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**TOPIC**

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**Reforming The Process of  
Judicial Appointments**

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## REFORMING THE PROCESS OF JUDICIAL APPOINTMENTS

### Context

- In India, the appointment of judges has long been a matter of debate, closely tied to the challenge of pending cases. As of April 2024, a staggering 60 lakh cases remained pending across various High Courts, while 30% of judicial seats remained vacant.

### About the Judicial Appointments (Historical Context)

- Before the **National Judicial Appointments Commission (NJAC) Act, 2014**, the appointment process was primarily **guided by conventions**. For instance: The **collegium system**, where a group of senior judges recommended appointments, played a significant role.
- The **senior-most judge of the Supreme Court** was traditionally appointed as the **Chief Justice of India**.

### Collegium System

- It is a novel mechanism devised to ensure a democratic system of appointment and transfer of judges. It came into existence through **Second and Third Judges Case judgments**.
- There is **no such law or Constitutional Provision** that mentions or defines the collegium system.
- It is headed by the CJI and comprises 4 other senior-most judges of the court.
- **High Court (HC) Collegium:** An HC collegium is led by its Chief Justice (CJ) and four other senior-most judges of that court.

### Evolution of Collegium System

- **Article 124:** Supreme Court judges should be appointed by the President after consultation with such judges of the High Courts and the Supreme Court as the President may deem necessary.
  - ♦ The CJI is to be consulted in all appointments except his or her own.
- **Article 124(2) of the Constitution of India:** Every judge of the Supreme court is appointed by the President of India in consultation with such of the judges of the Supreme court and High courts as the President may deem necessary.
- **Article 217:** High Court judges should be appointed by the President after consultation with the CJI and the Governor of the state.
  - ♦ The Chief Justice of the High Court concerned too should be consulted.
- However the actual process has gone through various changes due to the Apex court verdict.
- **First Judges Case, 1981 (S P Gupta Vs Union of India):** A seven judge Constitution Bench held that the President of India is the final authority to appoint and he need not follow the advice of the judges whom he consults.
  - ♦ It meant 'consultation is not concurrence'.
- **Second Judges Case, 1993 (Supreme Court Advocates-on-Record Association Vs Union of India):** A nine-judge Constitution Bench overruled the decision given in SP Gupta Case and devised a specific procedure called 'Collegium System' for the appointment and transfer of judges in the higher judiciary.
  - ♦ It accorded Primacy to the CJI in matters of appointment and transfers while also ruling that the term 'consultation' would not diminish the primary role of the CJI in judicial appointments.
  - ♦ 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. (Article 50 of Constitution of India: Separation of powers between Judiciary and Executive)
- **Third Judges Case (1998):** The 1993 decision was reaffirmed with minor modifications in 1998, on a reference made by the President under Article 143 of the Constitution.
  - ♦ It was held that the recommendation of appointment etc should be made by the chief justice of India and

his four senior most colleagues instead of earlier two and is referred to as the Collegium.

- ◆ Both 1993 decision and 1998 opinion lay down that the senior most judge of the SC should be made as CJI.
- **Fourth Judges Case (2015):** The constitutional validity of both the Ninety-Ninth Constitutional Amendment and the NJAC Act, 2014, was challenged in the Supreme Court in 2015.
  - ◆ A constitutional bench of five judges with a majority of 4:1 struck down the NJAC, declaring them unconstitutional and void, stating that it posed a threat to the independence of the judiciary.

### National Judicial Appointments Commission (NJAC) Act, 2014

- It was enacted to regulate the procedure for recommending individuals for judicial appointments, and was established as per Article 124A of the Indian Constitution.
- It consists of the following members:
  - ◆ The Chief Justice of India (CJI) as the Chairperson.
  - ◆ Two senior-most judges of the Supreme Court.
  - ◆ The Union Minister of Law and Justice.
  - ◆ Two eminent persons nominated by a committee comprising the Prime Minister, the CJI, and the Leader of the Opposition in the Lok Sabha.

### Selection Process (Supreme Court Judges)

- The Commission recommends the senior-most judge of the Supreme Court as the Chief Justice of India (CJI) if found suitable.
- For other judges of the Supreme Court, the Commission considers ability, merit, and other specified criteria.
- A member of the Commission whose name is under consideration does not participate in the relevant meeting.

### Selection Process (High Court Judges)

- Apart from seniority, the ability and merit of the High Court judge are considered during the recommendation process.

### Rules and Regulations

- The NJAC has the power to make rules and regulations governing its functioning.
- These rules and regulations are laid before Parliament.

### Transparency and Independence

- The NJAC aims to strike a balance between transparency and judicial independence.
- It ensures that appointments are based on merit and suitability.

### Collegium System vs. NJAC

- The collegium system, where senior judges recommend appointments, has been the prevailing method. However, it has **faced criticism for its lack of transparency, accountability, and nepotism.**
- In 2014, the **NJAC Act** sought to replace the collegium system. The NJAC would have **included members from both the judiciary and the executive**, aiming for a balanced approach.
- However, the NJAC faced legal challenges, and in 2015, the Supreme Court **declared it unconstitutional.** Consequently, the **collegium system was reinstated as the primary mechanism** for judicial appointments.
- Some legal professionals argue that the NJAC could be a better system, especially if we want faster appointments.

## Why Reform Needed in Judiciary?

- **Charges of Nepotism and Favouritism:** The Collegium does not provide any guidelines in selecting the candidates for the judge position of the Supreme Court because of which it leads to wide scope for nepotism and favouritism.
  - ♦ It may lead to the wrong choice of the candidate while overlooking the right candidate.
- **Misuse of Power:** In India, three organs work partially independently but they keep check and balance and control on the excessive powers of any organ. Collegium gives the immense power to Judiciary to appoint Judges, and misuse of powers could happen.
- **Lack of Transparency:** Collegium system leads to non-transparency of the judicial system, which is very harmful for the regulation of law and order in the country.
- **Inequitable representation of backward and minority communities:** As per the data available with the Union Law Ministry, out of 537 appointments to High courts between 2018 and 2022, 424 (79%) were from the general category (upper caste), 57 (11%) were from Other Backward Castes (OBCs), 15 (2.8%) were from Scheduled Castes (SCs) and 7 (1.3%) were from Scheduled Tribes (STs).
  - ♦ There is no provision for reservation in judicial appointments from marginalised communities to ensure social diversity, as the government appoints only those persons as judges of Supreme Court and high courts who are recommended by the SC collegium.
- **Issue of Social Diversity:** In the last three decades, the collegium system has failed to address the issue of social diversity in higher judiciary, as originally devised by the Supreme Court.
- **Judicial Vacancies:** Presently, India has 25 High courts with a total sanctioned strength of 1,114 judges, and only 782 judges are working while the remaining 332 judges' posts are vacant.
- **Lack of Representation of Women:** Only 107 judges, or 13% of all HC judges, are female. There are currently four women justices out of the sitting 33 in the Supreme Court.
- Additionally, delays in appointments often arise due to **disagreements between the executive and the judiciary.**

## Way Forward: Suggested Reform

- **Consultation and Consensus:** Before finalising any plan, all relevant stakeholders—judiciary, legislature, civil society, and Bar Associations—should be consulted.
  - ♦ There should be focus on the inclusivity of marginalised sections of society including women while appointing in the higher judiciary.
- **Reform the Memorandum of procedure (MoP):** There is a need to reform the MoP for the appointment of the Chief Justice of India, Judges of the Supreme Court and High Courts.
- **Creating a Cadre of Public Service for Retired Judges:** Another interesting proposal is to create a cadre of public service for retired judges. From this pool, appointments could be made to constitutional and statutory posts, as well as special assignments.
  - ♦ These judges would continue to receive the full pay and facilities of a Supreme Court judge for life.
- **Comprehensive Judicial Reform:** Beyond appointments, India needs comprehensive judicial reform. Our current system faces challenges related to enforcement of contracts, high litigation costs, and inconsistency in judicial outcomes.
  - ♦ Addressing these issues would contribute to a more efficient and effective judiciary.

## Lessons from Other Countries

- Many countries have commissions responsible for judicial appointments. These commissions typically involve members from the judiciary, legal academia, politicians, and laypersons.
- For instance, the **U.K. established the Judicial Appointments Commission**, which oversees nominations for judges in England and Wales.

- Learning from these international models, India could explore a similar committee-based approach to ensure a broader perspective and reduce delays.

### Best Practices

- **In the USA:** The appointments are made by the President. Judges of the Supreme Court are nominated by the President and confirmed by the United States Senate.
- **In Germany:** The appointment of the Judges is made through the process of the election. Half the members of the Federal Constitutional Court are elected by the executive and half by the legislative.
- **In the UK:** The SC Judges are appointed by a five peoples selection commission. That committee consists of the SC President, his deputy and one member each appointed by the JACs which consist of lay persons, members of judiciary and the bar; of England, Scotland and Northern Ireland.

### Conclusion

- Achieving a balance between judicial independence, transparency, and efficiency is crucial. Reforming the process of judicial appointments requires thoughtful consideration and collaboration among all stakeholders.

Source: TH



### Mains Practice Question

- [Q]** Evaluate the effectiveness of the collegium system in India for appointing judges to the higher judiciary. Discuss the potential benefits and drawbacks of alternative mechanisms that ensure the independence, impartiality, and efficiency of the judiciary.

