Collegium 2.0: How Should India Appoint its Judges

Shubhankar Dam
Collegium 2.0  
How Should India Appoint its Judges  
Quartz India, November 03, 2015  

In April, the Ninety-ninth Constitutional Amendment Act, 2014, came into force. Enacted by the Indian Parliament and ratified by state legislatures, it created the National Judicial Accountability Commission (NJAC) to provide for a new mechanism by which to appoint judges in India.

By October, after a much anticipated verdict in Supreme Court Advocates-on-Record Association v Union of India, the Supreme court of India invalidated the constitutional amendment.

Consequently, the NJAC is dead: It is in the Constitution, but no longer part of it.

The saga on judicial appointments in India, however, isn’t over yet. Supreme court judges who invalidated the NJAC will engage in self-help sessions starting Nov. 3. They will hear suggestions to improve the existing method of appointing judges, namely, the collegium system. Three questions are central to this exercise: What is the collegium system? What should it become? How should India get there? Thinking through these questions rigorously is the best way to make the forthcoming exercise count.

The collegium system is an arrangement by which five senior-most judges of the Supreme Court appoint all other appellate judges in India. The executive is merely a rubber stamp: The president of India formally signs the notifications. Developed by an advisory opinion of the Supreme Court in 1998, the mechanism has the trappings of India’s caste system. Brahmins (judges) insist on their exclusive authority to interpret the scripture (Constitution). And they rely on their interpretative authority to perpetuate a hereditary order. Only Brahmins can beget Brahmins; only judges may appoint future judges.

Its brahminical orientation apart, the collegium system, from beginning to end, is a mystery. The pool from which to select judges is wide. Why then do particular names come up for consideration? Of those who are considered, why are some immediately rejected? Of those who make it to a (likely) short-list, why are some appointed but not others? What sorts of materials do judges consider while evaluating potential candidates? Do judges recuse themselves in case of any conflict of interest? Or, do appointments succeed precisely because of such conflicts? We do not know. We can’t. The system is a black box.

Parliament created an alternative mechanism in response to these lingering issues: The NJAC. The chief justice of India, two senior-most judges, the union law minister and two "eminent persons" were trusted with the authority to finalise appointments. The court has invalidated it. Why? The NJAC verdict runs into 1,030 pages. But one word
captures its essence: mistrust. “If not us, who?” is the leitmotif that runs through the decision. The majority belabours its view that the executive in India cannot be trusted to do the right thing; too often it hasn’t. They fear intrusion and interference, even intimidation, in ways that may undermine the independence of the judiciary.

The invalidation of the NJAC amendment means that the collegium system stands revived. But in what form should it continue? What should it become? As a form, the collegium, currently, is a monopoly; as a process, it is a black box. It should become less of both. Becoming less of a monopoly means allowing some degree of democratic participation in the appointment system. Becoming less of a black box means allowing some degree of transparency in the appointment process. But all of these within the larger framework of the collegium arrangement.

Take democratic participation first. Judges, incrementally, have come to rule India. There is hardly any facet of public life that is untouched by judicial verdicts. But the people have no say in who (judicially) governs them. This democratic deficit may be remedied through executive nominations. Currently, the system is entirely judge-led. Recommendations from the collegium are sent to the law ministry which forwards them to the President. The ministry or the President may object to names. But judges can—and often do—insist on their choices. Consequently, the executive only has a negative role. It should have a positive role, too.

Perhaps preliminary nominations for one-third of all vacancies should emanate from the collegium; one-third nominations should come from the union cabinet and the remaining one-third should come from the president. Making room for formal inputs at the nomination stage has the advantage of partially addressing the democratic deficit. The judiciary (with no electoral mandate), the union cabinet (with restricted mandate) and the president (with a national mandate) will have a say initially. Of course, nominations are just that. Under the collegium system, the judges retain the authority to reject executive nominees.

Second, making the process less of a black box. Once nominations come in, two things are worth paying attention to. What criteria should the collegium use to assess the candidates’ suitability? These aren’t publicly available. They must be. Then, there is to task of applying these criteria to individual candidates. Should those deliberations be made public or come under the Right to Information Act? They should, but only after a considerable period of time.

Transparency isn’t an unqualified good; too much of it can be harmful. Revealing discussions about successful candidates—or even unsuccessful ones—may have unintended consequences. Perhaps all files should be made available after the relevant judges have retired. By then, the stakes would be much lower. Ultimately, transparency must serve the larger objective of improving the collegium system, over time. And it is possible to do so without undermining the institution in the short run.

How should this transition happen? Slowly, through incentives. At the forthcoming hearings, judges should consider incentivising the executive: “Show us over time you
can make statutory or non-judicial appointments properly, and we will consider your nominees with lesser suspicion”. The mistrust quotient, high today, may change with time. For that, the executive must prove its bonafide.

It is easier to list what the executive should avoid. Picking petty fights with those already in office; delaying appointments; intolerance towards those with contrarian views; or the tendency to appoint barely qualified henchmen and women are obvious red flags. All too often the executive has been guilty of these and more. And they reiterate the judges’ intuition that the executive is too immature to take its constitutional obligation seriously. But if the executive mends its ways, ultimately, judges too must show flexibility.

This approach renders the collegium a perennial work in progress. It will remain a constant dialogue between the executive and the judiciary—one where the executive tries to justify why it should have a piece of the pie and a judiciary that tries to justify why it should keep the pie it already has. Both have something at stake. Ultimately, a constitutional sweet spot may emerge: a somewhat representative and transparent system of judicial appointments, alongside an executive that is capable of self-restraint and moderation.

*Shubhankar Dam, a constitutional expert, is a Hong Kong-based professor of law*