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**TRANSPARENCY IN APPOINTMENTS TO HIGHER JUDICIARY IN INDIA: IMPERATIVE OF THE  
HOUR**

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**ABSTRACT**

The Indian Judiciary enjoys the privilege and liability of acting as the custodian and the conscience keeper of the Constitutional vision, ideology and the cherished goals prescribed for the State. The Institution has been heavily armoured to immunize it from any pressure, endangering its independence in the performance of its vital role in the preservation of ‘Rule of Law’, starting right from the stage of nominating, short-listing and selecting the best suited candidates for the ‘job’. Substantive emphasis is paid on the absence of any extraneous consideration while zeroing down upon a particular candidate and rather concentrating only on the merit, credibility and independence of a prospective candidate. Any manipulation at the level of appointments, especially by the Executive, has a direct and potent threat to the independence of the ‘Judge’ in the performance of his judicial duty without any prejudices in his mind. In the zeal to safeguard the Judicial Institution and to maintain and sustain its independence, the entire process of judicial appointments has turned into quite an opaque process, the bulk of which remains shrouded in mystery. There are no disclosed and settled parameters which motivate or de-motivate short-listing of candidates for Judge-ship; the grounds for selection or non-selection seldom appear, religiously, in public domain; meritorious people often do not find seat in the Bench; upward movement from the High Courts to the Supreme Court also is seen to happen on undisclosed parameters, which cumulatively, cast a negative image about the august Institution and keeps the system away from proper accountability. The need of the hour is to ensure transparency in judicial

appointments so as to strengthen the trust and confidence of the people in the Judiciary and to place it 'beyond suspicion'.

## INTRODUCTION

The judiciary in India enjoys the privilege and the liability of acting as the custodian and the conscience keeper of the constitutional vision, the constitutional ideology and the cherished goals<sup>1</sup> which have been prescribed to be pursued by the State. The body is an important support system for the preservation of the Rule of Law and in the delivery of justice to one and all. The Rule of Law can be upheld only with an active judiciary, one to which the people can turn for the protection of their rights, liberties and freedoms whenever these are endangered or for protection against any misuse or abuse of power by the authorities.

"An independent judiciary and a judiciary with the power to issue practical orders, is more important than any number of grand theoretical declarations about the rights of man."<sup>2</sup> Diarmuid F. O' Scannlain, a United States Circuit Judge, has observed<sup>3</sup> in reference to the role of judiciary in upholding Rule of Law that "justice needs to be delivered by competent, ethical and independent representatives and neutrals." The Rule of Law would be a fallacy without independent courts to comment upon the legality of an action, to ensure equal protection of laws, to apply laws indiscriminately on all and to offer redressal to the grievances of the citizenry. The Judiciary, which is entrusted with such a mammoth task, needs to be strong, responsible and independent. In the absence of an independent judiciary, the constitutional title of justice would appear to be deceptive, ornamental and futile.

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<sup>1</sup>INDIA CONST. PREAMBLE (stating "Justice, Liberty, Equality and Fraternity") ["CONST."]

<sup>2</sup>M.N. Venkatachalliah, *Rule of Law: Contemporary Challenges*, 45 INDIAN J. PUB. ADMIN 322 (1999) [hereinafter, "Venkatachalliah"].

<sup>3</sup>Diarmuid F. O' Scannlain, U.S. Circuit Judge, Lecture at the University of Notre Dame-London Law Centre (Feb. 21, 2013)

The members of the Constituent Assembly, during the drafting of the Constitution of India, had been vociferous about the vital role to be performed by the judiciary in India and the measures required to be undertaken to ensure the independence of the institution. As far as the role to be assigned to the judiciary was concerned, they “trusted the judges to exercise the judicial power of invalidating statutes”<sup>4</sup> and harboured a belief that the Judges would do so “with mature self-restraint, act[ing] thus only in cases of patent unconstitutionality and not for giving effect to their personal philosophy and predilections.”<sup>5</sup> The deliberations during the Assembly deliberations, as far as the independence of judiciary was concerned, seemed to be guided by the postulate that “if the beacon of the judiciary was to remain bright, the courts must be above reproach, free from coercion and political influence.”<sup>6</sup> The members held a valid apprehension that the independence of Judiciary would be a vulnerable feature having witnessed the British system of appointment of judges at the unfettered discretion of the Executive. The power, thus vested in the Executive, had consequently resulted in the appointment of judges favourable to the colonial government. Such political undercurrents and experiences have been instrumental in giving a final shape to the present Constitution.

The institution of the judiciary has been heavily armoured by the varied provisions running through the Constitution of India. The provisions, as such, tend to immunize the judiciary from pressures originating from different quarters and from those bearing the potentiality of endangering its independence in the performance of its vital role in the preservation of ‘Rule of Law.’ The multi-layered protective cover over the sacrosanct institution operates right

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<sup>4</sup>Soli J. Sorabjee, *Role of the Judiciary: Boon or Bane?*, ILC QUARTERLY 129 2011-12 (3 & 4).

Supreme Court of India, Report of the Ad hoc Committee 63 First Series (May 21, 1947) in GRANVILLE AUSTIN, INDIAN CONSTITUTION: CORNERSTONE OF A NATION 170 (2000) [“Austin”] (The Report recommended that “a Supreme Court with jurisdiction to decide upon the constitutional validity of acts and laws can be regarded as a necessary implication of any federal scheme.”)

<sup>5</sup>SOLI SORABJEE, *supra* note 4 at 129.

<sup>6</sup>GRANVILLE AUSTIN, INDIAN CONSTITUTION: CORNERSTONE OF A NATION 164 (2000).

from the stage of nominating, short-listing and selecting the best suited candidates for the “job” to providing them security of tenure,<sup>7</sup> security against arbitrary removal,<sup>8</sup> salary,<sup>9</sup> service conditions,<sup>10</sup> jurisdiction and thus the requisite freedom from any external or internal pressure. The Constitution even places a bar on their right to practice, plead or act in any court or before any authority within the territory of India with respect to a person having retired as a Judge of the Supreme Court,<sup>11</sup> and in the case of a person having retired as Judge of a High Court, from pleading or acting in that High Court<sup>12</sup> so as to ensure that they remain truly independent in the performance of their judicial functions.

Independence of the judiciary is directly linked to the quality of personnel manning the institution and such quality, in turn, is dependent on the manner and mode of inducting judges into the system. During the process of appointments, substantive emphasis, ought to

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<sup>7</sup>CONST., *supra* note 1 at arts. 124, cl. 2, 217, cl. 1 (Judge of SC to hold the office till 65 years of age/Judge of a HC to hold the office till the age of 62 years).

<sup>8</sup>*Id* (A Judge shall not be removed from his office except by an order of the President passed after an address by each house of Parliament supported by a majority of the total membership of that house and by a majority of not less than two thirds of the members of the House present and voting has been presented to the President in the same session for removal on the ground of proved misbehavior or incapacity.)

<sup>9</sup>CONST. *supra* note 1 at art. 125, cl. 1 (There shall be paid to the Judges of the Supreme Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule. Article 221 cl. 1 states -There shall be paid to the Judges of each High Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.)

<sup>10</sup>CONST. *supra* note 1, art. 125 cl. 2 (Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule/221(2):- Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule

<sup>11</sup>CONST., *supra* note 1, art. 124 cl.7 (No person who has held office as a Judge of the Supreme court shall plead or act in any court or before any authority within the territory of India).

<sup>12</sup>CONST. *supra* note 1, art. 220 ( No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts.).

be placed on the absence of extraneous considerations or parameters while focusing on the merit, credibility and independence of a prospective candidate. It is in public interest that the system of selection of Judges be kept distant from ‘irrelevant influence, untested prejudices and elitist empathies’ and be guided by ‘democratic circumstances, political ethos and constitutional values’.<sup>13</sup> Any manipulation at the level of appointments, especially by the Executive, would be a direct and potent threat to the independence of the Judge in the performance of his primary role of acting judicially without any prejudice. The Constitution of India further propels this ideology by imposing an obligation<sup>14</sup> upon the State to take steps to separate the judiciary from the executive. The independence of judges reflects “not only the independence of their mind and discretion but also the independence of their seat and tenure from political vicissitudes.”<sup>15</sup> It has been aptly observed that “any method of judicial selection shall safeguard against judicial appointments for improper motives.”<sup>16</sup>

It has been repeatedly stated that in the zeal to safeguard the Judicial Institution and to maintain and sustain its independence, the entire process of judicial appointments has turned into an opaque process, the bulk of which remains shrouded in mystery. There are no disclosed and settled parameters and criteria which motivate or de-motivate short-listing of candidates for the Judiciary; the grounds for selection seldom appear in the public domain; meritorious people do not often find a seat on the Bench; elevation from the High Courts to the Supreme Court is based on undisclosed parameters,<sup>17</sup> casting a negative image<sup>18</sup> of this

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<sup>13</sup>V R Krishna Iyer, *Quae Curia (What a Court)! A new Indian Judicial Order is the Need of the Hour*, in ESSAYS ON HUMAN RIGHTS, JUSTICE & DEMOCRATIC VALUES 80 (2004).

<sup>14</sup>CONST. *supra* note 1, art. 50.

<sup>15</sup>VENKATACHALLIAH, *supra* note 2 at 322.

<sup>16</sup> U.N. Basic Principles on the Independence of the Judiciary, adopted by the 7th U.N. Congress on the Prevention of Crime and the Treatment of Offenders (1985) endorsed by G.A. res. 40/32 of 29 November 1985 and 40/146 of 13 December 1985 [“UN Basic Principles”]

<sup>17</sup>*Id.* (“Promotion of Judges, wherever such a system exists, should be based on objective factors, in particular, ability, integrity and experience”).

institution and depriving it of accountability in its internal functioning. A careful analysis, hence, needs to be made in order to understand whether in seeking to insulate the institution body, we have made the entire system totally opaque and outside the realm of general scrutiny, and whether the system has become unaccountable in the garb of protecting its independence.

A quick journey through the system of appointments to the higher Judiciary amidst political and constitutional developments from 1950 to the present shall facilitate further analysis of the issue(s) at hand.

The Indian Judiciary has had a chequered past, despite a clear vision of independence running through the system of appointments, transfers, post-retirement bars and other allied provisions safeguarding the autonomy of the judiciary, contained in the Constitution of India. It is pertinent to observe that the Constitution<sup>19</sup> does not enumerate the criteria<sup>20</sup> for the selection of candidates for being appointed as a Judge; similarly it is conspicuously silent about the procedure for the selection of prospective Judges and it does not throw sufficient

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<sup>18</sup> News is not new disclosing that the Chief Justices have lost much of the credibility not only in matters of judicial appointments but also in administrative matters.

<sup>19</sup>CONST., *supra* note 1, art 124 cl. 3 ( A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and-

(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or  
(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or  
(c) is, in the opinion of the President, a distinguished jurist.

Article 217(2)The Constitution of India :- A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and-

(a) has for at least ten years held a judicial office in the territory of India; or  
(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession;)

<sup>20</sup>The Constitutional provision speaks only about the kinds of persons who may be appointed as judges of the Supreme Court.

light on the intensity<sup>21</sup> of the consultative process<sup>22</sup> preceding the appointment of judges. The men behind the drafting of the Constitution had perhaps contemplated that through the passage of time healthy practices would be generated and established to govern the system of judicial appointments, which is perhaps why they offered merely a skeletal scheme for appointment. The absence of clear-cut formulae in the Constitution regarding the subtle intricacies connected with judicial appointments, which could not possibly have been laid down in black and white, has given birth to numerous controversies in the process of judicial appointments.

Granville Austin<sup>23</sup> has observed that the act of recommendation or non-recommendation of names for judicial selections on ‘undisclosed criteria’ has been the norm since the inauguration of the Constitution. The Law Commission of India, vide its Fourteenth Report<sup>24</sup> of 1956, found that “the judicial selections (*made till the time of preparation of the report*) appear to have proceeded on no recognizable principle and seem to have been made out of considerations of political expediency or regional or communal sentiments. Some of the members of the Bar appointed to the Bench did not occupy the front rank in the profession either in the matter of legal equipment or of the volume of their practice at the Bar. A number of more deserving and capable persons appear to have been ignored for the reasons that can stem only from political or communal or similar grounds.”

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<sup>21</sup> Use of words ‘may’ and ‘shall’ in Article 124(2) indicate ‘directory’ and ‘mandatory’ nature of the process respectively

<sup>22</sup> CONST. *supra* note 1, art. 124 cl. 2 (Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after **consultation** with such of the Judges of the Supreme Court and of the High Courts in the States as the President **may deem necessary** for the purpose.)

Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India **shall always be consulted**

<sup>23</sup> GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 125 (1999).

<sup>24</sup> MINISTRY OF GOVERNMENT OF INDIA, LAW COMMISSION REPORT ON REFORM OF JUDICIAL ADMINISTRATION 69, 14<sup>th</sup> Rep.(Vol. 1).

The lack of transparency in the system of appointments and the absence of any defined criteria for selections to the higher judiciary had become quite evident by the actions of the Government in the period of 1970s where appointments to the Judiciary were made with the intention of having ‘committed’ judges who would, in all probability, uphold the policies of the Government. Elevation to the top post of Chief Justice of India was done<sup>25</sup> on no identifiable parameter, discarding the long established and perhaps logical convention(s) of giving the privilege to the senior-most judge(s). Sixteen judges<sup>26</sup> of various High Courts were served with transfer orders by the government on the basis of no recognizable criteria, except the hidden agenda that those transferred comprised Judges who had defied the Government during the Emergency period by delivering ‘anti- government’ rulings. The Additional Judges were not given extensions in some cases,<sup>27</sup> were given brief extensions<sup>28</sup> in some cases and even reverted<sup>29</sup> to District Courts without disclosing reasons or material that formed the basis of such decisions. The cumulative effect of these developments was that the Government recognised no obligation to disclose reasons behind the appointment of a person as a Judge or the transfer of a Judge from one High Court to another or the elevation of a Judge, treating itself to be in the utmost custody of the prerogative of appointing judges and dealing with their service conditions. This began the process of loss of transparency in the system, giving

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<sup>25</sup> K. Subha Rao, *The Supersession of Judges-The price of executive interference*, THE STATESMAN, May 14, 1973 in N.A. PALKHIWALA, A JUDICIARY MADE TO MEASURE (1973) (Breach of seniority in the appointment of the Chief Justice of India has been witnessed twice in the constitutional history of India. Justice Shelat, Grover and Hedge had been superseded by Justice A.N. Ray); H.R. KHANNA, NEITHER ROSES NOR THORNS 88 (1987) (At another point of time Justice HR Khanna was superseded by Justice M. H. Beg).

<sup>26</sup> Justice D. M. Chandrashekhar, M. Sadanandaswamy, A.P. Sen, Justice Rangarajan being the prominent ones.

<sup>27</sup> Two Judges on the Bombay and Delhi High Court, U.R. Lalit and R.N. Aggarwal were refused continuations despite favourable recommendations from the Chief Justices of the concerned High Courts

<sup>28</sup> O.N. Vohra, V.C. Shukla, S.N. Kumar and S.B. Wad had been granted a brief extension of three to four months

<sup>29</sup> R. N. Aggarwal had to suffer the humiliation of being reverted as the Sessions Judge in Delhi

birth to arbitrariness<sup>30</sup> and the rule of whimsical attitudes in the dealings of the government with the Institution.

The later developments in the process of judicial appointments witnessed changes with the passage of time. The power of the executive, due to its periodic misuses, gradually slipped<sup>31</sup> from its hands and the Judiciary came to exercise substantive influence in the process. Ultimately, the consultee member in the Constitutional setup virtually got veto power in the process by the birth of the ‘Collegium System.’ However, the ‘fashion’ of transparency in judicial appointments, transfers, promotions, securing or not securing post-retirement vocations has rarely been made public. No procedure, thus far in place, could ever boast of utmost transparency in its appointments to the Higher Judiciary. It is a blot on our democratic system that the process of selecting judges takes place under completely mysterious conditions with a mere handful of persons involved in the deliberations and the ‘secrets’ about the suitability or non-suitability, credibility or non-reliability of candidates remain buried in their hearts with the commoners never coming to know about the reasons for selections and rejections. It has been remarked of the British system<sup>32</sup> to the same tune, that

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<sup>30</sup> Shah Commission of Inquiry Interim Report, *available at* [https://archive.org/stream/137896426ShahCommissionOfInquiryInterimReportI/137896426-Shah-Commission-of-Inquiry-Interim-Report-I\\_djvu.txt](https://archive.org/stream/137896426ShahCommissionOfInquiryInterimReportI/137896426-Shah-Commission-of-Inquiry-Interim-Report-I_djvu.txt) (on Indira Gandhi’s hand written “*I do not approve..*” on the continuance of U. R. Lalit as a Judge of the High Court observed that the act amounted to an “abuse of authority and misuse of power”)

<sup>31</sup> S. P. Gupta v. Union of India A.I.R. 1982 S.C. 149 (India) ( “It was open to the Central Government to override the opinion of the Constitutional Functionaries (who ought to be consulted) and take its own decision regarding suitability or non-suitability of a candidate.); Supreme Court Advocates on-record Association v. Union of India A.I.R. 1994 S.C. 268 (India) (The Chief Justice of India, being in the best position to scrutinize the worth of a Judge, and also to eliminate political influence(s) in the process, had to have the ‘Final Opinion’ in the matter: he needed to consult two of his senior colleagues before finalizing upon a name.); In Re Presidential Reference (1998) 7 S.C.C. 739 (India) (Upheld primacy of the opinion of the CJI and four of his colleagues.)

<sup>32</sup> David Pannick cited in V R Krishna Iyer, *The Higher Judiciary: Appointments and Disappointments*, in *ESSAYS ON HUMAN RIGHTS, JUSTICE & DEMOCRATIC VALUES* 96 (2004).

“the reasons why one candidate, rather than another, has been recommended to the Queen remain hidden in the files of Lord Chancellor’s Department or concealed within the breasts of those senior judges amongst whom ‘soundings’ have been taken.”

These unfortunate developments have invited the anguish of legal luminaries and stakeholders across the country. Justice Krishna Iyer once lamented<sup>33</sup> that in India, the Judiciary is ‘handpicked confidentially in dark room operations, secret bargains and mutual adjustments.’ Since the Judiciary also happens to be an institution of democracy, it is manifestly expected that that the selection to the positions of such authority and of utmost impartiality must be transparent and accountable and ‘should not be by a mysterious method confined to a few *pro tem* humans in high office.’<sup>34</sup> The former Attorney General of India, Goolam E. Vahanvati has observed that,<sup>35</sup> “nobody can deny the problems that exist. Some outstanding judges were left out of promotions for reasons which may not have been explained and were, in some cases, highly doubtful. Equally, some undeserving candidates sneaked in. There is also general acknowledgement of the lack of transparency.” He goes on to observe and lament how some talented individuals could find only a late entry into the Supreme Court ‘for reasons which appeared to be based on personal prejudices and predilections’ (of members of the Collegium).<sup>36</sup> The consequential impact of lack of clear and transparent norms and parameters in the process of appointments and promotions is manifest in many judges being deprived the opportunity of reaching the Apex Court or of being appointed as the Chief Justice, thus causing a loss to the institution itself, as well as career setbacks to the Judges in question individually. In the opinion of the former Attorney

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<sup>33</sup> V R Krishna Iyer, *The Higher Judiciary: Appointments and Disappointments*, in *ESSAYS ON HUMAN RIGHTS, JUSTICE & DEMOCRATIC VALUES* 96 (2004).

<sup>34</sup> JEROME FRANK, *COURT ON TRIAL* (1973).

<sup>35</sup> Goolam E Vahanvati, *Judiciary at a Cross Roads*, *THE TIMES OF INDIA*, Aug 22, 2014.

<sup>36</sup> At one point of time, Executive was responsible for creating walls of secrecy around the process and even now the evil has not been remedied; the game spoiler now happens to be the Collegium System.

Generally, while admitting the lack of transparency in the process, various aspects of perusal of records of prospective candidates and analysis of their ‘work’ could not be expressed in public<sup>37</sup> since judges refrain from giving media releases or holding press conferences.

Some recent aberrations in judicial appointments deserve a careful scrutiny at this juncture of time to highlight the repercussions of having a non-transparent system of appointments and promotions and the impact of the same upon the image and credibility of the most revered Institution.

The case of the recommendation of the name of Gopal Subramaniam<sup>38</sup> as a Supreme Court Judge, and his subsequent withdrawal of consent to be appointed as Judge, is pertinent at this point against the backdrop of transparency and the fairness of the selection process. Notably, the Government did not accept the name of Subramaniam<sup>39</sup> for appointment as a Supreme Court Judge due to ‘certain’ factors which have been reported by the media<sup>40</sup> but have not been officially made public by the concerned authority(s). The manner of his ‘non

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<sup>37</sup>This is done under the shield of Independence of Judiciary and in the zeal to safeguard and sustain the credibility of the sacrosanct Institution.

<sup>38</sup> Senior Advocate of the Supreme Court of India and former Solicitor General of India; Subramaniam was lead counsel for CBI in the 26/11 Mumbai terror attack case that led to AjmalKasab’s conviction. He was also amicus curiae in the Sohrabuddin fake encounter case, often taking on the then NarendraModi government of Gujarat in court. He played a key role in getting the court to order a CBI probe into the case.

<sup>39</sup>Maneesh Chhibber, *Govt apprehensive about making Gopal Subramaniam a SC judge, sends back name to collegium for reconsideration*, THE TIMES OF INDIA, June 19, 2014.

<sup>40</sup>Gopal Subramaniam has published his letter addressed to the Chief Justice of India, reflecting anguish over the incident. He mentions “Over the past two weeks quite a few media reports have voiced the Union Government’s reservations about my appointment. These reports speak of alleged adverse reports against me by the Intelligence Bureau and the CBI. I must say that these media reports are malicious insinuations based on half truths, and appear to be a result of carefully planted leaks aimed at generating doubts in the minds of the Collegium and of the public as to the suitability and propriety of appointing me as a Judge of the Supreme Court. I am fully conscious that my independence as a lawyer is causing apprehensions that I will not toe the line of the government. This factor has been decisive in refusing to appoint me. I have no illusions that this is so. I find it strange that no newspaper even spoke of my work over 34 years. The very fact that the Executive Government has not acknowledged my work, is sufficiently indicative of the true nature of its intentions.” Available at <http://media2.intoday.in/indiatoday/images/2014/download-1403683355676.pdf>.

appointment’ due to ‘dislike’ from the government is questionable as reasons behind such ‘dislike’ have not been substantiated or publically expressed. This episode reflects the opacity of the screening process for the Supreme Court Judges, which is ultimately against the interest, reputation and credibility of the institution.<sup>41</sup> The rejection of Gopal Subramaniam’s candidature has been challenged and questioned by people across different quarters. Karunanidhi has targeted the Centre on the rejection,<sup>42</sup> questioning whether his name was ‘rejected’ because of his service as *amicus curiae* in the *Sohrabuddin Fake Encounter* case.<sup>43</sup> The rejection of a candidate nominated through the Collegium by a Government with a ‘powerful mandate’, without cogent and tried reasons is to be viewed critically. The then Chief Justice of India, Justice Lodha, also expressed regret on the development, terming the act of rejection ‘unilateral’ coming from the executive without him being consulted over the matter.<sup>44</sup>

It has been reported that the Collegium System has resulted in a “*complete dereliction of norms of transparency in the functioning and accountability for choices made by the Collegium. No published criteria are followed by the collegiums for choosing judges, little is known about short-listing procedures and no reasons are communicated for its decisions.*”<sup>45</sup>

It is true that a lack of transparency in the working of the Collegium has failed in giving the Constitutional Courts ‘men of high erudition’.

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<sup>42</sup>Karunanidhi Targets Centre on GopalSubramaniam Rejection Row, NDTV, July 3, 2014 available at <http://www.ndtv.com/article/south/karunanidhi-targets-centre-on-gopal-subramaniam-rejection-row-552561>.

<sup>43</sup>J. Venkatesan, *Law Ministry turns down Gopal Subramaniam’s elevation as SC judge*, THE HINDU, June 19, 2014 available at <http://www.thehindu.com/news/national/law-ministry-turns-down-gopal-subramaniam-elevation-as-sc-judge/article6127460.ece>

<sup>44</sup>Utkarsh Anand, *Chief Justice Lodha breaks his silence, calls decision on Gopal Subramaniam unilateral*, THE INDIAN EXPRESS, July 2, 2014 available at <http://indianexpress.com/article/india/india-others/cji-r-m-lodha-breaks-his-silence-says-gopal-subramaniam-was-rejected-without-my-consent/2/#sthash.QzSXv3iv.dpuf> k

<sup>45</sup>Arghya Senguta, *Reform Judicial Appointments*, TIMES OF INDIA, New Delhi, July 1, 2014. She is the Founder and Research Director for the Vidhi Centre for Legal Policy.

Justice Markandey Katju,<sup>46</sup> demonstrated the total absence of transparency in the process of appointments to the Higher Judiciary and the occurrence of ‘high-handed’ political influence in the process by exposing<sup>47</sup> the case of an Additional Judge of the Madras High Court, who had allegedly, on the backing of an important political leader of Tamil Nadu, entered the High Court as an Additional Judge, granted two extensions of a year each and ultimately designated a permanent Judge of the High Court. Justice Katju has revealed that during the tenure of the Judge as the District Judge, there had been eight adverse entries recorded against him by various portfolio Judges of the Madras High Court, however all these entries had been deleted by an Acting Chief Justice of the Madras High Court purportedly to ensure his appointment as Additional Judge. Further, despite adverse Intelligence Bureau reports against him, he was granted extensions of his terms as the Additional Judge and consequently made permanent by the Government due to its political considerations. Justice Katju had revealed that the people involved in the matter included Justice R. C. Lahoti and Justice Y.K. Sabharwal, both of whom as the Chief Justices of India at different points of time had granted extensions of one year to the Additional Judge despite having knowledge of his ‘taint’ along with Justice K.G. Balakrishnan, who as the Chief Justice of India had confirmed him as the permanent Judge of the Madras High Court. The allegation clearly reflects the total opacity of the manner in which the service judges gain entry into the High Courts, the criteria for the extension or non-extension of their terms, the criteria for confirmation or non-confirmation of the additional judges as permanent judges, the scope of consultation between the Judiciary and the Government, the secret bargains between the two and the actions finally arrived at. Had there been absolute transparency in the system, no government or the Chief Justice of India would have acted thus due to the fear of public rebuke. The lack of transparency empowers people to carry out manipulations and act whimsically and arbitrarily, knowing

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<sup>46</sup> Retired Supreme Court Judge and currently the Chairman of the Press Council of India

<sup>47</sup> *How a corrupt Judge continued in Madras High Court*, THE TIMES OF INDIA, New Delhi, July 21, 2014.

that they cannot be held accountable for their actions because of the veil of secrecy around them. In the case of *Shanti Bhushan v. Union of India*,<sup>48</sup> the decision of the Chief Justice of India in appointing Justice Ashok Kumar<sup>49</sup> to the Madras High Court, despite adverse reports against him and without consultation with the Collegium, had been challenged but the limitations to the process of judicial review<sup>50</sup> has surfaced after the opinion<sup>51</sup> of the Apex Court in the matter.

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<sup>48</sup>*Shanti Bhushan v. Union of India*, (2009) 1 SCC 657.

<sup>49</sup> Justice Ashok Kumar happens to be the Judge about whom Justice Katju has been talking about.

<sup>50</sup> Para 8 and 11 in *Shanti Bhushan v. Union of India*: “So far as the scope of judicial review in such matters is concerned, it is extremely limited....” The Bench referred to the scope of review as had been laid down in Special Reference No.1 of 1998; 1998 (7) SCC 739, para 32 “Judicial review, in the case of an appointment or a recommended appointment to the SC or the HC, is available if the recommendation concerned is not a decision of the CJI and his senior-most colleagues, which is constitutionally requisite. Judicial review is also available if, in making the decision, the views of the senior-most SC Judge who comes from the HC of the proposed appointee to the SC have not been taken into account. Similarly, if in connection with an appointment or a recommended appointment to a HC, the views of the Chief Justice and senior judges of the High Court as afore-stated, and of SC Judges knowledgeable about that HC have not been sought or considered by the CJI and his two senior-most puisne judges, judicial review is available. Judicial review is also available when the appointee is found to lack eligibility.

Also as per The Supreme Court in *Supreme Court Advocates on Record Association v. Union of India*, 1993(4) SCC 441, para 482 “Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment or of a transfer being made without the recommendation of the CJI, these matters are not justiciable on any other ground, including that of bias, which, in any case is excluded by the element of plurality in the process of decision making.”

It is pertinent to note that the challenge to Justice Ashok Kumar’s appointment by Shanti Bhushan in the current matter derives support from the recent allegation of Justice Markanday Katju, a retired Judge of the Supreme Court of India that three successive Chief Justices of India recommended extensions to a ‘corrupt’ additional judge and who ultimately became a permanent judge under the tenure of KG Balakrishnan’s Chief Justice-ship. (Katju was obviously referring to Justice Ashok Kumar in his revelations). Dhananjay Mahapatra, *MarkandeyKatju's allegations: In 2005, PMO had pushed to have 'corrupt' judge made permanent*, THE TIMES OF INDIA, July 23, 2014 available at <http://timesofindia.indiatimes.com/india/Markandey-Katjus-allegations-In-2005-PMO-had-pushed-to-have-corrupt-judge-made-permanent/articleshow/38883679.cms>.

<sup>51</sup>The apex court declined to quash the appointment of Justice Ashok Kumar observing that “the clock can’t be put back”, Para 16 and 17 of *Shanti Bhushan v. Union of India*,(2009) 1 SCC 657.

The manner in which the Collegium system functions stands further illustrated by the controversy involving former Chief Justice of India Altamas Kabir. It has been reported that the Chief Justice of the Gujarat High Court had written to the President and Prime Minister stating that the prime reason for him being overlooked for elevation to the Supreme Court, was the fact that he had opposed the elevation of Justice Kabir's sister as a High Court Judge when he was a member of the bench in the Calcutta High Court. His request for perusal of the material which formed the basis of Justice Kabir's decision regarding his competence and character was turned down. The allegations made by the Gujarat Chief Justice stand unverifiable as the "collegium has now become nothing more than a cabal, a secret society whose deliberations are not a matter of public record."<sup>52</sup>

This impact of opacity in the selection process and the fancifulness of the same is further clearly demonstrable by the impudence of the Collegium in not accepting and responding to the objection<sup>53</sup> raised by the Prime Minister's Office regarding the appointment of Justice Dattu, Justice Ganguly and Justice Lodha to the Supreme Court over senior Judges - Justices Shah, Justice Patnaik and Justice Gupta. The fact that Justice A.P. Shah, the Chief Justice of Delhi High Court could not find his way into the Supreme Court, despite an illustrious judicial career<sup>54</sup> has to be deprecated. The reasons for his non-elevation are again based on no official communiqué but on mere rumours, untested and uncorroborated facts. It has been

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<sup>52</sup>Abhishek Sudhir, *Restoring the judiciary's credibility*, THE HINDU, July 24, 2014 available at <http://www.thehindu.com/opinion/lead/restoring-the-judiciarys-credibility/article6242504.ece> (last accessed on 03.11.2014).

<sup>53</sup>Diwakar & Dhananjay Mahapatra, *PMO returns 3 names mooted for SC judges*, THE TIMES OF INDIA, November 11, 2008 available at <http://timesofindia.indiatimes.com/india/PMO-returns-3-names-mooted-for-SC-judges/articleshow/3697198.cms> . (The PMO is learnt to have sought from the law ministry the reason for the seniority consideration being given a go-by.)

<sup>54</sup> He had delivered celebrated judgments in Delhi High Court, bringing the CJI under the RTI and decriminalizing Section 377 of the Indian Penal Code.

reported<sup>55</sup> that during his stay in the Madras High Court, some orders passed by him had created ‘unfavourable impressions’ with a Collegium Member, which perhaps led to him losing the title. Based purely on the seniority rule, he was one of the senior-most High Court Chief Justices who ought to have been a forerunner for elevation to the Supreme Court. However, other junior judges were recommended for the same, dropping his name aside. FaliNariman has criticised the Collegium for ignoring the candidature of Justice Shah for elevation to the Supreme Court.<sup>56</sup> In a public meeting while sharing the dias with the then Chief Justice of India, K.G. Balakrishnan, Nariman expressed “disappointment” in legal circles over Shah becoming a casualty of the “vagaries of the present system of judicial appointments”, despite being a “role model for all judges.” Commenting upon the lack of transparency and a consequent proportionate arbitrariness in the dealings of judicial appointments, Nariman also cited the instance of Justice A.K. Patnaik, who could not, initially, gain entry into the Supreme Court because of a consistent refusal of one member of the Collegium to do so; it was only after the retirement of that member that Justice Patnaik’s candidature was accepted. He had also made a passing remark over the appointment of Justice P.D. Dinkaran to the Apex Court despite allegations of land grabbing against him, which again spoke of the high-handedness of the people responsible for the appointment(s). Justice A.P. Shah, chairman of the Law Commission of India has time and again registered his distaste for the opaque conduct of the Collegium System, holding that appointments to the Higher Judiciary lacked transparency. He once remarked in an interview to a television channel, that “the Collegium System is so opaque that even if someone wants to speak out, he cannot do it having come from the same system.” He further opined that the “Collegium

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<sup>55</sup>As per P.P.Rao, available at <http://www.ndtv.com/article/india/justice-a-p-shah-retires-hurt-16247>.

<sup>56</sup>*Fali slams SC Panel for ignoring judge who penned gay verdict*, THE TIMES OF INDIA, Nov 20, 2009 available at [http://epaper.timesofindia.com/Repository/getFiles.asp?Style=OliveXLib:LowLevelEntityToPrint\\_TOI&Type=ext/html&Locale=english-skin-custom&Path=CAP/2009/11/20&ID=Ar01700](http://epaper.timesofindia.com/Repository/getFiles.asp?Style=OliveXLib:LowLevelEntityToPrint_TOI&Type=ext/html&Locale=english-skin-custom&Path=CAP/2009/11/20&ID=Ar01700).

System has completely failed; judges are appointed on unknown criteria....favourites get appointed and the rest are left out". Justice Shah pointed out that the Collegium had gone ahead to appoint a Judge at the age of sixty when the 'criteria' clearly says that any appointment to Higher Judiciary has to be below the age of fifty five.<sup>57</sup>

The past few years have also given birth to various other controversies regarding the appointment or non-appointment of several people, such as Bhaskar Bhattacharya, N.V. Ramanna,<sup>58</sup> and P.D. Dinakaran.<sup>59</sup> The Gujarat High Court Bar Association had passed a resolution,<sup>60</sup> "protesting" the overlooking of "legal competence, honesty, dedication and steadfastness" of its Chief Justice, Bhaskar Bhattacharya, whose appointment had allegedly been stalled because of one Collegium member's animosity towards him.<sup>61</sup> In a similar fashion, another resolution passed by the Madras High Court Bar Association, shared its concern over the opacity of the selection process.<sup>62</sup> It is pertinent to note that the process of

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<sup>57</sup> *Collegium System Failed; Law Panel Chief*, THE TIMES OF INDIA, New Delhi, August 26, 2014.

<sup>58</sup> PIL had been filed by the advocates contesting Ramana's appointment on the ground that a criminal case was pending against him at the time of his elevation to the bench and that he was guilty of suppression of vital information: PILs dismissed: cost imposed upon the petitioners. *Supreme Court junks plea for removal of Andhra Pradesh High Court judge*, THE ECONOMIC TIMES, Feb 4, 2013 available at [http://articles.economictimes.indiatimes.com/2013-02-04/news/36743123\\_1\\_apex-court-justice-ramana-collegium](http://articles.economictimes.indiatimes.com/2013-02-04/news/36743123_1_apex-court-justice-ramana-collegium).

<sup>59</sup> J. Venkatesan, *Balakrishnan pushed for Dinakaran's elevation: Katju*, THE HINDU, August 11, 2014 available at <http://www.thehindu.com/news/national/katju-stokes-fresh-controversy-targets-excji-kg-balakrishnan/article6304714.ece> (.).

The Supreme Court has refused to disclose details regarding the decision on elevating Karnataka High Court Chief Justice P.D. Dinakaran to the Supreme Court, which has since been stalled following allegations of land grab against him." available at <http://www.thehindu.com/news/national/details-on-dinakaran-elevation-confidential-supreme-court/article124915.ece>.

<sup>60</sup> A.P. Shah, *Appointments in the Higher Judiciary must be based on merit and reflect social diversity*, available at <http://www.judicialreform.in/forums/showthread.php?tid=971>.

<sup>61</sup> AjitPrakash Shah, *Appointments in the higher judiciary must be based on merit and reflect social diversity*, THE TIMES OF INDIA, July 10, 2013 available at <http://timesofindia.indiatimes.com/edit-page/Appointments-in-the-higher-judiciary-must-be-based-on-merit-and-reflect-social-diversity/articleshow/20992942.cms>

<sup>62</sup> *Id.*

induction of judges is initiated by the Chief Justice of India in the case of inducting a Judge for the Supreme Court or by the Chief Justice of the High Court for selecting a Judge for the High Court. However, the important and significant process of choosing sentinels of the Constitution and the upholders of Rule of Law remains distant from any form of public participation. The very idea of open hearings, consultations with public and the stakeholders and inviting proposals for objections against recommended names is foreign to judicial selections in India.

Given the swelling discontent over the non-transparent working style of the Collegium System, the National Judicial Appointments Commission Act, 2014 and the Constitution (One Hundred and Twenty First Amendment) Bill, 2014 enacted as the Constitution (Ninety Ninth Amendment) Act, having come into force,<sup>63</sup> is being projected as the harbinger of transparency. However, it is amply clear that unless the proposed system under the National Judicial Appointments Commission works on settled, disclosed and publicized parameters for the performance of the assigned role, it shall be merely replacing the monopolized power of judicial appointments under the Collegium system, rather than making the system broad-based and transparent. Justice A.P. Shah has categorically remarked<sup>64</sup> that “we don’t need a reactionary move setting up a Judicial Appointments Commission merely for the sake of it, for that would achieve nothing. We need a well thought out and consultative process of selection with identified norms and criterion...Choosing Judges based on undisclosed criterion, in largely undisclosed criterion, reflects an increasing democratic deficit and must be abandoned.” It has been appropriately observed and suggested by Justice Ruma Pal<sup>65</sup> and Arghya Sengupta that the exercise of power by the body must be accompanied with reasons

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<sup>63</sup>*National Judicial Appointments Commission Act Notified*, PRESS INFORMATION BUREAU, Government of India,

Ministry of Law & Justice, 13-April-2015, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=118224>

<sup>64</sup> *supra* note 60

<sup>65</sup> Former Judge of the Supreme Court of India.

to be publicly disclosed, holding that “transparency, a key leitmotif of the reform of the appointment process, demands such disclosures.”<sup>66</sup> There is a need to work upon the exact functional criteria for the selection of Judges and also bring the same in public domain viz., number of judgments delivered, jurisprudential significance of the judgments delivered, the personal and judicial integrity of the Judges; analysis of members of the Bar also needs to be conducted on tangible parameters viz. number of appearances in matters, appearances at the final stages of hearing, their personal integrity, etc., in order to reach to a logical conclusion.

The process of selection needs to be manned by a body which must ‘exchange view(s), openly where all possible candidates are considered, using the inherent, confidential enquiries and with definite criteria rooted in the social values and functional capabilities, which the Constitution implies. The practice of maintaining secrecy about proposed names for judge-ship has to be done away with; the prospective names may be publicized to facilitate an opportunity to the stakeholders to analyse their worth and this may remove corrupt politicking in the process. The need of the hour is to ensure transparency in the judicial appointments so as to strengthen the trust and confidence of the people in the Judiciary and to place it ‘beyond suspicion.’ “The Judges must be selected and appointed by methods which are transparent and which ensure the independence of their functions without allegiance or loyalty to the appointing authority.”<sup>67</sup> It is safe to conclude that it is time for overhauling the entire process of judicial appointments with a view to convey to the masses, who bestow an extreme degree of faith and reverence in the institution that it is manned by a completely transparent system and is accountable to the public at large.

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<sup>66</sup>THE TIMES OF INDIA, New Delhi, 17<sup>th</sup> August, 2014

<sup>67</sup> T. R. Andhyarujina, *Challenges before the Judiciary-An Indian Perspective*, INDIAN ADVOCATE, 2010-2011