

**‘GOVERNED BY WHOM?’ – REDEFINING THE ROLE OF
HIGHER JUDICIARY, DIVERSITY AND JUDICIAL
LEGITIMACY IN THE INDIAN CONTEXT**

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The constitutional design of the structure of India’s apex court put the Supreme Court and High Courts almost in the same position when it comes to adjudication of constitutional cases. High court decisions can be appealed before the apex court since it is the court of last resort. The Supreme Court not only acts as a court of last resort but also for violation of fundamental rights it acts as a court of first resort. Given this kind of vast power arrangement, undoubtedly, the Supreme Court of India enjoys a very powerful status amongst other apex courts worldwide. Due to such an arrangement of power, the appointment process has been the big stick. India was never averse to representation on the lines of caste, religion, gender etc. in its public employment and educational institutions. Historically, judicial appointing authorities have taken into consideration ‘religious and regional diversity’ factors while selecting judges, despite Law Commissions’ strong objections. Various judgments have highlighted that “social reflection” of the society, along with other qualitative markers must be taken into account in making appointments in order to give them some democratic legitimacy. However, how these markers are to be assessed and measured has been left dangling to the “consultation” process of the collegium. Due to the lack of a transparent mechanism for measuring these markers, coupled with an expansive governance-oriented role of the higher judiciary, the question “who are we governed by?” has become quintessential. In light of this backdrop, the paper briefly articulates the burden of the expanded role of the judiciary and then moves on to explore how this expanded

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role has opened a Pandora’s box and led to question about who the judges are, how they are being selected and how legitimate are their adjudication process from a democratic point of view.

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INTRODUCTION

Many constitutional scholars in modern times have critically evaluated the current global political landscape as being in a state of ‘crisis’.⁴ In post-emergency India, there was a clear distrust in the parliament to resolve social conflicts⁵ – in modern-day terminology, it may be referred to as a ‘democratic deficit’.⁶ One may call it the Parliament’s lack of sensitivity or awareness, that led people to turn to the courts as an alternate forum to vent their dissatisfaction. This reliance on courts in

⁴ Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO NORTHERN UNIV. L. REV. 351 (2018); Yaniv Roznai, *Israel: A Crisis of Liberal Democracy*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? MARK TUSHNET ET. AL., (Oxford University Press, 1st ed., 2018); Tom Gerald Daly, *Democratic Decay: The Threat with a Thousand Names*, LSE COMMENT (Mar. 09, 2019), <https://blogs.lse.ac.uk/usappblog/2019/03/09/democratic-decay-the-threat-with-a-thousand-names/>.

⁵ S. P Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U.J.L. & POL’Y 29 (2001).

⁶ ANDREW MORAVCSIK, *IS THERE A ‘DEMOCRATIC DEFICIT’ IN WORLD POLITICS? A FRAMEWORK FOR ANALYSIS*, GOVERNMENT AND OPPOSITION LTD. (Blackwell Publishing, 2004).

times of a ‘deficit’⁷ might have filled the democratic vacuum, but it also gradually gave rise to problems of democratic legitimacy. Normally, had the court been functioning within its ambit of only dispute resolution, these questions of legitimacy would not have arisen, but the court’s refusal to be a silent negotiator in the country’s ‘governance’ issues relating to socio-politically sensitive cases has made it the epicentre of constitutional scrutiny and larger public mistrust. With this expansion in its role, it has drawn public interest like moths to a flame. Unelected judges are indicted with the charge(s) of making political choices for the larger society which does not come under their constitutional charters.⁸ In *Union of India v Association for Democratic Reforms*⁹, the Supreme Court had observed that, by virtue of Article 32, read with Article 142 of the Constitution, court could make orders which by virtue of Article 141 get the effect of law and by Article 144, mandates all authorities to act according to such orders till the legislative vacuum is filled by the Parliament. Through these constitutional provisions, though the court has ensured the implementation of its orders, it has opened dense fissures from a legitimacy point of view. The question that arises next is - if the courts are performing the law-making function (in situations of a legislative vacuum), then how democratically legitimate is it to frame laws?

One way to look at the debate of judicial activism vis-à-vis overreach, being there right from the inception of the concept of judicial review¹⁰ and showing no signs of slowing down in terms of intensity, is to inquire

⁷ Judith Resnik & Rane Dilg, *Responding To A Democratic Deficit: Limiting The Powers And The Term Of The Chief Justice Of The United States*, 154 UNIV. PENNSYLVANIA L. REV. (2006).

⁸ In *Anoop Barnwal v. UOI*, (2023) 6 SCC 161, the solution that India has followed after various committee deliberations was setting up a “committee model” that included India's chief justice and two other political actors until the legislative vacuum is filled, which the legislature filled by bringing in the Chief Election Commissioner and other Election (Appointment, Condition, and Terms of Office) Act 2023. The legislation has gone up for the challenge in *Jaya Thakur v. UOI* (W.P. (Civil) No. 14/2024, on whether the Appointment of Election Commissioners Act, 2023, nullifies *Anoop Barnwal v. Union of India*. What makes the judiciary authorise its presence as mandatory in the selection of the Chief Election Officer? More importantly, what makes the judiciary think that presence of its agent in the commission would ensure a “full proof” method?.

⁹ *Union of India v. Association for Democratic Reforms*, (2002) 5 SCC 294.

¹⁰ *Shankari Prasad v. Union of India*, AIR 1951 SC 458.

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how the enhanced role of the judiciary can be legitimised. This conflict between overreach and activism is quintessentially a power conflict between two inter-governmental institutions bordering on ‘legitimacy’. However, until the debate is settled, when courts are faced with critical socio-political issues, it must take a call to resolve the issue at hand. The underlying question is where does the court draw that power from and how legitimate that power is. Justice Kate O’Reagan, while speaking at the Hamlyn Lectures in 2022 on the ‘role of court as a body-politic’, stressed upon the fact that courts have a dynamic interdependent relationship with other organs of governance.¹¹ In this context, Bottoms and Tankebe’s dialogic approach to legitimacy can take the conception of legitimacy beyond the normative framework within which the court functions.¹² Legitimacy, other than what it means and why it is significant, must also be understood from the point of the factors that create and sustain it.¹³ ‘People’ are a huge part of those factors that contribute to maintaining the trust of the court. Therefore, transparency in dealings of the courts is a way of involving the ‘people’ in the process of legitimisation. Perhaps, that is how democratic legitimacy needs to be constructed through dialogue between multiple stakeholders (those who bring in the conflicts) and the powerholders (resolving authority) who function in their given structure.

On the other hand, there is also the growing popularity of ‘responsive judicial review’ by the court to self-restrict itself.¹⁴ However, the biggest challenge in this approach is that the court has already expanded its role so far that it is difficult to retrieve its steps back and put the ‘magic wand’ away. Therefore, the paper intends to discuss how to balance out the ‘legitimacy’ issue without surgically curbing judicial independence. The

¹¹ Oxford Law Faculty, *The Hamlyn Lectures 2022: Courts and the Body Politic*, YOUTUBE (Nov. 16, 2022) <https://www.law.ox.ac.uk/content/event/hamlyn-lectures-2022-courts-and-body-politic>.

¹² Anthony Bottoms & Justice Tankebe, *Beyond procedural justice: a dialogic approach to legitimacy in criminal justice*, 102 J. CRIM. L. & CRIMINOLOGY 119 (2012).

¹³ *Id.* at 124.

¹⁴ Rosalind Dixon & Michaela Hailbronner, *Ely in the world: The Global Legacy of Democracy and Distrust forty years on*, 19(2) INTL J. CONST. L. 427 (2021).

question of legitimacy draws its sustenance from how judges are appointed. Is it, *per se*, a democratic process?

According to Dr. Ambedkar, judges were to be appointed through a “middle course”, whereby neither the executive nor the judiciary were to become the *imperium imperio*.¹⁵ What India witnessed in its constitutional history is the setting up of a collegium, which lacked both a constitutional logic and a democratic process. The collegium is basically judges chosen by judges. The democratisation of this selection process holds a key to perhaps lending a hand in establishing legitimacy to the expanded role of the judiciary, where it stands today. The collegium has followed the principles of diversity in the composition of the judiciary for a very long time silently and to a larger extent, discretionally or informally.¹⁶ With the advent of sustainable governance, it has become imperative that diversity is brought to the forefront and understood in a sense that can increase inter-governmental balance. The process of including diversity in the composition of the bench remains a debatable proposition.

With the purpose of redefining the conflict of judicial legitimacy and diversity, the authors of this paper have delved into three intertwined issues - first, the changing role of the court, second, the eclectic understanding of judicial independence and third, how diversity offers a probable solution to enhance public confidence in the judiciary today. The article follows an analytical doctrinal methodology in analysing the recent trend in understanding the role of the higher judiciary. This paper is broadly divided into three parts. Part I analyses the trajectory of the role of the court from a traditional positivist court to a governance-oriented activist court and the burden it has taken upon itself in that process. Part II seeks answers to the questions raised in Part I by establishing diversity as a probable solution to legitimise the court’s

¹⁵ 8 LOK SABHA SECRETARIAT, CONSTITUENT ASSEMB. DEB., May. 24, 1949, <https://www.constitutionofindia.net/debates/24-may-1949/>. Speech by B. R. Ambedkar, “*The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex-hypothesis, well qualified to give proper advice in matters of this sort.*”

¹⁶ GEORGE H. GADBOIS JR., JUDGES OF THE SUPREME COURT OF INDIA (Oxford University Press, 1st ed., 2016); ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION (Oxford University Press, 1st ed., 2014).

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expansive actions but of course with restraint. Part III deliberates on the concerns regarding the limits and potholes of the diversity approach, followed by Part IV, which explores the eclectic concept of judicial independence that hinders reforms in the judicial appointment process.

THE JUDICIAL ROLE: A GREATER BUT SELF-ENHANCED BURDEN

Indian judiciary is essentially a three-tier organisation. The higher judiciary consists of the Supreme Court and the High Courts. The Supreme Court acts both as the highest appellate body and the highest constitutional court of the country and the High Courts serve as the highest appellate body and constitutional courts of the states.¹⁷ Unlike the federal division of powers between the State judiciaries and the Union judiciary in the United States, the judiciary in India is monolithic, with the Supreme Court being the overseer of all other courts and the ultimate announcer of the law of the land.¹⁸ Both the Supreme Court and the High Courts have the power to enforce writs for the protection of fundamental rights - the High Courts additionally can issue writs to protect any other right.¹⁹

The rise of judicial governance in India,²⁰ is a process initiated and led by the Supreme Court, exercising both hermeneutic and adjudicatory leadership over the judicial structure as described in the preceding paragraph.²¹ It is often considered to be ‘The World’s most powerful

¹⁷ For an overview of the Indian judiciary, See, Upendra Baxi, *Law, Politics and Constitutional Hegemony: The Supreme Court, Jurisprudence and Demosprudence*, in SUJIT CHOUDHRY ET AL. EDS., *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* (Oxford University Press, 1st ed., 2015).

¹⁸ INDIA CONST. art. 141.

¹⁹ INDIA CONST. art. 32, 226.

²⁰ Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. UNIV. GLOBAL STUD. L. REV. 1 (2009); Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India*, 33 B.U. INT. L. J. 169 (2015).

²¹ For the leadership employed by the Supreme Court, See generally, Upendra Baxi, *Law, Politics and Constitutional Hegemony: The Supreme Court, Jurisprudence and Demosprudence*,

Court'.²² But, like any other public institution in India, the judiciary also has a chequered history. Its stature and activity was heavily diminished during the emergency era.²³ The post-emergency period has seen a tremendous rise and expansion in the power of the Indian higher judiciary, namely the Supreme Court. The Court has come a long way, from being a positivist Court to a good governance Court, which has been linked with the global trend towards the same.²⁴ How did this transformation come about? What was the context in which this transformation developed? This section focuses on the trajectory of the expansion of judicial power in India and touches upon the legitimacy concerns arising therefrom.

The Indian judiciary led by the Supreme Court started its journey after the independence of India and the commencement of the Constitution in a highly positivist manner, holding that law means 'positive state-made law'.²⁵ The initial batches of judges were more in favour of granting the Parliament with the ultimate power to make or unmake laws. While in favour of protecting property rights (still a fundamental right) it marked a 'graceful exit' in favour of the legislature with regard to the ultimate power of amending the Constitution.²⁶ Yet in *Golaknath v. State of Punjab*, the Court, concerned with a fractured majority in the parliament, sought to protect fundamental rights from the purview of constitutional amendments.²⁷ This started the long constitutional battle between the legislature/executive and the judiciary, which resulted in the promulgation of the doctrine of basic structure. The Supreme Court in *Keshavananda Bharati v State of Kerala* declared that the Parliament can

in SUJIT CHOUDHRY ET AL. EDS., THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press, 1st ed., 2015).

²² Clark Cunningham, *The World's Most Powerful Court: Finding the Roots of India's Public Interest Litigation Revolution in the Hussainara Khatoon Prisoners Case*, in SP SATHE & SATYA NARAYAN EDS., LIBERTY, EQUALITY AND JUSTICE: STRUGGLES FOR A NEW SOCIAL ORDER, 83-96 (Eastern Book Company, 1st ed., 2003).

²³ See generally ADM Jabalpur v. Shivkant Shukla, AIR 1967 SC 1207.

²⁴ Robinson, *supra* note 20.

²⁵ AK Gopalan v. State of Madras, AIR 1950 SC 27.

²⁶ Shankari Prasad Singh Deo v. Union of India, (1951) SCC 966; Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845; also see generally, UPENDRA BAXI, INDIAN SUPREME COURT AND POLITICS (Eastern Book Company, 3rd ed., 1980).

²⁷ IC Golaknath & Ors. v. State of Punjab, AIR 1967 SC 1643.

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amend any part of the Constitution except the basic structure of the Constitution.²⁸ This had been nothing short of a judicial coup whereby the Court assumed ‘constituent power’ having the final say in validating a constitutional amendment through the litmus of some uncharted basic features to be propounded by the judiciary itself.²⁹

Yet within a few years of this bold move, the emergency was declared, and the Courts’ emergency-era activity has been criticised as akin to judicial surrender.³⁰ After the Emergency period, the Court was keen to regain its lost legitimacy by engaging in a populist quest for ‘social justice’. Thus the Court evolved the Public interest litigation (PIL) movement. With diluted rules of standing and of procedure, coupled with self-enhancement of flexible remedial powers the Court has ensured a wide range of issues could be hauled into the courtroom which was not otherwise possible in a strict positivist set-up.³¹ The Court removed itself from the positivist shackles with its creative reinterpretation and affirmation of the principle of interdependence of the different provisions of the Constitution, which has consequently allowed the Court to shape rights which were otherwise impossible to shape through a textual interpretation of the Constitution.³² Apart from these, the judiciary, namely the Supreme Court also wrested control over judicial appointments from the executive through PILs.³³

The Indian Judicial Activism, through its PIL jurisdiction, has extended its powers beyond known territories of traditional adjudication and

²⁸ Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

²⁹ Upendra Baxi, *The Judiciary as a Resource for Indian Democracy*, SEMINAR (Nov. 2010) https://www.india-seminar.com/2010/615/615_upendra_baxi.htm.

³⁰ Sathe, *supra* note 5.

³¹ Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 T. AM. J. COMP. L. 495 (1989).

³² The Court finally established the inter-link between Articles 14, 19 and 21 in *Maneka Gandhi v. Union of India*, AIR 1978 SC 1473; Consequently, it was possible to read textually unjustifiable Directive Principles into the fundamental rights, thereby making the principles justiciable.

³³ Supreme Court Advocate-on Records’ Association v Union of India, (1993) 4 SCC 441.

actively embraced and promoted the public law model of litigation.³⁴ The Indian Supreme Court in its own evaluation has differentiated between three phases in the expansion of the jurisdiction in PIL.³⁵ It is to be noted that these phases are not separated in watertight compartments, rather they often overlap and are interlinked. It is better to see these developments as the expansion of the scope of judicial power to new terrains. During the first phase, the PIL jurisdiction restrained itself to the relatively restricted field of enforcement of the individual rights of the socio-economically downtrodden section of the population. To be clear, the Court through the procedural inventions of PIL sought for the protection and enforcement of individual rights with greater creative vigour. The Right to Life under Article 21 was made the repository of all other rights and conjoint reading of this article with the non-justiciable directive principles resulted in the creation of a plethora of unenumerated rights such as, right to shelter,³⁶ right to livelihood,³⁷ right to legal aid,³⁸ right to health,³⁹ right to information,⁴⁰ right to clean environment⁴¹ etc.

In the second phase, the court moved towards its lawmaking role, actively importing international legal obligations with regard to the protection of the rights into the Indian legal regime, declaredly to supplement the legislative vacuum. For example, the Court delivered a guideline to prevent sexual harassment of women at workplaces in the absence of legislation.⁴² In a similar vein, the Court also issued guidelines for the protection of children's rights in inter-country adoption.⁴³

³⁴ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV., 1281 (1976).

³⁵ State of Uttaranchal v. Balwant Singh Chauhan & Ors. (2010) 3 SCC 402.

³⁶ Shantistar Builders v. Narayan Khimalal Gotame & Ors. (1990) 1 SCC 520.

³⁷ Olga Tellis & Ors v. Bombay Municipal Council (1985) 3 SCC 545.

³⁸ Madhav Hayawadanrao Hoskot v. State of Maharashtra, (1978) 3 SCC 544; For the link established between the directive principle to free legal aid with right to life, a fundamental right under Art 21., See State of Maharashtra v. Manubhai, (1995) 5 SCC 730.

³⁹ Pt. Parmanand Katara v. Union of India & Ors., (1989) 4 SCC 248.

⁴⁰ People's Union For Civil Liberties v. Union of India, (2003) 4 SCC 399.

⁴¹ Subhash Kumar v. State of Bihar, (1991) 1 SCC 598.

⁴² Vishakha & Ors. v. State of Rajasthan & Ors., (1997) 6 SCC 241.

⁴³ Laxmi Kant Pandey v. Union of India, 1987 (1) SCC 66.

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The contemporary third phase is that of acting as a ‘super executive’, as a good governance court over the rest of the organs of the government.⁴⁴ This was the stage where the Court actively took over the task of disciplining the executive in terms of promoting good governance. In *Vineet Narain v. Union of India*,⁴⁵ the Court, supervised the work of the Central Bureau of Investigation in connection with the Jain Hawala scam involving several dominant politicians of the day. It enhanced the power of the Central Vigilance Commission to monitor corruption.⁴⁶ The process of judicial transformation of the relationship between the three organs of the government had been slow but drastic, and there was ‘little left untouched by the passion’ of this novel PIL/SAL Culture imbibed by the judiciary.⁴⁷

These ventures into policy issues are not isolated but a part of the pattern. The real challenge is that the judiciary in India with its hyper-active incursions into governance has brought unto itself a greater burden than any other highest court in the world.⁴⁸ It has a greater need to justify and legitimise its actions, something which the Indian judiciary seems to be uncomfortable dealing with.⁴⁹ Amongst the justifications offered by the Court in legitimising its actions, the most frequent are, the need to fill the ‘legislative vacuum’ and the need to participate in upholding the constitutional vision.⁵⁰ The Court has time and again asserted that the judges do have a role to play in filling the vacuum left open by the legislature/executive inaction with suitable orders and directions till the latter starts functioning.⁵¹ On the other hand, the PIL movement itself is rooted in the judicial urge to engage with the constitutional visions of

⁴⁴ The three phases, Creative, Lawmaking and Super Executive has been described in Shubhankar Dam, *Lawmaking Beyond Lawmakers: The Little Right and the Great Wrong*, 13 TUL. J. INT. & COMP. L. 114-116 (2007).

⁴⁵ *Vineet Narain v. Union of India*, (1998) 1 SCC 226.

⁴⁶ *Id.*

⁴⁷ Dam, *supra*, note 44, at 110.

⁴⁸ Robert Moog, *Activism on the Indian Supreme Court*, 82(3) JUDICATURE 131 (1998).

⁴⁹ A casualty of justice or goal oriented decision-making has been the requirement of reasoned decisions. The Court orders are often not speaking orders.

⁵⁰ Dam, *supra*, note 44, at 126-128.

⁵¹ *Vineet Narain v. Union of India* (1998) 1 SCC 226.

‘social justice’.⁵² Yet it does not entertain all types of policies. Subhankar Dam argues that the Court intervenes in only the politically ‘comfort zones’ of individual rights, which can be found in the constitutional scheme of rights and duties and which is supposed to be backed by popular legitimacy. For example, the right of women against sexual harassment, protection of children from malpractices in adoption etc., which are already there in the Constitutional right framework, and would not raise as many eyebrows if the judiciary intervenes. In other words, the judiciary creates zones of legitimacy. He suggests that the Court’s legitimacy may come from entertaining only those activities which are informed by the Constitutional rights duty consciousness.⁵³ However, in recent times, the Court has moved far beyond that. In continuance with the super-executive role, the Court has for instance, in its anti-corruption drive ordered the allocation of natural resources through only auction.⁵⁴

From a political science perspective, Pratap Bhanu Mehta analyses the role of the Court to be one of democratic balancer, and not much of a principle-driven judiciary.⁵⁵ It functions as an institution that balances different tensions between power holders in the country. In other words, when entering into overreaching grounds, the Court stands in higher need of legitimacy than the *per se* legitimacy that traditional courts have enjoyed. ‘Without a legitimising process, judicial legislation creates a constitutional imbalance, that challenges the representative foundations’ of the democratic polity.⁵⁶ The position in which the Court has placed itself in, is one which it cannot easily back out from.

Therefore, the need for greater public legitimacy and faith is required since an uninformed exercise of power may be detrimental to the very institution it seeks to overpower. This paper argues that the same can be achieved in part with the help of proper representation in the judiciary. In

⁵² P.N. Bhagwati & C.J. Dias, *Judicial Activism in India: A Hunger and Thirst for Justice*, 5 NUJS L. REV. 171 (2012).

⁵³ Dam, *supra* note 44, at 132-34.

⁵⁴ Subrahmanian Swamy v. Manmohan Singh (2012) 3 SCC 64; Manohar Lal Sharma v. Principal Secretary (2014) 9 SCC 516.

⁵⁵ Pratap Bhanu Mehta, *India’s Unlikely Democracy: The rise of Judicial Sovereignty*, 18(2) J. DEM. 70-83 (2007).

⁵⁶ Dam, *supra* note 44, at 140.

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this paper, the authors have focused on one aspect of representation i.e. gender. The following sections elaborate on the need and condition of gender representation in the Indian higher judiciary.

ACHIEVING JUDICIAL DIVERSITY THROUGH REPRESENTATION: REDUCING THE BURDEN

A. OPTICS OF DIVERSITY

Historically, appointing authorities have taken into consideration the ‘religious and regional diversity’ while selecting judges despite Law Commissions’ strong objections.⁵⁷ Among other concerns, the Law Commission noted and criticised the practice of appointing judges on communal and regional grounds and the exertion of executive influence in that process.⁵⁸ Another point that the Commission raised was the inability of the appointment process to appoint someone in the “distinguished jurist” category. It seemed the Law Commission was not of the same opinion as the appointing authorities that prior judicial experience is a *sine qua non*. Even though regional considerations were criticised in appointing judges by the Law Commission, it resurfaced numerous times in future discussions. While discussing the suitability of the Number of Judges, Amendment Bill,⁵⁹ with respect to the appointment of judges to the Supreme Court, Ajit Singh Sarhadi represented the voices who believed that along with merit and efficiency, regional considerations should also be taken into consideration, both in and while finalising appointments.⁶⁰ The debatable question in appointing judges from a diverse background is the selection process. The anti-diversity viewpoint based on a superfluous understanding of ‘merit’ and ‘secularism’ no longer fits into the modern discourse. The conventional contesting idea that diversity dilutes merit has been rejected by many

⁵⁷ LAW COMMISSION OF INDIA, Report No. 14, REFORM OF JUDICIAL ADMINISTRATION (1958).

⁵⁸ *Id.* at 34.

⁵⁹ LOK SABHA DEBATES, Apr. 27, 1960 *speech by* Ajit Singh Sarhadi, 6773-75 https://eparlib.nic.in/bitstream/123456789/54807/1/lcd_02_11_03-09-1960.pdf.

⁶⁰ *Id.*

modern democracies, of which South Africa is the prime example.⁶¹ The paper addresses ‘diversity’ from the point that it does not erode efficiency but enhances the court’s legitimacy. Achieving a diverse composition of the bench through a transparent accountable process will be a true marker of democratising the bench.

Gadbois Jr.’s seminal work has given a demographic account of the profile of judges which shows that several extraneous factors were responsible for selecting judges in which merit was not the single factor.⁶² These appointments made between 1950-1989 showed a high homogenous tendency of selecting judges of the same make and kind giving rise to a default-male image of what a judge should look like. Women never stood a chance before 1989 to fit into this closely guarded image of a Supreme Court judge. The Supreme Court of India has on multiple occasions addressed the issues regarding what constitutes ‘merit’ and whether it dilutes ‘efficiency of administration’.⁶³ It began with a Brahmin woman filing a suit under Article 226 alleging that her basic right to admission to college was violated despite having good grades because of certain Communal Order.⁶⁴ Diversity was practised in the State of Madras way before the Constitution came into existence and there was a set practice to ensure the representation of different communities because of a non-Brahmin movement in Madras in the early 1920s.⁶⁵ As Abhinav Chandrachud narrates, Madras in 1912 had a disproportionate over-representation of Brahmins as sub-judges in provinces compared to their overall population in the province, which resulted in a political backlash from the civil society that brought about

⁶¹ S. AFRICA CONST. §174(2) entrenching “*the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed*” is a laudable attempt to mitigate the ‘diversity v merit’ debate.

⁶² GADBOIS & CHANDRACHUD *supra* note 16.

⁶³ Abdullah Nasir & Priya Anuragini, *Of Merit and Supreme Court: A Tale of Imagined Superiority and Artificial Thresholds*, 58(11) EPW (Mar. 18, 2023), https://www.epw.in/sites/default/files/engage_pdf/2023/04/03/161715-.pdf;

GAUTAM BHATIA, *THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS* (Harper Collins India, 1st ed., 2019).

⁶⁴ *State of Madras v. Srimathi Champakam Dorairajan*, AIR 1951 SC 226.

⁶⁵ ABHINAV CHANDRACHUD, *THESE SEATS ARE RESERVED: CASTE, QUOTAS AND THE CONSTITUTION OF INDIA* (Penguin India, 1st ed., 2023).

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this change.⁶⁶ The protected communities were non-Brahmin Hindus, backward Hindus, Harijans, Anglo-Indians and Indian Christians & Muslims. It is a different debate to study the efficacy and degree of these distributions. Still, it certainly points out that India had the ethos of ‘representation’ before the constitution came into existence.

Representation has been tested against meritocracy. The court has equated ‘marks’ with efficiency or merit, which continued to reflect in many other cases⁶⁷ until the court acknowledged that ‘merit’ and ‘efficiency’ are not the same thing and merit cannot be measured through neutral criteria.⁶⁸ All these discussions have been on the line of vertical reservations, it becomes confusing when it comes to horizontal reservations that give representation to women and other categories of people. The differential treatment of vertical and horizontal reservation jeopardises women’s interests.⁶⁹ In *Rajesh Kumar Daria v. Rajasthan Public Service Commission*⁷⁰, the Supreme Court explained the distinction between vertical and horizontal reservation by explaining the “over and above” and “minimum guarantee” aspects of both.⁷¹ The Supreme Court clarified

⁶⁶ *Id.* at 27.

⁶⁷ *The General Manager, Southern Railway v Rangachari*, AIR 1962 SC 36; *Dr. Preeti Srivastava and Anr. v. State of MP And Ors.* (1999) 7 SCC 120.

⁶⁸ *B.K. Pavitra v. Union of India*, (2019) 16 SCC 129.

⁶⁹ CHANDRACHUD, *supra* note 65.

⁷⁰ *Rajesh Kumar Daria v. Rajasthan Public Service Commission* 2007 (8) SCC 785.

⁷¹ *Id.* ¶7. “Where a vertical reservation is made in favor of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under the Open Competition category. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of ‘Scheduled Castes-Women’. If the number of women in such a list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list

in *Saurav Yadav v. State of Uttar Pradesh*, that migration from reserved to open category is justified but not vice-versa.⁷² For vertical reservation, the migration from reserved to open category was already clarified on the grounds that it may happen that few reserved category candidates can overcome the structural and institutional barriers and therefore would defeat the purpose of reservation if they remained in the reserved category. By the same logic, migrations in the horizontal reservations can be justified. It does, however, open the risk of reverse discrimination since it gives the disadvantaged group (for instance women) a double opportunity to secure positions both in reserved as well as in open categories. Thus, India was never opposed to representation on the lines of caste, religion, gender etc. in its public employment and educational institutions. Still, it made reservation the most utilised way of achieving social diversity. In majority judgments, “diversity” has been hitched with “merit”, which became a normative touchstone on which adjudication was carried on despite the warnings of reading “merit” as “efficiency of administration” raised in *BK Pavitra v. Union of India*⁷³. Nonetheless, if diversity has not eroded the other institutions and merit is not limited to ‘grades’ thereof, applying the same logic, diversity shall not pull down the efficiency of the judiciary as well. Still the question of how to apply “diversity” in judicial appointments, remains unanswered.

B. SELECTION OF JUDICIAL CANDIDATES

The wide requirements of Articles 124 and 217 in the Constitution leave enough free passage to devise a mechanism to select the best judicial candidate. Selection of High Court judges takes place in two ways, either through judicial service or through the Bar, i.e., two types of persons can be appointed as a judge of a High Court: a) judicial officers of ten years’ standing, b) high court lawyers of ten years’ standing.⁷⁴ When it comes to Supreme Court judges, the Constitution provides that the following individuals can be appointed as judges: a) high court judges of five years’

relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.”

⁷² *Saurav Yadav & Ors. v. The State of Uttar Pradesh*, (2021) 4 SCC 542.

⁷³ *B.K. Pavitra v. Union of India*, (2019) 16 SCC 129.

⁷⁴ INDIA CONST. art 217.

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standing, b) high court lawyers of ten years’ standing or, c) distinguished jurists in the opinion of the President.⁷⁵ This kind of qualification does not specifically speak much about the ‘kind’ of candidates appointed to the Court but gives wide powers to the ‘appointing authority’ to select candidates from a broader pool.

In the history of judicial appointments, people have silently observed the institutional conflict and a saga of inter-governmental distrust.⁷⁶ In *Registrar General, High Court of Madras v. R Gandhi*, the court while dealing with the limited scope of judicial review in the assessment of eligibility of judicial candidate of a High Court observed that:

“Appointments cannot be exclusively made from any isolated group, nor should it be pre-dominated by representing a narrow group. Diversity therefore in judicial appointments to pick up the best legally trained minds coupled with a qualitative personality, are the guiding factors that deserve to be observed uninfluenced by mere considerations of individual opinions.”⁷⁷

How these “guiding factors” are to be assessed and measured has been left dangling in the “consultation” process of the appointing authority. Constitutionally speaking, the executive makes the appointments after consultation with the judiciary. However, the “consultation process” itself has been the bone of contention for decades post-emergency. The opinions of judges in Justice Himatlal Sheth’s case pointed towards very relevant and significant questions regarding “consultation” required under Article 222 and “reasons” to be specified for transfers of judges.⁷⁸ The judges did not consider the “consultation” a binding requirement of the Executive to appoint. Rather, they penned down safeguards against arbitrary transfers by stating that such consultation must be “real,

⁷⁵ INDIA CONST. art 124.

⁷⁶ S.P. Gupta v. President of India, AIR 1982 SC 149; Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268; In Re Presidential Reference, AIR 1999 SC 1.

⁷⁷ Registrar General, High Court of Madras v. R. Gandhi, (2014) 11 SCC 547.

⁷⁸ Union of India v. Sankal Chand Himatlal Sheth, AIR 1978 SC 2328.

substantive and effective” which will be done after “full, fair and complete discussion”. Post-Himatlal, the debate became more ferociously heated with the advent of the judges’ cases where appointment and transfer of judges were jointly debated.⁷⁹ The First Judges case did not make observations regarding the appointment of judges, however, Justice Bhagwati and Desai made observations about what criteria is to be utilised in appointing judges.⁸⁰

The subtle remarks on “representation” as a criterion of appointment by the Supreme Court could not take precedence over ‘merit’ as a preferred touchstone on which appointments are required to be made. The stress has been so much on efficiency and anti-polarization that diversity could never take a front seat in the discussion on representation. In fact, ‘seniority’ as a norm has prevailed in selecting judges which directly goes against achieving a representative court. Justice Ahmadi, while disagreeing with the majority in the Second Judges case, observed that seniority not only disturbs the representative character of the court but also pushes ‘merit’ to the secondary position.⁸¹ In a concurring opinion, Justice Pandian commented on the significance of ‘social reflection of the

⁷⁹ S.P. Gupta v. President of India, AIR 1982 SC 149; Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268; *In Re* Presidential Reference, AIR 1999 SC 1.

⁸⁰ SP Gupta v. President of India, AIR 1982 SC 149. *“The appointment of a Judge of a High Court or the Supreme Court does not depend merely upon the professional or functional suitability of the person concerned in terms of experience or knowledge of law though this requirement is certainly important and vital and ignoring it might result in impairment of the efficiency of administration of justice, but also on several other considerations such as honesty, integrity and general pattern of behaviour which would ensure dispassionate and objective adjudication with an open mind, free and fearless approach to matters in issue, social acceptability of the person concerned to the high judicial office in terms of current norms and ethos of the society, commitment to democracy and the rule of law, faith in the constitutional objectives indicating his approach towards the Preamble and the Directive Principles of State Policy, sympathy or absence thereof with the constitutional goals and the needs of an activist judicial system. These various considerations, apart from professional and functional suitability, have to be taken into account while appointing a Judge of a High Court or the Supreme Court and it is presumably on this account that the power of appointment is entrusted to the Executive.”*

⁸¹ *Supreme Court Advocates on Record Association v. Union of India*, AIR 1994 SC 268, ¶407 (J. Ahmadi). *“The seniority principle and the legitimate expectation doctrine are incapable of realistic application as they would destroy the representative character of the superior judiciary, which is absolutely essential for every segment of society to have confidence in the system. The seniority principle and the legitimate expectation doctrine would only push merit to the second place.”*

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society’ in every sphere including the judiciary, by observing the judges should be appointed from a diverse background.⁸²

Prof MP Singh has called for a ‘reflective judiciary’ given the court’s role in policy making which will justify this expanded role.⁸³ Earlier this responsibility of maintaining diversity was with the executive, who herself was a representative of the people, however, with the collegium being the deciding authority, the burden of understanding the mechanism of diversity and implementing has shifted to the judges.⁸⁴ Undoubtedly, the judiciary has faced challenges in implementing a diverse judiciary. As of 2023, out of 569 Judges appointed in the High Courts since 2018, 17 belong to the SC category and 09 belong to the ST category.⁸⁵ The Supreme Court has not seen any woman judge from SC and ST background since its inception. It is puzzling to observe this dichotomy of principles that the Supreme Court has followed for other public institutions (as discussed in the preceding section) in comparison with itself in matters relating to representation and diversity.

THE CHALLENGES OF ACHIEVING GENDER DIVERSITY IN APPOINTMENTS

For this article, authors remain confined to ‘gender’ in its binary sense. The need for greater gender diversity is largely understood in India in terms of number⁸⁶, given the current representation of women in the

⁸² Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441.

⁸³ M.P. Singh, *Securing the Independence of The Judiciary-The Indian Experience*, 10(2) IND. INT’L & COMP. L. REV. 245-292 (2000).

⁸⁴ *Id.* at 284.

⁸⁵ Information and Transparency, Only 17 SC, 9 ST judges among 569 HC appointments since 2018, THE LEAFLET (Mar. 18, 2023) <https://theleaflet.in/only-17-sc-9-st-judges-among-569-hc-appointments-since-2018/>.

⁸⁶ *Strongly Recommend 50% Reservation In Judiciary For Women Lawyers: CJI*, THE OUTLOOK, (Sept. 26, 2021) <https://www.outlookindia.com/website/story/india-news-strongly-recommend-50-reservation-in-judiciary-for-women-lawyers-cji/395836>.

judiciary.⁸⁷ This however is not an end in itself. In this part, two basic points of gender diversity are dealt with - the 'why' and 'how'. The arguments for greater demographic diversity are often driven by the belief that it will lead to 'value diversity' by drawing from different life experiences of judges.⁸⁸ While speaking at the HT Leadership Summit 2022, Justice Chandrachud spoke about his experience of working with Justice Ranjana Desai which established the above.

*"There is something intrinsic about gender which adds to decision making ...irrespective of the outcome that you arrive at in an individual case, they bring to the case, a more deliberative, consultative and dialogic process to the art and science of judging."*⁸⁹

According to Malleson,⁹⁰ at the risk of sounding redundant, one must ask why gender diversity is required for at least three reasons which seem to be applicable to India as well. First, the rationale of equality must have a strong theoretical and empirical basis if it truly desires to change the legal profession's structural arrangement and the judiciary. For women 'Equality' has been largely perceived from a victim-oriented approach, whereby women have rightfully gained an equal footing in cases of violation of their privacy in multiple forms. The gamut of literature on gender justice indicates the progress made so far. However, with the advent of 'equality' that acknowledges the equal autonomous position of women in society,⁹¹ opens a Pandora's box and urges us to shift from a victim-oriented approach to an anti-discrimination-oriented one.

⁸⁷ R. Sai Spandana, *Only 107 of 788 Sitting High Court Judges are Women*, SUPREME COURT OBSERVER (Jun. 30, 2021) <https://www.scobserver.in/journal/only-107-of-788-sitting-high-court-judges-are-women/>; List of Senior Advocates on 7/7/2022 https://main.sci.gov.in/pdf/seniorAdvocatesDesig/11122021_201328.pdf.

⁸⁸ Kate Malleson, *Values Diversity in the United Kingdom Supreme Court: Abandoning the 'Don't-Ask-Don't-Tell' Policy*, 49 J.L. & SOC'Y 22, 22 (2022).

⁸⁹ Swati Bhasin, *'Why Don't We Have More Women Judges?' Chief Justice Shares Views at HTLS 2022*, HINDUSTAN TIMES (Dec. 7, 2022), <https://www.hindustantimes.com/india-news/hindustan-times-leadership-summit-2022-why-don-t-we-have-more-women-judges-chief-justice-dy-chandrachud-shares-views-at-htls-2022-101668239165657.html>.

⁹⁰ Kate Malleson, *Justifying Gender Equality on the Bench: Why Difference Won't Do*, 11 FEMINIST LEGAL STUD., 1, 1 (2003).

⁹¹ *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

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That brings us to Mallesson’s second reason – what forms of actions may legitimately be pursued to achieve the goal of gender diversity? A blind reservation policy may not serve its purpose without assessing the ground realities of women in the profession. As seen in Part II, the judiciary has a predetermined mindset of appointing the best legal minds as judges, therefore, a reservation policy seems highly unlikely. In the legal profession, it is widely acknowledged that the profession has not been accommodative of women openly.⁹² There are numerous forms of biases and hurdles that women cut through to make a living out of the profession.⁹³ Justice Leila Seth’s account of being tested tenaciously by the system gives a clear picture of how the system assesses its women.⁹⁴ Nonetheless, women brace up against these challenges and create a work-life balance suitable for themselves. Lack of attrition data, however, does not let us have a complete picture. Nonetheless, the greater question is that to enhance diversity should women irrespective of their calibre be preferred for judicial appointments over male judges? Given the fact that the size of the pool of female students and advocates is smaller in comparison to males.⁹⁵

⁹² Swagata Raha & Sonal Makhija, *A Survey of the Challenges Faced by Indian Women Advocates in Litigation*, INDIA L. NEWS (Dec. 1 2013), <https://indialawnews.org/2013/12/01/a-survey-of-the-challenges-faced-by-indian-women-advocates-in-li>.

⁹³ *Id.*

⁹⁴ LEILA SETH, *ON BALANCE: AN AUTOBIOGRAPHY* (Penguin Books, 1st ed., 2007).

⁹⁵ MINISTRY OF EDUCATION, DEPT. OF HIGHER EDUCATION, GOVT. OF INDIA, ALL INDIA SURVEY ON HIGHER EDUCATION (2020-2021), <https://aishe.gov.in/aishe/viewDocument.action?documentId=322>, 2.76 lakhs males and 1.36 lakh females enrolled in law;; MINISTRY OF EDUCATION, DEPT. OF HIGHER EDUCATION, GOVT. OF INDIA, ALL INDIA SURVEY ON HIGHER EDUCATION, 15 (2019-2020), https://www.education.gov.in/sites/upload_files/mhrd/files/statistics-new/aishe_eng.pdf, The students enrolled in Law stream are 4.32 lakh out of which 2.87 lakh are male and 1.45 lakh are female ; MINISTRY OF EDUCATION, DEPT. OF HIGHER EDUCATION, GOVT. OF INDIA, ALL INDIA SURVEY ON HIGHER EDUCATION, 10 (2018-2019), <https://aishe.gov.in/aishe/viewDocument.action?documentId=262>, The students enrolled in Law stream are 3.98 lakh out of which 2.64 lakh are males and 1.34 lakh are female; MINISTRY OF EDUCATION, DEPT. OF HIGHER EDUCATION, GOVT. OF INDIA, ALL INDIA SURVEY ON HIGHER EDUCATION, 11 (2017-2018),

That brings us to the third reason – what level of participation of women is necessary, either proportionate or lesser/greater than males? This is by far the most pertinent question to ask. Inspiration can be drawn from the experiences of South Africa in its support. The transformative policies were introduced with the goal of balancing the demographic composition in accordance with the constitutional mandate under section 174 of the Constitution of South Africa 1996:

“[t]he need for the judiciary to reflect broadly the race and gender composition of South Africa must be considered when judicial officers are appointed”.

The Cape Bar policies introduced in 2009 take the initiative of acknowledging the practical disadvantages that women experience because of maternity leave.⁹⁶ Although bordering on essentialism, the policies include maternity leaves and various financial benefits to retain women in the profession, which is otherwise heavily dominated by white male lawyers.

Deliberating on the second aspect – how to achieve diversity – is problematic without touching upon the issue of transparency in matters related to judicial appointments. Justice Chelameswar’s dissent in *Supreme Court Advocates-on-Record Assn v Union of India*⁹⁷ (NJAC judgment) destroyed the basis of the collegium’s existence by condemning it to be counter-textual and against the intent of the Constituent Assembly. It has been proved that in times of distress if political branches fail, so can the judiciary. Therefore, to believe that the judiciary is the ultimate protector

<https://aishe.gov.in/aishe/viewDocument.action?documentId=245>, The students enrolled in Law stream are 3.7 lakh out of which 2.5 lakh are males and 1.2 lakh are females; percentage of female senior advocates in Supreme court is 4.5%. List of senior advocates on 7/7/2022

⁹⁶ Constitution of the Cape Bar, 1993 <https://capebar.co.za/wp-content/uploads/2021/04/1.-Cape-Bar-Constitution-2021-04-15.pdf>; Geoff Budlender, Cape Bar adopts new maternity policy, Bar News <https://www.gcbsa.co.za/law-journals/2009/december/2009-december-vol022-no3-pp10-11.pdf>.

⁹⁷ Supreme Court Advocates-On-Record Association and Anr. v. Union of India, (2016) 5 SCC 1 ¶ 90.

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of people’s rights and liberties is unnecessarily rigid.⁹⁸ The defenders of collegium may argue that given the era’s need, collegium was a required solution to save the institutional independence of the judiciary in a post-emergency period. By the same logic, in the present socio-political backdrop, developing a representative judiciary has become the need of the hour, which the collegium is not able to cater to.

Independence of the judiciary is indeed a basic feature but judicial appointment is not the only way to ensure it, other factors have roles to play and the primacy of judicial opinion is certainly not the only way to ascertain independence. Asserting the importance of transparency in the appointment process, J Chelameswar quoted J Ruma Pal’s observation on the opacity of collegium proceedings that breeds and harbours disastrous practices.⁹⁹ Eventually, the Court did not approve of a commission model however, inspired by its spirit of judicial reform, the Supreme Court collegium decided to publish the resolutions of the collegium. As Prof Tripathy explains, the practice of publishing resolutions was made subject to ‘confidentiality’ with a possibility of tampering with the degree of transparency.¹⁰⁰ Meijer defines transparency as the availability of information about an actor that allows other actors to monitor the workings or performance of the first actor.¹⁰¹ From the point of relation between object and subject of transparency, appointing authority is observed by people as well as other professional stakeholders.¹⁰² From the point of exchange of information, information relating to internal working and performance is made available to the monitoring actor in a

⁹⁸ ADM Jabalpur v Shivkant Shukla, AIR 1967 SC 1207; AK Gopalan v State of Madras, AIR 1950 SC 27.

⁹⁹ Supreme Court Advocates-On-Record Association and Anr. v. Union of India, (2016) 5 SCC 1, ¶¶ 90 & 106.

¹⁰⁰ Rangin P. Tripathy, *The Supreme Court Collegium and Transparency: A Non-Committal Relationship*, 17(1) SOCIO-LEGAL REV. (2022).

¹⁰¹ Albert Meijer, *Understanding the Complex Dynamics of Transparency*, 73(3) PUBLIC ADMIN. REV. 429 (2013).

¹⁰² *Id.*

wholesome way so that it helps in constructing the socio-political reality.¹⁰³

Collegium's practice of sharing information in light of maintaining fictional transparency seems to be a make-shift approach to cope with the allegations of opacity.¹⁰⁴ The trajectory of published information of resolutions will throw light to see the gaps in information shared by the collegium.¹⁰⁵ For instance, the collegium's decision on a candidate after acknowledging that it has given due consideration to diversity factors, did not put out any evidence in regard to factors that let them finalise that candidate. As recently as 2021, the Supreme Court has published 'statements' instead of 'resolutions' without citing the reasons for approving the proposal for the elevation of advocates as judges in Punjab and Haryana High Court.¹⁰⁶ The same practice continued in September 2022.¹⁰⁷ A stark difference was observed in the resolution of October 2022, whereby the collegium came together to fill up 11 vacancies of judges in the Supreme Court.¹⁰⁸ Not only did the statement become a resolution, but it also gave a glimpse of the nature of deliberation that happened amongst the collegium members. Gradually, the publication of collegium resolutions has lifted the veil of non-transparency to a certain

¹⁰³ *Id.*

¹⁰⁴ Markandey Katju, *One Way to Fix the Collegium is to Televisе its Proceedings*, THE WIRE, (Nov. 5th, 2015), <https://thewire.in/law/one-way-to-fix-the-collegium-is-to-televisе-its-proceedings>.

¹⁰⁵ *Re: Appointment of Ms Justice Sunita Agarwal, Judge, High Court of Judicature at Allahabad as the Chief Justice of the High Court of Gujarat*, SUPREME COURT OF INDIA, (Nov. 21, 2011) https://main.sci.gov.in/pdf/Collegium/05072023_173908.pdf. Very recently with the elevation of chief justices of high courts resolutions passed on 5th of July 2023, the collegium mentioned the demographic factors that they considered before finalizing the judges. *Appointment of Ms Justice Sunita Agarwal, Judge, High Court of Judicature at Allahabad as the Chief Justice of the High Court of Gujarat*.

¹⁰⁶ *Supreme Court Statement*, (Sept. 1 2021) https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/documents/collegium/03092021_174313.pdf.

¹⁰⁷ *Supreme Court Statement*, (Sept. 12 2022) https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/documents/collegium/12092022_130910.pdf.

¹⁰⁸ *Resolution*, (Oct. 9, 2022) https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/documents/collegium/10102022_055250.pdf.

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extent by giving out the criteria and qualities taken into consideration before approving a candidate to the Supreme Court.¹⁰⁹ Justice Varale’s appointment also witnessed the same pattern.¹¹⁰ Although it is much appreciated, only time can tell whether these practices will continue to become a long-standing convention.

People have to keep faith in the wisdom of the collegium choosing a suitable candidate. Balancing the right to know, the right to privacy and the transparency, accountability and independence of the judiciary, J Chandrachud once opined that increasing transparency would not threaten judicial independence.¹¹¹ He carefully demystified the non-existence of any fiduciary relationship between the CJI and other judges, whereby he is not entrusted with any such power to protect and further the interests of individual judges who disclose their assets to him in an official capacity.¹¹² Every disclosure cannot be garbed under the cover of independence. If the information that flows from the top is murky such that it cannot give a preliminary clear picture about the process, criteria for selection, the people consulted, and the people considered for appointment, how can they devise a practical mechanism to enhance diversity? With a limited pool of women candidates, the collegium can only serve a half-baked cake in the name of gender diversity.

DEMOCRATISATION AND JUDICIARY: AN ECLECTIC UNDERSTANDING OF JUDICIAL INDEPENDENCE

As observed in the previous sections, judicial appointment has undergone many changes and has managed to include diversity informally. However, those informal measures have not been able to

¹⁰⁹ *Resolution*, (Jul. 11, 2024)
<https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/07/2024071134.pdf>.

¹¹⁰ *Resolution*, (Jan. 17, 2024)
<https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012921.pdf>.

¹¹¹ Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481.

¹¹² *Id.*

reflect positively on the inclusion of “non-traditional voices”. That is why, it has become imperative to deliberate how to democratise the appointment process which could break the system of “tokenism” in it. Democratisation as noted by Christian Larkin is a ‘gradual evolutionary’ process that helps in establishing democratic procedures.¹¹³

A stable socio-political environment nurtures the establishment of the rule of law, which allows a country to develop a constitutional culture for itself. This entire process of democratisation creates a unique powerful position for the judicial branch, as the authors have deliberated earlier.¹¹⁴ The escalation in the courts’ role in matters of governance is complicatedly linked with the independence of the judiciary. An independent judiciary can fulfil the role of a fair arbitrator/negotiator among constitutional actors. But what connotes an “independent judiciary”? The Indian Constitution has identified several markers to ensure judicial independence and has safeguarded its’ security through several mechanisms,¹¹⁵ among which appointments have been the most contested ones.¹¹⁶ The history of higher judicial appointments in India has been shrouded in an eclectic understanding of judicial independence, which has not let the discussion of appointment explore beyond conventional ideas. Over a period of time, independence of the judiciary has been equated with the independence from Parliamentary law, which does not resonate with the original intention of the framers of the Constitution.¹¹⁷

¹¹³ Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996).

¹¹⁴ Dam, *supra* note 44, at 114-116.

¹¹⁵ The Judges (Inquiry) Act, 1968, No. 51, Acts of Parliament, (1968), regulates the procedure of investigation during the impeachment proceedings against a judge; The Supreme Court Judges (Salaries and Conditions of Service) Act, 1958, No. 41, Acts of Parliament, (1958); and the High Court Judges (Salaries and Conditions of Service) Act, 1954, No. 28, Acts of Parliament, (1954) determines the salaries, pension and other privileges of Judges of Supreme Court (Article 125), and of the High Court (Article 221). Parliament has widened the jurisdiction of the Supreme Court by means of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, No. 28, Acts of Parliament, (1970).

¹¹⁶ INDIA CONST. art 124.

¹¹⁷ 8 CONST. ASSEMB. DEB., (May 23, 1949), <https://www.constitutionofindia.net/debates/23-may-1949/>. Prof. KT Shah’s

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The usual discussion has been around “who” can appoint judges rather than “who” can be a judge. Dr. Ambedkar in the Constituent Assembly Debates had raised the concern of judges being biased without demeaning the significant role of an adjudicator. Dr. Ambedkar’s concern echoed through aeons and resonated in *CPIO, Supreme Court of India v Subhash Chandra Agarwal*.¹¹⁸ The Supreme Court in *Subhash Chandra Agarwal* acknowledged that adjudicators in robes are human beings and may be predisposed to the failings that are inherently human.¹¹⁹ This is why more emphasis is required to be on “who the judge is?”. Though the judgment did not define the standards of judicial appointment the concurring opinion of Justice DY Chandrachud emphasised the need to put those standards in the public domain to promote public confidence.¹²⁰ The judiciary is not an elected body politic, it enjoys a public trust which is manifested in the independence that it enjoys. Making it accountable, as J Chandrachud observed, certainly does not dilute its independence.¹²¹

The next question that comes up immediately is “how much” and “what kind” of information can be put out in the public domain to fulfil the necessary requirement of maintaining transparency? Though *Helen Suzman*¹²² was decided in 2018 and cited in *CPIO, Supreme Court of India v Subhash Chandra Agarwal* in 2019, it has remained largely confined to academic discussion to date. Subhash Chandra Agarwal dealt with four major objections against public access to information on appointments/selection of judges, namely, (i) confidentiality concerns; (ii) data protection; (iii) the reputation of those being considered in the selection process, especially those whose candidature/eligibility stands

proposed amendment of bringing a completely independent judicial branch was opposed by Shri K.M. Munshi on the ground that India has adopted the British model with an apex court designed in the image of the Privy Council.

¹¹⁸ Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481

¹¹⁹ *Id.* at ¶ 53.

¹²⁰ *Id.* at ¶ 117.

¹²¹ *Id.*

¹²² Helen Suzman Foundation v. Judicial Service Commission, 2018 (7) BCLR 763 (CC) 8.

negated; and (iv) potential chilling effect on future candidates given the degree of exposure and public scrutiny involved.¹²³

Indian judiciary is yet to discuss the modalities of information to be divulged and it largely depends on whether they want to step out of their cocoons.¹²⁴ The 2016 NJAC judgment¹²⁵ when it struck down the constitutional amendment on establishing a commission model made it clear that there are serious flaws in the present appointment system. A couple of years later, keeping up with the spirit of judicial reform, the Supreme Court collegium decided to publish the collegium resolutions with reasons. Prof. Tripathy's empirical study on collegium resolution reveals that the collegium had embarked on a path of grand plans of "transparency" without giving serious thought to the "degree" of transparency is feasible to achieve.¹²⁶ Very recently, the Supreme Court Collegium has amended its ways of publishing resolutions by legitimising the "informal"¹²⁷ factors as formal for considering a candidature as judge of the Supreme Court.¹²⁸ Having said so, the disbursing of information on collegium resolution is a highly Chief Justice-led phenomenon. Since, the time when the collegium started publishing its statements or resolutions, it has faced criticisms of lack of transparency and as a partial response to that CJI Dipak Mishra initiated the practice of publishing

¹²³ Larkins, *supra* note 113, at ¶ 82.

¹²⁴ *Id.*

¹²⁵ Supreme Court Advocates-on-Record Association. v Union of India, (2016) 5 SCC 1.

¹²⁶ TRIPATHY, *supra* note 97; Alok Prasanna Kumar, *Supreme Court Stops Uploading Collegium Resolutions on Website: Move is Major Self-Inflicted Wound, Smacks of Institutional Cowardice* FIRSTPOST (OCT. 22, 2019).<https://www.firstpost.com/india/supreme-court-stops-uploading-collegium-resolutions-on-website-move-is-major-self-inflicted-wound-smacks-of-institutional-cowardice-7536991.html>.

¹²⁷ ABHINAV CHANDRACHUD, *THE INFORMAL CONSTITUTION*, (Oxford University Press, 1st ed., 2014).

¹²⁸ Appointments of Justice N. Kotishwar Singh and Justice R. Mahadevan are recent examples of how collegium resolutions are disbursing information about their decisions. It divulges the reasons for considering a candidate and giving precedence to one over others. Supreme Court Collegium Resolution dated 11th July 2024. <https://cdn.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/07/2024071134.pdf>.

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them along with reasons from 2017.¹²⁹ So, it depends largely on that one person what kind of reforms he/she envisages, which tomorrow might change as well. Assessment of resolutions per se is not what this article intends to articulate; however, it takes into account the above-mentioned strategic gaps that limit the reach of collegium.

The existing Memorandum of Procedure talks about the authorities who are to decide on the proposed names. However, it lacks how to screen or assess those proposed candidates or what qualitative and quantitative criteria are to be measured and how to measure before finalising the proposed names. For instance, in a published proposal for the appointment of advocates to Punjab and Haryana High Court, some 11 names were recommended to the collegium by the Chief Justice of Punjab and Haryana High Court along with his two senior-most judges on 24th November 2017. The existing memorandum says to judge the suitability of these recommendations must be vetted by the concerned state Chief Minister (along with the Governor) and consulted with the judges who are conversant with the affairs of that court. For assessing the merit and suitability, all the materials pertaining to the recommendees must be scrutinised including observations of the Department of Justice.¹³⁰ This is the same procedure which was followed in 2024 as

¹²⁹ Mihir R., *Collegium’s 13 Resolutions Recommending SC Judges*, SUPREME COURT OBSERVER, (Sept. 25, 2021) <https://www.scobserver.in/journal/collegiums-13-resolutions-recommending-sc-judges/>.

¹³⁰ The proposal for appointment of a Judge of a High Court shall be initiated by the Chief Justice of the High Court. However, if the Chief Minister desires to recommend the name of any person he should forward the same to the Chief Justice for his consideration. Since the Governor is bound by the advice of the Chief Minister heading the Council of Ministers, a copy of the Chief Justice’s proposal, with a full set of papers, should simultaneously be sent to the Governor to avoid delay. Similarly, a copy thereof may also be endorsed to the Chief Justice of India and the Union Minister of Law, Justice and Company Affairs to expedite consideration. The Governor as advised by the Chief Minister should forward his recommendation along with the entire set of papers to the Union Minister of Law, Justice and Company Affairs as early as possible but not later than six weeks from the date of receipt of the proposal from the Chief Justice of the High Court. If the comments are not received within the said time frame, it should be presumed by the Union Minister of Law, Justice and Company Affairs that the

well.¹³¹ The revised Memorandum proposed to set up separate search-and-evaluation committees for the Supreme Court and all 25 high courts, which would screen names for appointment before they are recommended by the collegium.¹³² In the absence of a revised Memorandum of Procedure, higher judicial appointments lack a discussion on a transparent qualitative assessment of a judicial candidate, which is quintessential for taking the discussion on “who the judge is” further.

CONCLUSION

Carving a transparent appointment process is required for the judiciary to sustain itself in the times that we live in now. The expanded role and responsibilities of the institution have attracted questions like “Who are we governed by”, which is a pertinent one. This paper has attempted to cover an extensive discussion in a cogent manner by briefly discussing the role of the court, attempting to achieve diversity through representation, challenges in those attempts and why democratisation attempts should step out from an eclectic understanding of ‘judicial

Governor (i.e. Chief Minister) has nothing to add to the proposal and proceed accordingly.

The Union Minister of Law, Justice and Company Affairs would consider the recommendations in the light of such other reports as may be available to the Government in respect of the names under consideration. The complete material would then be forwarded to the Chief Justice of India for his advice. The Chief Justice of India would, in consultation with the two senior-most Judges of the Supreme Court, form his opinion in regard to a person to be recommended for appointment to the High Court. The Chief Justice of India and the collegium of two Judges of the Supreme Court would take into account the views of the Chief Justice of the High Court and of those Judges of the High Court who have been consulted by the Chief Justice as well as views of those Judges in the Supreme Court who are conversant with the affairs of that High Court. It is of no consequence whether that High Court is their parent High Court or they have functioned in that High Court on transfer. Available at <https://doj.gov.in/memorandum-of-procedure-of-appointment-of-high-court-judges/>.

¹³¹ Resolution, dated 24th September 2024. <https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/09/2024092494.pdf>.

¹³² Pradeep Thakur, *Supreme court pushes judge appointments, government keen on fixing memorandum of procedure*, THE TIMES OF INDIA, (Oct. 24, 2023) <https://timesofindia.indiatimes.com/india/supreme-court-pushes-judge-appointments-government-keen-on-fixing-memorandum-of-procedure/articleshow/104662367.cms>.

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independence’. No social institution is value-neutral.¹³³ Every institution is run by people and to expect blindly that people can be value-neutral is nothing but a mirage. To ensure true independence of the judiciary it is pertinent to step out of this cocooned understanding of associating every aspect of judiciary’s functioning with judicial independence. Any attempt to tame the reigns of the judiciary cannot be seen as a violation of the basic structure of the Constitution. Using ‘representation’ to achieve diversity to enhance public confidence in the judiciary remains a less explored area of research in India.

The roots of discussion on representation may fairly be drawn from the arguments of a reflective judiciary.¹³⁴ As enunciated in the 1983 *Montreal Declaration*,¹³⁵ the principle of ‘fair reflection’ has since been reaffirmed in numerous international instruments and operationalised in many domestic and international judicial appointment procedures. However, the method of achieving ‘fair reflection’ of non-traditional voices differs for different countries. A transparent appointment process should be the first step, if India has to think along the lines of building a ‘reflective’ judiciary then it can think along the lines of proportional representation. Hobbs believes that fair reflection of the society does not require fair reflection to mean an exact proportion. It simply requires that in its composition, the judiciary should mirror society in all its diversity - religious, gender, geographical, social, ideological, and so on.¹³⁶ Under the present appointment process it seems very easy to make the bench ‘pseudo-diverse’ (which means token appointments of non-traditional voices) but the lack of a transparent accountable method of appointments raises questions about the legitimacy of such diversity.

¹³³ Uday Shankar, *Appointment of Judges in Higher Judiciary*, in SWATI DEVA, LAW & INEQUALITIES (Eastern Book Company, 1st ed., 2010).

¹³⁴ Harry Hobbs, *Finding a Fair Reflection on the High Court of Australia*, 40(1) ALT. L. J. 13 – 17 (2015).

¹³⁵ *Montreal Declaration, Universal Declaration on the Independence of Justice*, unanimously adopted at the final plenary session of the First World Conference on the Independence of Justice held at Montreal (Quebec, Canada) on Jun. 10, 1983, <https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf>.

¹³⁶ Hobbs, *supra* note 134.

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Deeper questions of proportional representation of marginalised voices on the bench can be answered when the actual hurdles faced by ‘marginalised voices’ can be identified. Does collegium possess adequate information on where the non-traditional people are losing out and how can this attrition be controlled? It is certainly not enough just to put a ‘known’ non-traditional voice on the bench based on the opinion of a handful of judges. Appointing authorities will have to delve much deeper rather than just saying, “he belongs to a backward community from the State of... His appointment will bring diversity to the Bench.”¹³⁷

¹³⁷ *Supreme Court Collegium Resolution* (Jul. 11, 2024), <https://cdn.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/07/2024071134.pdf>.