Constitutional Provisions

The constitutional provisions related to their appointment are:

- **Article 124** says the President should appoint Supreme Court judges after consultation with such judges of High Courts and the Supreme Court as he/she may deem necessary. The Chief Justice of India is to be consulted in all appointments barring his/her own.
- **Article 217**, which deals with the appointment of High Court judges, says the President should consult the CJI, Governor, and Chief Justice of the High Court concerned.

1.2 Collegium System

- The Chief Justice of India should consult a collegium of four senior most judges of Supreme Court for appointment of judge to Supreme Court.
- In case of appointment of high court judge, the Chief Justice of India should consult the collegium of two senior most judges of Supreme Court.
- In case of transfer of high court judge, the Chief Justice of India should consult collegium of four senior most judges of Supreme Court.

1.2.1 How Collegium System came into existence?

- **First Judges Case, 1981:** The Supreme Court ruled that the recommendation made by the CJI to the President can be refused for “**cogent reasons**”, thereby giving greater say to executive.
- **Second Judges Case, 1993:** It is also known as Supreme Court Advocates-on Record Association vs Union of India. It led to the **creation of the collegium system**. The Supreme Court said that the Chief Justice of India should be given the “**primal**” role in appointments.
- **Third Judges Case, 1998:** The President K R Narayanan issued a **Presidential Reference** to the Supreme Court over the meaning of the term “consultation” under article 124 and 217 of Indian Constitution. The question was whether “consultation” required consultation with a number of judges in forming the CJI’s opinion, or whether the sole opinion of CJI could by itself constitute a “consultation”. In response, the Supreme Court laid down **guidelines for the functioning collegium system**.

The inception of the collegium system was well-intentioned. In all fairness, it did solve the problem of excessive executive interference.

1.2.2 Problems with Collegium System

Judges are today chosen on undisclosed criteria in largely unknown circumstances.

- **Opaqueness:** The biggest problem with the collegium system is that it is completely opaque — and any system that is not transparent will be open to misuse.
- **Nepotism:** Sometimes the high office of higher judiciary is patronized. A person, whose near relation or well-wisher had been a judge in the higher courts or is a senior advocate or is a political high-up, stands a better chance of elevation (**Uncle Judge syndrome**)
- **Lack of Permanent Commission:** The administrative burden of appointing and transferring judges without a separate secretariat or intelligence-gathering mechanism to profile appointees. This led to inefficiency in appointment process and higher judiciary has huge number of vacant positions.

Justice Ruma Pal, former SC judge remarked that it is one of the best-kept secrets in the country. Justices J. Chelameswar and Kurian Joseph, in their opinions, pointed out that the collegium system lacks “transparency, accountability and objectivity”.

2 Steps taken by government to reform judicial appointment

2.1 Venkatachaliah Commission

The government appointed the Justice M N Venkatachaliah Commission in 2000 to opine whether there was need to change the collegium system.

- The commission opined in favour of change, and prescribed an National Judicial Appointment Commission
- It has to be consisting of the CJI and two senior-most judges, the law minister, and an eminent person from the public, to be chosen by the President in consultation with the CJI.

2.2 National Judicial Appointment Commission

- The government moved 99th Constitutional Amendment Bill to establish National Judicial Appointment Commission
- It was envisaged as an independent commission to appoint and transfer judges of High Court and appoint judges of Supreme Court of India.
- It was composed of three senior judges, two eminent outsiders and the Law Minister.
- The constitutional amendment was passed by Parliament and was ratified by 20 states.
- However, before it was notified, it was challenged in Supreme Court as an attempt by government to interfere with the independence of the judiciary.

The motive behind creation of NJAC was to bring reforms in appointment process of Indian higher judiciary

3 Why Supreme Court struck down NJAC? - Logic

- NJAC did “not provide an adequate representation, to the judicial component” and that new provision in Constitution are insufficient to preserve the primacy of the judiciary in the matter of selection and appointment of Judges”
- “Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an ex officio Member of the NJAC.”
- The amendment impinged upon the principles of “independence of the judiciary”, as well as, the “separation of powers”.
- The clause which provided for the inclusion of two “eminent persons” as Members of the NJAC was held ultra vires the provisions of the Constitution.

On the other hand, the Supreme Court expressed its intention to find ways to improve the functioning of the collegium system

4 Implications of judgement

- The judgement has once again undermined the authority of Parliament to legislate on matters pertaining to Judiciary
- Some legal experts have labelled the verdict as judicial activism by judiciary and manifestation of conservative outlook when it comes to reforming its own institution

- With this verdict, the appointment shall continue through Collegium system. However, the judiciary is seeking to bring reforms ensuring transparency and fair recruitment process

5 Why judicial appointments must remain the prerogative of the judiciary

- **Government is major litigant:** Since the government is a major litigant, giving it an edge in appointments would amount to fixing the courts.
- **Independence of Judiciary:** It has been regarded as basic structure of constitution and NJAC was termed as violating the independence of judiciary
- To enable **Separation of Powers** between executive and judiciary as directed by Constitution of India

6 Measures required to reform for Judicial appointment in India

- The entire appointment system needs to be opened up to the Right to Information (RTI) Act, so that any citizen can seek and get information about the process through which a judge was appointed
- Vacancies in the Supreme Court and in the High Courts need to be filled up. Most High Courts are functioning with half or one third the sanctioned strength
- The persons of doubtful integrity who might have been appointed by the mistake of the collegium have to be weeded out. But methods like voluntary retirement could be an option.
- The “uncle judges” syndrome could be eliminated by not posting any judge in a High Court where his/her kin was practising.
- The infrastructure in the courts needs improvement — there will not be enough court halls, chambers, or staff, if all the vacancies are filled.
- There needs to be appointment of ad hoc or additional judges to clear pending cases — the collegium is generally reluctant to appoint retiring judges as ad hoc judges.
- The Supreme Court should lay down institutional mechanisms for transparent functioning of the collegium.
- The Collegium should accept applications for appointments as High Court judges. This is followed in the U.K. and can be adopted in India too.
- There must be full and complete disclosure of relationships and affiliations of applicants to sitting and retired judges.
- Minimum eligibility criteria for consideration need to be laid down, including appearances in important cases.
- All the three organs of the state should introspect as to why there has been no or inadequate representation in the higher judiciary from amongst women.
- Provide a **uniform retirement age** for judges of the Supreme Court and the High Courts, so that the present practice of some judges seeking to be in the good books of the members of collegiums is avoided.
- A minimum tenure should be provided to the Chief Justice of India and the Chief Justice of High Courts.
- Court management should not be vested with Judicial Officers but assigned to trained managers.
- **Permanent Commission** may be constituted to scrutinize the credentials of candidates and recommend names to collegium. These Permanent Commissions should also be enabled to scrutinize complaints of dishonesty and lack of integrity of judges.

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