

17<sup>th</sup> January, 2023**Judicial Independence: FOR WHOM THE BELLS TOLL!!***Resist the Executive's Attempt to Discredit & Undermine Independence of the Judiciary.*

As the Modi government reaches the final stretch of its second five-year term, one can see the beginnings of its new priorities. The drumbeats against the judiciary, the lone institution which is not totally within its control, have become louder. Right from the Law Minister to the Vice President, questions are being raised about the judiciary and its way of functioning. The first salvo was against the collegium system and the mode of appointment of judges. Then the courts were excoriated (rightly so) for not being representative institutions in terms of caste background. The Vice President opened a fresh line of attack, criticizing the Supreme Court's decision in *'Kesavananda Bharati v State of Kerala'* as being 'against democracy'. The Law Minister has now again upped the ante, by writing on 16<sup>th</sup> January, 2023 to the Chief Justice, asserting that the executive should be represented on Search – cum – Evaluation Committee' (SEC) for appointment of judges to the Supreme Court. This latest demand flies in the face of the law laid down by the Supreme Court on how judges are to be appointed, keeping in mind the question of the independence of the judiciary.

It is vital that civil society responds to this attempt to delegitimize the judiciary using various stratagems. PUCL will in this statement respond to the attack on the collegium system and then follow up with a 2<sup>nd</sup> statement on the criticism of the *'Basic Structure Doctrine'* evolved in *Kesavananda Bharati* case, by the Vice President of India.

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At the very outset, the PUCL deplors the concerted, systematic and relentless attack on the collegium system of appointment of the judges of the High Courts and the Supreme Court, led by the Union Law Minister, Kiren Rijiju and other high constitutional functionaries. The statements made by the Law Minister over the last few months barely disguise the threat held out to the independent functioning of the highest judiciary; his retort on undue delay in appointment of judges saying, **"Never say that the government is sitting on files, then don't send the files to the government, you appoint yourself, you run the show"** is a warning of what is coming and ominous.

The government has made clear that it views PILs seeking accountability from the Government as well as bail petitions as irritants and has gratuitously advised the Supreme Court not to hear bail petitions or "frivolous PILs". The Law Minister has made no secret of the government's desire to control judicial appointments stating, "unless the

procedure of appointment of judges changes, the issue of high judicial vacancies will keep cropping up". The Law Minister is also being disingenuous by disowning the responsibility of the Central Government in delayed judicial appointments by sitting on recommended elevations reiterated by the Collegium. The statement of the Vice-President, Jagdeep Dhankar, criticising the Supreme Court striking down in 2015 the NJAC as undoing the will of the people and stating that "the world does not know any such instance", has only added to atmosphere of concern.

The strident attacks on the judiciary by the Union Law Minister is clearly part of the Central Government's strategy to undermine and discredit the judiciary and to accept the primacy of the Central Government's role, not just in appointment of judges but verily in influencing the way the judiciary functions. The aim is to neutralize and subvert the independent role envisaged by the Constitution for the Constitutional Courts.

An independent judiciary is the cornerstone of a constitutional democracy because it upholds the Constitution - its basic structure and system of checks and balances; protects the Fundamental Rights of citizens; and ensures through judicial review that the laws passed by the Parliament and the actions and policies of the Executive are in harmony with Constitutional principles. An independent judiciary is all the more critical in the present period, when the ruling party has used its brute majority in Parliament to ram through critical laws with hardly any discussion, within or outside Parliament, many of which have been constitutionally challenged before the Supreme Court. One cannot ignore the reality of 'majoritarianism' posing a serious threat to the Constitutional values of secularism, federalism, social justice and socialism in our polity and society. What is to be noted is that the attack on the judiciary follows on the heels of a systematic subversion of other important constitutional institutions which are meant to play an independent role as monitors of democracy such as the Election Commission, NHRC, CBI, ED, IT Department, and other bodies.

There is no doubt that the Collegium system is far from perfect. Its lack of transparency and accountability have resulted in the preservation of caste, class, gender and community privileges, nepotism and favouritism, and the lack of capability, fairness, efficiency and integrity among sitting judges. Many High Court Bar Associations have had to repeatedly protest inappropriate appointments, elevation and transfers. In terms of social origins, the Judiciary remains a bastion of the privileged, and this is bound to reflect in the nature of judicial pronouncements. The current Collegium system urgently requires reform by bringing in more transparency, accountability and evolving a fact-based, objective, and verifiable system of selection.

However, the intention of the Law Minister, who is merely echoing the thinking of the Modi-led government, doesn't appear to be to streamline the process of judicial

appointments pending creating a broader consensus on creating an independent judicial appointments body. The Union Law Ministry would not have been criticised if they had taken the lead to initiate public discussion and build consensus on a clear, objective, rule-based criteria for selection of candidates and appointment of judges, transparency, accountability, and inclusion of diverse communities in India. Rather, it is clear that the aim of the Central government is to rein in what appears to be a less – submissive Supreme Court, which under CJI's Ramana, UU Lalit and now YV Chandrachud is comparatively more liberty sensitive, fundamental rights affirming and constitutionally responsive court than the previous courts under CJI's Dipak Misra, Ranjan Gogoi and SA Bobde.

It is important to point out that the Collegium system was the product of historical circumstances when the Supreme Court had to confront brazen attempts by the Executive to hijack the judicial appointment process by packing the Court with its nominees. The Collegium system, first evolved in the 'Advocates-On-Record Association' case (1993) subsequently expanded through a series of judgments, to free judges and justice from the clutches of the politicians in power. Despite the serious shortcomings of the Collegium system, there are judges in both the High Courts and the Supreme Court, who have a sense of fidelity to the values of the Constitution and to their oath to 'maintain true faith and allegiance to the Constitution'. Be it with respect to matters concerning bail in UAPA cases, or the hijab ban matter in the Supreme Court, some judges have stood in defence of the Constitution even if it meant opposing the government's will.

When the Modi Government came to power in 2014, it inaugurated its rule by sending back the recommendation of the Collegium with respect to the elevation of Gopal Subramaniam as a judge of the Supreme Court. Gopal Subramaniam had been the Amicus Curiae in the Sohrabuddin case involving the current Home Minister as the accused. The reason for this decision required no further explanation.

The Union Government has also consciously demonstrated that it was not averse to penalising those judges who have shown independent thinking or whose values are not aligned with the government. Amongst the controversial issues was the transfer of Justice Rajiv Shakder from Delhi HC to Madras HC, (2016), Justice Abhay Thipsay from Bombay HC to Allahabad HC (2016), denial of elevation of Justice Jayant Patel, first by abruptly transferring to Karnataka HC and thereafter to Allahabad HC (2017) to deny him elevation as CJ, leading to his resignation; and the 2019 controversy over returning Collegium recommendation of appointment of Justice Akhil Kureshi as CJ of MP and subsequent transfer to Meghalaya HC. In most of these cases, the will of the Government prevailed over the then existing Collegium.

In recent times, since 28<sup>th</sup> September, 2022, the Central Government has remained mute about the Collegium's resolution to transfer Orissa High Court Chief Justice Dr. S.

Muralidhar as Chief Justice of the Madras High Court. Justice Muralidhar was earlier transferred to the Punjab HC from Delhi HC, immediately after he had directed the Delhi Police to take a decision on filing a FIR against Union Minister Anurag Thakur, and BJP leaders - Parvesh Verma, Kapil Mishra and Abhay Verma - for making allegedly inflammatory speeches. As on date, the Centre has remained silent on its response.

Since 28<sup>th</sup> November 2022, the Union Government has been sitting on files of most of the 20 names proposed (some of whose names were reiterated, thus becoming binding) for elevation to various High Courts. Clearly these files have crossed the 4-month rule as laid down by a three-judge Bench of the Supreme Court. One of the names is Saurabh Kripal, who would be the first openly gay judge in India if elevated.

As recently as 10 January, 2022, the SC Collegium reiterated for the third time, its decision to elevate advocate Nagendra Ramachandra Naik as a Karnataka High Court judge. The Collegium had made the decision on October 3, 2019 with the decision being reiterated *twice* – once on March 2, 2021, and then on September 1, 2021. The Centre has once again remained non-responsive.

While the collegium system has been attacked as being opaque in its working, it is important to point out that there is little public understanding as to why the National Judicial Appointments Commission Act, 2014 was struck down by the SC as unworkable and violative of the basic structure of the Constitution. All the counsels who argued against the 99<sup>th</sup> Amendment before the Supreme Court, including Senior Advocates - Fali Nariman, Arvind Datar, (late) Anil Divan and (late) Ram Jethmalani repeatedly submitted before the Supreme Court that they had no objection to the NJAC replacing the Collegium and pointed out that the selection Committee under the NJAC, was made of 6 members, with a majority of 4 who could be controlled by the Central Government, with little possibility of the views of Committee members from the judiciary, being considered. But since the Union of India refused to concede this point the 99<sup>th</sup> amendment was finally struck down as being violative of the basic structure. Besides, the proposed NJAC did not have any mechanisms to ensure greater citizen participation, greater independence from the executive, greater adherence to constitutional integrity, greater social inclusivity or even simply better performance.

What the current accelerated attacks on the judiciary reveal is that even the sliver of independent thinking or adherence to constitutional values that still remains in the judiciary, is proving to be intolerable to the Executive. The Executive in its pursuit of absolute power is seeking to delegitimize and pave the way for the destruction of the Collegium system. It is no coincidence that these attacks are taking place during the tenure of Chief Justice YV Chandrachud who is expected to fulfil his oath to “bear true faith and allegiance to the Constitution”, even at the cost of going against the will of the executive.

If the Executive succeeds in its aims, then even the sporadic reassertion of constitutional values by the judiciary will become a thing of the past. We will have before us an authoritarian regime which will be totally unchecked by any constitutional restraints. Such a situation cannot but be viewed with deep foreboding by anyone who cares about the future of India's constitutional democracy. It is important for citizens to understand, that at its very heart, the issue of appointment of judges is not a private affair between judges and the Executive but an issue with grave consequences to the common citizen in terms of preserving and protecting the Indian Constitution, promoting its ethos and values and ensuring the survival of constitutional democracy.

It is under these circumstances that the PUCL is issuing this public call to "**We, the People of India**", with the reminder that what is at stake is the autonomy and independence of the judiciary. "*We the People*", especially constitutionally minded citizens and civil society groups need to stand up to collectively raise their voices and demand that the Central Government and its functionaries stop the public attacks on the Collegium and the judiciary, abide by the spirit of the Constitution and respect its values, ethos and proprieties.

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**Dr. V. Suresh, General Secretary, PUCL**