

**CUTS INTERNATIONAL
COMMENTS/ SUGGESTIONS ON EFFECTIVE WORKING OF
COLLEGIUM SYSTEM FOR APPOINTMENT OF JUDGES OF
HIGH COURTS AND THE SUPREME COURT**

Background

It is a well-known fact that the independence of the judiciary is the basic requisite for ensuring a free and fair society under the rule of law. It is responsible for good governance of the country which can be secured through establishment of an unbiased judiciary. The basic need for the independence of the judiciary rests upon the following:

- To keep a check on the working of the organs i.e., legislative, executive and judiciary
- Interpreting the provisions of the Constitution and legislations
- Disputes referred to the judiciary
-

Also, the appointment process has a great implication on independency and quality of the judicial system; however, judicial appointments, especially in the HCs (HC) and the Supreme Court (SC) have always been in controversy. The Collegium, constituting of judges, appoint judges of SC and HC as mentioned under Article 124 (2) and Article 217 (1) of the Constitution, respectively. However, the present system of appointment is quite opaque and information is not available in public domain regarding the appointment of judges. Further, it does not come under the purview of RTI. Challenging the lack of transparency in the collegium system, the present government introduced the National Judicial Appointment Commission Act (NJAC Act) which established the NJAC consisting of the Chief Justice of India (CJI) and two senior most judges, the law minister, leader of opposition and an eminent person from the public, to be chosen by the President in consultation with the CJI.

However, the NJAC Act was held unconstitutional as it was felt that it will erode the independence of judiciary in relation with the appointments of judicial officers. The apex court held that it is of paramount importance to maintain judicial independence as it is the central pillar for the rule of law. In this regard, the SC as per the writ petition filed in the case *Supreme Court Advocates on Record Association & Others Vs. Union of India* welcomed suggestions and comments on reviewing the existing collegium that would enhance transparency in the appointment of judges.

Consumer Unity and Trust Society (CUTS International), is a leading public interest non government organisation working towards improving public welfare and governance which requires transparency in the system. It is suggested that there is a need to put the essential information such as appointment of judges in the public domain. It would encourage the new system to be more vivid having time-bound appointments and well defined selection criteria. Judicial selection must be made more explicit which will make them accountable for the decisions made thereby ensuring the judiciary to remain independent and function efficiently. Following transparency in the procedure would lead to appointment of well qualified judges, competent to serve the judiciary, eventually enhancing the functioning of Courts.

The suggestions are provided by CUTS International as below:

Transparency

- The tenure of all the judges, and consequent all the upcoming vacancies, must be available in public domain, including on the websites of the High Courts and the Supreme Court.

13.11.2015

Any interested stakeholder must be eligible to obtain information about the forthcoming vacancies for a specific period (say, three months in future)

- Presently, the judicial appointments do not come under the purview RTI Act and to ensure transparency, it is necessary that such information is placed in public domain.
- The search and selection process by the collegium must be initiated three months in advance of the impending vacancy to ensure adequate time period for application, scrutiny, interview, selection and recommendations of names.
- The collegium also must record the minutes of meeting of consultative process and upload the same on the court's website so that the public is aware of such decisions.
- The candidates/applicants eligible for the post of HC/SC judge should not be restricted to the names suggested by the senior advocates. Advocates/judges/interested candidates fulfilling the mentioned criteria must be eligible to apply.
- The application filled by the interested candidates must clearly provide for the bio data along with the information indicating their relatives who are judges and membership of any political party.
- However, preparing an Intelligence Bureau (IB) report regarding the candidates does not seem to be necessary as the Secretariat would be conducting a background check up. However, it could take assistance of IB as and when required.
- Objections from public should be invited on the applications received and a common format must be developed to enable public to file its objections on the applications made. All public objections must be required to be backed by relevant evidence but it must not be possible to reject any public objection without a reasoned order. Adequate provision to penalise false, vexatious and frivolous complaints must also be made.
- A transparent ranking methodology should be developed to scrutinise the applications received. Rankings could be accorded on different indicators like experience, track record of disposals and adjournments, education qualifications, public objections, relation with members of bar, bench, officers of collegiums secretariat. Different indicators could be provided different weights, with negative weightage to related parties.
- The names shortlisted for interview must be published in public domain, i.e. on the websites of High Courts and Supreme Court. The short listing/rejection should be made after reasoned decision.
- The interview process must be transparent and any conflict of interest must be avoided i.e. members of collegium having common interest with the shortlisted candidates must recuse themselves from the interview and decision making process.
- A reasoned decision should be made after the interview process, and the names of successful candidates should be published in the public domain, i.e. on websites of High Courts and Supreme Court.

Eligibility

- A minimum eligibility criterion must be set transparently to invite applications. Graded eligibility could be set for qualifying as judges for High Courts and Supreme Court.
- For instance, for qualifying for the position of High Court judge, around 15-20 years of experience in legal field could be considered. The experience must not be limited to practicing in a court but must include providing legal advice, teaching experience, and research in legal matters. For Supreme Court, experience of around 20-25 years could be prescribed.
- Minimum qualifications must be set for eligibility, such as, bachelor degree in law in India, or equivalent degree in other jurisdictions.

13.11.2015

- Knowledge of important judicial concepts, legislations, rules and regulations, domestic and international precedents and practices, could be illustrated by appearance in cases of important judicial matters, publications in journals of international repute, and advising government and private parties on important legal issues. The candidates must be required to display their knowledge, through citing publications etc, in the application format.
- Interested applicants who are related to any sitting judge or practising advocate must be required to provide reasons as to 'why their applications should not be rejected summarily' to avoid conflict of interest.
- All candidates must be required to explain mechanisms they would adopt for avoiding conflict of interest, existing or potential.
- The eligibility criteria must be well defined and elaborately mentioned and placed on the website for the benefit of the public. These criteria must be separately put for district court judges, HC judges and SC judges and other interested candidates. The eligibility criteria must include factors such as age, qualification, legal knowledge, income limits, minimum experience of service in legal field, landmark judgements etc.
- The procedure along with the application must be clearly explained on the website well in advance. Evaluation can be done on the basis of examination conducted. Only short listed candidates could be then interviewed by the collegium or panel appointed by the collegium. For evaluating the merits of the candidates, lesson can be learnt from Australia which follows the '*point grading system*' where appointments are conducted on the basis of merit. The parameters include legal skills such as knowledge of the law, intellectual capacity and experience, manage the Court with complex fact situations and arguments, ability to write judgements and personal qualities such as integrity, impartiality, strong sense of fairness, decisiveness and a sound temperament.¹ The same can be incorporated by the Committee scrutinising the applications. The Committee must be independent and ensure that selected candidates have been chosen as per their legal skills and personal quality. The shortlisted names along with their bio data with other documents must be provided in the website for the public.
- Judges who are experienced in the field of specific laws could be encouraged to be elevated in the same field for better efficiency in adjudication of matters. However, judges should not be elevated only on the basis of seniority but also on the basis of their merit.

Secretariat

- An independent body of senior officers must be formed (named as the Secretariat) that would be established in the SC of India and every HC. These officials would be selected by the judiciary and would exclude practicing lawyers. The body would be constituted to ensure efficient selection of judges.
- Further, the Secretariat must report every matter including analysis of judgments, background check, quality of work as an advocate or scholar, integrity on prospective appointees to the collegium so that it is ensured that selection of judges is not twiddled. It would be independent of the executive and responsible for preparing and classifying information and preparing updated data base. The same would benefit the collegium to take precise decision on judicial appointments.
- Its function would be well defined so that it functions accordingly. Few functions include collecting background information and other relevant details about the scholars, members of the bar, district court judges, HC judges who have applied for the post of judges of HC and SC.

¹ Simon Evans and John Williams, Appointing Australian Judges: A New Model; available at https://sydney.edu.au/law/slr/slr30_2/Evans.pdf

13.11.2015

- Further, to ensure transparency and maintain accountability, the Secretariat must publish rules/regulations for making applications and also complaints against candidates.
- The secretariat must develop specialised skills like vetting of applications, comparison with eligibility criteria, background checks of candidates, verification of public objections, identifying conflicts of interests, and verifying authenticity of details provided in the application.
- The Law Commission of India could provide initial technical support to such an independent body. A minimum fee could be charged from interested applicants to cover the costs of running the secretariat.

Complaints against advocates/judges

- After the shortlisted names are published on the website, complaints/grievances can be filed against individuals along with substantial evidence within 30 days of being published.
- Then, the individual must be given an opportunity to be heard after which the complaint would be examined by panel of retired judges. It has to be made sure that such judges are not influenced by any other external factors. An option must be given to both the parties to be heard.
- Again the role of Secretariat would come into play in such situations, to find out relevant evidence and present the same for quick disposal of the case. Collegium must be kept in loop during the entire process and given clear and detailed report so that the panel is in a position to deliver better decisions.
- It is essential to put all these information on the website to ensure transparency.

Transfer of Judges

- Every transfer so made must have brief reasons, recorded and put on website. This has to be done to ensure confidence of the litigating public in both the transferor and transferee HCs. The consent of the judges also is necessary while transferring them and all these details have to be clearly mentioned on the website.
- With regards to puisne judges, criteria and factors must be clearly specified and uploaded on the website. Also, while promoting a puisne judge, reasons must be clearly specified along with his/her bio data and experience in the website.
- It is suggested in the report that the judges must be transferred only on account of administrative exigencies; however the same has not been clearly defined, therefore need to be elaborately defined. Also, transfer of judges should clearly indicate whether the judges to be transferred in the same jurisdiction or different jurisdiction. Further, transfer due to conflict of interest with relatives practicing at the Bar does not seem a strong reason for the judges to be transferred. It would also adversely affect the ongoing cases which the judge is well versed with. While delivering judgement, the judge takes into the consideration the evidence provided by the advocates representing the parties and being at the position of the judge must not affect his conflict of interest with his relative. This suggestion seems to have missed to provide the link to the objective of providing more efficiency to the existing collegium.

Encouraging women judges

- It is also suggested that to increase the number of women judges in HC as well as SC, the collegium must include a women judge, taking into consideration her experience, legal skills, landmark judgements, etc, during the selection process. Also, to increase the count, more

13.11.2015

women advocates/judges must be suggested for the post of HC/SC judge. However, all the women candidates must fulfil the specified criteria for the same.

Appointing economists to the Bench

Considering the large number of commercial disputes coming up before the courts and with new commercial benches in High Courts and commercial courts being created, it might be useful for the Collegium to appoint economists on the bench to assist the judicial members to appreciate the dispute in its full splendour and arrive at best judgments. The New Zealand High Court has an economist on the bench and until recently the French Supreme Court too had an eminent economist on the bench in the Commercial and Financial Chamber of the court.

Timeline for appointment of judges

- Looking into the huge vacancies in the Indian judiciary, it is suggested that the appointment of judicial officers must be done within a specific period of time. A well-defined timeline must be specified and uploaded in the website. Delay in appointment would adversely affect the proper functioning of court and judicial system. Suggestions can be also invited from the interested stakeholders for the same for improved delivery of justice.

Use of modern technology

- The Secretariat with the help of modern technology must create a database and store names of the advocates and judges along with the information necessary by the collegium. It also must record the performance, judgements delivered and personal information including the complaints filed against, if any for swift review. Use of computers would result in enhanced efficiency, productivity and quality of output.
