



A Call for Reform in Judicial Appointments

This editorial is based on "[Reforming the process of judicial appointments](#)" which was published in The Hindu on 02/08/2024. The article brings into picture the debate over India's collegium system reveals its transparency and accountability issues, with the 2015 NJAC dissolution emphasizing the difficulties in reform.

For Prelims: [Articles 124\(2\) and 217\(1\)](#), [National Judicial Appointments Commission](#), [Supreme Court](#), First Judges Case, National Judicial Appointments Commission, [Law Commission of India](#), [Parliamentary Standing Committee](#), Judicial Appointment Mechanisms Across Different Countries.

For Mains: Arguments in Favor and Against of the Collegium System in India.

The ongoing debate over judicial appointments in India, governed by the Constitutional provisions of [Articles 124\(2\) and 217\(1\)](#), underscores the limitations of the **current collegium system**. While designed to safeguard judicial independence, the system's lack of transparency, accountability, and susceptibility to nepotism have drawn significant criticism. The [National Judicial Appointments Commission \(NJAC\)](#), which aimed to address these concerns through a multi-stakeholder approach, was unfortunately struck down by the [Supreme Court](#) in 2015.

Examining judicial appointment systems in other countries, such as the **UK, South Africa, and France**, which involve commissions comprising various stakeholders, reveals that India could benefit from a similar model. A revamped NJAC, **incorporating input from all relevant parties**, could strike a balance between judicial independence and accountability, leading to faster and more transparent appointments. This would be instrumental in addressing the chronic issue of delayed justice in India and restoring public confidence in the judiciary.

How the Collegium System has Evolved over Time?

- **First Judges Case (1982):** In the case of *S.P. Gupta vs. Union of India*, a seven-judge Constitutional Bench of the Supreme Court ruled that "**consultation**" with the Chief Justice of India (CJI) in judicial appointments does not equate to "concurrence," meaning that the **CJI's opinion does not hold primacy as per the Constitution**.
 - The judgment further clarified that proposals for appointments to High Courts could be initiated by any of the four constitutional authorities **mentioned in Article 217**, not exclusively by the Chief Justice of the High Court.
 - This ruling shifted the **balance in favor of the executive's role** in judicial appointments, a practice that remained in place for 12 years.
- **Second Judges Case (1993):** In the case of Supreme Court *Advocates-on-Record Association vs. Union of India*, a nine-judge Bench of the Supreme Court, by a 7:2 majority, **overruled the First Judges Case**.

- The court held that the Chief Justice of India should play the primary role in the appointment of judges.
 - It interpreted "**consultation**" to mean "**concurrence**," thereby establishing the collegium system.
- This system relies on the **collective opinion of the CJI and the senior-most judges**, rather than an individual opinion, in the judicial appointment process.
- **Third Judges Case (1998)**: In the context of a Presidential reference under **Article 143 of the Constitution**, a nine-judge Bench of the Supreme Court reaffirmed the decision made in the Second Judges Case.
 - The court held that the recommendation for judicial appointments should be **made by the Chief Justice of India (CJI)** in consultation with the **four senior-most judges of the Supreme Court**.
 - This ruling firmly established the collegium system, where the **collective opinion of the CJI and senior judges** became binding on the government in matters of judicial appointments.
- **Memorandum of Procedure (MoP)**: Like the collegium system, the Memorandum of Procedure (MoP) is a judicial innovation, **drafted by the Ministry of Law and Justice** as directed by the Supreme Court in the Second and Third Judges Cases.
 - It outlines the process for appointing judges to the higher judiciary, with separate MoPs for Supreme Court and High Court judges.
 - In 2015, the **Supreme Court directed the government to revise the MoP to increase transparency** in the collegium's proceedings.
 - However, this led to a **year-long deadlock between the executive and judiciary** over certain MoP clauses.
 - The government has since sent proposals to supplement the MoP, which is currently under the Supreme Court's consideration.
- **National Judicial Appointments Commission (NJAC)**: The NJAC was proposed following recommendations from the [National Commission to Review the Working of the Indian Constitution \(2002\)](#).
 - The UPA government introduced the **NJAC Bill in 2013**, but it lapsed due to the dissolution of the Lok Sabha.
 - The NDA government reintroduced the **NJAC Bill in 2014**, leading to the passage of the **NJAC Act, 2014**, under the **Ninety-ninth Constitutional Amendment**.
 - The NJAC was to consist of the **CJI as the Chairperson, two senior Supreme Court judges, the Union Minister for Law and Justice**, and two eminent persons nominated by a committee comprising the **Prime Minister, CJI, and Leader of the Opposition**.
- **Fourth Judges Case (2015)**: The constitutional validity of the NJAC Act and the Ninety-ninth Constitutional Amendment was **challenged in the Supreme Court**, which, in a **4:1 decision**, declared both the Act and the amendment unconstitutional.
 - The court cited concerns over **inadequate judicial representation in the NJAC** and the involvement of executive members, arguing that these factors **violated the principle of judicial independence** and the **basic structure of the Constitution**.



Collegium System



- System of appointment and transfer of judges
- Evolved through judgments of the Supreme Court, and not by an Act of Parliament

Constitutional Provisions Related to Appointment of Judges

- **Articles 124 (2) and 217**- Appointment of judges to the Supreme Court and High Courts
 - **President makes appointments after consulting with "such judges of the Supreme Court and of the High Courts"** as s/he may deem necessary.
- But the Constitution **does not lay down any process** for making these appointments.

Evolution of the System

First Judges Case (1981)

- SC held that in the appointment of a judge of the SC or the HC, the word "consultation" in Article **124 (2)** and in Article **217** of the Constitution does not mean "concurrence"
- Gave the **executive primacy** over the judiciary in judicial appointments

Second Judges Case (1993)

- SC overruled the First Judges Case
- Gave **birth to the Collegium System (Primacy to the Judiciary)**
- Collegium included the Chief Justice of India and the **2** most senior judges of the SC

Third Judges Case (1998)

- SC expanded the Collegium to include the CJI and the **4** most-senior judges of the court after the CJI

Current Structure

- **Supreme Court Collegium:** CJI and the **4** senior-most judges of the SC
- **High Court Collegium:** CJI and **2** senior most judges of the SC

Criticism

- Opaqueness
- Scope for Nepotism
- Exclusion of Executive
- No Predetermined Procedure of Appointment

National Judicial Appointments Commission (NJAC)

- It was an **attempt to replace the Collegium System**. It prescribed the procedure to be followed by the Commission to appoint judges
- NJAC was established by the **99th Constitutional Amendment Act, 2014**
- But the **NJAC Act was termed unconstitutional** and was struck down, citing it as having affected the independence of the judiciary



What are the Arguments in Favor of the Collegium System in India?

- **Upholding Judicial Independence:** The Collegium system ensures that judges appoint their peers, maintaining the **judiciary's independence from the executive branch**.
 - This prevents **political interference in judicial decisions**, safeguarding the rule of law and ensuring fair justice.
- **Prioritizing Merit and Experience:** Judges are selected based on their **qualifications, experience, and judicial acumen**.
 - The collegium system allows for a more nuanced assessment of candidates, considering factors **beyond academic credentials**.
 - This ensures that the most competent and experienced individuals are appointed to the bench.
- **Promoting Diversity and Inclusivity:** The collegium system has been instrumental in **promoting diversity within the judiciary**.
 - It has led to the appointment of judges from various backgrounds, including **women, marginalized communities, and regions**.
 - This ensures that the judiciary reflects the diverse nature of Indian society and fosters public trust.
 - For instance, the appointment of **Justice Leila Seth** as the first **woman Chief Justice of a High Court in India** is a testament to the system's commitment to inclusivity.
 - Also, [Justice BV Nagarathna](#) poised to be first woman Chief Justice of India in 2027.
- **Ensuring Institutional Memory and Continuity:** The Collegium System, with its reliance on senior judges, **allows for the preservation of institutional memory** and the continuity of judicial practices and precedents.
 - This can be particularly important in a **complex legal system like India**, where the interpretation and application of laws often evolve over time.
 - The Collegium's ability to maintain a consistent approach to judicial appointments has helped to ensure a **smooth transition of power within the judiciary**, even during periods of political instability or changes in government.

What are the Arguments Against Collegium System in India?

- **Lack of Transparency:** The Collegium System has been criticized for its opaque decision-making process, with **little to no public scrutiny or justification for the appointments made**.
 - This lack of transparency can undermine public trust in the judiciary and raise concerns about the fairness and integrity of the selection process.
 - One of the most notable failures of the collegium system was the appointment of **Soumitra Sen** as a **Calcutta High Court Judge** in December, 2003, despite allegations of **fund misappropriation during his time as a court-appointed lawyer** in a dispute between two public sector undertakings.
- **Uncle Judges' Syndrome:** The Collegium System, with its closed-door deliberations and **reliance on senior judges**, has been accused of fostering an **insular culture that can lead to nepotism and cronyism**.
 - There are concerns that **personal connections and loyalty**, rather than merit, may play a role in the selection of judges.
 - The [Law Commission of India](#) criticized the collegium system in its **2008 report**, highlighting issues of nepotism and lack of checks and balances.
- **Lack of Diversity and Representation** The Collegium System has been criticized for its **failure to promote greater diversity** within the judiciary, particularly in terms of gender, caste, and regional representation.
 - The dominance of **senior judges from certain backgrounds** may result in a judiciary that does not adequately reflect the diversity of the Indian population.
- **Lack of External Oversight and Input:** The Collegium System operates without any external oversight or input from other stakeholders, such as the **public, legal experts, or civil society organizations**.
 - This can result in a decision-making process that is insulated from broader societal

perspectives and concerns.

- [Parliamentary Standing Committee](#) on Law and Justice 2016 Report expressed concern over **delays in filling judicial vacancies and recommended that judicial appointments should be a participatory function** jointly performed by the judiciary and the executive.

How do Judicial Appointment Mechanisms Differ Across Countries?

▪ United States of America

- **Appointment Process:** Federal judges are appointed by the President with the advice and consent of the Senate.
 - Candidates undergo assessment by a committee of the **American Bar Association** and are reviewed by the **Senate Judiciary Committee before a Senate vote.**
- **Tenure:** There is **no fixed retirement age for judges;** they hold office for life, contingent upon "good behavior."

▪ United Kingdom

- **Appointment Process:** Following the establishment of the UK Supreme Court in 2005, the appointment process shifted **from the Lord Chancellor to the Judicial Appointments Commission.**
 - This commission includes barristers, judges, laypeople, solicitors, and magistrates.
 - Despite this shift, the **Lord Chancellor retains the residual power to reject candidates based on merit.**

▪ Other Countries

- **Canada, South Africa, and Various U.S. Jurisdictions:** These countries utilize an **independent Judicial Appointment Commission system**, which is well-regarded for its effectiveness.
- **Ireland, Israel, New Zealand, and the Netherlands:** These countries have established judicial appointment committees to oversee the selection of judges.

What Changes Could Enhance the Existing Collegium System?

- **Enhanced Transparency and Accountability:** The Collegium system should be made more transparent to increase public trust.
 - **Clear guidelines and procedures for judicial appointments** should be established, and public consultations should be incorporated into the process.
 - This would ensure that the judiciary is accountable to the people it serves.
- **Balanced Role for the Executive:** While the judiciary should maintain its independence, the executive branch should have a greater role in judicial appointments.
 - A **revised NJAC**, incorporating representatives from the judiciary, executive, and civil society, could strike a balance between judicial independence and accountability.
 - This would **prevent the judiciary from becoming overly powerful** and ensure that appointments are based on merit and public interest.
- **Merit-Based Appointments:** The Collegium system should strictly adhere to **merit-based criteria for judicial appointments.**
 - **Qualifications, experience, and judicial acumen** should be the primary considerations.
 - This would ensure that the most competent and qualified individuals are appointed to the bench, enhancing the judiciary's efficiency and effectiveness.
- **Time-Bound Appointments:** To address delays in judicial appointments, **strict timelines should be established for the Collegium process.**
 - This would prevent vacancies from persisting for extended periods, ensuring that the judiciary is fully staffed and able to handle the caseload efficiently.
- **Public Participation:** The judiciary should actively seek public input in the judicial appointment process.
 - This could be achieved through **public consultations, online forums, and feedback mechanisms.**

- Public participation would help to ensure that the judiciary is responsive to the needs and expectations of the people it serves.

Conclusion

The debate over India's judicial appointments highlights the need for reform in the collegium system to address issues of transparency, accountability, and delays. **Revising the NJAC or adopting similar reforms** could help resolve these challenges and improve the overall functioning of the judiciary.

Drishti Mains Question:

Discuss the evolution and impact of the collegium system of judicial appointments in India. Evaluate its effectiveness in ensuring judicial independence and transparency.

UPSC Civil Services Examination, Previous Year Question (PYQ)

Prelims

Q. Consider the following statements: (2019)

1. The 44th 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 the 'National Judicial Appointments Commission Act, 2014' with reference to the appointment of judges of higher judiciary in India. (2017)