TRANSPARENCY: A THREAT TO ‘INDEPENDENCE OF JUDICIARY’?

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ABSTRACT
This article makes an attempt to investigate the current debate on transparency in the judicial appointments i.e. whether it lacks the transparency, indeed or is it merely alleged? By examining a number of cases, it weighs the judicial stand and leanings of the Supreme Court of India on the issue of transparency and also highlights the dual stand of the Supreme Court of India while adjudicating the issue of transparency for different institutions and judiciary. The article also attempts to explore the probable reasons of the deliberate secrecy adopted by the judiciary in the appointment process. It argues in its conclusion that the transparency in the judicial appointment shall strengthen the institution as well as the ‘independence of judiciary’, a basic feature of the constitution.

INTRODUCTION
The Constitution of India rests function of the appointment of the Judges to the Supreme Court of India and High Courts in the Union Executive (President of India through Council of Minister) in consultation with the Chief Justice of India, the ethos was confirmed in the First Judges’ Case. 1 But, in the year of 1993, a nine judges bench of the Supreme Court in the matter of, popularly known as, Second Judges’ case2 invented the collegium (CJI and two seniormost judges), a system for appointment of judges in the superior judiciary. The strength of this machinery of judicial invention was further cemented by a unanimous bench of nine judges of the Supreme Court in the matter of Third Judges’ Case3 from CJI plus two senior most judges to CJI plus four senior most judges. The provision laid down in the Art. 141 of the Constitution of India declares such judgment to be the law of the land. Thus, the latter two decisions amounted to virtual amendment of the Constitution leading India to become the only known governing system of the world where judges appoint judges.

The move of the judicial invention has been meeting with the patchy criticisms since its inception, mostly on the grounds of opaqueness, lack of transparency, nepotism and

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1S.P. Gupta v. Union of India, AIR 1982 SC 149
2Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441
3In Re: Under Article 143, 1998 (5) SCALE 629
favouritism. Justice Ruma Pal has described the working of the collegium as “one of the best kept secrets in the country.”\(^4\) Justice P.N. Bhagwati showed his disappointment from the collegium by stating: “The (collegium) system does not work satisfactorily. I am not in favour of it. I don’t know what the truth is but going by rumours, bargaining goes on between the collegium judges. People are losing confidence in the mode of appointing judges. Therefore, it is necessary to change it.”\(^5\) Various instances of corruption and backing the elevation of the corrupt judges were also seen by the Former Judges of the Supreme Court and High Courts. Senior Advocate Fali S. Nariman who contested the matter for collegium went on to the extent of saying that “(the) case I won-- but which I would prefer to have lost”\(^6\) on the functioning of the collegium. Justice V. R. Krishna Iyer expressed his concern on the issue of transparency by quoting Judge Jerome Frank as- “In a democracy, it can never be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions.... unable to accept the inescapable shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts.”\(^7\) Justice J. S. Verma, the author of the majority opinion in the Second Judges Case, also highlighted that the collegium system was not working properly and had suggested the immediate setting up of an independent national commission to appoint judges to the Superior judiciary.\(^8\)

What is noteworthy in the above discussions is that the speakers, claimants and whistleblowers, seeking transparency and voicing themselves against the mal-functioning of the collegium system, are mostly former judges, who either did not witness the collegium during their tenure or preferred silence while on the bench, and eminent senior lawyers, who being a member of bar maintain a closeness with bench and remain aware of the affairs of bench, but do not participate in the collegium.

But, a new chapter was written on the day when for the first time in the history of the judicial appointment in India a member of the collegium i.e. the fifth seniormost judge of the Supreme Court of India, Justice J. Chelameswar alleged that the process of appointment of judges through the collegium lacks transparency and accountability. He revealed that “the records are absolutely beyond the reach of any person including the judges of this Court (the Supreme Court of India) who are not lucky enough to become the Chief Justice of India. Such a state of affairs does not either enhance the credibility of the institution or does good for the people of this country.” He professed that “transparency is a vital factor in constitutional governance...Transparency is an aspect of rationality. The need for transparency is more in the case of an appointment process” And keeping this object in his mind and conveying his dissent for the present state of affairs in the collegium, he sent a communiqué to the Chief Justice of India raising the issue of transparency, refusal to attend the meetings of the collegium and advised the need of maintaining records of the proceedings of the collegium containing the basis of appointment, elevation and transfer and also advocated for bringing objectivity in appointments. However he did not disclose the exact contents of the three pages letter. Hours after, the Chief Justice of India, through PTI, replied in reference to the revelation that “We will sort it out.” Certainly, there is a high probability of the matter to be sorted out between the two “but the litigating, and the general public will never know how the matter is settled in-house. Unless incumbent judges say more in the future, rumours will persist as to how the matter was handled.” The revelation by an insider/ member of the collegium not only cemented the allegation of lack of transparency for the outside world but also unearthed that lack of transparency is also operative for the insiders, amounting the institution of collegium to be a one man institution.

JUDICIAL STAND ON TRANSPARENCY

9 Ibid.

The need for transparency in the process of appointment of superior judiciary has been debated time and again at different forums and has been raised, supported and sought by socio-legal intelligentsias and public alike. The Superior Judiciary is very often alleged of, to have remained an elite, aristocrat and nepotistic institution, after independence, lacking transparency in its appointment process. An opaque system, wherein common people have been virtually excluded from competing their elite counterparts. Despite the above facts, the Superior Judiciary has been a champion of transparency and has desired and professed to bring institutions in a crystal compartments, when it comes to the appointments or decision-making in other governmental bodies or functionaries but contested and strongly defended, when it was sought from the judiciary in the matters of appointment of judges.

The Supreme Court of India, in the matter of *Kranti Associates (P)Ltd. v. Masood Ahmed Khan*, ratio of which was also reiterated in *Manohar v. State of Maharashtra*, insisted the judicial, quasi-judicial and administrative authority for the recording of the reasons in the process of decision-making and declared it to be a requirement for the judicial accountability and transparency. The court observed that “the ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.” Also, in the matter of *Union of India v. Namit Sharma*, the Apex court laid down the guidelines for the process of appointment of Chief Information Commissioner and other Information Commissioners, directed that the committee “must mention against the name of each candidate recommended, the facts to indicate his eminence in public life, his knowledge in the particular field and his experience in the particular field and these facts must be accessible to the citizens as part of their right to information under the Act after the appointment is made.”

However, in the matter of *Supreme Court Advocate on Record Association v. Union of India* (NJAC), while deciding the outlines and modalities of the Memorandum of Procedure for the

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14 In the matter of *Supreme Court Advocate on Records v. Union of India*, Writ Petition (Civil) no. 13 of 2015, the Hon’ble Court observed that the “opaqueness in the process of judicial appointments has been a matter of much public debate and discussion.”

15 (2010) 9 SCC 496

16 (2012) 13 SCC 14


18 (2013) 10 SCC 359


20 Writ Petition (Civil) No. 13 of 2015, Supreme Court, December 15, 2015
appointment of judges, the court ruled out that the Government of India shall formulate the Memorandum of Procedure (MOP) in consultation with the CJI, who will further take the unanimous opinion of the four seniormost judges of the Supreme Court of India, collectively the collegium. The Court further ruled that the MOP should contain the procedure to record the minutes of the discussion including the dissenting opinion of the judges in the collegium and other such mechanism for addressing the complaints “*while making provision for the confidentiality of the minutes consistent with the requirement of transparency in the system of appointment of Judges.*”21 Thus, the information such recorded may be shared within the collegium only and not allow access to the public. Similarly, in the matter of *M. Veerabhadraiah v. High Court of Karnataka*22 the bench of Chief Justice S.K. Mukherji and Ravi Malimath, J. dismissed the writ petition, citing ‘bereft of merit’ wherein, information of the candidates being considered for the appointment as judges of the High Court of Karnataka was urged to make public on the website of the High Court.

On 20th September 2016, in a writ petition in the nature of PIL filed by the National Lawyers Campaign for Judicial Transparency and Reforms, a group of lawyers seeking transparency in the appointments of judges in the superior judiciary through the establishment of a “pubic transparent body” neither controlled by the executive nor judiciary, was dismissed by a bench of Supreme Court headed by Justice Arun Mishra. At one time, during the hearing, the court also expressed that it does not need a certificate of transparency from the petitioner. The court observed that the issue raised can be resolved by amending the Constitution.23 However, the Hon’ble Court seems not to take into consideration that the introduction and working of the collegium is a result of judicial innovation and not of the constitutional amendment. The word “collegium” finds no place in the Constitution of India.

Thus, above discussed cases and respective observations therein, reveal the dual stand and reluctant face of the judiciary in bringing transparency in the appointment of judges.

**REASONS OF SECRECY**

The above discussions and judicial precedents lead to two formidable facts- first, that the appointment process in the superior judiciary is not transparent, indeed and, second, the

22 *Writ Petition No. 14126 of 2016*, Karnataka High Court, March 22, 2016
23 *Plea for independent body to appoint judges dismissed*, The Hindu, September 21, 2016

http://www.thehindu.com/todays-paper/tp-national/plea-for-independent-body-to-appoint-judges-dismissed/article9129636.ece
judiciary is sternly unwilling to remove the veil of secrecy from the process of appointment of judges to the superior judiciary.

In the absence of an authorised official communication or declaration from the chairs of the collegium explaining the reasons of the deliberate secrecy, people sitting outside the collegium will be left with no option but to make a way in the stone walled fort by hammering their wild but reasoned guesses. The author, herein below examines the following probable reasons which may lead to the Hon’ble Apex Court to adopt the course of secrecy:

1. National Interest demands secrecy.
2. Judicial Interest shall meet irreparable loss.
3. Independence of Judiciary shall be compromised.

1. National Interest demands secrecy

The term “national interest” is a vague term with very wide amplitude. It is referred to as “what is best for a national society” and generally understood as any act or omission to further and promote the sovereignty and integrity of the nation. As an instrument of political action, it serves as a means of justifying, denouncing, or proposing policies. Therefore, according to the above definitions and propositions it shall be justified to hide certain information if its publication is likely to cause some harm to the nation or it’s interest. Since national interest is a part of policy making, it falls in the domain of Legislature and Executive of the Central government.

In order to get an idea of national interest and its relationship with the Judiciary, in absence of an authority, we will have to peep into the minds of the Legislature and the Executive through transparency law of the nation.

The Legislature enacted The Right to Information Act, 2005 “in order to promote transparency and accountability in the working of every public authority.” Sec.8 of the Act exempts the ambit and scope of the Act on the grounds of national interest and where any court of law has specifically forbids the publication of any such information, among others. Further, Sec.24 of the Act declares that the provisions of the Act shall not be applicable to the intelligence and security organisation raised and maintained by the Central or the State governments. It is notable here that the Act does not exempt the Courts from its ambit. Hence, it is clear that in the wisdom of the Parliament, Court doesn’t hold any such information, publication of which

may compromise the interest of the nation. If any specific matter comes before the court of such nature, the court may prohibit it’s publication. Thus, as a matter of policy, information held by the courts are public information, accessible to the public.

2. Judicial Interest shall meet irreparable loss

The collegium, while scrutinising the candidatures, possess the information of the nature of personal, professional, academic and many other informational inputs like allegation, objections from the bar or bench and corruption of the candidates, collected by the investigative agencies and other instrumentalities. The candidature is decided on the basis of these very records and reports.

If transparency is brought in the process of appointment, the only immediate threat is that of getting this very information public, which may cause loss to the candidates at the individual level, only and only if, it is contrary to the general norms of acceptance of candidature. To the contrary, in the long run, the candidates aspiring for judgeship shall restrain themselves from indulging in corrupt practices and aspire for high moral character in order to make their claim high among other candidates. The people indulged in corrupt, immoral or illegal practices will refrain themselves from applying for the judgeship in fear of getting exposed of their immoral and illegal activities. Hence, the bench shall be adorned of best deserving human beings. It will also save precious time of judiciary and the investigative instrumentalities in scrutinising the best candidates from the lot of good.

Therefore, the argument of causing irreparable loss to the judicial interest does not sustain on merit and contrarily proves in favour of transparency.

3. Independence of Judiciary shall be compromised

The Independence of judiciary was held to be the basic feature of the Constitution by the Supreme Court in Keshavanand Bharti case.25 Also, Dr. L.M. Singhvi, an eminent jurist, who was entrusted to the task of preparing a report, inter alia, on the independence and impartiality of the judiciary by the United Nations Economic and Social Council (1980), in his capacity as the Special Rapporteur, submitted his Final Report to the United Nations Commission on Human Rights (1985) wherein he observed: - “It needs to be said that impartiality and independence of the judiciary is more a human right of the consumer of justice than a privilege

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25 AIR 1973 SC 1461, 1480
of the judiciary for its own sake.” Hence, it being inseparable part of the Constitution and considered as human rights, cannot be compromised with.

The Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 coupled with the Bangalore Principles of Judicial Conduct 2002 lays down certain bare minimum values as- Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence. Art. 1 of the latter documents which deals with the first value i.e. Independence, in its clause-6 suggests that a judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence. Pertinent herein is the reinforcement of public confidence to ensure ‘independence of judiciary’ and that an institution, epicentre of constant attack and allegation of opacity, nepotism, patriarchy and reluctant of bringing transparency in the process of appointment cannot be said to be commanding the confidence of people. With the passage of time, along with the growing consciousness of people, the institute shall start suffering the trust and confidence deficit. And Judiciary, devoid of public confidence, shall lead to a compromise with the independence of judiciary.

CONCLUSION

Therefore, for the continued command of the confidence and respect of people, Independence of Judiciary and Constitutional governance, it is desirable to unveil the process and information involved in the appointment of judges, in the interest of a strong judiciary. Because, secrecy leads to suspicion and in the words of Justice V. R. Krishna Iyer, “suspicion is the upas tree under whose shade reason fails and justice dies. Judges, great in status and mighty in their majesty, should be, like Caesar’s wife, above suspicion.” The Apex Court too, in the matter of Naresh Sridhar Mirajkar v. State of Maharashtra has cited the observation of Jeremy Bentham as- "In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial

28 1966 SCR (3) 744
injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the Judge himself while trying under trial the security of securities is publicity.”

Hence, transparency cannot be said to be a threat to the ‘Independence of Judiciary’ instead it shall strengthen the judiciary.

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