BLOGS

# Appointment of Judges in India: Analysis of the 4 Judges Case and the Collegium System

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## Introduction

The Indian judiciary has garnered a reputation for its judicial activism, wherein the Supreme Court frequently engages in nullifying unconstitutional legislation and matters of governance, thereby impinging on the executive's purview.

Although there may be varying perspectives on the concept of judicial activism, it is widely acknowledged that the judiciary's unwavering intervention has effectively safeguarded democratic procedures.

The proliferation of activism has engendered a discourse regarding the equilibrium of authority among the judiciary, legislature, and executive branches, specifically in relation to the nomination of judges.

## An analysis of the appointment procedure under the Collegium System

The present Collegium System employed for the selection of judges has faced considerable criticism owing to its perceived lack of transparency and vulnerability to nepotistic pressures. This system is characterized by the unique attribute of vesting the judiciary with the authority to choose its own members, a distinguishing factor that differentiates it from other prominent democratic countries.

In accordance with the Indian Constitution, the appointment of judges to the Supreme Court is a collaborative effort between the President of India, the Chief Justice of India, and other judges on

the Supreme Court and High Courts. The process of appointing High Court judges entails a consultative role for the President of India, the Chief Justice of India, the Governor of the relevant state, and the Chief Justice of the respective High Court.

In accordance with the constitutional provisions outlined in **Article 74**, the President of India, who is an essential component of the executive branch, possesses the power to effect appointments.

The process of appointment had been unchallenged until 1973, when **Justice A.N. Ray** was appointed as the Chief Justice of India, **superseding three judges** who held seniority and had made rulings that were unfavourable to the government.

This event marked the beginning of a power struggle between the judicial and executive branches, leading to attempts to curtail the independence of the judiciary. The efforts under consideration involved the use of transfers as a means of exerting control over judges as well as the appointment of additional judges to review their decisions before they were finalised.

## The First Judges Case (1981) / S P Gupta Case

In the present scenario, a constitutional bench comprising seven learned judges opined that the term **“consultation”** as enshrined in the Constitution does not connote “concurrence” and that the final authority in the **appointment of judges vests with the Union Government rather than the Chief Justice of India**.

Another important point in the discussion was the part where the Supreme Court decided that a High Court Judge can be transferred to any other high court of a state even against his will.

## The Second Judges Case / Supreme Court Advocates on Record Association (SCARA)

The First Judges Case displayed significant characteristics, however, it resulted in a reduction of the judiciary’s independence by reducing the Chief Justice of India’s power to that of an advisor.

The opportunity to restore balance arose with the arrival of the Second Judges Case, in which a constitutional bench comprising nine members invalidated the precedent established by the First Judges Case thus binding the President of India with the consultations of the Chief justice of India.

If a disagreement arises between the President and the Chief Justice of India regarding the appointment of judges, the perspective of the Chief Justice would be given priority.

This case sort of created the Collegium System. The Collegium System was instituted by the judiciary with the objective of mitigating the Chief Justice's power by stipulating that two eminent judges be consulted for Supreme Court appointments and two distinguished judges of the corresponding High Court be consulted for High Court appointments.

## The Third Judges Case

The Third Judges Case served to further advance the Collegium System. The measure in question has served to augment the pool of senior judges participating in the vetting process for judicial appointments while also elucidating that the Chief Justice's viewpoint necessitates consultation with a majority of judges.

Following the Third Judges Case, the judiciary was bestowed with the ultimate authority in matters pertaining to the appointment of judges, which subsequently resulted in a counteraction. After this case it was held that consultation would include a collegium of 4 senior-most judges of the Supreme Court and if even 2 of the judges are against a candidate, the CJI will not recommend the name to the Government.

The year 2014 saw the emergence of the Ninety-Ninth Constitutional Amendment and the National Judicial Appointments Commission (NJAC) Act, both of which sought to supplant the Collegium System and usher in a new era of transparency and accountability.

## The Fourth Judges Case

The Fourth Judges Case saw the Supreme Court invalidate "the Ninety-Ninth Constitutional Amendment and the NJAC Act", citing their unconstitutionality. The Court has adduced a multitude of rationales, among them the inadequate representation of the judiciary in the NJAC as well as the encroachment upon judicial autonomy by its very existence being primary.

## Summary of the Cases

**Edit Frist Judges CaseSecond Judges CaseThird Judges CaseFourth Judges Case**
**Consultation does not mean concurrence. The President was not bound to make a**

**decision based on the consultation of the Supreme Court.Supreme Court overruled its earlier verdict and changed the meaning of consultation to concurrence thus binding the President of India with the consultations of the Chief justice of India.Consultation would include a collegium of 4 senior-most judges of the Supreme Court and if even 2 of the judges are against a candidate, the CJI will not recommend the name to the Government.The Ninety-Ninth Constitutional Amendment and the NJAC Act held unconstitutional citing inadequate representation of judiciary in NJAC and encroachment on judicial autonomy.**

## Conclusion

Following the declaration of the NJAC Act of 2014 as unconstitutional, the Supreme Court acknowledged the inadequacies inherent in the present collegium system employed for the appointment of judges. To address these issues, the Court sought input from both the legal sector and civil society to establish a more accountable and transparent system through soliciting recommendations.

Simultaneously, the Court recommended that the Government of India finalize the current Memorandum of Procedure (MoP) by enhancing it in partnership with the Chief Justice of India and the collective viewpoint of the Collegium, which comprises the four most seasoned puisne judges of the Supreme Court.

A dispute emerged in 2016 between the Collegium and the executive branch regarding the finalization of the new MoP. This led to significant delays in the appointment of new members to the higher judiciary, despite an increasing number of available positions.

The Collegium expressed substantial opposition to the proposed Memorandum of Procedure (MoP) presented by the Central Government. The endorsement of the proposed Memorandum of Procedure is contingent upon the Collegium's approval, as the Chief Justice of India lacks the authority to assent to it unilaterally.

As per the latest reports of 2017, the deadlock pertaining to the new MoP has been resolved after several rounds of negotiations. As per reports, the Collegium, headed by Chief Justice of India J.S. Kehar and consisting of D. Misra, J. Chelameswar, R. Gogoi, and Madan B. Lokur, has agreed to incorporate particular contentious clauses in the MoP, albeit with certain alterations.

The issues under consideration pertain to a provision that confers authority upon the Central Government to reject a candidate’s appointment on the grounds of national security apprehensions, in addition to the establishment of secretariats within the High Courts and Supreme Court to maintain a roster of judges that aid the Collegium in the process of candidate selection.colle