Article Title:" Collegium has run its course: Even in the new NJAC system, judiciary has effective veto on appointing judges"

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India is the only country in the world where the higher judiciary is self-appointed, that is, existing judges appoint new ones. This so called collegium system has been in place since 1993, based on three Supreme Court judgments in 1981, 1993 and 1998, together known as the 'Three Judges Cases'.

The Constitution does not provide for such a collegium, and judges used to be appointed by the executive branch, that is the government, until 1993. However, the Constitution not only guarantees an independent judiciary, it also specifically mandates the Supreme Court to interpret the Constitution itself. Thus it is particularly important to understand the backdrop to the highest court's interpretation that judicial independence could only be ensured through such a unique system.

Well before the first judgment in 1981, rumblings of discontent had emerged against what were seen as Indira Gandhi's efforts to establish the executive's primacy over the judiciary. For instance, the highly regarded justice H R Khanna's resignation on being superseded to the chief justice's post in January 1977 had resulted in weeks of protests by bar associations across the country.

Now, after a constitutional amendment has finally created the much-discussed National Judicial Appointments Commission (NJAC), the matter has come full circle, with the Supreme Court hearing a PIL against it. Though the collegium system solved the original problem it was intended to tackle — the executive's whimsical appointment of judges — it has led to unanticipated new problems.

Amid whispered allegations of favouritism, nepotism, groupism and outright bias, the collegium system has also resulted in a significant number of vacancies in the higher judiciary: 10% in the Supreme Court and 36% in the high courts, even as they collectively grapple with a mammoth load of more than 5 million cases.

Every now and then someone bemoans India's abysmally low ratio of judges to population of 13 per million versus 50-100 in western democracies. Among others, the law commission and several chief justices have made recommendations to dramatically increase the number of judgeships at all levels. The easy excuse for the executive and legislative branches for not acting on this is that even existing posts in the higher judiciary don't get filled up.

Besides accusations of bias and inefficiency, the collegium system does not even meet the basic standards of transparency expected of high office. Among many credible critics,

retired Supreme Court justice Ruma Pal has called its workings “the best kept secret in the country”. Finally, and perhaps most importantly, the collegium goes against the principle of checks and balances crucial to every democracy.

True, judges can be impeached by Parliament. But that is extremely rare and in fact, despite calls for it on several occasions, has happened only once. In any case, impeachment is akin to Parliament’s own “nuclear option” of a no-confidence vote: necessary as a last resort when no other option exists, but hardly suitable as a means to facilitate routine functions. Just as Parliament is in desperate need of reforms to unclog its day-to-day functioning, so is the judiciary.

In such issues concerning the fundamental tenets of constitutional democracy, it is instructive to examine the practices of other countries. A quick glance at how other democracies appoint judges of the higher judiciary is revealing. They run the gamut from the executive branch having sole authority, to having some role for the legislature, but only rarely is the judiciary itself involved.

In Canada, for example, a screening committee of MPs shortlists names, from which the prime minister makes the final selection. In the US, only the president can nominate names, but they must then be approved by the senate. In Japan, it is the cabinet’s decision. There is no country, and especially not any respectable democracy, which has a totally self-appointing system like India’s collegium.

Perhaps most telling is the case of the UK, particularly because of the shared roots of our political systems. There, judges used to be appointed by the lord chancellor, a member of the cabinet. But after a 2005 constitutional amendment, a Judicial Appointments Commission (JAC) was set up for the purpose. Strikingly, not only is the UK’s JAC not headed by a judge, and only a third of its members are judges, but another third are required to be laypersons without a legal background!

By contrast, India’s NJAC is headed by the chief justice, and half its members are judges of the Supreme Court. Another third of its members are persons of eminence, selected by a panel consisting of the chief justice, the prime minister, and the leader of the largest opposition party. Thus, while introducing checks and balances, the NJAC nevertheless gives India’s judiciary the most say compared to any other country. In fact, the judiciary effectively still gets a veto over appointments.

In retrospect, the events of the 1970s and 1980s justified the Supreme Court taking unto itself the appointment of judges, in the interest of keeping the judiciary independent. But times have changed. The judiciary’s independence is no longer in doubt. And India is a much more mature democracy, whose citizens deserve better. It is time for the highest court to loosen its grip a little, and let the pendulum, which had gone from one extreme to the other, swing back to the middle.