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CRITERIA FOR THE COURTS: ON THE APPOINTMENT OF JUDGES

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In 1973, at the acme of Prime Minister Indira Gandhi's move towards securing a "committed judiciary", the then Minister of Steel and Mines, S. Mohan Kumaramangalam, offered a spirited defence of the government. In speeches made both in Parliament and outside, and through a number of writings, Kumaramangalam asserted the virtues of what he thought was a legitimate policy. It was important, he wrote, invoking the words of the great U.S. judge Benjamin Cardozo, for any government, "to examine the 'philosophy', the 'outlook on life', and the 'conception of social needs' of a proposed appointee" to the higher judiciary. In choosing persons for the Supreme Court, in particular, he believed, it was necessary to assess a judge's outlook on "broad matters of the State," and "on the crucial socio-economic matters" that concerned the nation.

To a casual observer, Kumaramangalam's words might have sounded rational, but veiled behind them were the government's rather more threatening motives. As Nani Palkhivala described it, the policy was really an effort at creating a judiciary that would be "made to measure", that would bend to accommodate the government's whims and caprices. Yet, even today, much as the policy of the time appears baleful to constitutional democracy, Kumaramangalam's defence of the programme broods over the process followed in making appointments to the higher judiciary.

Only recently, on November 2, four new judges were elevated to the Supreme Court. But neither the Collegium's discussions on the appointees, as published on the court's website, nor the popular discourse on the persons chosen concern themselves with a discussion on the records of these judges. We are left with little idea, for instance, on what broad constitutional philosophy these judges espouse, what their approach to constitutional interpretation might be, and on how they might view the general role of the higher judiciary.

Contrary to what some might believe, engaging with a judge's outlook to the Constitution isn't necessarily inimical to judicial autonomy. Kumaramangalam's motives may have been ill-founded, but he was hardly at fault in arguing that the Constitution represented not merely a document of rules but also a certain tradition, and that the method involved in appointing judges to the higher judiciary is as much a part of that tradition as any other constitutional process might be.

It is important, no doubt, to resist the particular brand of commitment that Kumaramangalam was after. But there is at least a kernel of cogency in his argument that we cannot afford to ignore. Judicial review gains its legitimacy from the Constitution. But given that judges are unelected officials, won't its continuing legitimacy be at stake if we deem it undemocratic to so much as wonder what the constitutional philosophy of a nominee might be? Should we dismiss all claims for democratic accountability in the appointment process by harking back to the dark days of the Emergency?

As things stand, the procedure adopted in appointing judges is seen as entirely divorced from the ordinary constraints of a democracy. This wasn't quite how the Constituent Assembly saw things. The framers believed that the judiciary was integral to the social revolution that the Constitution was meant to usher in. They, therefore, as Granville Austin wrote, "went to great lengths to ensure that the courts would be independent, devoting more hours of debate to this subject than to almost any other aspect of the provisions."

To that end, the Constitution comprises a number of special clauses. It provides for, among other things, a fixed tenure for judges of the Supreme Court and the High Courts; ensures that salaries and allowances of judges are charged directly to the Consolidated Fund of India; confers powers on the courts to punish for contempt of themselves; and, importantly, ensures that judges can only be removed through a process of parliamentary impeachment. But, much as these provisions aim to ensure that the judiciary remains ensconced from governmental interference, the framers always believed that the power to appoint judges must vest with the executive.

Accordingly, the Constitution provides, in broad terms, that judges to the Supreme Court would be appointed by the President in consultation with the Chief Justice of India (CJI) and such other judges that he deems fit. But through a series of rulings the Supreme Court replaced the consultative method prescribed by the Constitution with one that gave the CJI and his four senior-most colleagues (the “Collegium”) primacy in selecting candidates. But this system has proved notoriously opaque. Efforts to replace it with a National Judicial Appointments Commission (NJAC) came up a cropper after the court struck down the 99th constitutional amendment, in *Supreme Court Advocates-on-Record Association v. Union of India* (2015). The primacy enjoyed by the collegium in making appointments to the higher judiciary, the court declared, was a part of the Constitution’s basic structure.

Extraordinary as these findings were, the court nonetheless promised to look into the prevailing system and reform it from within. Three years later, we’ve seen little in the way of tangible change. The problems inherent in the present system are evident even from a bare reading of the collegium’s decision, published on October 30, 2018, endorsing the new designees to the Supreme Court: “While recommending the name of Mr. Justices Hemant Gupta, R. Subhash Reddy, Mukeshkumar Rasikbhai Shah, and Ajay Rastogi, the Collegium has taken into consideration combined seniority on all-India basis of Chief Justices and senior puisne Judges of High Courts, apart from their merit and integrity. The Collegium has also kept in mind, while recommending the above names, that the High Courts of Punjab & Haryana, Gujarat and Rajasthan have remained unrepresented in the Supreme Court since long.”

Therefore, it was really only concerns over the relative seniority of these judges and the extent of State-wise representation that kindled the collegium’s attention. The report does state the candidates’ merit was also considered. But given that the criteria for selection is entirely unknown, what merit means remains ambiguous, at best. In any event, the general constitutional values of a nominee have never been seen as a benchmark to review merit. Such discussions, on the other hand, are seen as anathema to judicial integrity, as a yardstick that ought to be extraneous to any selection made.

All of this still begs the question: even assuming the collegium did, in fact, discuss the constitutional philosophies of the various choices before it, ought we to leave it to our judges to select their own colleagues and successors? Should not a discussion on the kind of judges that India needs animate our public and political debates?

The NJAC may well have been hastily pushed through. But if the publication of the collegium’s decisions has shown us anything, it is this: that the collegium’s workings are mysterious and undemocratic. And for the most part, the government is happy with this arrangement. It clears some recommendations with alacrity, while holding back, often for months on end, others comprising nominees that it deems uncomfortable.

What we need today is a more sustained discussion on the nature and workings of a body that can potentially replace the collegium. Such a body must be independent from the executive, but, at the same time, must be subject to greater transparency and accountability. This commission

must also partake within it a facility for its members to have forthright discussions over the constitutional philosophies that a judge must possess. If we fail to bring these issues to the forefront, the rigours of democracy will never permeate into the judiciary, and we will only be further undermining public trust in the credibility of judicial review.

Suhrith Parthasarathy is an advocate practising at the Madras High Court

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