The Issues in the Collegium

Why in news?

The collegium system has been of late in news for tussles between the judiciary and the executive and the slow pace of judicial appointments.

What is the collegium system?

- In the original constitution, there is **no mention** of a collegium.
- **Supreme Court** – According to **Article 124**, Supreme Court judges are appointed by the President of India in consultation with Chief Justice of India (CJI) and other judges that he deems fit.
- The collegium consists of CJI and 4 senior most judges of the Supreme Court.
- These appointments could be in the form of elevation when High Court judges are appointed to the Supreme Court or direct appointments when experienced lawyers may be directly appointed.
- **High Court** - According to **Article 217**, High Courts judges are appointed by the President in consultation with CJI, Governor of the State and Chief Justice of that court.
- In case of transfers, President may move a judge from one High Court to another, after consulting the CJI.
- The High Court collegium has the chief justice of the High court with two other senior most judges.
- The high court collegium **only sends the recommendation** to the Supreme Court collegium on judicial appointments.
- The final decisions are taken by a collegium of the CJI and two senior most judges of the SC.
- This collegium of the three senior-most SC judges also decides transfers of HC judges in the country.

The procedure for the appointment of judges to the Supreme Court and various High Courts are laid in the Memorandum of Procedure (MoP).

How did the collegium system evolve?

- The Constitution vested in the President the power to make appointments to Supreme Court and High Courts and transfer judges between High Courts.
- The President (to act on the advice of the council of ministers) was required to consult certain authorities such as the CJI or chief justice of the high court appropriately.
- It was meant to reduce the executive element in the appointment process to the minimum and to eliminate any political influence.

- **First Judges Case, 1981 (SP Gupta case)** - The Supreme Court ruled that the word "consultation" could not be interpreted as "concurrence".
- Accordingly the CJI's opinion was **not binding** on the executive.
- **Second Judges Case, 1993** - The court overruled its earlier decisions and held that "consultation" meant "concurrence".
- This means that the advice rendered by the CJI on matters of appointments is **binding** on the President.
- But, the CJI was to formulate the opinion only through a body of senior judges that the court described as the '**collegium**'.
- **Third Judges Case, 1998** - The court clarified that the collegium would comprise
    - CJI and 4 senior-most colleagues - Appointments to Supreme Court
    - CJI and 2 senior-most colleagues - Appointments to High Courts
- Additionally, for HCs, the collegium would consult other senior judges in the SC who had previously served in the HC concerned.
- On whether these views of the consultee-judges are binding on the collegium or not, the judgments are silent.
- **NJAC** - The government, through 99th constitutional amendment, sought to replace the collegium with the National Judicial Appointments Commission (NJAC).
- The NJAC included the Union Minister for Law and Justice and two eminent persons, besides the CJI and next two senior most SC judges.
- **Fourth Judges Case (2015)** - The court ruled that the primacy of the judiciary in judges' appointments was embedded in the basic structure of the Constitution.
- It also held that the NJAC law gave politicians an equal say in judicial appointments to constitutional courts and declared NJAC to be **unconstitutional**.

What are the issues in the functioning of the collegium?

- **Non-transparency in appointments** - It is seen as a closed-door affair with no prescribed norms regarding eligibility criteria, or even the selection procedure.
- There is no public knowledge of how and when a collegium meets, and how it takes its decisions with no official minutes of collegium proceedings.
- **Nepotism and favouritism** - Allegations of nepotism and favouritism are rampant with judges in the collegium recommending their close relatives.
- **Lack of diversity** - The absence of an institutional mechanism to ensure diversity on the Bench in the judiciary is a problem.
- SCs, STs, OBCs and minorities are grossly underrepresented in the collegium picks.
- **Non-filling of vacancies** - Supreme Court judges often talk about the issue of pendency of cases, but still they are inactive in solving the problem.
- **Difference of opinion** - The conflicting opinion within the collegium members is hampering the functioning of the collegium system.
- Recently, while CJI Lalit wanted to circulate the recommendations for appointment to the Supreme Court, two judges in the Collegium preferred deliberations in person.
- **Issues with certain conventions** - By convention, once a recommendation for the successor to the CJI's office is made, the Collegium ceases to make decisions.
- Given that the CJI is appointed by seniority, many of them have a short tenure and this

sorts of convention may slow down decision-making.

References

1. Business Standard | Collegium system
2. Indian express | Debate over the collegium system
3. The Hindu | Issues in the Collegium's functioning
4. The Hindu | SC Collegium's primacy over appointments and transfers
5. The Print | Diversity in judiciary
6. Scroll | The Memorandum of Procedure

Quick facts

The Memorandum of Procedure (MoP)

- The Memorandum of Procedure is a document framed by the government in consultation with the CJI.
- It lays down the procedure for the appointment of judges to the Supreme Court and various High Courts.
- It was first issued in November 1947 and has been updated since.
- **The MoP for Supreme Court appointments-** It says that all appointments must be recommended by the collegium.
- This recommendation is then sent to the Central government via the law minister and then the prime minister before ending up at the President for appointment.
- **The MoP for High Court appointments**- It says that a High Court collegium must send a recommendation to the chief minister and the governor of the state.
- The governor, based on the advice received from the chief minister, will send the recommendation to the Union Minister of Law and Justice, who after consideration will forward the recommendation to the CJI.
- The CJI after being informed by the two senior-most judges of the Supreme Court should send the recommendation to the Union Minister of Law and Justice.
- It will be put before the Prime Minister who will advise the President about the appointment.
- In 2015, the Supreme Court had asked the government to frame a new MoP for increased transparency but the court and the government have failed to reach a consensus.

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