



## Judicial Independence ,Appointments and the Collegium

### KEYWORDS

collegium system

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### ABSTRACT

The collegium system has come under a fair amount of criticism. One recommendation by a collegium came to be challenged in court. The court held that who could become a judge was a matter of fact, and any person had a right to question it. But who should become a judge was a matter of opinion and could not be questioned. As long as an effective consultation took place within a collegium in arriving at that opinion, the content or material placed before it to form the opinion could not be called for scrutiny in a court. Presently, by a recent order in the Fourth Judges' Case, the court has invited everyone, including the public to suggest by mid-November 2015. how to improve it, broadly along the lines of - setting up an eligibility criteria for appointments, a permanent secretariat to help the collegium sift through material on potential candidates, infusing more transparency into the selection process, grievance redressal and any other suggestion not in these four categories, like transfer of judges. The position of Chief Justice of India is attained on the basis of seniority amongst the judges serving on the court.

**The collegium system** is a system under which appointments and transfers of judges are decided by a forum of the Chief Justice of India and the four senior-most judges of the Supreme Court. It has no place in the Indian Constitution.

**Article 124** deals with the appointment of Supreme Court judges. It says the appointment should be made by the President after consultation with such judges of the High Courts and the Supreme Court as the President may deem necessary. The CJ is to be consulted in all appointments, except his or her own.

**Article 217** deals with the appointment of High Court judges. It says a judge should be appointed by the President after consultation with the CJ and the Governor of the state. The Chief Justice of the High Court concerned too should be consulted.

The collegium system has its genesis in a series of three judgments that is now clubbed together as the "Three Judges Cases". The S P Gupta case (December 30, 1981) is called the "First Judges Case". It declared that the "primacy" of the CJ's recommendation to the President can be refused for "cogent reasons". This brought a paradigm shift in favour of the executive having primacy over the judiciary in judicial appointments for the next 12 years. On October 6, 1993, came a nine-judge bench decision in the Supreme Court Advocates-on Record Association vs Union of India case — the "Second Judges Case". This was what ushered in the collegium system. The majority verdict written by Justice J S Verma said "justiciability" and "primacy" required that the CJ be given the "primal" role in such appointments. It overturned the S P Gupta judgment, saying "the role of the CJ is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter. Here the word 'consultation' would shrink in a mini form. Should the executive have an equal role and be in divergence of many a proposal, germs of indiscipline would grow in the judiciary."

Justice Verma's majority judgment saw dissent within the bench itself on the individual role of the CJ. In a total of

five judgments delivered in the Second Judges case, Justice Verma spoke for only himself and four other judges. Justice Pandian and Justice Kuldip Singh went on to write individual judgments supporting the majority view. But Justice Ahmadi had dissented and Justice Punchhi took the view that the CJ need not restrict himself to just two judges (as mentioned in the ruling) and can consult any number of judges if he wants to, or none at all. For the next five years, there was confusion on the roles of the CJ and the two judges in judicial appointments and transfers. In many cases, CJs took unilateral decisions without consulting two colleagues. Besides, the President became only an approver.

In 1998, President K R Narayanan issued a presidential reference to the Supreme Court as to what the term "consultation" really means in Articles 124, 217 and 222 (transfer of HC judges) of the Constitution. The question was if the term "consultation" requires consultation with a number of judges in forming the CJ's opinion, or whether the sole opinion of the CJ constituted the meaning of the articles. In reply, the Supreme Court laid down nine guidelines for the functioning of the coram for appointments/transfers; this came to be the present form of the collegium. Besides, a judgment dated October 28, 1998, written by Justice S P Bharucha at the head of the nine-judge bench, used the opportunity to strongly reinforce the concept of "primacy" of the highest judiciary over the executive. This was the "Third Judges Case".

### Arguments against system.

- \* The administrative burden of appointing and transferring judges without a separate secretariat or intelligence-gathering mechanism dedicated to collection of and checking personal and professional backgrounds of prospective appointees;
- \* A closed-door affair without a formal and transparent system;
- \* The limitation of the collegium's field of choice to the senior-most judges from the High Court for appointments to the Supreme Court, overlooking several talented junior judges and advocates.

**Moves were taken to correct**

- \* The Law Commission in its 214th Report on 'Proposal for Reconsideration of Judges cases I, II and III' recommended two solutions:
- \* To seek a reconsideration of the three judgments before the Supreme Court.
- \* A law to restore the primacy of the Chief Justice of India and the power of the executive to make appointments.

A National Judicial Commission remains a proposal. The Constitution (98th Amendment) Bill was introduced in the Lok Sabha by the NDA government in 2003. It provided for the constitution of an NJC to be chaired by the CJI and with two of the senior-most judges of the Supreme Court as its members. The Union Law Minister would be a member along with an eminent citizen to be nominated by the President in consultation with the Prime Minister. The Commission would decide the appointment and transfer of judges and probe cases of misconduct by judges, including those from the highest judiciary.

**SC guidelines on appointments**

- 1 The term "consultation" with the Chief Justice of India in Articles 124 (2), 217(1) and 222 (1) requires consultation with a plurality of judges in the formation of the opinion of the CJI. The sole, individual opinion of the CJI does not constitute consultation.
2. He CJI can only make a recommendation to appoint a judge of the Supreme Court and to transfer a Chief Justice or judge of a High Court in consultation with the four senior-most judges of the Supreme Court. As far as the High Courts are concerned, the recommendation must be made in consultation with the two senior-most judges of the Supreme Court.
- 3 Strong cogent reasons do not have to be recorded as justification for a departure from the order of seniority in respect of each senior judge who has been passed over. What has to be recorded is the "positive reason for the recommendation".

- 4 The views of the judges consulted should be in writing and should be conveyed to the Government of India by the CJI along with his views to the extent set out in the body of this opinion.
- 5 The CJI is obliged to comply with the norms and the requirement of the consultation process in making his recommendations.
- 6 Recommendations by the CJI without [such compliance] are not binding upon the government.
- 7 The transfer of High Court judges is judicially reviewable only if the CJI took the decision without consulting the other four judges in the Supreme Court collegium, or if the views of the Chief Justices of both High Courts [involved in the transfer] are not obtained.
- 8 The CJI is not entitled to act solely in his individual capacity, without consultation with other judges of the Supreme Court, in respect of materials and information conveyed by the Government for non-appointment of a judge recommended for appointment.
- 9 The CJI can consult any of his colleagues on the appointment of a HC judge to the Supreme Court or transfer of a judge. The consultation need not be limited to colleagues who have occupied the office of a judge or Chief Justice of that particular High Court .

**REFERENCE**

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