

1. Critically analyze the process of selection of the Supreme Court judges in India. Suggest measures to prevent the executive's unnecessary intervention into the judiciary.

(250 words)

**Answer:**

**Process of selection of judges of supreme court :-**

- The method of selection of judges by a collegium of Supreme Court judges finds no place in the Constitution.
- The Constitution confers the power of appointment of judges on the President of India i.e. the Government of India to be made in consultation with the Chief Justice of India and other judges of the Supreme Court and the High Courts.
- The collegium method was created as a result of two judgments of the Supreme Court, first in 1993 and by a follow-up President's Reference to the Court in 1998.
- With the best of intentions of securing the independence of the judiciary, the Supreme Court rewrote the provisions of the Constitution for appointment of judges and appropriated the power to appoint judges by the judges.
  - By the first case the power was vested in the Chief Justice of India in whom it was held the primacy lay in appointments assisted by two judges of the Supreme Court.
  - In the second case the court took away the primacy of the Chief Justice of India and vested the power in a collegium of the Chief Justice of India and some senior-most judges of the Supreme Court.
- Third Judges Case
  - The Collegium was expanded to include the CJI and the next four (up from two) senior-most judges. It was concluded that the CJI could only recommend judges for appointment after consultation with the other four judges, and any candidate has to be supported by a majority of the Collegium.
  - Once the Collegium makes a recommendation to the President, the President can either accept it or send it back to the Collegium for reconsideration. If the Collegium once again recommends that candidate for appointment with unanimous agreement the President is bound by the recommendation.
- General rule of thumb when it comes to appointing existing High Court judges is seniority more senior judges in these courts should be considered for elevation to the Supreme Court. However, where a particular judge has demonstrated exceptional ability or character, the order of superiority can be superseded. The reasons behind that particular judge being appointed need to be recorded in such cases.
- The final position is thus that even though the formalities need to be performed by the President, the actual decision-making power when it comes to appointment of Supreme Court judges rests with the Collegium

**Criticism :-**

- **Controversial appointments:-**
  - The conduct of the Justice Karnan ever since his elevation to the bench has been controversial.
  - There is a failure to make an assessment of the personality of the contemnor at the time of recommending his name for elevation.
  - The controversy over the proposed elevation of Justice P.D. Dinakaran of the Karnataka High Court to the Supreme Court by the collegium of the Chief Justice and four senior-most judges of the Supreme Court was criticised for overlooking apparently suitable judges by the collegiums
- The executive has little or no role in the appointment of judges as a result
- Supreme court is overburdened:-
  - The Supreme Court did not realise the burden it was imposing on the collegium of selecting judges for the Supreme Court and High Courts and transferring them from one High Court to another.
  - An administrative task of this magnitude must necessarily detract the judges of the collegium from their principal judicial work of hearing and deciding cases.
- Lacking this infrastructural backup the collegium resorts to ad hoc informal consultations with other judges in the Supreme Court who are expected to know the merits of a proposed appointee from a High Court or occasionally by sounding a member of the Bar.

- These methods are poor substitutes for a full time intensive collection of data about an incumbent, his work, standing, merit, integrity and potential which requires to be made considerably in advance for filing in the vacancy.
- Besides, the collegium's deliberations are secret, the system is opaque and the choice of a judge is only known when his name is forwarded to the Government for formal appointment
- The collegium has necessarily limited its field of choice to the senior-most judges from the High Court for the appointments to the Supreme Court, overlooking the several talented junior judges in the High Courts or members of the bar.
- Skewed representation of socio economic backward classes like women, scheduled castes and tribes in the Supreme Court.

**Executive intervention in judiciary :-**

- Recent controversy about government's opposition to the elevation of the Chief Justice of the Uttarakhand High Court, Justice K.M. Joseph, to the Supreme Court, as recommended by the Supreme Court collegium.
- **NJAC:-**
  - With NJAC the commission was meant to ensure that the Judiciary wouldn't get sole control over appointments by including the Law Minister and two "eminent persons" decided by the PM, Leader of Opposition and CJI together. Only three judges (CJI + 2 others) were automatically part of the commission.
- **New memorandum of procedure:-**
  - After the Second and Third Judges Cases, a Memorandum of Procedure had been formulated to govern how the process of how the Collegium would make recommendations to the Executive.
  - The government therefore suggested that a new MOP be drafted and finalised for appointment of SC judges and the Executive to get a veto over candidates for national security reasons in this new MOP.
- Neither the old memorandum of procedure nor the Constitution of India set out any time limits for the Executive to approve the Collegium's recommendations. Consequently, the government has been able to frustrate the judges by just sitting on the files and doing nothing about them.
- Chief justice is not being consulted by the president when the latter appoints additional judges to the High Court Division for a two year term. After the two year term, additional judges are either confirmed as permanent or may be appointed for another term as additional judges.

**Way forward:-**

- In several countries of the Commonwealth, National Judicial Appointment Commissions have been established to select judges. Such judicial commissions have worked with success in the U.K., South Africa and Canada.
  - The advantage of judicial commissions are that they are independent, broad based and they represent not only the views of the judiciary but also of the executive and other sections of society.
  - They are transparent in their working even to the extent that applications are invited by public advertisement, as was the case when judges were appointed to the new Supreme Court of the U.K. recently.
- With the size of the Indian superior judiciary, it may be necessary to have two judicial commissions in India, one for the Supreme Court and another for the High Courts.
- There should be a Fix time limit for approval of recommendations.

## **PRACTICE QUESTIONS**

**Answer the following Questions**

1. Indian judicial system needs several reforms. Examine. (250 words)
2. India should seek to publish "green GDP" figures that take into account depreciation of natural capital stock due to economic exploitation and environmental degradation. Critically analyse. (250 words)