

The Predicament of the Collegium

The complete composition of the collegium continues to run into rough weather.

Alok Prasanna Kumar writes:

The collegium system of appointment of judges is once again in the news. The union government, through Union Minister of Law and Justice Kiren Rijiju and the Vice President Jagdeep Dhankar, has been making its displeasure about the system public in the last few weeks. Moreover, the somewhat unintelligible, if not preposterous, suggestion has also come from the union law minister that the government should have a representative in a screening committee that sends the names to the judges in the first place.

This sudden dissatisfaction with the collegium system of appointments is a mystifying development for a number of reasons. This system has been in vogue for three decades now and has been followed since 2016 when the Supreme Court of India struck down the National Judicial Appointments Commission (NJAC) amendment and law. While there were reactions to the judgment, expressions of governmental discontent with the collegium system of appointments were few and far between 2016 and 2022. Scores of appointments have been made in the meantime and one cannot recall the union minister or anyone from the union executive constantly attacking the system for being non-transparent, subjective, or unconstitutional.

A casual observer of the judiciary may wonder what the cause for the discontent might be, particularly, at this moment. However, the keen observer of the judiciary will point out that the last few years have had Chief Justices of India (CJIs) who have, in one way or the other, consistently undermined the collegium system in a number of ways, to the benefit of the union government. Such CJIs have ignored the demands to modify the Memorandum of Procedure (MoP) as recommended by the Supreme Court itself. They have allowed the union government to run roughshod over the existing MoP. They have consistently failed to stand up for nominees against whom the union government has run vicious whisper campaigns. They have watched quietly, as only those with the same political bent as the union executive have been given a quick passage into the judiciary, and others left in limbo no matter their individual abilities as judges.

It seemed as though all it took for the collegium to reconsider its recommendations was the mild expression of displeasure on the part of the union government. The collegium was reduced to yet another search and selection committee, while the final call on the appointment of judges was left with the union government.

What has changed recently is that the collegium of judges under the CJI, D Y Chandrachud has actually started to function

as intended in standing up for itself and its nominees. This change in the collegium's functioning was most evident in the manner in which the collegium put out a public statement defending one of the judges' nomination to the Delhi High Court, responding to the government's insinuation that his sexual orientation made him unfit to be a judge. This bold defence of a bold choice was also reflected in other nominees whose names were reiterated by the collegium with detailed responses to the baseless objections raised by the union government.

This assertion of some amount of independence has caused consternation in the union government. The same law minister who was upset with the collegium's lack of transparency is now worried that the opinion pieces masquerading as "IB Reports" are being made public by the collegium. Though the appointments still have not been made as of publication, the collegium has at least indicated its intention of not going along, tamely, with the wishes of the union government.

What the statements about the collegium indicate, therefore, is frustration at the loss of control over the process. Concerns over the representation, transparency, etcetera are simply a cover for the real reason for governmental discontent with the appointments process—the need to have a pliant judiciary that does the union government's bidding.

None of this should be taken as an endorsement of the collegium system of appointments. It is precisely the system's glaring shortcomings in the context of objectivity and transparency that have been exploited by the union government to try and produce a pliant judiciary. Three decades is a good time to also re-examine and re-evaluate the system itself and see if it has achieved its intended objectives of ensuring independence and quality in the higher judiciary. While the NJAC was a poorly conceived and ill-executed idea for reforming the process of appointments, it cannot be denied that the current system is also in dire need of reform and replacement.

A new system of appointment of judges will look to go beyond the executive–judiciary dynamic and introduce the most important but as yet ignored stakeholder—the public—into the picture. Amid the back and forth between the judiciary and the executive, it is worth reminding everyone that the judiciary exists not to serve itself or the executive but the people of India.

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