

Judiciary and Its Collegium System

We need a more transparently and efficiently appointed, diverse set of judges.

Alok Prasanna Kumar writes:

The current back and forth between the union government and the judiciary over judicial appointments is welcome. For too long, the union government ran roughshod over the appointments process with little to no protest from the collegium or the rest of the judiciary. It “segregated” nominees for appointment, returned reiterated nominees, or simply refused to make appointments until nominees quit on their own out of frustration. All of this was quite contrary to the Memorandum of Procedure set out consequent to the Third Judges’ case. More than the union government’s intransigence on the matter, it was the collegium’s acquiescence that was worrying. Successive chief justices even as the union government subverted the collegium process, turning it into a “search and selection committee” style system.

The assertion of the sanctity of the collegium process and the Memorandum of Procedure is thus welcome. The statements of the union law minister and vice president have been responded to by the judges from the bench and at various fora. Whether this results in any change in the behaviour of the union government, in adhering to the Memorandum of Procedure or making appointments in a prompt manner, remains to be seen.

That said, the collegium system is by no means the best or the most effective system for the appointment of judges in India. The collegium system of the appointment of judges, introduced in the Second Judges’ case by a judicial sleight of hand to address specific concerns of executive interference in the appointment process, has outlived its use and perhaps stands in the way of true judicial reform.

Three failings are obvious—it is non-transparent, inefficient, and there is stifling diversity in the judiciary. There are presently no clear criteria communicated to the public as to how the suitability of candidates for judgeship is assessed by the collegium. This absence becomes more acute when questions are raised about the integrity and ability of individual judges. With greater scrutiny of the judiciary than ever before, the public’s faith in the judicial system slips even further with every questionable appointment and their unacceptable conduct on the bench.

At the same time, the collegium system has fallen short in the task of efficiently filling up the vacancies at the high court level.

As of 1 December 2022, 330 seats or 30% of the sanctioned strength of high courts remain vacant. This number is an improvement over the past years where the constant churn of judges and lack of formalised processes meant that the collegium was rarely, if ever, able to ensure a high court strength of more than 700 judges. Given that the high court is the most overburdened level of the judiciary (given the high number of pending cases per judge), this is an unsatisfactory state of affairs affecting the dispensation of justice.

In privileging seniority as an appointment criterion, the collegium has also turned itself into a clique of sorts with largely male, upper-caste judges picking male upper-caste candidates for judgeships at the high courts and Supreme Court. Even though the presence of reservations has increased the representation of women, Dalits, Adivasis, and other excluded communities in the district judiciary, this has not yet been reflected in the high courts and the Supreme Court, which remain largely dominated by upper-caste men. Judges from the district judiciary appointed to the high court tend to have shorter tenures than their counterparts from the bar. This means that they are rarely senior enough to be part of the high court collegium that performs the important task of choosing nominees to the high court.

Needless to say, the failings of the collegium system cannot be addressed by reverting to some prior, discredited system of appointment that gives the union government a predominant say in the process. Likewise, resurrecting the failed model of the National Judicial Appointments Commission (NJAC) will not work; what is needed at the moment is a greater focus on the “how” of judicial appointments rather than just the “who.” Specifically, what is needed is an appointment process that focuses on clear criteria for the appointment of judges, ensures transparency in the process, and is efficient in being able to ensure timely appointments. Missing also in the current discussion about the collegium is the presence of the citizen in the process. If there was one commendable aspect of the NJAC amendment, it was the inclusion of an “eminent person” in the NJAC.

