

Lateral entry for judiciary too – This may be the good idea

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The [Narendra Modi](#) government recently announced a plan to recruit private sector professionals, based on a three-year fixed tenure (extendable up to five years), to fill joint-secretary-level vacancies in the Union government. These are otherwise filled through departmental promotions in keeping with the protocol laid down by Union Public Service Commission. The plan aims to harness private sector expertise for policymaking and implementation of several government schemes and programmes. Though there is little clarity yet on how the selection committee for these appointments will be constituted—care must be taken to avoid conflict of interest—this is still a great opportunity for utilising both private sector expertise and traditional government management experience.

The question now is: Can a similar model be adopted for the appointment of judges? This is especially significant given the huge backlog of cases. As per official data, a total of nearly 82 lakh civil cases and 1.87 crore criminal cases are pending before the Indian courts. In the high courts, as per the latest department of justice data, 411 posts (for both permanent and additional judges) are lying vacant—against an approved strength of 1,079 and a working strength of 668. That’s a whopping 40% shortfall.

Although there is no constitutional mechanism, the appointment of Supreme Court and High Court judges is undertaken through the collegium system that came into existence in 1993 after the decision of the Supreme Court in *Supreme Court Advocates-on Record Association v. Union of India*, which held the supremacy of the Chief Justice of India over the executive in judicial appointments and transfers. Under this scheme, the five senior-most judges of the Supreme Court (including the Chief Justice of India) recommends a name to the Union government for appointment to the Supreme Court as well as the 24 high courts in India. However, in 2014, the Modi government tried to bring in the National Judicial Appointments Commission (NJAC) Bill. This was roundly criticised by the judiciary because the executive could nominate two members to the NJAC, apart from the fact that the Union law minister was also to be a part of it. The Supreme Court struck down NJAC in October 2015 and upheld the collegium system while acknowledging that the latter needed some reforms.

The revamped collegium system that discloses the reasoning of the collegium behind a selection/rejection has not been able to appoint judges at ease. The judiciary and the executive seem to be at logger-heads. This is especially significant after Justice KM Joseph’s elevation was rejected by the Union government and sent back to the collegium for reconsideration. It was also reported earlier this year that while the Supreme Court collegium had recommended 75 names, these names were pending for government’s approval.

Against such a backdrop, it is pertinent to examine if judges can be hired on a fixed-term basis. Article 124 of the Constitution (which prescribes appointment of Supreme Court judges) and Article 217 (appointment of High Court judges) don’t prohibit the short-term appointment of judges. The criticism that is often heard is that the best

lawyers are not made part of the judiciary—though this is primarily because the best legal minds may not be keen to join the judiciary for various reasons. A fixed short-term appointment, of 3-5 years, may generate interest amongst many. They can serve as members of the judiciary and can then return to private practice. The resulting increase in the pool of available judges can potentially help reduce the backlog of cases.

Some may argue that there will be a conflict of interest if judges are appointed for a short duration as they could end up serving private interest. But, in the existing system, instances of a judge—especially from the lower judiciary—being prompted by vested interests, are not unknown. With adequate disclosures and a watertight appointments process, the conflict issue can be addressed. An independent body can be set up, and depending on experience and specialisation, judges can be appointed on an ad hoc basis. These judges should not be appointed in the jurisdiction where they practised as lawyers, and should not be allowed to practice in the jurisdiction where they served as judges after the completion of their tenure.

With the Insolvency and Bankruptcy Code, 2016 and Commercial Courts, Commercial Division, the Commercial Appellate Division of the High Court's Act, 2015, and various specialised tribunals for IPR, securities law, environment law, etc, there is also an urgent need for specialised subject-matter expert judges. All developed jurisdictions not only have specialised courts, but also judges with specific expertise. Although the commercial courts, commercial division and Commercial Appellate Division of the High Court's Act, 2015, widened the reach of the judicial process, they did not mandate appointment of specialised judges. If judgments by lateral-entry judges are well reasoned, there may be a reduction in the number of appeals being filed across India, reducing the pendency of cases. Appointment of judges on a contractual basis, thus, may be a good idea.

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