

NJAC: Lessons for the BJP govt on road ahead

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I: There is perhaps no one, on any end of the political spectrum or outside of it, who would disagree that our judicial system is in dire need of reform. The quality of judges varies greatly across different benches of high courts, with some being outstanding and others unapologetically mediocre. The system has proven itself vulnerable to graft and nepotism. Since its inception, the collegium system has worked almost unaltered with some faults and failings becoming institutionalised over time.

It was with the objective of improving the existing system that the previous government embarked upon a series of reforms during the second half of its tenure. Three bills were prepared focussing on different aspects of the judiciary. The completion of this endeavour was left to the good offices of BJP once it came to power.

However, with the Supreme Court striking down the constitutional amendment that would have estab-

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lished the NJAC, we have taken a significant step back. While the Supreme Court's order is respected, it is now time to introspect and determine what could have been done for a different outcome.

II: It is our belief that there were three areas where the government could stand to improve:

First, the approach adopted by the BJP government and those in charge of navigating the law was not one of conciliation and compromise, but of confrontation. Perhaps emboldened by the strength of their numbers in the Lok Sabha, the government did not feel the need to build a broader consensus, hoping that legislative majority alone could be an answer to unilateral decision-making. In theory it could have been. In practice, it cannot. It was also not entirely graceful to wash dirty laundry in public. There was, in retrospect, no need to name and shame judges. Diplomacy is an essential part of manoeuvring any law but it becomes doubly so when you have to convince a sceptical judiciary that it's in their best interests.

Second, the BJP's amendments, though few in number, made substantial changes which had an impact on the way the law came to be viewed



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by the apex court. They systematically altered the carefully crafted balance that had been achieved with the draft prepared by the previous government. Veto powers were given to two members, meaning that it would become possible to game the system if the two decided to collude (the judgment draws attention to the potential for abuse). Hard-coding the constitution of the committee into the amendment instead of leaving it open to easy amendment could also have been examined in greater detail. Many voices have spoken out about better defining the criteria for the posts of eminent personalities. Greater engagement with the judiciary over the last year-and-a-half could have helped address these concerns.

Third, the BJP government chose to disregard the other pillars of reform and chose almost exclusively to focus on the law regarding judicial appointments. The other two bills, which related to judges inquiry and judicial accountability, were allowed to languish. These were impor-

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tant parts of a nuanced answer to a complex problem. The bill on judicial accountability particularly would have ensured greater transparency in decision-making by holding judges accountable to a statutory standard. The inquiry bill, on the other hand, provided a forum governed by the higher judiciary itself while establishing a transparent institutional mechanism for speedy redressal of complaints against judicial impropriety and misconduct.

III: The learned judges have predicated their judgment on the fact that the doctrine of 'Separation of Powers' is an essential part of the 'basic structure' of the Constitution. The government should have drawn attention to the many illustrations where judges have assigned to themselves the function of making laws. It wasn't very long ago that the Supreme Court was assigning forest

clearances. National Green Tribunal has come up with a new tax for vehicles entering Delhi. Judicial encroachment into executive and legislative affairs is not new. If there is to be an airtight separation of powers then it must cut both ways. As the government goes forward, it must insist on the same standard being applied for all three branches.

The BJP government is quick to state that the bill was

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supported by all political parties. That may be true. This is also because no one disagrees with the legislative intent with which the bill was crafted. However, the job of successfully shepherding it through Parliament and helping it achieve life is solely that of the government. It is a worrying prospect, especially for a government whose record in eroding institutional autonomy and undermining constitutional safeguards has been under constant question recently. Was it not so long ago that BJP itself sought to undo the land acquisition law they had voted unanimously in support of while in opposition? Achieving legislative success is a lonely endeavour and one that requires grace.

For a year-and-a-half, legislative success has eluded the government. Its attempts at legislation have been seen as anti-farmer (land acquisition), incomplete (GST) and now unconstitutional. For a party that claims a historic mandate, the BJP government must start asking itself the hard questions — what is the common theme in all of these lost opportunities at reform?

The answer is hubris.

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