

Accountability and independence

C. Raj Kumar



The Hindu SET A BOUNDARY: The influence of the government in the appointment process of judges affects the autonomy of the judiciary. Photo: Shiv Kumar Pushpakar

Transparency in the appointments of judges can be ensured without government representatives serving as members in the Judicial Appointments Commission

The debates surrounding the proposed Judicial Appointments Commission (JAC) Bill, 2013 for the appointment of judges to the higher judiciary, is a critical matter that impinges on the future of the Indian judiciary. Some of the provisions of the draft bill raise serious questions of constitutional importance that must be carefully examined by the government before any constitutional amendment is made.

It will not be in the government's interests if the provisions are taken up for judicial adjudication for potential violation of the Constitution, especially the basic structure doctrine. It is possible that even after constitutional amendments, there may be a

challenge to these provisions. It is important for the government to formulate a more rigorous set of guiding principles on the basis of which a constitutional amendment can be formulated.

It will be a mistake to assume that a replacement and change of the body that is playing a dominant role in this process will ensure fair and transparent appointments. There is enough evidence to suggest that appointments made by governments have been marred by controversies and have been questioned for their lack of transparency, impartiality and integrity. Institutionalised forms of nepotism, and biases and prejudices, have been infused into the appointment process, even when appointment were made by high-powered committees comprising the Prime Minister and the Leader of the Opposition.

Reforms in appointment process

Under these circumstances, it is important for the country to have a genuine debate as to what parameters need to be adopted while seeking reforms in the appointment process. The process of appointments has evolved since the passing of the Constitution. Even though three major decisions by the Supreme Court settled the matter on the primacy of the judiciary in the form of its collegium deciding matters relating to the appointment of judges, there is little doubt that the existing collegium-based system needs reform. Many judges of the higher judiciary have themselves acknowledged that this system needs greater transparency, inclusiveness, participation and consultation at a broader level. But how do we establish a system in which the people who exercise powers do so in a responsible manner?

Before any attempt is made to draft a legislation, there is an urgent need for the government to have a broad-based consultation with lawyers, judges, academics, civil society and the media as to how we can balance judicial accountability on the one hand and the independence of the judiciary as an institution on the other. The following parameters may be considered for this.

Whatever procedures are formulated for the appointment of judges, there must be a broad-based consultative process in which all stakeholders are involved. One of the sharpest criticisms of the existing collegium model is that the entire process of appointments of judges to the Supreme Court is dependent on the Chief Justice of India (CJI) and the four senior most judges of the apex Court. In the case of the High Courts, it is the CJI and the collegium comprising two senior most judges of the Supreme Court who decide appointments. Unfortunately, while it is true that this process requires re-examination, the process envisaged in the proposed collegium under the new legislation — that two eminent persons will be selected by the Prime Minister, the CJI and the Leader of the Opposition — is equally arbitrary and lacks transparency.

Further, most appointment processes in India do not have any information on how competence and suitability of candidates is measured, necessitating a need for parameters to measure both.

Nearly a decade ago, the U.K. significantly revamped the process relating to judicial appointments. The JAC was constituted as an independent body which selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland. The creation of the JAC was one of the significant changes brought about by the Constitutional Reform Act, 2005, which also reformed the office of the Lord Chancellor and established the Lord Chief Justice as head of the judiciary of England and Wales. The qualities and abilities being used by the JAC for selection of judges in the U.K. may be of relevance in the Indian context as well. Intellectual capacity, personal qualities, the ability to understand and deal fairly, authority and communication skills, efficiency, leadership and management skills are the basis on which candidates are selected. There are detailed explanations as to how these qualities will be identified among candidates.

Role of lawyers in appointments

The Bill in its current form has not envisaged any role for lawyers who are in many ways important in the process of appointment of judges. In many jurisdictions, lawyers are involved significantly in all stages in the process of appointment. There is a need to reconsider the current provisions to include lawyers and law professors as members of the JAC.

One of the important reforms in the U.K. was to diversify the commission. The JAC in the U.K. is a 15-member commission and the Chairman is always a lay member. Of the 14 other commissioners, it is mandatory that five are judicial members, two are professional members, five are lay members, one is a tribunal judge and another is a non-legally qualified judicial member. The current JAC in the U.K. has two professors in it. The commissioners are appointed in their own right and are not representatives of the professions they come from. The diversity of the commission makes it inclusive and enables each member to bring the knowledge, expertise, and most importantly, the independence of mind and the versatility of experience to the selection process.

Over the last few decades, different forms of biases and prejudices have infused the selection processes and the working of committees. The role of government representatives in the appointment of judges should be eliminated or at least significantly reduced. There are a number of legal, constitutional and policy reasons for this, but the most important is the changing dimensions of constitutional governance. Today, the government is the largest litigant in the courts. Every law, rule, regulation, policy and decision of the government has come into sharper legal and constitutional scrutiny. This change is not just a marginal change in the way India is governed, but a substantive one which has wide-ranging consequences for constitutional governance.

The influence of the government in any form in the appointment process of the judges affects the independence of the judiciary. If the purpose of the government and society is to ensure accountability of the judiciary and provide a greater degree of transparency in the appointments of judges, this can be ensured even without government representatives and political actors serving as members in the JAC.

The way forward

There is a great opportunity for the new government to recognise the importance of the judiciary as an institution that safeguards the character of our democracy. If constitutionalism and democratic governance are going to the basis for measuring the effectiveness of institutions, then the JAC should reflect that vision. In its current form in the draft legislation, it does not. Hence, a wider degree of consultation and participation of all stakeholders is needed.

(C. Raj Kumar is vice-chancellor of O.P. Jindal Global University, Haryana.)