

## 1. Who will Guard the Guards?

### Context:

- ▶▶ The recent transfer of Chief Justice Vijaya K. Tahilramani from the Madras High Court to Meghalaya high court and the consequent resignation of the Justice.

### Introduction:

- ▶▶ The transfer of Chief Justice Vijaya K. Tahilramani from the Madras High Court to Meghalaya is shocking and disconcerting. She had presided over a court of 75 judges and administered a subordinate judiciary in 32 districts in addition to the Union Territory of Puducherry. In contrast, the Meghalaya High Court has only three judges and a subordinate judiciary in just seven districts.
- ▶▶ The transfer of a Chief Justice from one of the bigger High Courts to one of the smallest High Courts in the country is considered to be an obvious case of downgrading and amounts to public humiliation of the highest judicial officer in a State.

### What is the Collegium System?

- ▶▶ The Collegium System is a system under which appointments/elevation of judges/lawyers to Supreme Court and transfers of judges of High Courts and Apex Court are decided by a forum of the Chief Justice of India and the four senior-most judges of the Supreme Court.' There is no mention of the Collegium either in the original Constitution of India or in successive amendments.
- ▶▶ The recommendations of the Collegium are binding on the Central Government; if the Collegium sends the names of the judges/lawyers to the government for the second time.

### How Collegium System Works?

- ▶▶ The Collegium sends the recommendations of the names of lawyers or judges to the Central Government. Similarly, the Central Government also sends some of its proposed names to the Collegium. The Central Government does the fact checking and investigate the names and resends the file to the Collegium.
- ▶▶ Collegium considers the names or suggestions made by the Central Government and resends the file to the government for final approval. If the Collegium resends the same name again then the government has to give its assent to the names. But time limit is not fixed to reply. This is the reason that appointment of judges takes a long time.

## Conditions for Transferring Judges:

- ▶▶ The Supreme Court derives its power to select, appoint and transfer judges from its own verdict in Three Judges Cases.
- ▶▶ After a spate of “punishment transfers” of upright judges by the Central government during the Emergency in 1975, the judiciary arrogated to itself the power in order to preserve judicial independence. Thus, the collegium system consisting of the Chief Justice of India and four senior-most judges of the Supreme Court was put in place.
- ▶▶ However, the apex court’s power to transfer is not unfettered and absolute and can only be carried out in public interest for better administration of justice. The Supreme Court can order a judge’s transfer to improve the functioning of either of the High Courts or if there are close relatives of the judge practising in the same Court.
- ▶▶ The apex court can also do so if the judge has litigation or property interest in the State or has become controversial and so her continuance in the same High Court is not conducive.
- ▶▶ But in the recent case of transfer, the collegium’s recommendation stated that the transfer was made “in the interests of better administration of justice,” the lack of public interest is glaring. The judge has conducted herself with dignity befitting the high office, has not been mired in any controversy, and does not have any close relatives practising in Tamil Nadu.
- ▶▶ The most pertinent question here is whether the transfer serves the interests of administration of justice for the people of Tamil Nadu.
- ▶▶ This shows that even though the office of High Court is constitutionally protected, it is not beyond vulnerability.
- ▶▶ In the past, the functioning of the collegium has attracted much criticism, largely due to aberrations in certain selections and transfers. Retired Supreme Court judge, called the functioning of the body a “mystique” shrouded in “secrecy”.
- ▶▶ Later, the government’s attempt to have a National Judicial Appointments Commission (NJAC) was rejected by the Supreme Court in 2015 and the system of collegium has continued with its opaqueness and inconsistencies.
- ▶▶ Ironically, the judge who has been recommended to replace Justice Tahiramani, was superseded in 2018 when the collegium found him junior to be “more suitable” for the position of Himachal Pradesh High Court Chief Justice. He was later appointed in May 2019 to head one of the smallest High Courts. Hence, the collegium’s recommendation to have him replace Justice Tahiramani, who has had three stints as acting Chief Justice of the Bombay High Court, defies logic.
- ▶▶ The transfer appears arbitrary, coming at a time when a judge junior to her, has been recommended for appointment as Chief Justice of the Kerala High Court, which has a larger strength than its counterpart in Meghalaya.

## Earlier Instances:

- ▶▶ Earlier, in 2017, Justice Jayant Patel, who was slated to be appointed Chief Justice of the Karnataka High Court, had resigned when he was transferred to the Allahabad High Court. Significantly, he was a member of the Bench of the Gujarat High Court that had ordered a CBI probe in the Ishrat Jahan encounter case.
- ▶▶ One is reminded of Justice H.R. Khanna, who had braved intense political pressure to dissent in the ADM Jabalpur case (Habeas Corpus case) during the Emergency and chose to resign when faced with supersession.

## A Check on The Collegium:

- ▶▶ In recent times, despite its judicial pronouncements in cases such as the entry of women into Sabarimala and triple talaq, the Supreme Court has not exactly covered itself with glory in cases of women on its administrative side. The transfer of the highest-ranked woman High Court judge in the country will only dent the credibility of the collegium further.
- ▶▶ In 1977, a famous judge has warned that “public power is a lofty trust to be operated and, if private impulses or public aberrations play upon the exercise, the Court shall quash the lawless fiat.”
- ▶▶ The collegium is not a creation of the Constitution, but of the court itself. Yet, when the collegium’s decisions are called into question for having been influenced by extraneous considerations, there is no institutional check.
- ▶▶ In the general atmosphere prevalent now where even constitutional functionaries are kowtowing to the powers, the judge by resigning stands tall as a pillar of courage.

## Way Ahead:

- ▶▶ The process for the appointment of judges lies at the heart of an independent judiciary.
- ▶▶ The Second Judges’ case of 1993 led to the formation of a collegium of high-ranking judges which has since then identifying persons for appointment to the SC and high courts.
- ▶▶ While the collegium began with a desire for judicial independence, the recent collegium appointments show that it is not transparent.
- ▶▶ The lack of a written manual for functioning, the absence of selection criteria, the arbitrary reversal of decisions already taken and the selective publication of records of meetings shows that the Collegium is getting opaque.
- ▶▶ Also, the higher judiciary has exempted itself from the Right to Information Act.
- ▶▶ Thus, India needs to restore the credibility of the higher judiciary by making the process of the appointing judges transparent and the collegium must also open its proceedings to the public.

## Conclusion:

- ▶▶ Revelations of a judge in 2011 that consensus in the collegium was often arrived at by “trade-offs” with “disastrous consequences” and that “sycophancy” and “lobbying” had coloured the appointments are ominous. Such actions shake the faith of the public in the judges’ functioning.
- ▶▶ The resignation of a judge with 17 years of judicial service, just a year before her retirement, has to raise alarm bells about the health of the system. Judges of High Courts enjoy constitutional tenure and protection and cannot be subjected to public shame for undisclosed reasons.
- ▶▶ Any arbitrary transfer by the Supreme Court collegium reduces the High Court judges to a subordinate status. Further, the collegium system, by its opacity, has failed to build a fearless and strong judiciary and serve the public interest. The real question is who will guard the guards themselves?
- ▶▶ The Supreme Court cannot function as a sentinel of justice unless it puts its own house in order. Its functions, both judicial and administrative, have to be transparent and accountable.
- ▶▶ Courts have in the past held illegal executive orders passed without reason. The same should apply to the administrative actions of the apex court’s collegium.

**Source: The Hindu**

