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NJAC out, collegium needs reform

C. Raj Kumar

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The Supreme Court of India, in a landmark verdict, declared the 99th Constitutional Amendment and the National Judicial Appointments Commission (NJAC) Act void and unconstitutional. While this is not an entirely unexpected consequence from the standpoint of the legal and constitutional framework provided for the establishment of the NJAC, the Supreme Court has upheld the values of constitutionalism and independence of judiciary — a "basic structure" of the Constitution. The court called it a "collective order".

Independence of judiciary is one of the basic aspects of the constitutional framework. Our Constitution envisaged a judiciary absolutely independent from influences of the legislature and the executive. The Supreme Court carefully examined Article 124A(1) of the Constitution, which provides for the Constitution and composition of the NJAC.

Besides the Chief Justice of India (CJI) and the two other senior judges of the Supreme Court, who are ex-officio members of the NJAC (clauses (a) and (b) of Article 124A(1)), it has the Union law minister and two eminent persons to be nominated to serve as members of the NJAC.

There have been many decisions in the past, which have reinforced the fact that the independence of judiciary is a basic structure of the Constitution. The court was convinced that the NJAC — with three judges of the Supreme Court and three other members who are not expected to belong to the judiciary — would undermine the independence of judiciary. It concluded that, "…clauses (a) and (b) Article 124A(1) are insufficient to preserve the primacy of the judiciary in the matter of selection and appointment of judges… The same are accordingly, violative of the principle of 'independence of judiciary'."

The Supreme Court was conscious of the fact that the new framework envisaged the Union law minister to serve as a member of the NJAC under clause (c) of Article

124A(1). This provision makes the executive directly involved in the deliberations relating to the appointment of judges.

The court had two concerns on this matter and held, "...clause (c) of Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union minister in charge of law and justice as an ex-officio member of the NJAC... impinges upon the principles of 'independence of the judiciary' as well as, 'separation of powers'."

Further, the presence of the CJI in the three-member selection committee to select two "eminent persons" with other members being the Prime Minister and the Leader of Opposition puts the CJI in an awkward situation.

Past experience has demonstrated that governments have used these opportunities to negotiate different positions and appointments that will best reflect their own interests.

When it comes to judicial appointments and, in particular, the participation of the CJI in this procedure makes this process different from other such appointments. There cannot be negotiations of the "give and take" kind that is envisaged in other committee processes. The institutional integrity of the office of the CJI needs to be protected.

There is little doubt that the collegium system has been fraught with problems. The SC's judgment has provided an opportunity for the court to be both self-critical and reflective in addressing the most important challenge of ensuring greater transparency and integrity in the appointment of judges.

One of the ways by which transparency is promoted is by making the process of appointment of judges democratic in nature.

One of the significant drawbacks of the collegium system of judges exercising absolute powers to appoint judges is the complete lack of transparency in the procedure and process of appointments. Nobody outside the system knew as to why some judges were appointed and some others were rejected.

Democratic governance expects a higher level of transparency in the appointment of judges and any effort to reform the collegium system cannot legitimise the undemocratic system of allowing veto powers to a few members for rejecting nominees without assigning any reason.

The credibility of the judiciary is indeed at stake and it has to get its act together with a view to addressing some of the central questions that all stakeholders in the justice system are asking.

What steps the judiciary will take with a view to reforming the existing collegium system? What will the Supreme Court do to ensure that the collegium system is significantly transformed with a view to infusing transparency and procedural fairness

in the selection of judges to the high courts and Supreme Court? How will the judiciary restore the faith of all actors in the legal system that judicial appointments will take place through a selection process that will withstand legal and constitutional scrutiny?

There is a strong expectation that a collective and participative process will begin on November 3, when the court will begin to hear this matter in relation to the suggestions for improving the collegium system.

The writer is the founding vice-chancellor of O.P. Jindal Global University and dean of Jindal Global Law School. He can be contacted at VC@jgu.edu.in