Syllabus subtopic: Structure, organization and functioning of the Executive and the Judiciary, Ministries and Departments of the Government.

Prelims and Mains focus: about the issue and its implications; about collegiums system: merits and criticisms

News: The Supreme Court asked the government why it was “holding back” recommendations for appointments to various High Courts even after reiteration by the Collegium.

Background

The Bench was conveying its alarm at the rising number of vacancies in various High Courts. Some of these courts are functioning only with half their sanctioned judicial strength. On an average, they suffer at least 40% vacancies.

Government’s view on delay of appointments

- The collegium delays the appointment process quite as the government. The government’s delay is largely because it thoroughly combs the antecedents of the candidate, leaving no room for error. The process, on an average, takes at least 127 days.

- On the other hand, the judiciary takes 119 days on an average merely to forward the file to the government. Some courts like Allahabad and Andhra take over 45 and 50 months to even report a vacancy. The appointment of Justice P.V. Kunhikrishnan of the Kerala High Court took two years to come through.

- The Collegium system was put to an end through the National Judicial Appointments Commission to make the appointments process transparent and participatory, only to be scrapped by the Supreme Court.

What next?
The apex court ordered the Registrar Generals of all the High Courts to submit reports of the pending judicial vacancies and likely ones in the future within four weeks.

**How did the Collegium system come into being?**

- The Collegium of judges is the *Supreme Court’s invention*. It does not figure in the Constitution, which says judges of the Supreme Court and High Courts are appointed by the President and speaks of a process of consultation. In effect, it is a system under which judges are appointed by an institution comprising judges.

- After some judges were superseded in the appointment of the Chief Justice of India in the 1970s, and attempts made subsequently to effect a mass transfer of High Court judges across the country, there was a perception that the independence of the judiciary was under threat. This resulted in a series of cases over the years.

- The ‘First Judges Case’ (1981) ruled that the “consultation” with the CJI in the matter of appointments must be full and effective. However, it rejected the idea that the CJI’s opinion, albeit carrying great weight, should have primacy.

- The Second Judges Case (1993) introduced the Collegium system, holding that “consultation” really meant “concurrence”. It added that it was not the CJI’s individual opinion, but an institutional opinion formed in consultation with the two senior-most judges in the Supreme Court.

- On a Presidential Reference for its opinion, the Supreme Court, in the Third Judges Case (1998) expanded the Collegium to a five-member body, comprising the CJI and four of his senior-most colleagues.

**What is the procedure followed by the Collegium?**

- The President of India appoints the CJI and the other SC judges. As far as the CJI is concerned, the outgoing CJI recommends his successor.
• In practice, it has been **strictly by seniority** ever since the supersession controversy of the 1970s.

• The **Union Law Minister forwards the recommendation to the Prime Minister** who, in turn, **advises the President**.

• For **other judges of the top court**, the proposal is initiated by the **CJI**. The **CJI consults the rest of the Collegium members, as well as the senior-most judge of the court hailing from the High Court to which the recommended person belongs**.

• The **consultees must record their opinions in writing** and it should form part of the file. **The Collegium sends the recommendation to the Law Minister, who forwards it to the Prime Minister to advise the President**.

• The **Chief Justice of High Courts is appointed as per the policy of having Chief Justices from outside the respective States**. **The Collegium takes the call on the elevation**.

• **High Court judges are recommended by a Collegium comprising the CJI and two senior-most judges**. The proposal, however, is **initiated by the Chief Justice of the High Court concerned in consultation with two senior-most colleagues**. **The recommendation is sent to the Chief Minister, who advises the Governor to send the proposal to the Union Law Minister**.

**Does the Collegium recommend transfers too?**

• **Yes**, the **Collegium also recommends the transfer** of Chief Justices and other judges.

• **Article 222** of the Constitution **provides for the transfer of a judge from one High Court to another**.
When a CJ is transferred, a replacement must also be simultaneously found for the High Court concerned. There can be an acting CJ in a High Court for not more than a month.

In matters of transfers, the opinion of the CJI “is determinative”, and the consent of the judge concerned is not required. However, the CJI should take into account the views of the CJ of the High Court concerned and the views of one or more SC judges who are in a position to do so. All transfers must be made in the public interest, that is, “for the betterment of the administration of justice”.

What is the common criticism made against the Collegium system?

Many have faulted the system, not only for its being seen as something unforeseen by the Constitution makers, but also for the way it functions. Opaqueness and a lack of transparency, and the scope for nepotism are cited often.

Retired SC judge Justice Ruma Pal once said: “The mystique of the process, the small base from which the selections were made and the secrecy and confidentiality ensured that the process may on occasions, make wrong appointments and, worse still, lend itself to nepotism.”

The attempt made to replace it by a ‘National Judicial Appointments Commission’ was struck down by the court in 2015 on the ground that it posed a threat to the independence of the judiciary. Dissenting judge, Justice J. Chelameswar, termed it “inherently illegal”.

Even the majority opinions admitted the need for transparency. In an effort to boost transparency, the Collegium’s resolutions are now posted online, but reasons are not given.

Some do not believe in full disclosure of reasons for transfers, as it may make lawyers in the destination court chary of the transferred judge. Embroilment in public controversies and having relatives practising in the same High Court could be common reasons for transfers.
In respect of appointments, there has been an acknowledgement that the “zone of consideration” must be expanded to avoid criticism that many appointees hail from families of retired judges. The status of a proposed new memorandum of procedure, to infuse greater accountability, is also unclear.