

BOOK REVIEW

THE INFORMAL CONSTITUTION: UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA

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BOOK: *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* **AUTHOR:** Abhinav Chandrachud **YEAR:** 2014 **FORMAT:** Hardcover **EDITION:** First **PUBLISHER:** Oxford University Press **PRICE:** Rs. 895

With the passing of the National Judicial Appointments Commission Act of 2014,¹ and the recent challenge to its constitutionality², there is renewed interest in, what may be called, the big secret of the Indian Judiciary - appointments to the constitutional courts, that is, the Supreme Court of India and the various state High Courts. While the debate on the desirability of an independent commission for judicial appointments, and the criteria it should use, is rich in its normative content, it suffers from a lack of clarity on the actual practices of selection and appointment undertaken thus far. Abhinav Chandrachud's empirical analysis of appointments to the Supreme Court between 1950 and 2009 provides this much needed clarity, specifically with regard to the criteria for selection of judges to the Supreme Court of India.

The Constitution of India 1950, in Article 124(3), lays down the criteria for appointment of a Supreme Court judge as follows:

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¹ The Constitution (Ninety Ninth) Amendment Act 2014 was enacted by the Parliament to pave the way for the promulgation of the NJAC Act.

² Petitions filed in SC challenging National Judicial Appointment Commissions Act and Constitution 99th Amendment Act, LIVELAW (6-1-2015), <<http://www.livelaw.in/petitions-filed-sc-challenging-national-judicial-appointment-commissions-act-constitution-99th-amendment-act/>>, Validity of judicial appointment law challenged, The Times of India (16-1-2015), <<http://timesofindia.indiatimes.com/city/kochi/Validity-of-judicial-appointment-law-challenged/articleshow/45905288.cms>>.

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(3) A person shall not be qualified for appointment as a Judge of the

Supreme Court unless he is a citizen of India and—

- (a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
- (b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
- (c) is, in the opinion of the President, a distinguished jurist.

Chandrachud argues that there is a distinction between this “formal eligibility criteria” and the criteria actually employed in selecting and appointing judges to the Supreme Court (p. 7). On the basis of his study of quantitative data pertaining to the 189 judges who have served on the Indian Supreme Court between 1950 and 2009 and qualitative data collected through semi-structured interviews with 29 former judges of the Supreme Court, Chandrachud identifies three informal criteria:

“(a) a judge should be at least 55 years of age in order to be considered eligible to be appointed to the Supreme Court, (b) he should be a senior High Court judge, or, especially over the last 20 years, the Chief Justice of a High Court, and (c) judges should reflect the geographic (and demographic) diversity of India, that is, judges are selected for the Supreme Court by taking into account the state or region they belong to, and whether they belong to non-traditional backgrounds, in terms of religion, caste, or gender.” (p. 2).

The book begins with an introduction that outlines the central claim and also lays out the research methodology. Chandrachud argues that “informal norms have seeped into the cracks of India’s written Constitution and live in its shadows” (p. 7). To the extent that he sets out to not only identify unwritten criteria for appointment but also show their metamorphosis into norms, Chandrachud takes on a heavy burden, one that is perhaps difficult to discharge given the constraints of empirical analysis in an area of substantial data vacuum.

Building upon the work of Rajeev Dhavan³ and G. H. Gadbois⁴, Chandrachud uses both official and non-official sources to construct por-

³ RAJEEV DHAVAN, *THE SUPREME COURT OF INDIA: A SOCIO-LEGAL CRITIQUE OF ITS JURISTIC TECHNIQUES* (1977); RAJEEV DHAVAN & ALICE JACOB, *SELECTION AND APPOINTMENT OF SUPREME COURT JUDGES: A CASE STUDY* (1978).

⁴ GEORGE H. GADBOIS JR., *JUDGES OF THE SUPREME COURT OF INDIA: 1950-1989* (2011); George H. Gadbois Jr., *Indian Judicial Behavior*, 5(3/5) *ECON. & POL. WKLY.* 149 (1970).

traits of the judges who have served on the Supreme Court, thus creating a repository of quantitative data relating to possible criteria for appointment. Thereafter, he uses tests of statistical significance for analysis, and identification of trends. The qualitative data from interviews is used primarily to draw conclusions from the statistical findings by outlining the motivations underlying changes in the criteria.

The data collection exercise undertaken by Chandrachud is extensive and he describes the same in detail in the Introduction. However, insofar as he hopes that this work will serve as a “foundation for [future] quantitative studies”, it would have been useful to have a clear description of the research design, including an outline of the operationalization of explanatory and response variables, and control variables. Further, while he acknowledges the limitations to data collection, readers would have benefitted from a brief discussion of the implications that this might have for data analysis and the subsequent substantiation of empirical claims.

Chapter One serves to contextualise the empirical analysis through an elaboration of the historical background of the Supreme Court of India. Two aspects are particularly noteworthy. First, Chandrachud makes extensive reference to the deliberations surrounding the establishment of the Supreme Court and its predecessor of sorts, the Federal Court. He thus succeeds in highlighting the aspirations and anxieties that guided decisions regarding procedure for selection of judges, qualification for appointment, and tenure. For example, he points out that the retirement age gap between the High Court and Supreme Court is explained by the need to incentivise judges from the former, to take up posts in the latter (pp. 36-38). In a sense these deliberations serve as additional data that can be used to explain the significance of changes in criteria over time.

Second, brief biographies of the judges who served on the Federal Court have been included, and an attempt is made to identify the basis upon which these judges were appointed. This is important as brings into sharp focus the discretion and resultant indeterminacy that has characterised the issue of appointment from the very beginning. It goes to show that in light of the inadequate guidance provided by the written criteria, the practice of supplementing the same through the creation of “unwritten” criteria is certainly not a new phenomenon.

Any analysis of the practice of appointing Supreme Court judges would be incomplete without an elaboration of the three Judges Cases.⁵ By fundamentally altering the process of selection of judges and making it the sole pre-

⁵ S.P. Gupta v. President of India, 1981 Supp SCC 87 (First Judges case); Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441 (Second Judges case); Special Reference No. 1 of 1998, In re, (1998) 7 SCC 739.

rogative of the Judiciary, more specifically of the collegium of Supreme Court judges headed by the Chief Justice of India, these Cases represent a break in the scheme of appointments to the Supreme Court. The Cases are hence important not only from a normative lens but also from a methodological point of view. First, they simplify the process of identification of criteria. By placing appointments firmly within the judicial realm, the confusion created by the often contradictory objectives of the Executive and Judiciary is avoided. An analyst can therefore make out trends and identify their underlying motivations more clearly, especially if he has access to qualitative data in the form of opinions of judges who were members of the collegium. Second, it problematizes the drawing of conclusions across the entire period of the Court's existence. As the motivations across organs of the state vary, and the Executive could override the Judicial recommendation, consolidation of patterns across appointments made before and after the Cases may create false positives or false negatives and thereby overstate the conclusion.

Chandrachud's discussion of the three Judges Cases in Chapter Two encourages the reader to engage with the aforementioned issues. He provides an informative and critical narrative of the Cases and also traces the political developments that led to the present collegium system of appointing judges – the tussle between the Executive and Judiciary vis-à-vis violation of the seniority norm to check activist judges, and the role of a weak centre in facilitating the ultimate usurpation of the power of appointment by the Judiciary. The Chapter also highlights the theme of judicial independence as the core motivation for establishing the collegium system of appointment by adopting the arguably questionable interpretation of the Constitution, which resulted in effectively reading consultation as “concurrence” (pp. 124, 130). This theme is relevant because it has also been used to justify the continuing lack of transparency and accountability in making appointments to the Court. By perpetuating secrecy in the selection process, judicial independence is at the root of both, the central thesis of the book, and the challenges to this thesis' empirical substantiation.

Chapters Three to Five contain the substance of the book. Chandrachud dedicates a chapter each to the three “unwritten criteria” of age, seniority, and diversity. The chapters are organised as follows: first, a brief overview of the debate surrounding the desirability of the criterion, through a comparative constitutional law lens; second, a narration of the qualitative study; third, a detailed statistical analysis of the quantitative data; and finally, an extrapolation of conclusions from the findings which include the identification of trends, their possible underlying reasons, and consequences.

Chapter Three deals with the criterion of age. Chandrachud notes that despite the fact that age related eligibility under the Constitution is 33 years, the age of appointment has steadily increased over the years from an average

of 57.67 years in the Court's first decade to an average of 59.7 years in the 2000s. Most appointees to the court fall in the age group of 58 to 62 years. In light of the retirement age of 65, this increase in the age of appointment has had the important consequence of substantially reducing the tenure of Supreme Court judges such that the average tenure is 1.63 years (pp. 167-168, 171-172). Chandrachud has analysed the age curve by breaking up the years of the Court into political eras: Nehru, post Nehru, Indira Gandhi, Janata party interregnum, Indira Gandhi's return, Rajiv Gandhi, post Rajiv Gandhi, and, finally, post Second Judges cases (pp. 173, 176). Special attention is drawn to the statistically significant differences in appointment age pre and post the Second Judges Case (p. 177). Categorisation on the basis of political eras is useful as it traces alterations in the relationship between the Judiciary and Executive, and subsequent changes in the guiding objective of the two organs. It also fits well with changes in the mode of appointment, and hence is crucial to appropriately delimiting trends in the data.

On the basis of the qualitative data, Chandrachud notes that the trend of appointing judges who are older is the result of greater emphasis on maturity and experience. While this is quite clear from the discussion of the data, it is his explanation of the significant change in criteria post the Second Judges Case that is worthy of note. Referring to the link between tenure length and the strength of influence of a judge within an independent institutional setting, Chandrachud hypothesises that it was a conscious decision of the collegium to appoint older judges in order to reduce the tenure length and hence offset the influence of the judiciary, making it "more palatable" for political actors (p. 150). To substantiate his claim, he refers to another visible trend - the increase in the size of the Supreme Court and the concomitant practice of sitting in benches of two. This too, he argues, is an exercise in ensuring judicial independence through political appeasement. In the final analysis, therefore, Chandrachud finds that the length of tenure is central to judicial independence and democratic legitimacy.

This analysis of alterations in appointment criteria as a means of "diffusing the political strength of the judges" (p. 162) is not readily borne out by the data and the statistical findings as they have been reported. Perhaps all that is needed is more detailed reporting of the data, including quantification of the information received through the interviews. This would serve to enlighten the reader as to the views of the judges on the topic. Additionally, further analysis of the combined effect of age of appointment, retirement age, tenure, size of the court, bench strength, and measures of activism using proxies such as number of judgments invalidating governmental action for example, may have provided greater insight into this issue. That said, given the increase in the influence of the Court in recent years and the democratic deficit critique, the claim of exercising judicial restraint through regulation of appointment age and tenure, is provocative and certainly worthy of extended exploration.

In Chapter Four, Chandrachud analyses the informal criterion of seniority. He finds that the criterion of seniority, as an indicator of the suitability of a candidate for appointment, prioritises judicial experience as measured in terms of the length of the tenure served on a high court and, more importantly, the position occupied therein. While the Constitution permits the appointment of lawyers and legal scholars to the Supreme Court, an overwhelming 97.9% of the judges appointed to the Supreme Court had prior judicial experience (p. 185). During the 2000s 88% of those appointed were high court chief justices (p. 193). Given the importance afforded to the criterion of seniority historically, this finding is not surprising but Chandrachud's statistical analysis exposes the rigidity with which the criterion is adhered to and the significance of any exceptions made.

There was a sharp increase in the proportion of the Supreme Court judges who were high court judges in the 1980s and the proportion has steadily increased since then. The same trend is seen with regard to the mean years these judges have served on the high court prior to elevation to the Supreme Court. In the 2000s this was between 13 and 14 years. Chandrachud finds that there has been a statistically significant rise in the mean number of high court chief justices appointed to the Supreme Court post the Second Judges Case. He concludes by observing that the post of the high court chief justice has been "reduced to a stepping stone to get to the Supreme Court" (pp. 193-194, 199).

Given that there are several alternate explanations for what seems to be an over reliance on the criterion of seniority, the discussion of the historic importance of the norm proves useful. Nonetheless multivariate analysis controlling for the effect of the age criterion, and an increase in the judicial pool from within which appointments can more easily be made could help in drawing more robust conclusions by isolating effects. Here as well, reporting of the findings of the qualitative interviews through tables and graphs would have given the reader a deeper insight into the views of the judges themselves.

Chandrachud argues that strict adherence to the seniority criterion comes at the cost of a robust tenure at the Supreme Court, and career diversity. This latter point is an important one, specifically in light of the recent appointment of two senior advocates to the Supreme Court.⁶ Such an appointment has been made only four times in the past. Chandrachud notes that lawyers have historically turned down offers of appointment, which has contributed to the career homogeneity on the Supreme Court bench (p. 205). This creates some difficulty. In the absence of data on offers made to non-judges for appointment, it is impossible to make a strong claim regarding the extent of adherence to the practice of appointing only senior high court judges to the

⁶ Hon'ble Mr. R.F. Nariman and Hon'ble Mr. Uday Umesh Lalit, who were senior advocates, have been appointed as Judges of the Supreme Court as of July and August 2014 respectively. <<http://supremecourtfindia.nic.in/judges/judges.htm>>.

Supreme Court. While some anecdotal evidence is reported which suggests that only few such offers were made, greater clarity is needed. Perhaps qualitative data relating to the experiences of senior members of the bar would be helpful in unpacking this issue further.

Chandrachud's challenge to the fairness of the application of the criterion, and his study of exceptions to the seniority norm, such as diversity, serve to give greater depth to the understanding of the collegium's decision making process.

Chapter Five deals with the criterion of diversity. Chandrachud identifies four kinds of diversity: geographic; religious minority communities; backward castes; and gender (pp. 215-219).

Chandrachud seeks to test the geographic diversity of the appointees in light of the political significance of the state, and the workload of its high court, both of which are found to be statistically associated with each other. The former is measured through the size of the state and the share of seats in the Council of States and House of the People. The latter is measured through the proxy of total sanctioned strength of the state's high court (pp. 241-243). The data shows that the Supreme Court has become more inclusive over the years and this has been facilitated, in part, by the increase in the size of the court (p. 246). However, certain high courts remain over-represented. Chandrachud notes that judges of the busier high courts are considered more attractive as candidates (pp. 250-251).

The analysis on geographic diversity brings to the fore two aspects of particular note. First, the collegium adjudges geographic diversity on the basis of the high court where the judge last served and not on the basis of ethnicity, place of birth, or native language (p. 216). This seems to suggest that instead of ensuring representation of geographic areas or states, the appointment process seeks to ensure representation of high courts. This might explain the finding of statistical correlation between appointments and busier courts, and also the absence of correlation between appointments and populated or politically relevant states. Second, a comparison of the number of appointments and also the length of the tenure of the appointees from different high courts exposes a variation in the mean age and also mean tenure across states (pp. 252, 253). This shows that the criterion of geographic diversity acts as a limiting factor on the criteria of age and seniority.

While the presence of a norm for geographic diversity can be made out to some extent from the data, the presence of a norm vis-à-vis the other diversity indicators is not quite as clear. Keeping in mind the seemingly haphazard selection with regard to religion, caste, and gender, one wonders if the appointment of persons belonging to non-traditional backgrounds is not so much a policy decision as it is a necessary after-thought at a time when minorities are

increasingly vocal about the need for greater representation. This is certainly true for religious diversity and gender diversity wherein representation falls far short of the population share within the country (p. 261). In this regard, the small sample size and the dearth of official data serve as limitations to more robust analysis. This is especially so with regard to caste status, wherein it would have been useful to disaggregate the data beyond the binary of forward and backward castes. Data limitations also restrict an enquiry into the interaction among the indicators of diversity, and their effect on the other two criteria of age and seniority.

Chandrachud laments that the diversity in the Court is “more symbolic than substantive” (p. 262). While this has been a recurrent criticism of the appointment process, the fact that it is borne out by the data helps strengthen the case for greater attention to be paid to the issue of diversity in the Supreme Court.

The book concludes by locating the central thesis within the larger scholarship on the creation of informal norms.

On the whole, Chandrachud successfully identifies certain trends in the appointment of judges to the Supreme Court of India by highlighting the age, seniority, and diversity related characteristics of those who have served on the Court. However, the analysis suffers on account of two factors. First, there is insufficient theoretical exploration of the process through which unwritten criteria, which serve as a guide to decision making, get converted into informal norms, which are, in essence, limits on decision-making. This is especially problematic in light of variation in the data, which may not be explained away as exceptions. Second, given the data vacuum in the area, which prevents analysis using a control group, it is not possible to eliminate, to the extent required, alternate explanations for the trends identified. Hence it is difficult to draw meaningful causal claims that would allow us to conclude that the trends in the data are in fact evidence of the creation of norms.

Despite the handicap of limited data, Chandrachud’s work goes a long way in drawing attention to the ability of institutions to build upon, and practically alter, norms that are democratically entrenched. His nuanced treatment of the historical material and narration of the statistical findings bring to the fore the role that competing Executive and Judicial objectives can play in this process of norm creation. At a time when India is debating the establishment of a commission for judicial appointments, these are important considerations to keep in mind.

The *Informal Constitution* is a significant contribution to the scholarship not in the least because of the extensive data it usefully catalogues, but also because of the framework it seeks to provide for critical reflection upon the same.