

On appointment of judges: Questions over delay

The move by the Supreme Court to seek an explanation from the government about the delay in finalising a fresh [Memorandum of Procedure \(MoP\) for the appointment of judges](#) in the higher judiciary raises more questions than answers. We do not know, for instance, what is holding up the process. It is not clear whether the government and the five-member Supreme Court Collegium have been unable to agree on some significant aspects of the MoP. It is possible that the consultative process has broken down and the government requires a nudge from the court to both explain the delay and expedite the process. The matter came to the highest court after the Delhi High Court dismissed an advocate's challenge to the appointment of judges without a new MoP being finalised as per the Supreme Court's December 2015 order. The two-judge Bench hearing an appeal agreed with the high court, but wanted to consider a related prayer — that there should be no further delay in finalising the MoP and that it should provide for a mechanism to avoid any undue delay in the appointment of chief justices for the various high courts. At present, seven high courts have only acting chief justices. The Centre must use this opportunity to throw some light on the status of the consultation between the government and the Collegium. The delay in finalising a fresh procedure for appointments is a cause for concern, as vacancies in the high courts have continued to increase while the pace at which new judges are being appointed remains sluggish.

What is really worrisome is that two issues may come to be seen as deliberately inter-linked: the delay in evolving a fresh procedure and the perceived tardiness in clearing and making fresh appointments. In the two years since legislation seeking to create a National Judicial Appointments Commission was [struck down by a Constitution Bench](#), there have been many instances of incumbent Chief Justices of India voicing dismay and anguish over the rising number of vacancies. Mercifully, these potential flashpoints did not turn into full-blown conflicts. This was possible because the appointments process, though slow, was never stopped and the recommendations of the Collegium were being processed and cleared by the Centre. That the same issue should crop up repeatedly is not a good sign. When it is agreed in principle that having a fresh and transparent appointments process is vital to institutional reform, it would be unfortunate if the two sides are seen as being obdurate and inflexible on the new MoP. A judicial direction to the government to notify a procedure approved by the Collegium will be an easy way out, but it will not do anything to address the problem of judicial primacy being seen as detrimental to judicial accountability. A consensus on this matter will be far more conducive to the public interest.

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