Future of Collegium System
Transforming Judicial Appointments for Transparency

C RAJ KUMAR

What steps will the judiciary take with a view to reforming the existing collegium system? What will the Supreme Court of India do to ensure that the collegium system is significantly transformed with a view to infusing transparency and procedural fairness in the selection of judges to the High Courts and the Supreme Court?

The Supreme Court of India in a landmark verdict declared the 99th Constitutional Amendment and the National Judicial Appointments Commission (NJAC) Act void and unconstitutional. This is not an entirely unexpected consequence (Kumar 2015a). The Supreme Court has upheld the values of constitutionalism and independence of judiciary, which is a part of the “basic structure” of the Constitution. In a “collective order” a Constitution Bench of Justices Khehar Singh, Chelameswar, Madan B Lokur, Kurian Joseph and Adarsh Kumar Goel invalidated the 99th Constitution Amendment and the NJAC Act. The decision of the Court was based upon a deeper recognition and understanding of the role of the judiciary within the Indian democracy. The decision is most compelling and is an appropriate one for definite reasons.

Protecting Independence of Judiciary

Independence of judiciary is one of the basic aspects of the constitutional framework (Kumar 2015b; Kumar and Gautam 2015). The makers of our Constitution envisaged a judiciary absolutely independent from influences of the legislature and the executive (Gautam 2015). The Supreme Court carefully examined Article 124A(1) of the Constitution, which provided for the NJAC. There have been many decisions in the past, which have reinforced the fact that the independence of judiciary is a basic structure of the Constitution.1 The Court was convinced that the NJAC with three judges of the Supreme Court and three other members who are not expected to belong to the judiciary

...are insufficient to preserve the primacy of the judiciary in the matter of selection and appointment of judges...The same are accordingly, violative of the principle of ‘independence of judiciary.’

Ensuring Separation of Powers

The Supreme Court was conscious of the fact that the new framework envisaged the union law minister to serve as a member of the NJAC. This provision makes the executive directly involved in the deliberations relating to the appointment of judges. The Court had two concerns on this matter and held,

...clause (c) of article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of law and justice as an ex officio Member of the NJAC...impinges upon the principles of ‘independence of the judiciary’ as well as, ‘separation of powers.’

Further, the presence of the Chief Justice of India (CJI) in the three-member selection committee to select two “eminent persons” with other members being the Prime Minister and the Leader of Opposition puts the CJI in an awkward situation. Past experience has demonstrated that governments have used these opportunities to negotiate different positions and appointments that will best reflect their own interests. There cannot be negotiations of give and take of the kind that is envisaged in other committee processes. The institutional integrity of the Office of the Chief Justice of India needs to be protected and cannot be undermined in this process (Kumar 2015c).

1 Collegium System and Its Future

There is little doubt that the collegium system for appointing judges to the higher courts in the country has been fraught with significant problems. This landmark judgment has provided an opportunity for the Court to be both self-critical and reflective in addressing the most important challenge of ensuring greater transparency and integrity in the appointment of judges. Transparency can be promoted by making the process of appointment of judges democratic in nature. Complete lack of transparency was one of the significant drawbacks of the collegium system. Nobody outside the system knew as to why some judges were appointed and some others were rejected.
The reform of the collegium system ought to be based on the following five principles, each of which need to be taken into account, while reimagining a new process for appointment of judges.

(a) Transparency: The most persuasive criticism of the collegium system has been the fact that appointment of judges has been secretive with no information available to anybody outside the collegium about the process leading to the appointment of judges. Any effort to reform the existing system should recognise the need for transparency in every stage of the appointment process. Without a transparent process of the appointment of judges, the collegium system will not have the credibility and the legitimacy for it to be accepted by all stakeholders within the legal system. Transparency will not be established merely by stating that the members of the collegium will act in a transparent manner. It will have to be demonstrated by the process that the judiciary adopts in the selection of judges.

(b) Diversity: The future of the collegium system and its credibility will depend upon the steps that it takes to infuse diversity and establish it as a norm and practice for the appointment of judges. The lack of gender diversity in the higher judiciary in India is a matter of critical concern and deserves urgent attention. It took 37 years for the Supreme Court to appoint its first woman judge. The next 25 years was followed by the appointment of four judges to the Supreme Court and for the first time in its institutional history, there were two women judges serving in the Court a few years ago. In a reply to a question that was raised in Parliament a few years ago, it was observed by the Ministry of Women and Child Development that the information provided by the Department of Justice, Ministry of Law, indicated that as of 10 July 2009, out of a total 649 judges in the Supreme Court and High Courts, there were 51 female judges. This represents a meagre 8% of the judges in the High Courts and Supreme Court who are women. It is not enough to assume that any transparent process will lead to the appointment of meritorious women as judges in the higher judiciary.

The following five-step process should be initiated with a view to promoting gender diversity within the higher judiciary in India:

(i) The existing judicial collegium should have at least one woman judge (regardless of seniority) who will be involved in all decisions for the appointment of judges to the High Courts and the Supreme Court.

(ii) Tangible efforts need to be taken for the promotion of existing women judges in the high courts to be chief justices of other high courts that can fast-track the process of consideration so that they can be appointed to the Supreme Court in the years to come.

(iii) The existing practice of examining the candidature of judges for appointment as judges of high courts or elevation to the Supreme Court only after attaining a particular age needs to be reconsidered so that more women lawyers could be appointed as judges of the high courts sooner than later so that they have greater opportunity to serve in the Supreme Court in the years to come.

(iv) The CJI may consider constituting a “Task Force for Promoting Gender

Higher Education in India
In Search of Equality, Quality and Quantity

Edited by
JANDHYALA B G TILAK

India has a large network of universities and colleges with a massive geographical reach and the facilities for higher education have been expanding rapidly in recent years. The story of higher education in India has seen many challenges over the decades and has not been without its share of problems, the most serious being a very high degree of inequity. Drawn from writings spanning almost four decades in the EPW, the articles in this volume discuss, among other things, issues of inclusiveness, the impact of reservation, problems of mediocrity, shortage of funds, dwindling numbers of faculty, and unemployment of the educated young.

Authors: André Béteille • Shiv Visvanathan • Suma Chitnis • Satish Deshpande • K Sundaram • Rakesh Basant, Gitanjali Sen • Jayati Ghosh • Thomas E Weisskopf • Lloyd I Rudolph, Susanne Hoeber Rudolph • A M Shah • Errol D’Souza • G D Sharma, M D Apte • Glynn L Wood • Andrej apartments • R Gopinathan Nair • D Ajit • D T Lakdawala, K R Shah • Dhipta Sivakumar • Akhil Singh • Jandhyala B G Tilak • Anindita Chakrabarti, Rama Joglekar • Karuna Chanan • Saumen Chattopadhyay • Samuel Paul • Deepak Nayyar • V M Dandekar • M Anandakrishnan • Thomas Joseph

Orient Blackswan Pvt Ltd
www.orientblackswan.com

Contact: info@orientblackswan.com
Diversity in Higher Judiciary” with at least 50% of its members as women judges, lawyers and academics to make proposals that will lead to the evolution of a gender diverse higher judiciary in India.

(v) Law schools across the country should take efforts to create a more gender diverse student body and faculty inspiring more women law students to seek careers in the judiciary.

(c) Competence: The competence of individuals to be appointed as judges needs to be clearly established. This is a very critical and central aspect of transparency. While the subjectivity in any aspect of selection is indeed inescapable, this should not discourage us from establishing certain threshold standards that will be taken into account for measuring competencies. In fact, in this day and age when every exercise of power by every authority is subject to the test of arbitrariness, there is no reason why the judiciary as an institution should be also imposing on itself a high standard to avoid any criticism of arbitrary exercise of powers. One of the ways by which the risk of the arbitrary exercise of powers in the process of the appointment of judges is in relation to the determination of criteria for selection. There are a number of measurable standards that could be evolved for determining competencies for assessing the suitability of individuals to be appointed as judges.

(d) Integrity: One of the most significant aspects of the judiciary as an institution is the bedrock of unimpeachable integrity that is expected out of judges. While it is essential that all public authorities are persons of integrity and rectitude, the public expectation when it comes to judges surpasses all other institutions. This means that integrity becomes a significant aspect to be evaluated in the selection process for the appointment of judges. The collegium system is well suited to determine whether the candidate under consideration would fulfill the criteria of unimpeachable integrity. The strength of judiciary as an institution is the fact that it is the guardian of the Constitution. It is the only authority that is vested with both the power to interpret the Constitution and to determine whether all institutions have acted in consonance with the Constitution. These are extraordinary powers and, hence, the responsibility of the collegium becomes higher and sacrosanct while selecting individuals who will be responsible to exercise these extraordinary powers.

(e) Conflict of Interest: The issue of conflict of interest needs to be thoroughly established in the process of selection of judges. The collegium has been fraught with serious allegations of different types of alleged conflict of interest among the members of the collegium and the individuals they have selected to become judges of the High Courts and the Supreme Court. There is an urgent need for the collegium to formulate a detailed set of rules and regulations that will govern the determination of conflict of interest among the members of the collegium who are involved in the selection of judges. For example, some of the issues that have come to the forefront in determining a potential conflict of interest could be: Whether judges from a particular high court or state should be involved in the selection of other judges from that state or high court. If so, what precautionary steps will be taken by the collegium to avoid or prevent biases, prejudices or other forms of preferences based on friendship or familiarity in the selection of judges. Another issue of conflict of interest could be to what extent lawyers who have worked as juniors in particular chambers who have become judges in later years could be involved in the selection of juniors from those lawyers' chambers to be selected as judges.

2 New Appointments Process Within Collegium System

While recognising the above principles, the process of the selection of judges by the collegium should cover the following with a view to significantly transforming the existing mode of appointment of judges. This mechanism may include:

(a) Criteria for Selection of Judges: The first step in the reform of the collegium system is about formulating a detailed set of criteria for the selection of judges. A noted scholar has quite rightly observed:

Between 1950 and 2009, 189 judges (including 37 chief justices) served on the Supreme Court of India...Not enough is known about who these judges were, and the criteria that were used to select them for the court...the Indian Constitution formally provides that three type of individuals can be appointed to the Supreme Court: (a) high court judges of five years' standing, (b) high court lawyers of 10 years' standing, and (c) 'distinguished jurist', that is law professors or others. However, this says very little, perhaps nothing, about the kind of candidates that are appointed to the Court (Chandrabhun 2014).

In fact, the need to re-examine the criteria for selection of judges become even more significant at this point of time as institutional transformation is possible when there is a challenge to the status quo. This is indeed such a moment for the judiciary. It has been observed that,

...Informal norms have evolved over a period of 60 years, which coexist alongside formal constitutional rules—norms that govern who will be considered fit and eligible for appointment to the Supreme Court...the three informal eligibility criteria, in particular, are used to select judges for the Supreme Court, criteria that have not been formally specified in any constitutional document: (a) a judge should be at least 55 years of age in order to be considered for eligible to be appointed to the Supreme Court, (b) he should be a senior high court judge, or, especially over the last 20 years, the chief justice of a high court, and (c) judges should reflect the geographic (and demographic) diversity of India, that is, judges are selected for the Supreme Court by taking into account the state or region they belong to, and whether they belong to non-traditional backgrounds in terms of religion, caste, or gender (Chandrabhun 2014).

The members of the collegium need to introspect as to the rationale for never appointing a “distinguished jurist” to the Supreme Court and to confine the selection of judges only to the community of lawyers and judges while completely ignoring the legal academia as a constitutionally recognised constituency from where judges could be appointed to the Supreme Court.

(b) Application Process and a Rigorous Scrutiny of the Candidature: There is a
need for an application process, which might include a nominations system. In some ways, both these processes will ensure that the widest possible pool of candidates is available for the selection of judges. There is also a need for a more rigorous scrutiny of the applications so that the candidates are assessed on the basis of the criteria that were formulated. There is also a need to ensure procedural fairness by ensuring that the meetings of the collegium are conducted in a fair and transparent manner with a detailed account of the proceedings of the deliberations. There is no reason for the judges not being able to record the reasons for the selection or non-selection of individual candidates for their appointment as a judge. This needs to become part of the process to ensure both transparency and procedural fairness in the selection of judges.

(c) Permanent Institutional Mechanism within the Supreme Court: There is an urgent need to establish a separate and an independent institutional mechanism within the Supreme Court, which will exclusively serve as the administrative office for dealing with all matters relating to judicial appointments. This is one of the most important steps that the Court ought to take to ensure both transparency and procedural fairness in the selection of judges.

What is needed is an Office of Judicial Appointments, which will have its own staff headed by a director and other staff members whose main responsibility is to process all applications for the review of members of the collegiums. The processing of applications is not a routine mechanism, but rather a comprehensive and rigorous mechanism that will involve an entire administrative system to ensure that all information is duly collected and collated for the examination of the members of the collegium. One of the major challenges in the collegium system is also about the lack of time and attention given by the judges to the appointments process along with their primary duties and responsibilities of hearing cases, adjudicating matters and writing judgments. Establishing a separate and independent body for the appointment of judges, which will report to the collegium, will be one of the most important governance reforms that the judiciary can initiate towards promoting transparency.

3 The Way Forward

The credibility of the judiciary is indeed at stake and it has to get its act together with a view to addressing some of the central questions that all stakeholders in the justice system are asking. What steps will the judiciary take with a view to reforming the existing collegium system? What will the Supreme Court do to ensure that the collegium system is significantly transformed with a view to infusing transparency and procedural fairness in the selection of judges to the High Courts and the Supreme Court? How will the judiciary restore the faith of all actors in the legal system that judicial appointments will take place through a selection process that will withstand legal and constitutional scrutiny? These are questions that ought to be asked by the members of the collegium as much as by other judges of the Supreme Court as they work towards restoring the credibility of the judicial appointments process.

NOTE

1 See, for example, Union of India vs Sankalchand Himatilal Seth (1977): 4 SCC 193 at 236–37; Supreme Court Advocates-on-Record Association vs Union of India (1993): 4 SCC 441; In Re: Special Reference No. 1 of 1998 (1998): 7 SCC 739.

REFERENCES

Chandrachud, Abhinav (2014): The Informal Constitution—The Unwritten Criteria in Selecting Judges for the Supreme Court of India, Oxford University Press.


Journal Rank of EPW

Economic & Political Weekly is indexed on Scopus, “the largest abstract and citation database of peer-reviewed literature,” which is prepared by Elsevier NV (http://tinyurl.com/044sh7a). Scopus has indexed research papers that have been published in EPW from 2008 onwards.

The Scopus database journal ranks country-wise and journal-wise. It provides three broad sets of rankings: (i) Number of Citations, (ii) H-Index and (iii) SCImago Journal and Country Rank.

Presented below are EPW’s ranks in 2014 in India, Asia and globally, according to the total cites (3 years) indicator.

- Highest among 36 Indian social science journals and highest among 159 social science journals ranked in Asia.
- Highest among 36 journals in the category, “Economics, Econometrics and Finance” in the Asia region, and 36th among 835 journals globally.
- Highest among 23 journals in the category, “Sociology and Political Science” in the Asia region, and 15th among 928 journals globally.
- Between 2008 and 2014, EPW’s citations in three categories (“Economics, Econometrics, and Finance”; “Political Science and International Relations”; and “Sociology and Political Science”) were always in the second quartile of all citations recorded globally in the Scopus database.

For a summary of statistics on EPW on Scopus, including of the other journal rank indicators, please see http://tinyurl.com/9e594dj

EPW consults referees from a database of 200+ academicians in different fields of the social sciences on papers that are published in the Special Article and Notes sections.