Appointing High Court Judges–II

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On 4 February 2022, the former additional advocate general of Karnataka and senior advocate, Aditya Sondhi, withdrew his consent to be elevated as a judge of the High Court of Karnataka (Aditya 2022). This was not done in a fit of pique—it had been a year since his name was first proposed by the Supreme Court collegium and five months since his name was reiterated by the collegium. Yet, no appointment order was forthcoming from the union government.

There is no apparent reason why Sondhi's nomination has been held up; at least five others nominated along with or after him have already become judges of the High Court of Karnataka. It is not as if the system has broken down. There seems to be little interest in making it work when it comes to his nomination.

Sondhi's case is not a one-off; he was one among the many nominees to the high court whose nominations are pending with the union for a long period with no certainty about, if and when they will be appointed. Such delays suggest an effort by the union to assert control over the judicial appointment process and diminish the role of the Supreme Court collegium.

In the previous part of this column, I had analysed the appointment of high court judges based on the publicly available data (Kumar 2022). In this column, using the same data set, I intend to examine how the union government has segregated the names recommended for appointment to the high courts, what has been the impact of the same, and the constitutional change that this practice signifies.

Segregation of the Judges

The first major controversy over the "segregation" of names took place over the elevation of Justice K M Joseph, the then Chief Justice of the Uttarakhand High Court to the Supreme Court. Justice Joseph's name had been recommended by the Supreme Court along with Justice Indu Malhotra on 10 January 2018,[1] but while Justice Malhotra was appointed on 27 April 2018, Justice Joseph was appointed only on 7 August 2018—nearly two and a half months later. When questioned about this in open court, the then Chief Justice of India (CJI) Dipak Misra stated, somewhat surprisingly, that there was nothing per se wrong with such segregation of names (Prabhu 2018).

This is a somewhat strange position to take on the part of the CJI—it implies that the recommendation of the collegium is simply a suggestion, and the final call on how and when to appoint a judge will be that of the union. This is quite contrary to the judgment in the Second Judges case,[2] which clarifies that the recommendation of the CJI and the collegium would be binding on the union unless it can provide cogent reasons as to why the appointment cannot be made. This is ostensibly to preserve the independence of the judiciary and ensure that proper consultation takes place between the constitutional authorities. Nothing in the Memorandum of Procedure also permits the union to selectively appoint judges at a time of their choosing, once the collegium has sent across its recommendations (GOI 2022).

On the contrary, giving the union the power to pick and choose the names from the list implies that the union will now have a say on how long a given judge will serve and also on the seniority of the judge in question. Seniority is not a trivial matter—the CJI or the chief justice of a high court is almost always the senior-most judge of that court.

In looking at the segregation of names, we see two types—one where only the tenure of a recommended judge gets reduced and one where both the tenure and the intended seniority of the judge gets reduced. For instance, Justice Joseph, if he had been appointed on the same day as Justice Malhotra, would have had a slightly longer tenure. However, in the case of Sondhi, even if he had been appointed on 1 February 2022, he would have been placed at lower seniority than the five other judges who were recommended and appointed at the same time or after him.

Looking at the data related to the recommendations of the collegium and the appointment of judges, it is possible to discern all such instances of segregation by comparing the date of recommendation with that of appointment.

It has to be mentioned here that this list of segregations is not exhaustive for two reasons: (i) The Supreme Court only started making recommendations public since 3 October 2017, and there is no publicly available source of information for prior recommendations. (ii) Since 15 October 2019, the Supreme Court stopped making full collegium resolutions public and only statements are released. This has meant that it is not possible to tell in which situation a nominee's name has been recalled by the Court after being rejected it, though reiteration of names are still mentioned in the statements. Therefore, nominees awaiting appointment as on 1 January 2022 have been excluded from the list of segregations.

With these two caveats, we find that there are 42 judges whose names have been segregated from the list of nominees by the union as on 1 January 2022. They can be broken up by the high courts as shown in Table 1 and Table 2 (p 11).

While the first type of segregation seemed to have started in 2018 around the same time as the Justice Joseph controversy, the second type of segregation seems to have happened in the second half of 2018.

Table 1: Total Number of Judges Segregated before Appointment

High Court	Number of Judges
Allahabad High Court	4
Bombay High Court	5
Delhi High Court	1
Gauhati High Court	1
Gujarat High Court	2
High Court of Jammu and Kashmir and Ladakh	1
Karnataka High Court	6
Kerala High Court	1
Madras High Court	1
Orissa High Court	6
Patna High Court	8
Punjab and Haryana High Court	1
Rajasthan High Court	4
Uttarakhand High Court	1
Grand total	42

Table 2: Total Number of Judges Who Lost Seniority as a Result of Being Segregated

High Court	Number of Judges
Allahabad High Court	3
Andhra Pradesh High Court	1
Bombay High Court	2
High Court of Jammu and Kashmir and Ladakh	1
Karnataka High Court	4
Madhya Pradesh High Court	2
Madras High Court	1
Punjab and Haryana High Court	1
Rajasthan High Court	5
Uttarakhand High Court	1
Grand total	21

The first instance of the latter type of segregation was also seen in the second half of 2018, when the recommendation to appoint Justice H S Gill to the Punjab and Haryana High Court made on 1 August 2018 was kept pending, while six others recommended after him were appointed before or on the same day as him.

The three most egregious cases of such segregation relate to Justices Shamim Ahmed and Dinesh Pathak of the Allahabad High Court and Justice M G S Kamal of the High Court of Karnataka. Whereas the former were appointed 443 days after the first recommendation, with 14 judges recommended after them having already been sworn-in as judges of the Allahabad High Court, Justice Kamal was appointed 743 days after the first recommendation, with 12 judges having been recommended after him and sworn-in as judges of the High Court of Karnataka.

These are perhaps not even the most egregious instances of the political executive deviating from the appointment process. While the Memorandum of Procedure indicates that when the nominee's recommendation has been reiterated by the collegium, there are several instances of the union refusing to appoint and asking the collegium to reconsider. Such second requests for reconsideration are not envisaged in either the Two Judges' cases or in the Memorandum of Procedure. Nonetheless, in the cases of Sadiq Wasim Nargal, Nagendra R Naik, and Sakya Sen, the collegium has been forced to reiterate their names on two separate occasions, and as on 1 February 2022, none of the three have been appointed as judges of the respective high courts to which they have been recommended. In effect, this seems to be a sort of pocket veto being exercised by the union in the matter of appointment of judges.

Conclusions

By condoning the union government's power to segregate nominations, the Supreme Court collegium has effectively converted itself into a search-and-selection committee. Likewise, by condoning the union government's practice of repeatedly sending the same name back to the collegium for "reconsideration," the collegium has allowed the union to derail the appointment process.

Whereas the intent behind the collegium system was to ensure that the discretion of the union in appointing judges is minimised, this practice has increased the discretion of the union. By picking and choosing names, not only the union government can deter nominees it does not like by making the process a frustrating and humiliating one but can also effectively determine the order of seniority in the high courts. The intent behind setting up the collegium system was to protect the independence of the judiciary; however, in giving the union the final word in such matters, the collegium has effectively made itself obsolete.

It is a remarkable fact that while no successful amendment has been made to Articles 124 and 217 of the Constitution, the manner of appointment of judges has undergone at least two, and now three, changes. As I have detailed in the previous article (Kumar 2020), the process underwent change in around 1971 and then in 1993—first, as a result of a tacit understanding between the political executive and the CJIs, and second, as a result of the judgment of the Supreme Court in the Second Judges case. It would seem that sometime in 2018, another change has been introduced into the appointment system; this time as a result of the collegium's acquiescence of the political executive's assertion to have a final say in the appointment of judges.

Was such segregation and multiple reiterations condoned by collegiums in the past? The frustrating lack of transparency in the judicial appointment process has meant that there is still huge ambiguity on the role of collegiums. If, however, such practices were, in fact, condoned by the collegiums in the past, it would only call into question the entire collegium system from an earlier date.

The fact that the union is free to segregate recommended names and demand reconsideration of the same names multiple times should make us question the purpose of the collegium system. Its existence, without support in the Constitution, has been justified in the name of protecting the independence of the judiciary. Even apart from condoning questionable practices, such as segregation of names and multiple reconsiderations, recent events such as the transfer of Chief Justice Sanjib Bannerjee (Venkatesan 2021) and the non-elevation of Justice Akil Kureshi to the Supreme Court (Daniyal 2021) have heightened doubts about the ability of the collegium system of appointments to protect the independence of the judiciary.

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NOTES

1 Supreme Court of India, Resolution dated 10 January 2018, https://main.sci.gov.in/pdf/collegium/j_apptt_supreme_court.pdf, viewed on 15 February 2022.

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

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