



## THE INFORMAL CONSTITUTION – BOOK REVIEW

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Judicial appointments and, in particular, the collegium system have presented themselves as issues for academic and popular debate in India, at regular junctures.<sup>2</sup> While many have analyzed at length the effectiveness of the collegium system in protecting the independence of the judiciary, the most telling results appear to have been arrived at by a book that, ironically, expresses an intention to eschew any direct normative analysis of judicial appointments in India.<sup>3</sup>

Indeed, Abhinav Chandrachud's *The Informal Constitution*<sup>4</sup> does not directly concern itself with an examination of the legitimacy of the collegium system or its failings, a subject which the author himself notes as being saturated in legal literature. Instead, the author seeks to identify various factors that have evolved into eligibility criteria, influencing judicial elevations to the Supreme Court in India. The author identifies three factors in this regard:

“a) a judge should be at least 55 years of age in order to be considered eligible to be appointed to the Supreme Court, b) he should be a senior high court judge, or, especially over the last 20 years, the chief justice of a high court, and c) judges should reflect the geographic (and demographic) diversity of India, that is judges are selected to the Supreme Court by taking into account the state or region they belong to, and whether they

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<sup>2</sup> The uniqueness of this system that existed until recently in India, where Judges alone appoint other Judges to the higher judiciary, has perhaps prompted such extensive analysis of its workings. See N.R. Madhava Menon, *Berkeley Seminar Series on Law and Democracy*, University of California (September 2008), available at <<http://indiandemocracy08.berkeley.edu/docs/Menon-LawANDJustice-ALook%20.pdf>> (last visited on 23-1-2015).

<sup>3</sup> An extensive backgrounder on the debate over the collegiums system is available in the 214<sup>th</sup> Report of the Law Commission of India, Proposal for Reconsideration of Judges cases I, II and III (2008).

<sup>4</sup> Abhinav Chandrachud, *THE INFORMAL CONSTITUTION* (New Delhi: Oxford University Press, 2014).

belong to non-traditional backgrounds, in terms of religion, caste, or gender.”<sup>5</sup>

The author identifies and examines these, not as the singular considerations that determine appointments but as inviolable criteria that every candidate must satisfy “*no matter how meritorious ... [he] may be.*”<sup>6</sup> Such examination, despite the recent shift from the collegiums system, serves not only to better inform legal literature on judicial appointments and to showcase the existence of constitutional conventions within the framework of our written constitution, but also as damning evidence against the erstwhile system. In this regard, the author’s work achieves contemporary significance.

However, before proceeding on to these implications arrived at from the author’s work, it is necessary to examine each of the aforesaid points of examination adopted by him.

## I. THE AGE CRITERION

The author examines the issue of whether an informal, minimum age requirement exists and further proceeds to consider the policy objective behind such a minimum age requirement as well as the consequences of the same. The stated policy objective for following the norm of a minimum age of 55 is that a judge would attain a certain degree of maturity at this age and, as such, shall make better candidates for elevation to the high court.<sup>7</sup>

The author critiques this minimum age requirement as a means to ensure a certain degree of path dependence prior to elevation. However, the study does not conclusively determine how a candidate’s age is causal to his elevation. It is pertinent, in this regard, to highlight the fine distinction between age and experience, i.e. the number of years that a candidate has spent as a legal practitioner or high court judge before being considered for elevation to the Supreme Court. In fact, one would consider that the ‘maturity’ of a judge is relatable to experience rather than age. To cite an example, a certain judge may have been appointed to the Bench at a younger age whereas another may be older in age but be a relatively new appointee having fewer years of experience on the Bench.

The author, indeed, has examined other possible eligibility criteria including gender and a legal background, only to dismiss these as being incidental but not determinative factors that influence appointments. As the author observes, “*correlation is not causation.*” (citation needed, for the specific page number) As stated

<sup>5</sup> Abhinav Chandrachud, *THE INFORMAL CONSTITUTION* 3 (New Delhi: Oxford University Press, 2014).

<sup>6</sup> Abhinav Chandrachud, *THE INFORMAL CONSTITUTION* 264 (New Delhi: Oxford University Press, 2014).

<sup>7</sup> 80<sup>th</sup> Report of the Law Commission of India, *Appointment of Judges*, at 22-23 (1979).

hereinabove, experience rather than age would influence the maturity of the judge. Therefore, the criterion of ‘age’ appears to be lacking a rational nexus with its stated policy objective. Furthermore, age can also be seen as an incidental fact that accompanies seniority in so far as senior judges and especially Chief Justices of High Courts in India would have attained an advanced age, of say 55 years, before they attain such level of seniority.

Thus, a shadow of doubt may be cast over the positioning of age as one of the informal eligibility criterion and, although this review can boast of no empirical basis for its conclusion, it would appear *ex facie* that: i) experience on the bar or the bench would have a causal link to a candidate’s maturity rather than his physical age; and ii) age is a factum that accompanies seniority, perhaps inextricably so, and while the author’s data undoubtedly highlights seniority as a factor for eligibility in appointments, age (especially without seniority) enjoys no existence as an independent factor for consideration as an eligibility criterion.

Despite the same, merit is to be found in the author’s conclusion that the elevation of progressively older judges has resulted in smaller tenures in the Supreme Court.<sup>8</sup> This has, in turn, resulted in more judges being elevated to the Supreme Court and, as such, has perhaps incentivized more practitioners to accept appointments on to the Bench. However, this practice has also reduced judicial activism as an individual judge has little opportunity to make an impact because the candidates would be nearing retirement before they could fully accustom themselves and attain seniority as a judge of the apex Court. In the author’s words, while the collegium has pursued “*institutional independence*” by insulating appointments from executive control, their aforesaid practise has led to less “*individual independence*” for Apex Court judges.<sup>9</sup> Thus, the study convincingly postulates how the collegium system had changed little about judicial activism, except perhaps to diminish it.

## II. THE SENIORITY CRITERION:

The second eligibility criterion that has been traced by the author, i.e. seniority, is perhaps the most sacred and irrefutable amongst the three. The author traces the history of the practice of basing judicial appointments on the seniority of judges across High Courts, also examining the various occasions when seniority has been disregarded for practical and political reasons. Indeed, a large portion of the author’s contribution to the existing legal literature in this regard is that he provides a comprehensive understanding of the weight that has been given to seniority in: i) the British era, ii) the period from independence until the *Judges* cases (most notably the Emergency period), i.e. the period when

<sup>8</sup> Abhinav Chandrachud, *THE INFORMAL CONSTITUTION* 181 (New Delhi: Oxford University Press, 2014).

<sup>9</sup> Abhinav Chandrachud, *THE INFORMAL CONSTITUTION* 183 (New Delhi: Oxford University Press, 2014).

the executive still enjoyed some control over appointments and when political appointments and supercessions could occur even at the highest level; and iii) most significantly, the 'collegium era' when seniority has evolved into a determinative criteria for elevations.

Although the author stresses that seniority remains a grounds for eligibility but not expectation of elevation, even his comprehensive study unearths no instances of seniority being overridden in the 'collegium era'. Another significant aspect of the author's study is his identification of the original intent behind prescribing different ages of retirement for High Court and Supreme Court judges, i.e. 60 and 65 respectively. The author throws light upon how the same was intended to incentivize senior High Court judges to take up an elevation to the Supreme Court in a relatively junior position by adding years to their tenure of judgeship. He also concludes how the reasoning is perhaps lost today when elevation to the apex Court is considered the pinnacle of a judge's legacy and, in doing so, also puts forward a convincing case for scrapping the difference in retirement ages between High Court and Supreme Court judges.

### III. THE DIVERSITY CRITERION:

The third criterion, which the author describes as the 'most controversial', is also the criterion he is most critical of, and perhaps rightly so. The basis for the author's critique has been the erstwhile collegium's focus on geographical diversity and ensuring that every region of the country is adequately represented. This focus on geographical diversity, while ensuring political correctness, results in ethnic, sexual and other minorities going unrepresented on the Bench. A stark example, which the author highlights, in this regard is the fact that there have been little more than a handful of female judges who have been elevated to the Supreme Court.<sup>10</sup>

Indeed, the criterion of diversity, as it has been put into practice, is little more than symbolic; and the author successfully highlights how a vast majority of Supreme Court judges belong to the same professional background, having served as High Court judges. Although the Constitution itself allows for the appointment of 'distinguished jurists' on the Bench, inspired as the author notes by the noted American academician and Supreme Court judge Phillip Frankfurter, the same has rarely been implemented in practice.

Perhaps the very criterion of diversity can only amount to lip-service in a Court which rarely convenes plenary sittings and sits in small two-judge benches in most matters. In fact, the author himself concludes stating that diversity in the

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<sup>10</sup> Abhinav Chandrachud, *THE INFORMAL CONSTITUTION* 257-258 (New Delhi: Oxford University Press, 2014).

Supreme Court remains symbolic more than substantive.<sup>11</sup> It is undeniable that diversity, especially in a majoritarian democracy, is often limited as a means to cover the “*democratic illegitimacy*”<sup>12</sup> of the judges through an equitable distribution. However, even such symbolism would be worth preservation as it helps to ensure that more members of minority sections are incentivized to practise the profession.

#### IV. THE COLLEGIUM QUESTION

Thus, the author identifies the various informal criteria that inform elevations to the Supreme Court in India. Indeed, the author succeeds not only in tracing the evolution of each of these criteria historically, but also the practical consequences that have been borne out of each of these criteria such as the impact of the informal minimum age and consequently reduced tenures on judicial activism, the use of different retirement ages for High Court and Supreme Court judges to incentivize senior High Court judges to accept elevations to the Supreme Court etc.

However, as stated at the very outset, the most significant result that the author’s study achieves is the one that must be drawn by implication: that the collegium system, as it existed, following the three *Judges* cases had only achieved the following results:

The informal eligibility criteria of age, seniority and diversity have remained largely unchanged under the collegium system. In fact, the author traces how the adherence to elevating older, more senior judges has progressively increased under the collegium system. As noted hereinabove, this has resulted in reduced individual independence for judges. As such, though the collegium system has increased institutional independence by internalizing the elevation process, the same has failed to result in the creation of a more robust or activist judiciary.

Therefore, empirically, the criteria influencing appointments in the collegium era has largely remained unchanged. Radical and progressive appointments accounting for jurists from diverse, heterogeneous backgrounds have not been seen. In essence, the collegium has only succeeded in creating a more secretive process of appointments, breeding suspicion through its opacity, rather than achieving any tangible improvements in judicial appointments.

While politically-motivated supercessions such as those that had occurred during Indira Gandhi’s era have undoubtedly reduced, the aforementioned opacity has resulted in an even greater degree of arbitrariness in appointments where,

<sup>11</sup> Abhinav Chandrachud, *THE INFORMAL CONSTITUTION* 261-262 (New Delhi: Oxford University Press, 2014).

<sup>12</sup> Abhinav Chandrachud, *THE INFORMAL CONSTITUTION* 260 (New Delhi: Oxford University Press, 2014).

as the author notes, a single hushed whisper may destroy a jurist's chances of elevation.

Most significantly, the credibility and constitutional validity of the system is also thrown in question. The author, while noting that the collegium system lies against the original intent of the draftsmen of our Constitution, justifies the same on the basis that the constituent assembly was not a body constituted by universal adult suffrage and some of its members had been nominated instead of being elected.<sup>13</sup> As such, the principle of original intent is not inviolable and provides basis for the creation of a collegium system. However, the application of this rationale to justify the collegium system is fallacious in as much as the collegium itself is such a body that has not been constituted in a democratic manner through any popular mandate. Therefore, contravening the original intent, citing the lack of the constituent assembly's popular mandate, to create such an institution is also lacking in any sound legal basis.

## V. CONCLUSION

The author has performed not only a thorough analysis of the informal eligibility criteria that have influenced elevations to the Supreme Court, examining how these have evolved historically through a qualitative and quantitative analysis of the same, but also has successfully identified the advantages and disadvantages of the same. While the existence of such unwritten conventions enables judicial appointments to escape rigid criteria and evolve in an organic manner, the same can also lead to arbitrary appointments without any clear bases. In these circumstances, the constitution of the appointing body attains greater significance as its legitimacy becomes essential to confer legitimacy upon the appointments that are made outside any strict, written framework.

Whether the collegium system was such an institution can also be understood from the results of the author's analysis. In this regard, the author has carried out a pioneering study, quantitative and qualitative, of judicial appointments in the collegium era. Although he has avoided any direct normative analysis of the system's merits, the aforementioned results of this analysis clearly expose the failure of the collegium system. The National Judicial Appointments Commissions perhaps presents an alternative, and the author's study and the results of the same can, in great measure, aid in the design of the appointment criteria to be considered to implement a better system for judicial appointments in India.

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<sup>13</sup> Abhinav Chandrachud, *THE INFORMAL CONSTITUTION* 67-68, 274 (New Delhi: Oxford University Press, 2014).

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