Collegium System: Suggestions for Reforms

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Abstract

After the decision of the Supreme Court in the NJAC case, the collegium system is back in action vis-à-vis appointment and transfer of judges to the higher judiciary in India. The noteworthy aspect of the majority judgment in the case is that it acknowledges that there are flaws in the collegium system and it needs reforms. Suggestions were invited from the general public as well on four aspects. However, in addition to those four aspects, keeping in view the past experience of the working of the collegium system, reforms are needed to be brought in other respects too. More importantly to the working of the collegium system and the procedure it follows. Reforms must aim at obviating the scope for arbitrariness in the appointment process without compromising judicial independence. The five judge bench of the Supreme Court, which is currently seized of the matter, cannot bring all the reforms that are needed since it is bound by the decisions rendered in the second and the third judges' cases.

Keywords: NJAC, Collegium System, Appointment of Judges.

Introduction

The recent decision of the Supreme Court, in *Supreme Court Advocates - on - Record Association* v. *Union of India*,[1] has not only caused the demise of National Judicial Appointment Commission (NJAC) but also expressly provided for the resurrection of the collegium system. Though, it is mostly unlikely that the decision had surprised anyone (including the government) it certainly did not please everyone (most importantly the government).

For a student of constitutional law and judicial process, the decision, however, leaves many questions to go in search of answers. Most importantly, how did the judges go about in deciding this case? Did they decide the case according to their own 'will'? Or did they do it according to the 'will' of the framers of the Constitution of India?

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1 Writ Petition (Civil) No. 13 of 2015, Date of Judgment: October 16, 2015.

As to how do judges ordinarily go about deciding the cases, there are two different and extremely opposite views that exist. At the one end is what Justice Marshall of the United States of America said: "[T]he judicial department has no will in any case…judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law."[2] At the other end is what the French jurist Saleilles had said: "One wills at the beginning the result; one finds the principle afterwards; such is the genesis of all judicial construction. Once accepted, the construction presents itself, doubtless, in the ensemble of legal doctrine, under the opposite aspect. The factors are inverted. The principle appears as an initial cause, from which one has drawn the result which is found deduced from it."[3]

It requires much thought, deep reflection and great prudence to say which one of these two views is true as far as the decision of Supreme Court in the present case is concerned. Thus, for the time being, the task of finding answers to the above questions must be left aside, though, it is necessary to be undertaken at a later point in time. Presently, the focus should be on what next.

The noteworthy aspect of the majority judgment in the case is that it accepted that there are flaws in the collegium system and it needs reforms. Apart from the question of constitutionality of the collegium system, which till date remains unanswered, there are host of other problems with the collegium system *viz.*, lack of transparency, too much *ad hocism*, nepotism, favoritism and it limits the wider consultation contemplated under the Constitution.

Presently, judges to the Supreme Court and high courts are appointed according to the procedure envisaged under the Memorandum of Procedures for Appointment of Judges. Different procedures are prescribed for appointment of chief justice and puisne judges of the Supreme Court and chief justice and puisne judges of the high courts, acting chief justices, *ad hoc* judges, additional judges, etc., These procedures are formulated in conformity with the decisions of the Supreme Court in the *Second*[4] and *Third*[5] Judges cases. Thus, they have to be read in the light of those decisions.

Having accepted the flaws in the working of the collegium system, the Supreme Court of India *vide* its order dated November 5, 2015 has directed the Union Ministry of Law and Justice to issue public notice seeking suggestions for improving the working of collegium system. Suggestions were sought on four aspects: (i) How to improve transparency in

2 As cited in B. N. Cardozo, The Nature of Judicial Process 169 (2004).

3 *Id*. at 170.

4 Supreme Court Advocates – on – Record Association v. Union of India (1993) 4 SCC 441.

5 In re Special Reference No. 1 of 1998 (1998) 7 SCC 739.

judicial appointments, (ii) Formulation of eligibility criteria for appointment of judges, (iii) Establishment of an independent secretariat to assist the collegium, and (iv) Mechanism to deal with complaints and adverse reports about the persons within the zone of consideration of being appointed. In response, as per reports, many have sent suggestions and the Supreme Court is yet to deliver its judgment after considering those suggestions.

It is, no doubt, important to bring about reforms in those four areas. In addition, there are few issues with regard to the working of the collegium system itself and the procedure it follows. Those issues must also be addressed. The present paper briefly touches upon each of these issues and suggests measures for reforming the collegium system.

Working of the collegium system and the procedure it follows

First and the foremost concern is what a noted journalist Sudhanshu Ranjan has expressed in his book.[6] He said that in making appointments, history shows, even the said procedure (i.e., the procedure envisaged in the Memorandum of Procedures) is not strictly followed by the collegium. He says, "no rule has ever been followed consistently."

It is difficult to believe that the said procedure is not strictly being followed. If it not, then, the most important thing to be done is to ensure that the members of the collegium strictly follow the procedure adhering to its letters and spirit. There shall be no deviation. All consultation among the members of the collegium as well as the senior most judge in the Supreme Court from the High Court, from which a prospective candidate comes, shall be in writing. Each member of the collegium shall express his/her opinion in writing on each candidate considered for appointment whether or not the collegium member is in favor of appointment of such a candidate. Further, all communications/correspondence among all the constitutional functionaries involved in the process shall also be in writing. There is nothing new in it. It is a requirement under the existing Memorandum of Procedures.

Secondly, Memorandum of Procedures that relates to appointment of puisne judges to the High Courts and the Supreme Court do not contain any specific provision with respect to initial selection of candidates, from among those who possess the threshold qualification mentioned in the Constitution, to be considered for appointment. Thousands of Indian citizens possess those qualifications. How the initial selections are to be made for considering them for appointment is not clear. It seems it is entirely left to the Chief Justice to select candidates in consultation with the other members of the collegium. In that case, eligible candidates, who are more suitable, deserving and willing to be considered for appointment, would have no/very less chances of being considered if they are not

6 Sudhanshu Ranjan, Justice, Judocracy and Democracy: Boundaries and Breaches (2012).

noticed by the collegium judges. In order to address this problem, it is necessary to suitably amend the Memorandum of Procedure to make provision for inviting application/ nominations of eligible candidates in the prescribed form to be considered by the collegium. Application format provided in Annexure – I of the Memorandum Showing the Procedure for Appointment and Transfer of Chief Justices and Judges of High Courts can be used, with certain modifications, for the purpose of inviting applications/nominations.

Provision for inviting applications/nominations shall be made without prejudice to the powers of the collegium to consider, on their own accord, any candidates even without his/her application/nomination. Wider the zone of consideration, greater is the possibility of finding most suitable persons.

Thirdly, provision shall be made for inviting shortlisted candidates for interview/ interaction with the members of the collegium. There is nothing wrong in holding extensive formal interviews to ascertain the suitability of candidates. While appointing judges to the High Court, such interactions with the candidates shall be held by both the High Court and the Supreme Court collegiums.

Fourthly, Memorandum of Procedures provides that "[I]f the Chief Justice of India or other members of the collegium elicit views, particularly those from non-judges, the consultation need not be in writing but he, who elicits the opinion, should make a memorandum thereof and its substance in general terms which should be conveyed to the Government of India." One fails to understand the hardship that is likely to be caused if it is made mandatory to elicit opinion of non-judges also in writing. Procedures should be suitably modified to ensure that all consultations shall be in writing. It ensures that the person who expresses his/her opinion on the suitability of the candidates applies his mind and will not be too casual in expressing opinions.

Fifthly, the Memorandum of Procedures shall be so revised so as to allow the President to consult such 'other judges' of the high courts' and the Supreme Court, who are not members of the collegium. This would ensure wider consultation contemplated under the original constitutional scheme. Since, according to J.S. Khehar, J., it is not impermissible under the scheme envisaged in the *Second* and *Third* Judges cases, there shall not be any difficulty in doing it. It can be done without referring the matter to the larger bench.

Sixthly, as regards the primacy and the binding nature of the opinion of the judiciary is concerned, the *Second Judges* case provides that in the event of conflicting opinions, the opinion of the judiciary 'symbolized by the view of the Chief Justice of India' formed in the manner indicated shall have primacy. It categorically states that no appointment shall

be made unless it is in conformity with the opinion of the Chief Justice of India, even if the other four members of the collegium are in favour of the appointment. One might wonder as to why should a person appointed as Chief Justice of India for a short term (which is generally the case in India) shall have a decisive opinion in the matter of non-appointment. Such a position is sought to be justified on the ground that the Constitution expressly makes it mandatory to consult Chief Justice of India in appointing puisne judges to the Supreme Court and all judges to the high courts. When the scheme envisaged in the original constitutional scheme is not being followed, why only treat this provision, which, as per interpretation, allows the Chief Justice of India to have a veto, as so sacrosanct. It may not be wrong to allow the majority to decide. Of course, what is ideal is to make all recommendations unanimously.

Seventhly, the decision in the *Second Judges* case, permits the executive to express reservations in exceptional cases alone. In such cases, the executive is obligated to provide to the Chief Justice of India strong cogent reasons explaining why the candidate recommended by the collegium is not suitable for appointment. If the reasons are accepted, then the appointment of the candidate recommended may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and other judges, on reiteration of the recommendation, the appointment should be made "as a healthy convention."

There is a need to revisit this proposition. It should not be the sole responsibility of the executive to maintain "healthy convention." Even the judiciary should also play a constructive role in maintaining it. Thus, in case if the executive provides strong cogent reasons explaining why the recommendation made by the collegium is not acceptable, collegium shall respect the views of the executive, particularly when the said views are based on the opinions expressed by the other members of the judiciary, whom the President is free to consult in addition to the members of the collegium. It is better to have concurrence in the matter of appointment. Non-appointment of a person, whom the collegium thinks suitable, may not do any harm to the judiciary or its independence. It is appointing of undeserving/unsuitable persons that harms the judiciary. The collegium should guard against such appointments. However, in exceptional cases, where the members of the collegium are unanimously of the opinion that the executive is acting *mala fide* with ulterior motives or views are formulated taking into account irrelevant considerations, the collegium may reiterate its recommendation. It must also accord reasons in support of it. On such reiteration, the appointment shall be made "as a healthy convention."

These are the most urgent reforms that are to be brought to the working of the collegium system. It may, however, be noted that all these suggestions cannot be incorporated by the five judge bench. Some of them require modification of the procedure envisaged in

the *Second Judges* case, which was a nine judge bench decision.

Transparency in judicial appointments

The process of selection of judges to the Supreme Court and the High Courts in India is completely shrouded with secrecy. Ruma Pal J., former judge of the Supreme Court, called it "one of the best kept secrets in India."[7] Transparency in appointing process is the need of the hour. Thus, the following steps shall be taken:

(i) Eligibility criteria, as and when formulated/ revised, shall be announced on the website of the Supreme Court, every High Court and the Union Ministry of Law and Justice, Government of India.
These criteria shall include the threshold criteria envisaged in Constitution, the informal criteria that are actually being followed[8] and additional criteria, if any, formulated in future for determination of merit and suitability of candidates.

(ii) Vacancies in the Supreme Court and the High Courts shall be announced in advance. As stated earlier, there shall be an open invitation for all eligible candidates to apply in the prescribed format. Nomination of eligible candidates may also be invited.

(iii) The practice of providing regional and demographic representation in the Supreme Court shall be formally acknowledged and their extent earmarked. The percentage of judges selected/to be selected from each of the three categories mentioned in the Constitution shall also be announced.

(iv) Similarly, even with respect to appointment of judges to the High Courts, the percentage of judges selected/to be selected from each of the two categories mentioned in the Constitution shall be announced. Demographic and regional representation, if any, provided in the High Court shall also be made known.

(v) List of candidates, who had applied, nominated or considered by the members of the collegium on their own, shall be maintained. There shall be consultation among the members of the collegium on each of the candidates and all opinions shall be exchanged in writing. Proceedings of the collegium meetings, if any, shall be documented and the dissents, if any, shall also be recorded in the minutes. Such minutes, along with

7 See "*Judicial secret out in open Former judge skewers appointment process*" , *available at:* http://www.telegraphindia.com/1111111/jsp/frontpage/story_14735972.jsp (visited on February 19, 2016).

8 Abhinav Chandrachud, The Informal Constitution : Unwritten Criteria In Selecting Judges For The Supreme court of india (2014).

other written communications shall be sent to the Union Ministry of Law and Justice. At this stage confidentiality may be maintained but subsequent to the completion of the appointment process, at any appropriate stage, all the relevant information including all communications and correspondences between or among the constitutional functionaries involved in the process shall be made available under the Right to Information Act, 2005.

Independent researchers shall, with the permission of the designated authority, be allowed to access all the information. They are not to be constrained to obtain information only under the Right to Information Act, 2005.

(vi) After the expiry of reasonable period, all the records shall be transferred to National Archives as suggested by the Government of India.

Eligibility criteria for appointment of judges

If one looks back at all the debates and discourses on the topic of appointment of judges, it is evident that, unfortunately, so far the debates predominately have been on who should have the power to appoint judges and not on who should be appointed as a judge and how should he/she be appointed. Many of the core issues such as qualities and level of competence of a person to be appointed as judge, his or her values, views and convictions and their consonance with constitutional principles, need for ensuring diversity among the judges, which may be necessary to improve public trust and confidence in the judicial system, *etc*. have not received adequate attention.

Though, it has often been said that the merit alone is the basis for appointing judges to the higher judiciary in India, there are no known criteria for ascertaining the merits of the candidates. That is why Late Krishna Iyer J., had once said in a public speech that the process of appointment of judges is a "riddle wrapped in mystery and inside there is an enigma."

No doubt, the Constitution prescribes some threshold qualifications for appointing judges to the Supreme Court and High Courts. It provides that an Indian citizen may be appointed as a judge of the Supreme Court[9] or High Court[10] if he/she has any of the following qualifications.

As far as the appointment to the Supreme Court is concerned:

(i) Five years' experience as a High Court judge,

9 Art. 124.

10 Art. 217.

(ii) Ten years' standing as a High Court advocate, or
(iii) He/she is a distinguished jurist in the opinion of the President of India.

As far as the appointment to the High Court is concerned:

(i) Held the judicial office, at least for ten years, within the territory of India
(ii) Has been an Advocate of a High Court or of two or more such courts in succession at least for ten years.

It may be noted that a person who has ten years standing as a High Court advocate is eligible to be appointed as a judge either to the High Court or to the Supreme Court. Theoretically, it is possible to appoint a person with ten year standing as High Court advocate as a judge of the Supreme Court even though he/she never appeared before the Supreme Court in any case/matter.

The qualifications prescribed under the Constitution are just the threshold qualifications and thousands of Indian citizens possess them. How are persons selected for appointment from among them? On what criteria their merits are determined? These are the most pertinent questions.

As far as the appointment to the Supreme Court is concerned, recent study by Abhinav Chandrachud[11] reveals that in addition to the basic qualifications prescribed in the Constitution, there are certain additional threshold criteria's that are used to select judges for the Supreme Court. They are:

(i) Age of appointment: That a person should be at least fifty-five years of age in order to be considered eligible to be appointed to the Supreme Court.
(ii) Seniority: That he should be a senior high court judge, or, especially over the last twenty years, the Chief Justice of a High Court, and
(iii) Diversity: That the judges should reflect the geographic (and to some extent even the demographic) diversity of India.

As far as these criteria are concerned, *firstly*, they are not formally acknowledged and *secondly*, they cannot be used as a test or standards for determining the merit or suitability of the candidate. Thus, there are no known criteria for determining the merit of a candidate.

As far as appointments to High Courts are concerned, there are no such studies conducted to know about similar informal criteria, if any, that are being followed.

In this scenario, there is an urgent need to develop appropriate criteria for determining the merit. Arun Jaitley, the then leader of opposition in Rajya Sabha, advocated the need

11 *Supra* note 8.

for adopting 'objective criteria' for determining the merit and suitability of a candidate for appointments. While criticizing the present system, he opined that except the elected offices, there is no other office for which appointment is made without entry level threshold criteria. He indicated that at least the following questions should be asked to ascertain the merit and suitability of the persons considered for appointment:[12]

> What is your academic qualification? How bright were you during your academic days? What is your experience as a lawyer? If you are a judge, how many judgments have you written? How many have been set aside? How many have been upheld? How many juniors have you trained? How many cases have you argued? How many cases have been reported which you have argued? Have you got the laws laid down? Have you written papers on legal subjects?

These shall be accepted as relevant tests/factors for determining the merit and suitability of candidates. However, the requirement of merit should be harmonized with the need for reflective judiciary. The composition of the courts shall reflect the geographic and demographic diversity of the country. While making appointment, possibility of ensuring diversity without compromising on merit shall be explored.

Further, as far as the appointment to the Supreme Court is concerned, of the three categories mentioned in the Constitution, recent study by Abhinav Chandrachud[13] reveals that of all the appointments made between 1950 – 2011, 97.9% of the judges are appointed from the first category i.e., sitting High Court judges with five year experience. Only four judges (two more were appointed recently) from the second category and none from the third category. This is also a matter of serious concern and unfortunately not much attention is paid on it. It may be noted that appointing High Court judges to the Supreme Court on the basis of *inter se* seniority, unless there are serious allegation leveled against such person, has almost become the well established practice in India. Appointment by promotion of high court judges solely on the basis of seniority was certainly not the intention of the framers of the Constitution. On an overview of the Memorandum Showing the Procedure for Appointment of the Chief Justice of India and Judges of the Supreme Court of India, it is evident that the same was drafted keeping in mind that only High Court judges are eligible to be appointed to the Supreme Court. Appointment to the Supreme Court has almost become a mechanical process of determining the *inter se* seniority and recommending the candidates unless there are serious allegations against them. The correctness of this

12 Uncorrected Debates Rajya Sabha, August 18, 2011, *available at:* http://164.100.47.5/debatenew/newshow.aspx?arch=223 (visited on November 12, 2015).

13 *Supra* note 8.

approach needs to be examined.

Appointments shall be made from all the three categories. One should appreciate the reason behind making the distinguished jurist eligible to be appointed only to the Supreme Court and not to the High Courts. Proper understanding of jurisdictions these courts exercise and the nature of questions they are expected to resolve provide an adequate explanation.

Establishment of an independent secretariat to assist the collegium

The system of appointment of judges needs to be institutionalized. Undoubtedly, there shall be a secretariat to assist the collegium both at the High Court as well as at the Supreme Court level. More importantly at the Supreme Court level, a full-fledged secretariat is required since the Supreme Court collegium (its composition varies when comes to the appointment of High Court Judges) has a decisive role to play in appointing judges to both High Courts and the Supreme Court.

In addition, if it is necessary, the collegium judges should take leave from their regular judicial work for certain period to devote sufficient time to decide on the suitability of candidates considered for appointment. Appointing judges to the higher judiciary is a humongous task. About hundred vacancies arise every year. It may not be possible to devote sufficient time if the collegium judges are burdened with equal judicial work. As suggested earlier, it is desirable to hold extensive interviews/interactions with all the shortlisted candidates before selection. That requires more time.

Mechanism to deal with complaints and adverse reports

If the judicial appointments are wrongly made, it is nearly impossible to rectify the mistakes given the stringent procedure for removal of judges. Thus, every care must be taken to ensure that only the candidates who are most suited are appointed to the higher judiciary. Any complaints and adverse reports must be verified. If it is not possible for the collegium judges to examine them, they shall appoint enquiry committees consisting of three members as and when required, on case to case basis, to examine those complaints and adverse reports. An opportunity to be heard shall also be provided to the candidate within the zone of consideration against whom complaints or adverse reports are received.

Enquiry committee may consist of sitting/retired judges of the Supreme Court and eminent jurists. Practicing advocates and others within the zone of consideration shall not be appointed as members of the enquiry committee.

Conclusion

As the possibility of replacing the collegium system is ruled out at least for the time being, it is important to bring reforms in the working of the collegium system. It is axiomatic to state that while brining reforms, the core constitutional values *viz.,* independence of judiciary and integrity and effectiveness of judicial review shall be kept in mind. Once the criteria are finalized and the method followed in appointing judges is made known, it is difficult, if not impossible, for whoever have the power of appointment to appoint whomever they want. Need of the hour is to seriously consider each of the suggestions, examine their pros and cons and introduce necessary reforms. To do so, it is advisable to refer the matter to the larger bench.