

Appointing High Court Judges—I

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As of 17 January 2022, out of a total of 1,098 posts of high court judges, 411 or about 37% are vacant (Department of Justice 2022). This is not an exceptional situation and has persisted for a while now, notwithstanding the increase in the sanctioned number of high court judges back in 2014. One possible cause for this is that the appointment procedure of high court judges is the most constitutionally complex one. It involves the Chief Justice of the High Court, the Chief Justice of India, the governor of the state, and the President of India—no fewer than four.¹ In contrast, no more than two authorities are involved in the appointment of district (high court of the state and governor) and Supreme Court judges (Chief Justice of India and President). In practice and consequent to the Supreme Court of India's judgment in the second² and third³ judges' cases, the appointment actually involves the three senior-most high court judges in question, the three senior-most Supreme Court judges, and other Supreme Court judges familiar with the high court in question.

The minutiae of appointment process of high court judges is contained in the Memorandum of Procedure (MOP) for the appointment of high court judges (Department of Justice n.d.). This document outlines the responsibilities and powers of the various stakeholders at various steps in the appointment process. While there is no statutory or constitutional basis for the MOP, it is supposed to be adhered to by all concerned in compliance with the Third Judges case.

Although all the steps in the process are supposed to be documented, almost none of it is publicly available or made accessible through the Right to Information Act, 2005 (Upadhyay 2021). However, since 3 October 2017, the collegium of the Supreme Court started making its resolutions for nominations publicly available on its website in a bid to improve transparency.⁴ These resolutions included details of the names of candidates being considered, the reports received from the union government, etc. However, this practice has been curtailed somewhat with effect from 15 October 2019 with only a "statement" mentioning the names of those sent to the union government for the appointment as high court judges.

Nevertheless, even this data can clarify how the union government processes the

nominations sent in by the collegium. With each resolution and statement having a date and the date of appointment of judges publicly known, it is possible to calculate how long the union government took to make the appointment of a judge. This will include the time that any nomination was sent back to the collegium for reconsideration.

Methodology

Since collegium resolutions were first made public in October 2017, only appointments to high courts made after 1 January 2018 were considered in this column. Some appointments made after 1 January 2018 were not mentioned in any collegium resolution, suggesting that they were recommended prior to October 2017 and the exact date has not been made publicly known. Given this constraint, as of 5 January 2022, a total of 353 high court judges form part of the data set.

This list does not include judges who have merely been "confirmed," that is, additional judges who have been made permanent. It does not include Chief Justices of high courts or transferred judges. The reason for this is that the procedure for these actions, as laid out in the MOP, is quite different, and it would not make for an appropriate comparison in the context of the time it took for the government to act on the collegium's recommendation. The data set is therefore concerned only with "fresh appointments" to the high court, whether they be additional or permanent judges of the high court.

Basic Numbers

The data set of 353 judges has been broken down into the high court to which they were appointed and the "source" of the appointed in Table 1. Those high court judges who are drawn from among lawyers practising in that state are designated as "Bar" and those serving as judges in the subordinate judiciary are designated as "service."

Save for the Sikkim High Court and the Manipur High Court, every high court in India is represented in this data set. Table 2 gives a breakup of recommendations by year.

The drop in recommendations in 2020 is not surprising given the lockdowns and the uncertainty during the first wave of the COVID-19 pandemic (Kumar 2020). However,

there seems to have been a rise in the number of recommendations made in 2021.

Analysis of Time Taken

As per the MOP, once the recommendations are finalised by the collegium, the Ministry of Law and Justice is required to send them to the Prime Minister to advise the President on the appointment within a period of three weeks.⁵ Between the finalising of recommendations and the appointment of a judge under the warrant of the President of India, it is reasonable to expect that no more than four weeks ought to pass. However, the data suggests that this is not always so.

Table 3 (p 11) has the median time taken for the union government to appoint a high court judge after the collegium has made a recommendation, broken up by the high court and the source.

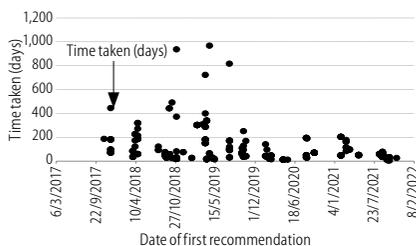
While there is wide variance in the numbers depending on the high court and the source, overall, the median time to appoint a judge was 55 days, though we see that there is a significant difference of nine days between "service" and "bar" judges across

Table 1: High Court Judges in the Data Set Broken Down by the High Court and the Source

| High Court | Source | | Total |
|--|--------|---------|-------|
| | BAR | Service | |
| Allahabad High Court | 33 | 25 | 58 |
| Andhra Pradesh High Court | 8 | 2 | 10 |
| Bombay High Court | 7 | 18 | 25 |
| Calcutta High Court | 9 | 12 | 21 |
| Chhattisgarh High Court | 2 | 5 | 7 |
| Delhi High Court | 7 | 4 | 11 |
| Gauhati High Court | 6 | 6 | 12 |
| Gujarat High Court | 13 | 8 | 21 |
| High Court for the State of Telangana | 6 | 6 | 12 |
| High Court of Jammu and Kashmir and Ladakh | 3 | 6 | 9 |
| Himachal Pradesh High Court | 2 | | 2 |
| Jharkhand High Court | 2 | 4 | 6 |
| Karnataka High Court | 22 | 9 | 31 |
| Kerala High Court | 13 | 7 | 20 |
| Madhya Pradesh High Court | 4 | 14 | 18 |
| Madras High Court | 13 | 10 | 23 |
| Meghalaya High Court | 1 | | 1 |
| Orissa High Court | 4 | 4 | 8 |
| Patna High Court | 8 | 2 | 10 |
| Punjab and Haryana High Court | 17 | 8 | 25 |
| Rajasthan High Court | 6 | 11 | 17 |
| Tripura High Court | 1 | 1 | 2 |
| Uttarakhand High Court | | 4 | 4 |
| Total | 187 | 166 | 353 |

Table 2: The Number of Recommendations and Appointments Made by Year

| Year | Recommendations |
|------|-----------------|
| 2017 | 17 |
| 2018 | 91 |
| 2019 | 84 |
| 2020 | 51 |
| 2021 | 110 |

Figure 1: Time Taken (Days) versus the Date of First Recommendation

the board. The 55-day median time of appointment is twice as long as that envisaged in the MoP.

When looking at the time taken to appoint across the years, an interesting pattern emerges. Table 4 breaks up the median time taken for appointment on the basis of the year in which the recommendation was made.

It would seem as though the process for appointment within the government has gotten quicker. While fewer recommendations were made in 2020 as a result of the lockdowns due to the pandemic affecting

Table 3: Median Time in Number of Days Taken by the Government to Appoint a High Court Judge after Recommendation

| High Court | Median of Time Taken (Days) by Source | | |
|--|---------------------------------------|---------|-------|
| | BAR | Service | Total |
| Allahabad High Court | 58 | 22 | 50 |
| Andhra Pradesh High Court | 172 | 66 | 119 |
| Bombay High Court | 151 | 70 | 70 |
| Calcutta High Court | 78 | 78 | 78 |
| Chhattisgarh High Court | 53 | 60 | 60 |
| Delhi High Court | 48 | 21 | 48 |
| Gauhati High Court | 53.5 | 42 | 42 |
| Gujarat High Court | 19 | 103 | 20 |
| High Court for the state of Telangana | 32 | 59 | 59 |
| High Court of Jammu and Kashmir and Ladakh | 142 | 58.5 | 69 |
| Himachal Pradesh High Court | 73 | | 73 |
| Jharkhand High Court | 76 | 37 | 37 |
| Karnataka High Court | 72 | 14 | 54 |
| Kerala High Court | 49 | 49 | 49 |
| Madhya Pradesh High Court | 27 | 52 | 52 |
| Madras High Court | 182 | 71 | 71 |
| Meghalaya High Court | 55 | | 55 |
| Orissa High Court | 72 | 16.5 | 16.5 |
| Patna High Court | 21.5 | 14 | 16 |
| Punjab and Haryana High Court | 57 | 63 | 57 |
| Rajasthan High Court | 56.5 | 47 | 47 |
| Tripura High Court | 187 | 16 | 101.5 |
| Uttarakhand High Court | | 33 | 33 |
| Total | 58 | 49 | 55 |

Table 4: Time Taken for the Recommendations Made by Year

| Year | Recommendations | Median Time |
|------|-----------------|-------------|
| 2017 | 17 | 182 |
| 2018 | 91 | 58 |
| 2019 | 84 | 70 |
| 2020 | 51 | 44 |
| 2021 | 110 | 49 |

The 2017 data relates only to the recommendations made between October and December of that year.

the functioning of the collegium, they were nonetheless processed quicker than in the previous years, and the trend continued into 2021. The mapping date of the recommendations and time taken to appoint presents an interesting pattern in Figure 1.

What Figure 1 seems to suggest is that the recommendations made post 2019 seem to be moving faster within the government for appointment.

However, a couple of caveats are needed to get a fuller picture. As of 2 December 2021, 51 recommendations of the collegium were pending with various limbs of the union government for appointment (Pandey 2021). These include 23 recommendations that have been reiterated by the collegium and two that have been reiterated twice (Press Trust of India 2022). Between 2 December 2021 and now, two further appointments have been made to the high courts bringing the number of pending recommendations to 49. Some of the pending appointments relate back to the recommendations made in January 2019 and even those made in the coming weeks would be delayed by more than three years!

There is another phenomenon, however, that is also worth noting here that might have contributed to the quicker pace of the appointments. Since 2019, the union government seems to be following a “pick-and-choose” policy by splitting up the names in a recommendation, appointing some and deferring others” (Sebastian 2021).

Strictly speaking, such “picking and choosing” by the government from the names recommended by the collegium is not permissible. When it was attempted in the context of nominations to the Supreme Court in the case of Justice K M Joseph, there was pushback from the Bar and no further recommendations were made to the Supreme Court till he was appointed as a judge. However, the same cannot be said in subsequent instances. Though the Chief Justice of India (CJI), Ranjan Gogoi, did criticise this practice in 2019 (Singh 2018), no CJI since has strongly objected to it.

Conclusions

The increased “efficiency” of appointments, at least in terms of improvement of the time it takes for the government to process a nomination and appoint a high court judge, seems to have come at a cost. In adopting a policy of picking and choosing names from a list to appoint, the union government has bypassed the MoP and given itself an unwritten veto over the appointment of high court judges. Unfortunately, this seems to be taking place with the full knowledge of the collegium, and given the absence of any protest, their acquiescence as well.

In the next article, I will examine the specifics of this “pick-and-choose” policy and the implications it has for the future of the high courts and judicial independence.

The author would like to thank Shreyashi Raj, intern at the Vidhi Centre for Legal Policy for her help with data collection in preparing this column.

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NOTES

- Article 213 of the Constitution of India.
- Supreme Court Advocates on Record Association v Union of India* (1993): 4 SCC 1.
- In re: Special Reference (1 of 1998) AIR 1999 SC 1.
- Supreme Court of India, Re: Transparency in Collegium System, 3 October 2018, viewed on 19 January 2022, <https://main.sci.gov.in/pdf/collegium/2017.10.03-Minutes-Transparency.pdf>.
- MoP Clause 15.

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