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AN EMPIRICAL ASSESSMENT OF THE COLLEGIUM'S IMPACT ON COMPOSITION OF THE INDIAN SUPREME COURT

—Rangin Tripathy* and Soumendra Dhanee**

Abstract Much of the legal scholarship on the collegium system of appointing judges in India has revolved around its constitutionality. This paper is based on the premise that an empirical investigation of the collegium's functioning is equally important. With an analysis of data spanning over seventy-two years, we have highlighted how the collegium has altered the composition of the Supreme Court. While the regional diversity of the court has improved in a relative sense, professional diversity in the court has deteriorated alarmingly. Lawyer-judges have acquired a complete hegemony at the expense of judges having a career in the lower judiciary. Judges from different parent High Courts have more equitable representation in the court. The collegium has adopted a policy of shorter tenure for judges and significantly reduced the number of judges having a tenure beyond eight years.

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I. INTRODUCTION

In India, since 1993, judges in the higher judiciary have been appointed by a collegium of judges instead of the executive. The collegium system was established by a judicial decision in 1993[1] and has been fortified by two other judicial decisions in 1999[2] and 2015.[3] Headed by the Chief Justice of India, the collegium includes four senior most judges of the Supreme Court when appointing a judge in the Supreme Court and two senior-most judges of the Supreme Court when appointing judges in the High Courts. There have been multiple legislative initiatives, without any success, to abolish the collegium system. The latest such effort, constitutional amendments establishing the National Judicial Appointments Commission, was struck down by the Supreme Court in 2015. For the time being, the collegium appears to be a permanent constitutional reality.

Since the collegium's inception, there has been an ongoing debate on its constitutionality and desirability. Those who oppose the collegium question the democratic legitimacy of a system where unelected judges have substituted the constitutional role of elected representatives. Those who support the collegium system highlight the threat to judicial independence from the executive. Commentaries on the collegium system have been mostly conceptual and doctrinal.[4]

However, there has been limited empirical research on the impact of the collegium on the judiciary. In fact, the extent of empirical research on the Indian judiciary as such is limited. Connected to the line of enquires explored in this paper, Gadbois has done some commendable work by painting a comprehensive image of the Supreme Court's composition from 1950 to 1989.[5] Gadbois had also contributed to an empirical understanding of the Supreme Court in his earlier works.[6] More recently, Chandrachud has continued some threads of

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1 *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441 : AIR 1994 SC 268 ('SCORA 1993').

2 *In re Special Reference No 1 of 1998* (1998) 7 SCC 739 : AIR 1999 SC 1.

3 *Supreme Court Advocates-on-Record Association v Union of India* (2016) 5 SCC 1 ('SCORA 2015').

4 Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India* (Oxford University Press 2018); Santosh Paul (ed), *Choosing Hammurabi: Debates on Judicial Appointments* (Lexis Nexis 2013).

5 George H Gadbois Jr, *Judges of the Supreme Court of India 1950-1989* (Oxford University Press 2011).

6 George H Gadbois Jr, 'Indian Supreme Court Judges: A Portrait' (1969) 3 Law and Society Review 317; George H Gadbois Jr, 'Indian Judicial Behaviour'(1970) 5(3/5) Economic & Political Weekly 149.

Gadbois' work[7] in his study of the Supreme Court judges from 1985 to 2010.[8] In relation to an empirical examination of the collegium's effect on the judiciary, Tripathy and Rai have compared the appointees of collegium and executive in the context of their tenure.[9] Alok Prasanna Kumar has also looked into the issue of tenure.[10]

This paper is an effort to mitigate the deficit of research in understanding the impact of the collegium. While it is important to engage with the phenomenon of collegium at a conceptual and analytical level, it is equally important to examine its effect in more tangible terms. This paper examines how the composition of the Supreme Court has changed under the collegium. Majority of the data for this paper has been obtained from the website of the Supreme Court of India[11] and through personal interviews. For the data which was not available in the Supreme Court website, previous works of Chandrachud[12] and Gadbois[13] have been helpful.

To be clear, unlike some other countries, in India, there is no constitutional or legal mandate for diversity in the composition of the judiciary on any identity marker (race, caste, religion, gender etc.). For example, there is a clear provision in United Kingdom that, at any point of time, the judges of the Supreme Court collectively between them will have knowledge and experience of the laws of each part of the United Kingdom.[14] This ensures that there is proper regional representation in the Supreme Court. In South Africa, the judiciary is required to broadly reflect the racial and gender composition of the South African society.[15] However, even without a constitutional mandate, it is worthwhile to explore the issue of composition as the extent of diversity and homogeneity reflects the power dynamics within the system. A historical trend of imbalanced representation is a credible indicator of marginalization in the governance mechanism.

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7 Chandrachud has not referred to the Gadbois's work in 2011 and only refers to his earlier works in 1969 and 1970. It seems the book by Gadbois was published only after Chandrachud had completed his work.

8 Abhinav Chandrachud, 'An Empirical Study of the Supreme Court's Composition' (2011) 46 (1) Economic and Political Weekly 71.

9 Rangin Pallav Tripathy and Gaurav Rai, 'Judicial Tenure: An Empirical Appraisal of Incumbency of Supreme Court Judges' in Shruti Vidyasagar, Harish Narasappa and Ramya Sridhar Tirumalai (eds), *Approaches to Justice in India- A Report by DAKSH* (Eastern Book Company 2017).

10 Alok Prasanna Kumar, 'Mapping the Appointments and Tenures of Supreme Court Judge' (2020) 55 (16) Economic and Political Weekly.

11 <https://sci.gov.in/> accessed 21 October 2019.

12 Chandrachud (n 8).

13 Gadbois (n 5).

14 Constitutional Reforms Act 2005, s 28 (7).

15 Constitution of the Republic of South Africa 1996, s 174 (2).

Broadly, this paper highlights the following findings: (1) The collegium has facilitated a greater hegemony of lawyer-judges within the judiciary in India.[16] The term 'lawyer-judge' refers to a person who becomes a judge in the higher judiciary at a later point in life after having established a professional practice in lawyering. Thus, a person is appointed as a judge in the higher judiciary because of her accomplishment as a lawyer and not on the basis of prior judicial experience. This is in contrast to 'career judges' who enter the judicial service at the entry level and then proceed to rise in the ranks through internal service norms. In a comparative framework of judicial appointments, these contrasting routes to the highest judicial offices can be characterized as 'recognition judiciaries' and 'career judiciaries'.[17] The hegemony of lawyer-judges has manifested in three ways. Firstly, and most critically, the collegium has drastically reduced the number of Supreme Court judges who previously served as judicial officers in the lower judiciary.[18] Secondly, lawyer-judges have a longer intended tenure than judges who were career professionals in the lower judiciary. Thirdly, Supreme Court appointees from High Court cadre ('HC cadre') (Service) have had a disproportionately low share of intended tenure compared to the appointees from HC cadre (Bar). Fourthly, the collegium has appointed more judges to the Supreme Court directly from the Bar in twenty-six years than the executive did in forty-six years. (2) The collegium has done a better job at ensuring regional diversity in the Supreme Court than the executive. While there is still a noticeable imbalance, the margins of disparity have reduced under the collegium. This is true both in terms of the number of appointees and the intended tenure of such appointees. (3) There has been a substantial decrease in the tenure of judges appointed by the collegium. The general trend of shorter tenures was also highlighted by Chandrachud[19] but he looked at the period between 1985 and 2010 as a continuous phase and did not compare the appointees under the executive and the collegium. This paper is also different from the findings of Tripathy and Rai[20] in an important aspect. Tripathy and Rai compared the actual tenure of judges appointed by the collegium and the executive. This paper looks into the intended tenure of judges

[16] The term lawyer-judge refers to judges who,before becoming a judge either in the High Court or the Supreme Court, spent their career in advocacy instead of serving in the lower judiciary. This includes Supreme Court judges who have been directly appointed from the Bar and Supreme Court judges appointed from the HC cadre (Bar).

[17] In 'career judiciaries', there is no lateral entry to the highest judicial offices and the only way to occupy such offices is to become a judge at the entry level and then progress through internal promotions. In 'recognition judiciaries', professionals (typically lawyers but not exclusively so) having established a reputation in another domain are appointed as judges even though they might not have had previous experience of judging. For more, see Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015) 16.

[18] In calculating this, we have identified judges who served in the lower judiciary at any point of time in their career. It includes judges who entered the judiciary at the entry level. It also includes judges who had a lateral entry into the judiciary after having practiced law for a number of years.

[19] Chandrachud (n 8).

[20] Tripathy and Rai (n 9).

which is a better indicator of the intentions of the appointing authority as to how they plan to shape the composition of the court. This paper also adds six years of additional data to the research.

Judges appointed on May 24, 2019 have been identified as the cut-off data point. Appointments made after the said date has not been considered. As on May 24, 2019, we had 109 judges appointed by the executive and 132 judges appointed by the collegium. Two judges were appointed before India gained independence and thus cannot be said to have been appointed by the executive. All the appointments have been divided into two categories; executive appointees and collegium appointees. This is different from the recent approach adopted by Alok Prasanna Kumar wherein the period under the executive (1947-1993) has been subdivided into two different segments with the tenure of S.M. Sikri as the Chief Justice as the dividing line.[21] This approach stems from observations made by Gadbois,[22] wherein an increased intervention by the government in the matter of judicial appointments has been noted. Gadbois notes that till 1971, the governments usually deferred to the decisions of the Chief Justice but this changed in 1971 when S.M. Sikri assumed the office. Starting from 1971, the executive practiced a more interventionist approach and did not accept the recommendations of the Chief Justice as a matter of routine. This approach of splitting the period under the executive based on the degree of dominance practiced by executive has not been adopted in this paper based on two considerations. The first consideration revolves around the data on appointments and the other is a thematic concern. Firstly, as Gadbois himself notes, the government did not adopt a uniform approach after 1971 and it varied in relation to different chief justices. Also, Gadbois provides an account of appointments only till 1989 and there is no record of the appointments between 1989 and 1993. Secondly, the fact that the authority to make a final determination on appointments vested with the executive prior to 1993 is indisputable. The practice of deferring to the decision of the Chief Justice was as much an exercise of this authority as the tendency to reject the recommendations of the Chief Justice. The executive generally deferred to the recommendations of the Chief Justice not pursuant to a constitutional obligation but as a strategic exercise of its authority. On the other hand, under the collegium system, the executive has a secondary role as a matter of obligation. While the approach of Kumar is useful in deciphering the factors which may contribute to the manner in which the government exercised its authority, for the purposes of this paper, the fact that the authority vested with the executive precludes the adoption of such an approach.

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[21] Kumar (n 10).

[22] Gadbois (n 5) 153-4.

II. PROFESSIONAL DIVERSITY IN THE SUPREME COURT: THE HEGEMONY OF LAWYER-JUDGES

The issue of diversity in the higher judiciary is usually discussed around factors such as gender, religion, caste, and regional representation. A point which has been thoroughly overlooked in this respect is the issue of professional background.[23] Barton, in his study of the American judiciary,[24] has shown how systemic biases (in favour of legal profession) can creep in due to the predominance of lawyer-judges in the composition of the judiciary. He has shown how the courts in America, regardless of the variance in the other identity indicators of judges, have consistently and unfairly favoured the interests of the legal profession through legally suspect judicial decisions. In this context, one can take the example of *Sahyers* v. *Prugh, Holliday & Karatinos, PL*,[25] where the US Court of Appeals for the Eleventh Circuit ruled contrary to settled statutory law. In this case, the court created a legal expectation on the plaintiff's lawyer to notify the defendant, a law firm, before instituting a suit under the Fair Labour Standard Act. The statute prescribed no requirement of prior notification. However, the court carved an exception only because the defendant was a law firm. The power to create this exception was sourced to the court's role in maintaining a proper condition of the legal community. The decision suggested that when the defendant is a law firm, it would be legally expected to establish prior communication so that a suit might not be needed even though such a requirement would not be expected in case of any other defendant. For this perceived lack of courtesy to fellow professionals, the plaintiff's lawyer was denied his attorney's fees even though the courts did not have any discretion in this matter under the statue.

A homogeneity of professional background is also likely to limit the range of skills at the Bench's disposal and prevent alternate approaches to emerge. A lack of diversity in the professional background of judges can trigger direct and latent prejudices in the judicial process affecting the very administration of justice.

There are three streams of professional background from which a person can be appointed as judge in the Supreme Court; judges of High Courts (HC Cadre), practicing advocates (Bar) and distinguished jurists.[26] While these three streams exist in theory, the overwhelming majority of the judges in the Supreme Court are appointed from the HC cadre. Only 3% of the judges in

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[23] In India, there has been some work in this respect recently by Alok Prasanna Kumar. He has looked into the professional background of High Court judges. See Alok Prasanna Kumar, 'Absence of Diversity in Higher Judiciary' (2016) 51(8) Economic and Political Weekly 10.

[24] Benjamin H Barton, *The Lawyer-Judge Bias in the American Legal System* (Cambridge University Press 2011).

[25] 560 F3d 1241 (11th Cir.2009).

[26] Constitution of India 1950, art 124 (3).

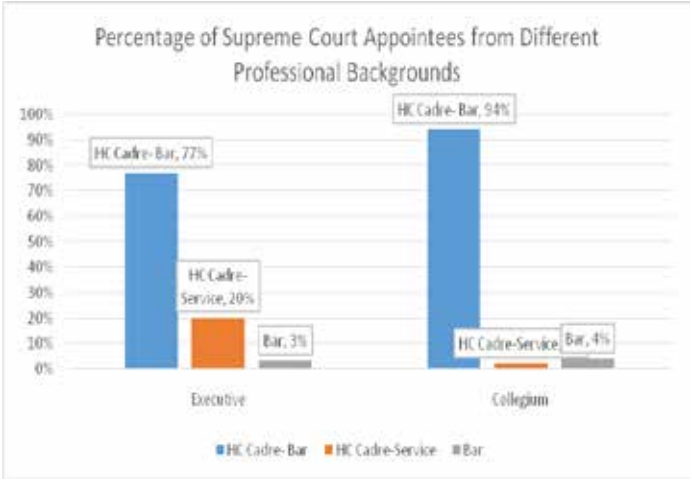
the Supreme Court have been appointed without ever having been a judge in any of the High Courts. These departures have exclusively been instances of practicing advocates being directly appointed as judges in the Supreme Court. No jurist has ever been appointed as a judge in the Supreme Court. To become a member of the HC cadre, there are two streams of professional background which provide an eligibility: judicial officers in the lower judiciary (Service) and practicing advocates (Bar).[27]

A. Proportion of Appointees from Different Professional Backgrounds

In general, when judges from High Courts are appointed to the Supreme Court, it is from amongst such judges who were appointed to the High Court from the Bar (HC cadre- Bar).Overall, only 12% of the Supreme Court judges appointed from amongst the HC cadre have had any experience of serving in the lower judiciary. This figure drops to 10% when we consider only such judges who were appointed to the High Court while still serving in the lower judiciary. 2% of the judges were appointed after they had left their service in the lower judiciary and were pursuing the profession of advocacy. It would be inaccurate for them to be characterized as belonging to HC cadre (Service). While it already had a lopsided pattern under the executive, this trend has acquired an extremity under the collegium. While only 21% of the executive appointees in the Supreme Court had any experience in the lower judiciary, the corresponding number for the collegium is 5%. Again, when we count only such judges who were appointed in the High Court while still serving in the lower judiciary (HC cadre - Service), these figures drop to 20% and 2% (Figure 1). The drastic increase in the influence of lawyer-judges can also be seen in the number of lawyers appointed as judges in the Supreme Court without any prior experience of judgeship at any level. In its forty-six years of functioning, the executive appointed only three lawyers directly to the Supreme Court. On the other hand, in its twenty-six years of functioning, the collegium has made five such appointments.

[27] Constitution of India 1950, art 217 (2).

Figure 1: Percentage of Supreme Court Appointees from Different Professional Backgrounds



B. Comparing Intended Tenure

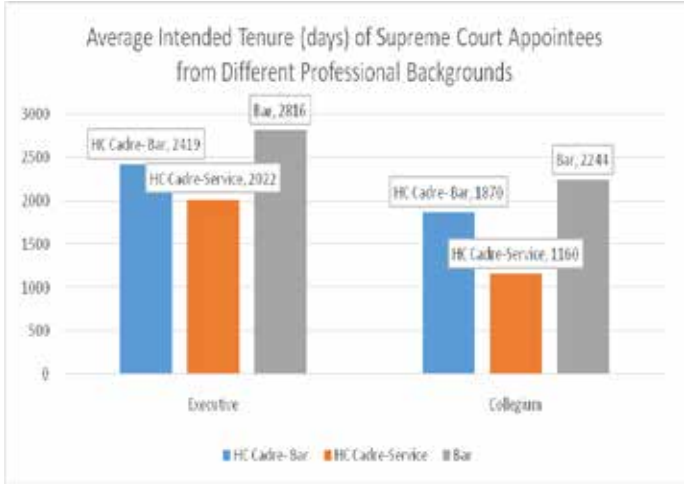
This influence of lawyer-judges is not simply reflected in the number of appointees but also in the tenure of such appointees (Figure 2). An issue in comparing tenure is in relation to judges who did not complete their tenure due to death or resignation. However, in this paper, we have calculated the tenure such judges would have had if they had completed their tenure. As we are looking into the influence of judges from different professional backgrounds in the selection process, it is helpful to keep in the mind the tenure that the appointing authority expected its appointees to have at the time selection. Thus, this analysis compares the intended tenure that judges would have had and not the actual tenure they had.

The average intended tenure of a judge in the Supreme Court appointed by the executive from the HC cadre was 2337 days and of a judge appointed directly from the Bar was 2816 days. Under the collegium, the average intended tenure of judges appointed directly from the Bar is 2244 days andof judges from the HC cadre is 1853 days. Thus, the collegium has broadly continued the trend of judges from the Bar having markedly longer tenure than the judges from the HC cadre although the difference in tenure is slightly less under the collegium (391 days) than it was under the executive (479 days).

However, the collegium has intensified the disparity in the intended tenure of Supreme Court judges from the HC cadre (Bar) and HC cadre (Service). The average intended tenure of Supreme Court judges from the HC cadre (Service) under the executive was 2022 days. For judges from HC cadre (Bar),

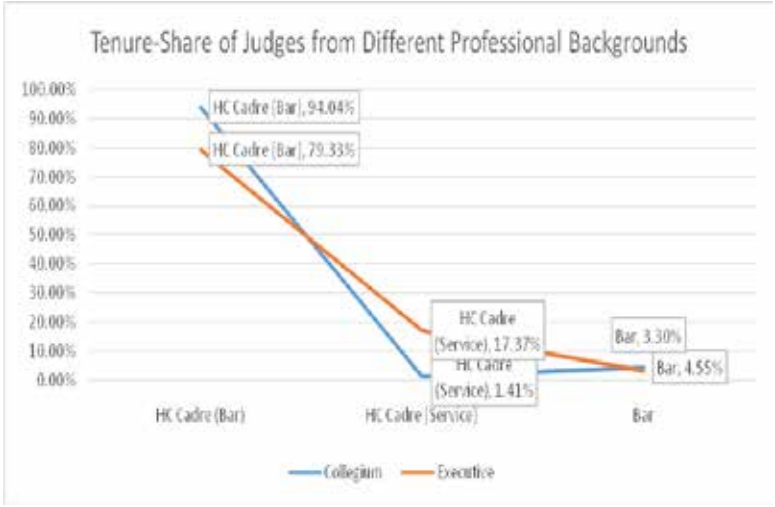
it was 2419 days. The average intended tenure of Supreme Court judges from the HC cadre (Service) under the collegium is 1160 days and that of the judges from HC cadre (Bar) is 1870 days. The collegium has increased the difference in intended tenure by 79%. Not simply is it rare for the collegium to allow judicial officers in the lower judiciary to reach the Supreme Court, it also intends them to have significantly shorter tenure compared to other judges.

Figure 2: Average Intended Tenure (Days) of Supreme Court Appointees from Different Professional Backgrounds



The extent of disparity in the tenure-share of the judges from different professional backgrounds is broadly similar to their proportion of appointments (Figure 3). Tenure-share is the share of judges in the combined intended tenure of all appointees. Judges from HC cadre (Bar) constituted 77% of all Supreme Court appointees under the executive and had 79.33% of tenure-share. Under the collegium, judges from HC cadre (Bar) constitute 94% of its Supreme Court appointees and also have 94.04% of tenure-share. Judges from HC cadre (Service) are the worst affected under the collegium. While they already constituted a miniscule 2% of collegium's Supreme Court appointees, their tenure-share is only 1.41%.

Figure 3: Tenure-Share of Judges from Different Professional Backgrounds



Of the forty-six chief justices that the Supreme Court has had (J. Ranjan Gogoi being the last one covered in this study), only three had prior experience in the lower judiciary before being appointed as a judge in any High Court. While J. K.M. Wanchoo was appointed by the executive, J. K.G. Balakrishnan and J.R. Lahoti were appointed by the collegium. However, both J. K.G. Balakrishnan and J.R. Lahoti had left their judicial service and were practicing advocates when they were appointed as judges in the High Courts. Thus, in seventy-two years since India's independence, there has been only one Chief Justice in the Supreme Court who was from the Service stream of the HC cadre. In twenty-six years, only 2% of the collegium's Supreme Court appointees have been from the Service stream of the HC cadre and none of them has assumed the office of the Chief Justice.

III. REGIONAL DIVERSITY IN THE SUPREME COURT: A LESS UNEQUAL BALANCE

While looking into the composition of the Supreme Court, regional diversity is an insightful parameter. It is important to remember that the provincial division of India was not an administrative exercised based on efficient management of territories. Rather, the delineation of regional provinces was based on an assertion of distinct linguistic and cultural identities. Thus, in the Indian context, the issue of regional representation becomes relevant in any analysis focusing on distribution of and access to position of powers and influence within a constitutional machinery. Additionally, the Indian Supreme Court is not only a constitutional court but also an appellate court hearing appeals originating from different parts of the country based on local laws applicable

only in particular states. The regional diversity mandate in United Kingdom is premised on this very requirement of functional expertise concerning regional laws. Thus, it would be instructive to examine the composition of the Indian Supreme Court from this perspective.

As we have already seen, an overwhelming majority of the Supreme Court judges (97%) are appointed from the HC cadre. Regardless of the appointing authority, it is well established that certain High Courts have been better represented in the Supreme Court[28] than the rest. The issue of representation of High Courts in the Supreme Court needs to be explored from two perspectives. The first and the obvious way is to look at the number of appointees from different High Courts.[29] The other way to look at the issue is to calculate the time-share of different High Courts in the Supreme Court.[30] This takes into account the amount of time spent in the Supreme Court by judges coming from different High Courts.

It is necessary to clarify some methodological choices. Tracing the parent High Court of Supreme Court judges is not a straightforward exercise. The parent High Court is the High Court where the person first becomes a judge and not the High Court where he or she served before being appointed to the Supreme Court. Since India's independence, many High Courts have been dissolved, merged, and created. For example, High Court of Mysore has ceased to exist and its jurisdiction has been taken over by the High Court of Karnataka. When new High Courts are created, typically, they take over the jurisdiction of a geographical area which was earlier under another High Court. For example, the High Court of Madhya Pradesh lost jurisdiction over the geographical area of Chhattisgarh when the new state was carved out of Madhya Pradesh and the Chhattisgarh High Court was established. Similarly, High Court of Himachal Pradesh came into existence only in 1971. Prior to that, High Court of Delhi exercised jurisdiction over the geographical area of Himachal Pradesh.

To resolve these issues, the following rules have been followed: (1) When a High Court no longer exists and its jurisdiction has been transferred to another High Court, a judge from the extinct High Court has been categorized under the High Court which acquired the jurisdiction of the extinct High Court. Thus, a judge whose parent High Court was the High Court of Mysore would be categorized under the High Court of Karnataka. (2) When a High Court has lost jurisdiction over a geographical area due to the creation of a new High Court, all judges appointed to the older High Court before the loss of jurisdiction are categorized under the older High Court even though they could have belonged to the geographical area which subsequently came under the jurisdiction of the new High Court. Thus, a judge in Madhya Pradesh High Court in

[28] Chandrachud (n 8); Tripathy and Rai (n 9).
[29] Gadbois (n 5); Chandrachud (n 8).
[30] Tripathy and Rai (n 9).

1988 is categorized under Madhya Pradesh High Court even if he may have belonged to the geographical area which subsequently came under the jurisdiction of Chhattisgarh High Court.

A. Improved Balance in Regional Representation

Of the all the Supreme Court appointees by the executive, 45% comprised of judges from the High Courts of Allahabad, Bombay, Calcutta, and Madras (Figure 4). The same four High Courts contribute 30% of the collegium's appointees. The four High Courts having maximum share of the collegium's appointments (Bombay, Delhi, Calcutta, and Patna) account for 34% of the collegium's appointees. The executive and the collegium have sourced their Supreme Court appointees from eighteen and nineteen different High Courts respectively. Under the collegium, no single High Court has had more than 10% share in the appointments. The highest share has been allotted to Bombay High Court and Delhi High Court (9%). It shows that while certain High Courts continue to enjoy disproportionate share in Supreme Court appointments, the extent of the hegemony has markedly reduced. Also, different High Courts have gained prominence under the collegium compared to the executive.

The following High Courts have had a decrease in their share of appointees under the collegium from what it was under the executive: Bombay, Allahabad, Calcutta, Madras, Punjab and Haryana, Jammu and Kashmir, Madhya Pradesh, and Andhra Pradesh.[31] The sharpest decline has been in the share of Madras High Court (reduced from 12% to 6%). The following High Courts have witnessed an increase in their share of appointees: Patna, Kerala, Karnataka, Gujarat, Gauhati, Orissa, Rajasthan, Delhi, and Himachal Pradesh.[32] The sharpest increase is in the share of Delhi High Court (from 2% to 9%). Both the decrease and the increase in shares of different High Courts is usually by not more than 1%. Of the seventeen High Courts which have witnessed either an increase or a decrease in their share of appointees, the difference is more than 1% only in relation to six High Courts (Allahabad, Calcutta, Madras, Delhi, Patna, and Himachal Pradesh). Thus, there seems to be a clear effort by the collegium to distribute the share of appointees more evenly. Much of this redistribution has come at the expense of Madras High Court (decrease of 6%) and Calcutta High Court (decrease of 5%).

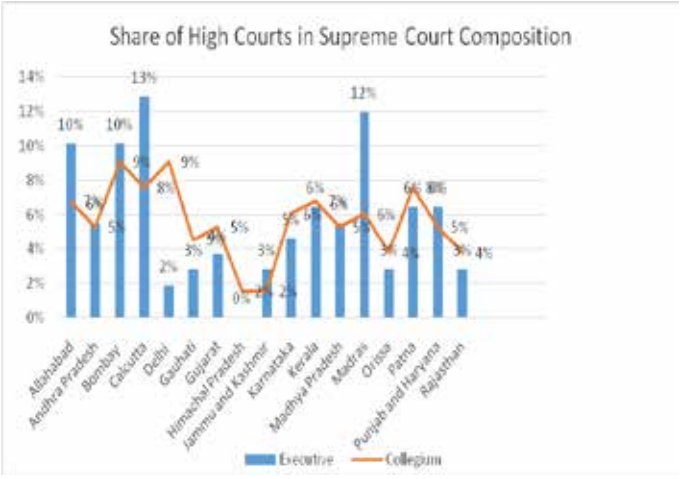
When we look at overall regional trends, the southern High Courts (Madras, Karnataka, Kerala, and Andhra Pradesh) have lost 4% of their share even

[31] Here, the High Court of Lahore has not been taken into account as it no longer exists and its jurisdiction was not transferred to any of the High Courts in India. Mehr Chand Mahajan, appointed by the executive, belonged to the High Court of Lahore.

[32] The High Court of Uttarakhand has not been considered as it came into existence only after the inception of the collegium.

though Karnataka and Kerala have witnessed an increase of 1% in their share. The share of the western High Courts (Bombay, Gujarat, and Rajasthan)[33] has increased by 1%. High Courts in the Hindi speaking states (Allahabad, Delhi, Madhya Pradesh, Himachal Pradesh, Patna, and Uttarakhand) have a share of 32% in the collegium's appointees. Under the executive, the share of the High Courts from the Hindi speaking states (Allahabad, Delhi, Madhya Pradesh, and Patna) was 24%.

Figure 4: Share of High Courts in Supreme Court Composition



B. Intended Tenure of Judges from Different High Courts

A more even distribution of regional representation of High Courts under the collegium has also resulted in a more even distribution of intended tenure of judges from different High Courts (Figure 5, Figure 6). Amongst the appointees of the executive, judges from the top four High Courts had a 44.21% share in the combined tenure of all appointees. The corresponding figure under the collegium is 34.27%. For most High Courts, the difference in the share of their appointees to the Supreme Court and the share of such appointees in the combined tenure of all appointees is less than 1%. In all appointments made by the collegium, the difference is more than 1% in relation to only two High Courts. Judges from Gauhati High Court comprise 5% of collegium's appointees but have a tenure share of 3.90%. For Himachal Pradesh High Court, the tenure share is 0.95% and it contributes 2% of collegium's appointees. Under the executive, the difference is more than 1% in relation to four High Courts. Madras High Court is a unique outlier. While judges from Madras High Court constituted 12% of the executive's appointees, their share

[33] Madhya Pradesh has been included in the list of Hindi speaking states.

in the combined intended tenure was 8.57%. No other High Court under the executive or the collegium has a difference of such degree.

Figure 5: Share of High Courts in Combined Intended Tenure of All Appointees - Executive

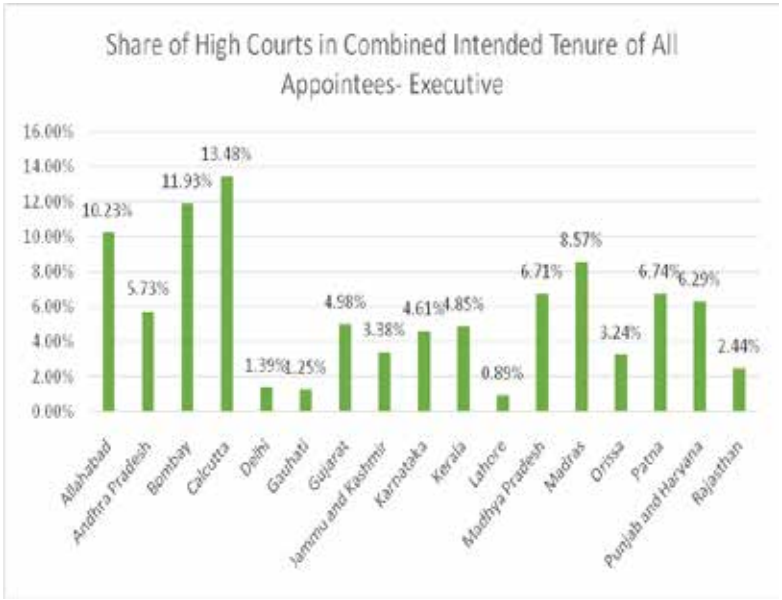
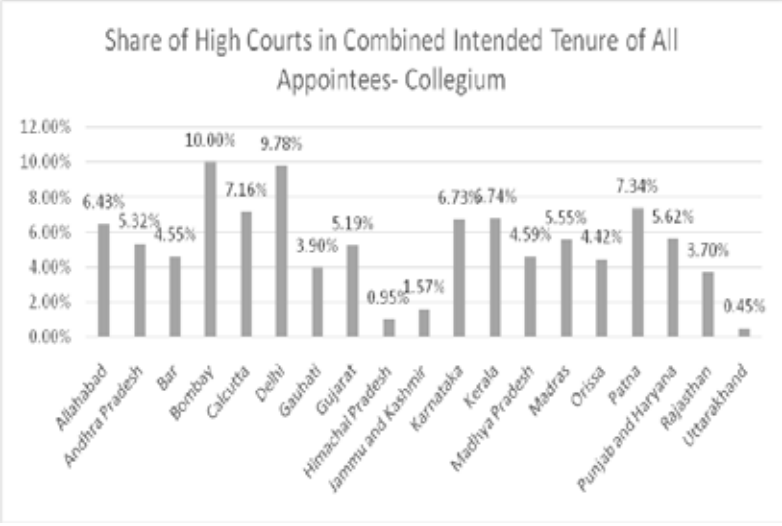


Figure 6: Share of High Courts in Combined Intended Tenure of All Appointees - Collegium

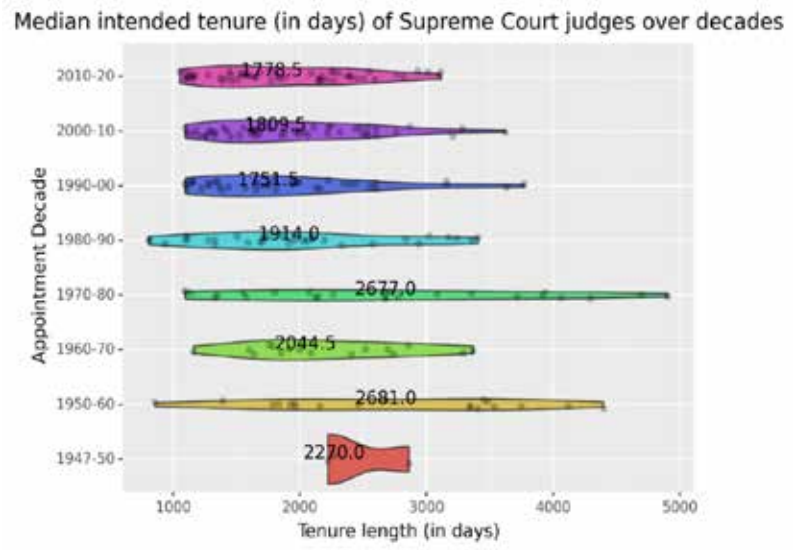


IV. TENURE OF SUPREME COURT JUDGES: A SHORTENED AFFAIR

Under the collegium, there has been a clear decrease in the average intended tenure of judges. While the trend of shorter tenures had already started in the decade prior to the 1993, there is a sharp decrease in intended tenure immediately after the collegium started appointing judges. While the average tenure of judges appointed by the executive was 2350 days, that of the judges appointed by the collegium is 1868 days. Since the values at both ends of the tenure lengths tend to be a bit extreme and could be seen as outliers, we have also used the median, which is better at representing the location (average) in the presence of outliers (Figure 7). The median in any period under the collegium does not come close to that of the period under the executive.

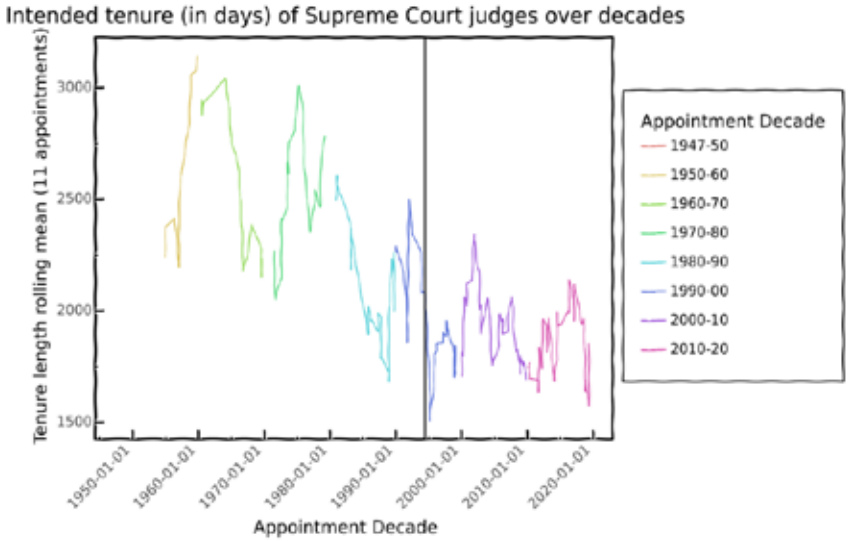
Another way to look at the clear influence of the collegium is to look at the timeline of judicial tenures. Here, instead of plotting the tenure lengths chronologically, we have plotted the cumulative average of eleven successive appointments,[34] so that the impact of outliers is somewhat mitigated and the trend in tenure lengths becomes evident (Figure 8).

Figure 7: Decade Wise Median of Judges' Intended Tenure



[34] While the observed trends hold for any reasonable window size, we choose the averaging window size of eleven to provide larger smoothing.

Figure 8: Rolling Mean of Judicial Tenure

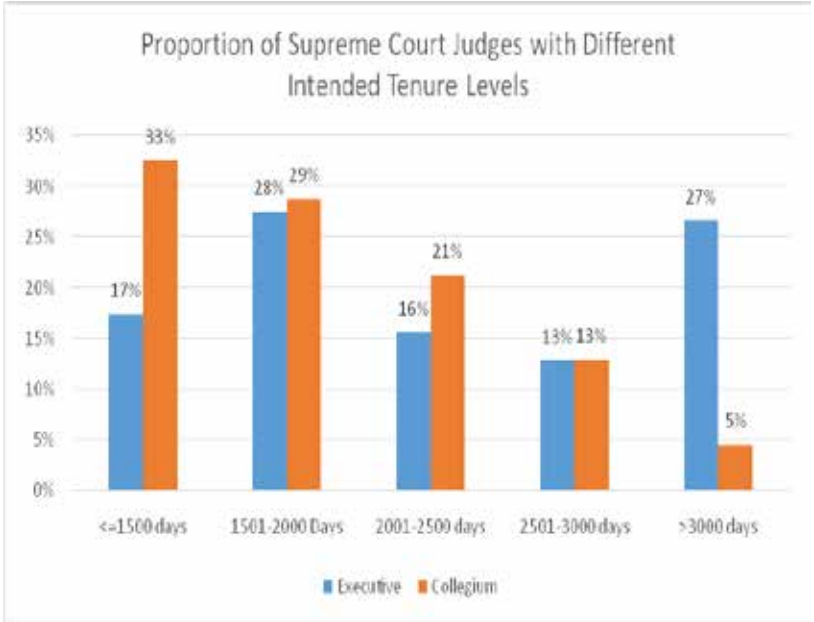


This change in pattern under the collegium is the result of two primary factors. Firstly, the number of appointees having really long intended tenure (more than 3000 days) is significantly more in case of the executive. Secondly, the proportion of judges having significantly shorter tenure (less than 1500 days) is much higher under the collegium (Figure 8). A shorter tenure of judges has also meant that judges from the HC cadre are appointed to the Supreme Court only after a substantially longer experience in the High Courts.[35]

Of all the judges appointed by the executive, 40% had an intended tenure of more than 2500 days (Figure 9). Only 18% of the judges appointed by the collegium have a similar intended tenure. The primary difference is in the bracket of judges having an intended tenure of more than 3000 days (collegium-5% and executive-27%). The collegium has actually appointed more judges with an intended tenure between 1500 and 3000 days (collegium-63% and executive-57%). However, the collegium has appointed a significantly higher proportion of judges with an intended tenure of less than 1500 days (collegium-33% and executive-17%).

[35] Chandrachud (n 8); Tripathy and Rai (n 9).

Figure 9: Proportion of Supreme Court Judges with Different Intended Tenure Levels



V. CONCLUSION

It is clear that the collegium's selection policies have visibly altered the composition of the Supreme Court in some significant aspects. The court has more regional diversity than it did under the executive. This is reflected in the fact that the number of appointees from different High Courts is more evenly distributed. The intended tenure of the appointees from different High Courts is also more even. At the same time, the diversity of judges from different professional backgrounds has decreased substantially. Judges from the HC cadre (Bar) have a virtual monopoly in the Supreme Court and judges from the HC cadre (Service) have been severely marginalized. Distinguished jurists continue to be ignored from being considered for judgeship. The collegium has also significantly reduced the tenure of Supreme Court judges.

The trajectory of change is consistent enough to dispel any reasonable possibility of these changes being unintentional. It is unlikely for the collegium to be unaware that judges from HC cadre (Service) comprise only 2% of its appointees to the Supreme Court. It is equally unlikely that a more balanced regional representation has materialized fortuitously over a period of twenty-six years since the collegium's inception.

What is unclear are the reasons behind these shifts in policies and the consequences of these changes. The collegium has an entrenched inclination towards secrecy and opaqueness which is well chronicled. While the collegium seemed inclined towards some kind of transparency after the decision in the fourth judges' case,[36] that hope has proved to be frustrating.[37] The result of this secretive functioning is that we do not know the exact reasons behind the significant changes that the collegium has engineered in the composition of the Supreme Court. While the reasons for a more balanced regional diversity might appear self-evident, there is much unknown about the extent to which this consideration affects the selection of judges. It is also difficult to decipher the rationality behind the hegemony of lawyer-judges and the shorter intended tenure of judges.

There is also no proper insight on the impact of this changed composition on the judicial process. For example, has the shorter tenure affected the capacity of judges to acclimatize with the functioning of the Supreme Court or has a longer experience in the High Courts prepared them better? Has the monopoly of lawyer-judges affected the trends of judicial opinions in the court? Has the pursuit of regional diversity affected the quality of judges being appointed? Does the presence of judges from different High Courts in the Supreme Court have any effect on the appeals rate of litigants from the concerned States?

The collegium is in the third decade of its existence. In this time, questions on the validity of its existence have dominated the discourse to the extent where an analysis of its functioning has been neglected. It is critical that the collegium is questioned and held accountable on the merits of its policies. For that to happen, there is the need to empirically examine the various ways in which the collegium might have affected the composition and functioning of the higher judiciary in India. Without such inquiries, the critique of the collegium is reduced to anecdotal narrations and sporadic reactions.

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[36] J Madan B Lokur was candid about the need of reforms in his concurring judgment. The court subsequently facilitated a public consultation on the appointment process. In October 2017, the collegium also started the practice of publishing its resolutions in the Supreme Court website. KrishnadasRajagopal, 'Now, SC Collegium to Make Judges' Appointments Transparent '*The Hindu* (6 October 2017) <https://www.thehindu.com/news/national/sc-collegium-to-make-its-recommendations-public/article19807802.ece> accessed 21 October 2019; Rangin Pallav Tripathy and Surya Prakash, 'Appointment of Judges to Higher Courts Governed by Instrument Lacking Democratic Scrutiny' *The Print* (20 June 2018) <https://theprint.in/opinion/appointment-of-judges-to-higher-courts-governed-by-instrument-lacking-democratic-scrutiny/72469/>accessed 21 October 2019.

[37] Maneesh Chhibber, 'Supreme Court is Going Back on Promise of Transparency, Building Case for Modi Govt's NJAC' *The Print* (18 October 2019) <https://theprint.in/opinion/supreme-court-judiciary-reforms-transparency-modi-govt-njac/307887/>accessed 21 October 2019.