



## Justice Inside Judiciary

This editorial is based on [“Debate over the collegium system: How are SC and HC judges appointed?”](#) which was published in The Indian Express on 08/10/2022. It talks about the Collegium System for Judicial Appointment in India and related issues.

**For Prelims:** Collegium System, 99<sup>th</sup> Constitution (Amendment) Act, Chief Justice of India (CJI), SP Gupta Vs Union of India 1981, Second Judges Case.

**For Mains:** Constitutional Provision for Appointment of Judges, Evolution of Collegium System, Issues Related to the Collegium System, Towards Representative Judiciary.

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**.

[Parliament of India](#) came with the [National Judicial Appointment Commission \(NJAC\)](#) and [99<sup>th</sup> Constitution \(Amendment\) Act](#) for reforms in **judicial appointment**, but the Supreme Court held it **unconstitutional** and void by striking down the **NJAC** and 99<sup>th</sup> Constitution (Amendment) Act.

Since then, the **Collegium system of appointment and transfer of judges** of the higher judiciary **has been debated for long**, and has been blamed for **tussles between the judiciary and executive**, as well as the **slow pace of judicial appointments**.

### What is the Collegium System?

- The **Supreme Court Collegium is a five-member body**, which is headed by the incumbent [Chief Justice of India \(CJI\)](#) 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 two other senior most judges** of that 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 as judges**.

### What Does the Constitution Say on the Appointment of Judges?

- **Articles 124(2) and 217** of the [Constitution](#) deal with the **appointment of judges to the Supreme Court and High Courts**.
  - 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.

## How did the Collegium System Evolve?

- **First Judges Case (1981):** In '**SP Gupta Vs Union of India**', 1981, the Supreme Court by a majority judgement held that the **concept of primacy of the Chief Justice of India was not really rooted in the Constitution**.
  - The **Constitution Bench** also held that the term "**consultation**" used in **Articles 124 and 217 did not mean "concurrence"**.
    - It means **although the [President](#) will consult these functionaries** for appointment, **his decision was not bound** to be in concurrence with all of them.
- **Second Judges Case (1993):** In '**The Supreme Court Advocates-on-Record Association Vs Union of India**', 1993, a **9-judge Constitution Bench** overturned the decision in 'SP Gupta'.
  - They devised a specific procedure called the '**Collegium System**' for the **appointment and transfer of judges** in the higher judiciary.
  - Also, the role of the **CJI is primal in nature** because this being a topic within the judicial family, the **executive cannot have an equal say in the matter**.
- **Third Judges Case (1998):** In 1998, then **President KR Narayanan** issued a **Presidential Reference** to the Supreme Court under **Article 143** of the Constitution (advisory jurisdiction) over the meaning of the term "consultation".
  - 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"**.
  - **The Supreme Court** laid down that the recommendation should be made by the CJI and his four senior most colleagues.

## What are the Issues Related to the Collegium System?

- **Exclusion of Executive:** The **complete exclusion of the [executive](#)** from the judicial appointment process created a system where a few judges appoint the rest in **complete secrecy**.
  - Also, they are **not accountable to any administrative body** that may lead to the wrong choice of the candidate while overlooking the right candidate.
- **Chances of Favouritism and Nepotism:** The collegium system does not provide any specific criteria for testing the candidate for the post of **CJI** because of which it **leads to wide scope for nepotism and favouritism**.
  - It gives rise to **non-transparency of the judicial system**, which is very harmful for the **regulation of law and order** in the country.
- **Against the Principle of Checks and Balances:** The principle of **check and balance is violated** in this system. In India, three organs work partially independently but they keep check and balance and control on the excessive powers of any organ.
  - However, the collegium system gives Judiciary immense power, which **leaves little room for checks and poses the risk of misuse**.
- **Close-Door Mechanism:** Critics have pointed out that this system does not involve any official secretariat. It is seen as a closed-door affair with **no public knowledge of how and when a collegium meets**, and how it takes its decisions.
  - Also, there are **no official minutes of collegium proceedings**.
- **Unequal Representation:** The other area of concern is the **[composition of the higher judiciary](#)**, women are fairly **underrepresented in the higher judiciary**.

## What Should be the Way Forward?

- **Balance Between Independence and Accountability:** The **real issue is not who (judiciary or executive) appoints the judges**, but the **manner in which they are appointed**.
  - For that, whatever may be the composition of the Judicial Appointment Commission (JAC), it is important to strike a **balance between judicial independence and judicial accountability**.

- The **Executive should have a say in appointments** but the composition of the JAC should be such that it **does not result in compromising judicial independence**.

- **Justice Inside Judiciary:** Care must be taken to ensure that the **institutional imperative of the Court for dispensing justice is maintained inside the judiciary** with equality of opportunity and fixed criteria for selection of judges.
- **Reconsidering the Establishment of NJAC:** NJAC's Act may be amended to include **safeguards** that would make it **constitutionally valid**, as well as reorganised to ensure that **majority control remains with the judiciary**.
- **Gender Diversity and Representative Judiciary:** **No woman has been appointed as Chief Justice of India** so far. There is a need to maintain and **promote Gender Diversity in Higher Judiciary** with a fixed percentage of its members as women judges that will lead to the evolution of a gender-neutral judicial system of India.
  - **Justice B.V. Nagarathna**, expected to be India's first woman Chief Justice of India in September 2027, is a welcome step in this direction.

### ***Drishti Mains Question***

Discuss how the Indian collegium system evolved and major issues associated with it.

## **UPSC Civil Services Examination, Previous Year Question (PYQ)**

### ***Prelims***

**Q. Consider the following statements: (2019)**

1. The 44<sup>th</sup> Amendment to the Constitution of India introduced an Article placing the election of the Prime Minister beyond judicial review.
2. The Supreme Court of India struck down the 99th Amendment to the Constitution of India as being violative of the independence of judiciary.

**Which of the statements given above is/are correct?**

- (a) 1 only
- (b) 2 only
- (c) Both 1 and 2
- (d) Neither 1 nor 2

**Ans: (b)**

### ***Mains***

**Q. Critically examine the Supreme Court's judgement on 'National Judicial Appointments Commission Act, 2014' with reference to the appointment of judges of higher judiciary in India. (150 words)**