

Polity Class 39

4th December, 2023 at 9:00 AM

JUDICIARY (CONTINUES) (09:15 AM)

- **Second Judges case (1993)**
- In the Second Judges case (1993), the Supreme Court (SC) reversed its earlier ruling and changed the meaning of the word consultation to concurrence.
- SC overturned the judgement of the SP Gupta case and held that consultation meant concurrence, i.e. the view of the CJI would have primacy in the appointment of the SC judges. Here, the CJI would also consult two senior judges of the SC.
- The SC also held that the senior-most judge of the SC should be the CJI of India, i.e. appointment of the CJI should be done based on seniority.
- **Third Judges Case (1998)**
- In this case, the Court opined that the opinion of the CJI is not the sole opinion.
- **Collegium System**
- This judgement also led to the formation of the Collegium consisting of the CJI and four other Judges of the SC. Consensus-based approach has to be adopted for the appointment.
- This entire process should be performed in writing and in case the due procedure is not followed, the opinion shall not be binding on the President of India.
- In case of appointment of judges of the High Court (HC), the CJI must consult the two most senior judges of the Supreme Court and the Chief Justice of the concerned High Court as well as any of the Judges of the Supreme Court who are familiar with the functioning of that High Court.
- In case of transfer of Judges of HC, he must also consult the Chief Justice of the two High Courts.
- The Court also stated that in case of appointment of the judges to the Supreme Court if any two judges disagree on a name then the Collegium must drop that name.
- Even a 5+1 collegium bench can be formed in case the next CJI is not a part of the 4 seniormost judges of the Supreme Court.

ISSUES WITH COLLEGIUM SYSTEM (09:56 AM)

- There is no transparency in the proceedings of the Collegium system. This has given rise to allegations of nepotism and favouritism within the judiciary.
- The role of the executive has been compromised and diluted and the balance between the Executive and the Judiciary has been disturbed.
- India is perhaps the only country in the world where the judges appoint themselves and checks and balances in the system have gone missing.

- The collegium system structurally tends to favour particular sections of society and is far from being representative of society.
- There have been inordinate delays in the appointment of High Court judges and depleting numbers in the higher judiciary tend to threaten the justice delivery mechanism. This can be attributed to a lack of secretariat to help the collegium in its functioning. E.g. Out of the total sanctioned strength of judges across the 25 high courts is 1,098 only 645 vacancies are filled.
- Justice J S Verma who was the principal author in the second judges case has stated on record that the Collegium system has been a failure. In his opinion despite the primacy of the executive some of the finest judges were appointed in the first four decades in contrast to the last three decades where the appointments by the collegium have turned out to be faulty.
- Some Critics argue that the collegium system amounts to a rewriting of the constitution.

NATIONAL JUDICIAL APPOINTMENT COMMISSION (NJAC) (10:10 AM)

- According to the 99th CAA, the appointment of Judges will be done by NJAC which will consist of a CJI, 2 seniormost judges, the Union Law Minister and 2 eminent persons recommended by a committee consisting of PM, CJI and Leader of Opposition in Lok Sabha.
- The Supreme Court Struck down the provisions of 99 CAA for the following reasons:
- The Principle of judicial independence will be compromised as the judiciary will not enjoy primacy in such a body.
- The Act provided that any two members could block an appointment by making a contrary vote.
- The presence of a Law Minister would be improper as usually, Law Ministers have been practising advocates and the government is the largest litigant in the courts.
- It would also violate the principle of separation of powers and create a conflict of interest in the functioning of the judiciary.
- The criteria for selection of eminent persons were vague, subjective and prone to misuse.
- The only judge to provide a dissent opinion was Justice Chelmeshwar who stated that judicial primacy in the appointments neither guarantees judicial independence nor is it a part of the basic structure of the Constitution.

WAY FORWARD (10:25 AM)

- The parliament may consider introducing another bill while providing primacy to the judiciary in NJAC.
- Till the time the NJAC is adopted, the judiciary must focus on bringing diversity to the functioning of the Collegium.

- The Parliament must consider enacting a law to ensure judicial accountability and transparency. This law can be based on the provisions of the Judicial Standards and Accountability Bill 2012.
- According to the former president of the Supreme Court Bar Association, the Collegium System has created a system of Imperium in Imperio (An empire within the empire) giving unquestionable powers to the Collegium. There is a need to bring certain checks and balances on the functioning of the Collegium.
- The Collegium must have an independent Secretariat to help in its functioning considering the overburdened nature of work on the Judges.
- We must learn from the British Practice of Judicial appointment of judges in place since 2005. The eligible candidates can submit their applications for appointments disclosing their relationship with the sitting and retired judges of the SC. The appointments are made by a Judicial Appointment Commission.
- The Executive and the judiciary should hold detailed consultations with each other according to the memorandum of procedure (MoP) evolved.
- After the 4th Judges case, the executive and Judiciary tried to revise the MoP to increase the involvement in the appointment and the transfer of the judges.
- Even though the MoP was evolved and agreed upon by both, it has not been brought into practice either due to a shortage of time with the Collegium or deliberate delays by the executive in making appointments to the judiciary.
- Any adverse report by the IB should be treated with caution and an enquiry committee should be formed to look into such reports.

AD HOC JUDGES (11:04 AM)

- Refer to the uploaded handout for more details.
- When there is a lack of quorum of the permanent judges to hold or continue any session of the Supreme Court, the Chief Justice of India can appoint a judge of a High Court as an ad hoc judge of the Supreme Court for a temporary period.
- He can do so only after consultation with the Chief Justice of the High Court concerned and with the previous consent of the president.
- Retired Judges
- At any time, the CJI can request a retired judge of the Supreme Court or a retired judge of a high court (who is duly qualified for appointment as a judge of the Supreme Court) to act as a judge of the Supreme Court for a temporary period.
- Recently SC expressed concerns over the appointment of ad hoc and retd judges, considering the no of judges in HC there is a need to evolve a simpler procedure. The executive should not delay the appointments.
- The court last year had laid down certain situations in which the judiciary should seek the
- appointments of ad hoc judges-

- i) If the vacancies in HC are over 20% or
- ii) If the cases have been pending for over 5 years

JURISDICTION OF THE SUPREME AND HIGH COURT (11:12 AM)

- **Territorial Jurisdiction**
- **SC-** It includes the entire territory of India.
- **HC-** It includes the territory within their jurisdiction.
- **Subject Matter Jurisdiction**
- **Article 131: Original and Exclusive Jurisdiction**
- **Original:** The case would be heard for the first time directly (first instance) in the SC such as a case between Gol and one or more States, Gol
- **Exclusive:** Such cases would be heard only in the SC and no other Court of the Country, i.e. there is no shared jurisdiction on such matters. Writ powers of the SC are not exclusive as writs can be issued by the HCs too.
- **Court of appeal**
- The Supreme Court is also a court of appeal and hears appeals against the judgements of the lower courts.
- It enjoys a wide appellate jurisdiction which can be classified under four heads:
 - 1. Appeals in constitutional matters
 - 2. Appeals in civil matters
 - 3. Appeals in criminal matters
 - 4. Appeals by special leave
- **Constitutional Matters**
- Under Art. 132(1), an appeal lies to the Supreme Court from any judgment, decree or final order, whether in civil, criminal or other proceedings, of a High Court if it certifies that the case involves a substantial question of law as to the interpretation of the Constitution.
- **Civil matters**
- **Article 133-** If the case involves a question of Law of general public importance and if it is certified by the High Court.
- The appellate jurisdiction of the Supreme Court on criminal matters is conferred by Article 134.
- The Supreme Court has only a limited criminal appellate jurisdiction in order to avoid piling up of cases in the Supreme Court.
- This can happen in two modes:

- Without the certificate of appeal from HC an appeal lies to the Supreme Court if,
- The High Court on appeal has reversed an order of acquittal of an accused person and sentenced him to death or sentenced him to imprisonment for life or for a period of not less than 10 years. It exists as a matter of right
- The High Court has withdrawn for trial a case from a lower court and sentenced the accused to death or sentenced to imprisonment for life or for a period of not less than 10 years.
- Special Leave Petition (SLP) powers of SC
- Those cases that do not fall under Articles 132, 133, 134 and if the SC feels that in such cases the injustice may have been carried out and there is a need for correction, it may entertain appeals from any court in the country except the Armed Forces Tribunals. In such cases, no certificate is required from the HC.
- It is an exceptional power provided to the SC to uphold justice in the country.
- Issues:
- It has turned SC into primarily become a court of appeal therefore diverting its attention from constitutional matters.
- The acceptance rate of SLPs has become too high and presently stands at around 14%. This has reduced the sanctity of the lower courts in the country.
- No standard guidelines have been formed for accepting or rejecting SLPs. Acceptance or rejection of SLPS is largely dependent on the face value of advocates.
- Review jurisdiction of SC
- The SC can review its own judgements in cases where a review petition has been filed.
- The court shall accept such a petition where a glaring mistake has been or a grave error has been committed by the court or in those cases where a new material evidence has been discovered which could not be discovered earlier despite the best efforts of the parties involved.
- A review petition must be filed within 30 days of the concerned judgment and should carry a certificate from an SC advocate on record.
- Curative petition
- It is an innovation of SC of India and not found in CONstitution.
- According to it, the SC can entertain a petition to cure a mistake or an error committed by the courts in its review judgements.
- This power was elaborated by the court in the case of Rupa Ashok Hurra vs Ashok Hurra.
- Advisory Jurisdiction

- The SC may be asked for its advisory opinion on a question of law or fact which in the opinion of the President requires the opinion of the Court for Public importance.
- The SC is not bound to give its opinion on such cases unless they relate to matters mentioned in Proviso 131 which include cases related to pre-constitutional treaties, agreements etc.
- Powers of SC under Art 142
- The SC may give such orders which are required for doing complete justice in a case.
- This is an extraordinary power that is invoked by SC in instances of Judicial Activism.
- As a Court of Record, the Supreme Court has two powers:
- A court of Record is a court whose judgements and orders are recorded for perpetual memory and are binding on the lower courts.
- These records and proceedings are of evidentiary value and can not be questioned when produced before any court

TOPIC OF THE NEXT CLASS- TRIBUNALS AND PANCHAYATI RAJ INSTITUTIONS