Collegium and transparency

On October 3, the Supreme Court's collegium published a resolution promising to hereafter make public, on the court's website, its various decisions, including its verdicts on persons nominated for elevation as judges to the high courts, its choices of candidates for elevation to the Supreme Court, and its decisions on transfer of judges between different high courts. These results, the resolution added, will be accompanied by the reasons underpinning the collegium's choices.

At first blush, the move strikes us as both necessary and important, as bringing transparency into a system that has been notorious for its opacity. But when probed deeper, on even a bare reading of the first set of publications released by the collegium, it becomes clear that the initiative adds, at best, a veneer of respectability to a mechanism that lacks any constitutional basis.

Perplexing reasons

Consider some of the reasons professed thus far. In the cases of A. Zakir Hussain and Dr. K. Arul, candidates nominated for elevation to the Madras High Court, the collegium has *verbatim* published the following statement of rejection: "keeping in view the material on record, including the report of Intelligence Bureau [IB] he is not found suitable for elevation to the High Court Bench." The details of what the IB's reports might contain and the apparent materials on record remain concealed. Yet, threadbare as these reasons might sound, those offered for rebuffing the nomination of Vasudevan V.N., a judicial member of the Income Tax Appellate Tribunal, are particularly perplexing.

"While one of the two consultee-colleagues has offered no views about his suitability, the other colleague has not found him suitable for elevation," the report reads. "As per record, his name was also recommended by the Collegium of the Calcutta High Court on 28.11.2016 and the Government of West Bengal has expressed its disagreement. Record placed before us also shows that the proposal for his elevation initiated on a previous occasion by the Collegium of the Bombay High Court was rejected by the Supreme Court Collegium on 1st August 2013. A complaint pointing out this fact has also been received in the office of the Chief Justice of India. Keeping in view the views of the consultee judges and the material on record the Collegium is of the considered opinion that Shri Vasudevan V. Nadathur is not suitable for elevation to the High Court Bench."

More questions

The collegium, ever since its inception, following the Supreme Court's judgment in what is known as the *Second Judges Case* (1993) has been enveloped by a sense of the hugger-mugger. The present revelations, much opposed to their perceived objective, scarcely make the system more transparent. In Mr. Vasudevan's case, for example, we don't know which of the "consultee-judges (presumably one of the two senior-most Supreme Court judges, in this case, who have previously served at the Madras High Court) objected to his elevation, and why the judge interviewed found him unsuitable. Also peculiar is the collegium's express noting that Mr. Vasudevan had previously been recommended by two different high court collegia, which would mean that, in all, the chief justices of three high courts, at different points of time, found him worthy of selection. But, we're now left wondering how the view of one "consultee judge" — whose reasons aren't provided to us — can override the opinion of three chief justices of three different high courts.

These issues concerning the system employed to appoint judges to the Supreme Court and the high courts — even if they often involve matters of inscrutable procedure — are of particular salience. The judiciary, after all, was regarded by the Constitution's framers as central to the social

revolution that the document was meant to herald. Indeed, as the historian Granville Austin recounted in his book, *The Indian Constitution: Cornerstone of a Nation*, the Constituent Assembly brought “to the framing of the Judicial provisions of the Constitution an idealism equalled only by that shown towards Fundamental Rights.” It saw the judiciary as critical to “upholding the equality that Indians had longed for during colonial days, but had not gained”.

Interpreting consultation

To this end, to ensure that judges would be insulated from political influence, the assembly agreed on a consultative process of appointing judges, a “middle course,” as B.R. Ambedkar described it. The Constitution avoided the cumbersome process of legislative interference and the undemocratic provision of a veto to the Chief Justice, and vested in the President the power to both make appointments and transfer judges between high courts. The President, who would act on the advice of the council of ministers, was, however, required to compulsorily consult certain authorities, including the Chief Justice of India (CJI), and, when making appointments to a high court, the chief justice of that court.

Originally, in 1977, in *Sankalchand Sheth*’s case, when interpreting the word “consultation,” the Supreme Court ruled that the term can never mean “concurrence”. Hence, the CJI’s opinion, the court ruled, was not binding on the executive. But nonetheless the executive could depart from his opinion only in exceptional circumstances, and, in such cases, its decision could well be subject to the rigours of judicial review. This seemed like a perfectly sound balance.

And indeed, in 1981, in the *First Judges Case*, the court once again endorsed this interpretation, albeit partly. But twelve years later, in the *Second Judges Case*, the court overruled its earlier decisions. It now held that “consultation” really meant “concurrence”, and that the CJI’s view enjoys primacy, since he is “best equipped to know and assess the worth” of candidates. But, the CJI, in turn, was to formulate his opinion through a body of senior judges that the court described as the collegium.

In 1998, in the *Third Judges Case*, the court clarified its position further. The collegium, it said, will comprise, in the case of appointments to the Supreme Court, the CJI and his four senior-most colleagues — and, in the case of appointments to the high courts, the CJI and his two senior-most colleagues. Additionally, for appointments to the high courts, the collegium must consult such other senior judges serving in the Supreme Court who had previously served as judges of the high court concerned. (On whether these views of the consultee-judges are binding on the collegium or not, the judgments are silent.)

What’s clear, though, is that these dizzying requirements maintain no fidelity whatsoever to the Constitution’s text. Yet the court has been keen to hold on to this power. Indeed, when the Constitution was altered, through the 99th constitutional amendment, and when the collegium was sought to be replaced by the National Judicial Appointments Commission — a body comprising members of the judiciary, the executive and the general public — the court swiftly struck it down. It ruled, in what we might now call the *Fourth Judges* Case (2015), that the primacy of the collegium was a part of the Constitution’s basic structure, and this power could not, therefore, be removed even through a constitutional amendment.

But perhaps mindful of some of the hostility that the system was facing, the judgment also promised to “consider introduction of appropriate measures”, to improve the “collegium system”. The new resolution, it might well seem, is an effort towards this end. Unfortunately, though, the publications only serve to further underscore the deficiencies in the appointment process, which remains, as Justice P.N. Bhagwati once described it, “a sacred ritual whose mystery is confined only to a handful of high priests”.

Suhrith Parthasarthy is an advocate practising in the Madras High Court

END