



## Right to Information and Appointments of Judges: An Appraisal

Dr. Manish Kumar  
Khunger

### KEYWORDS :

#### Introduction

Judiciary is one among the three organs of the State as envisaged in the scheme of our Constitution and has a unique role to play in comparison to the executive and the legislature, which are the other two organs of the State. Under the scheme of our Constitution judiciary is assigned much important role. The independence of Judiciary is of vital importance as Judiciary performs the unique function of upholding constitutionalism- rule of law, separation of powers, etc. and at the same time enforces the laws made by the legislature and the executive (in the form of 'delegated legislation'). Here, Independence means to function without fear or favor, and without committing allegiance to any internal or external power or influence. Therefore, who chooses the judge becomes a highly debated question, and one which has been a hot topic for decades. While on one hand, we must allow an independent judiciary to function, on the other complete autonomy may not be desirable.

#### Transparency in Judicial Administration: Mandatory

The Judiciary is one of the three branches of the Government. As such, it has functions that extend beyond the traditional role of "impartial third party" in the resolution of conflicts. Its intervention in the political system could be profound, influencing and sometimes in a very sophisticated manner the link between the State and Citizens as well as the relations between the various social actors. In this context and given the importance of the judiciary in political and institutional terms, transparency and access to information reforms are relevant due to their potential impact on the administrative and jurisdictional operation of the judicial bodies themselves<sup>1</sup>. In other words, the adoption by Judiciaries of transparency reforms could have a positive effect on their institutional capacity. Increasing their legitimacy, their authority *vis-a-vis* other political players and their relationships with citizens.

It should also be taken into account that the Judiciary is a key factor for the consolidation of Rule of Law. The importance of its role is reflected in various indexes and methodologies designed to assess the quality of public institutions and governance. Transparency International's National Integrity System recognizes the Judiciary as one of its pillars. Likewise, several diagnoses have identified the justice system as a relevant player in the matters of governance. The Worldwide Governance Indicators include the Judiciary in the measurements for the category of "Rule of Law."<sup>2</sup> Transparency of Judicial institutions and active participation in its processes and responsibility and accountability of the judiciary are the key indicators for the evaluation of democratic governance.

Moreover in democratic society, the administration of justice cannot be isolated from the political and social contexts in which its operators act, or take place without effective arrangements for the publicity both of its administrative operation and its jurisdictional work. In that sense, a majority of the information produced by the judiciary, like that generated by the other government branches, may be requested by any individual under the right to freely access public information and to control the exercise of public powers in the performance of their functions. There is an inalienable relationship between efficacy and openness. Efficacy of our courts is due to the open conduct of court proceedings. Judges function in open courts and the proceedings of a court can be, watched by any member of the public and is open to scrutiny. Transparency is the hallmark of our judicial system. That is partly the reason why the decisions of courts are generally accepted. An important element of the efficient and fair administration

of justice is to have the judiciary independent from both other areas of government and also private influences.

#### Voyage of Judicial Appointments in India

Before NJAC was introduced through Article 124A, Indian Constitution allowed appointment of Judges after consultation with such judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose<sup>3</sup>. This system worked well for a long time, until the 1970s. The situation during National Emergency, the prologue and epilogue witnessed a heavy tussle between the Judiciary and the Political-Executive. One instance is when Justice M.H. Beg was appointed the Chief Justice of India in supersession of Justice Khanna who is celebrated for his dissent in *ADM Jhalpur v. Shivkant Shukla*<sup>4</sup>. Another instance is during 1975-77 when numbers of Judges were transferred from one High Court to another for the mere reason that they had decided against the Government in certain cases that had 'political' aspect to them<sup>5</sup>. In this particular case, Justice Sakaichand Sheth, a Judge in Gujarat High Court was transferred to Andhra Pradesh High Court. He challenged this transfer at the Gujarat HC through a writ, which the Gujarat MC allowed as the transfer had taken place without any consultation of the CJ. Union of India appealed to the Supreme Court, which ensured independence of Judiciary when it disposed the case off and assured the Justices transfer back to Gujarat HC. This ping-pong battle for power between the Political-Executive and the Judiciary can be witnessed further in numerous judgements such as the Habeous Corpus Case<sup>6</sup>, *Shankari Prasad*<sup>7</sup>, *Golak Nath*<sup>8</sup> – *Kesavanand Bharti*<sup>9</sup>. In *Kesavananda Bharti* the Supreme Court laid down the Basic Structure Doctrine' (BSD) and thus gave a conclusion that no law can alter the basic structure of the Constitution. This doctrine is the unique brainchild of the Supreme Court of India, which is not present in any other democracy.

#### Collegium system

The collegium system was established based on the three Judges case and under the collegium system the appointments of judges to the High Court and Supreme Court are made by the Chief Justice of India and four most Senior Supreme Court Judges. The main reasons for the Government wanting to replace the Collegium system were twofold. One, the system had no Constitutional backing and two, it was opaque. There was no amount of disclosure regarding the candidates who would be selected for appointment of judges, the reasons for candidates being rejected etc. Even though there was a lot of hue and cry to bring the Collegium system under the purview of the Right to Information Act, 2005, it did not happen. By bringing the collegium under the RTI act, it would have ensured transparency and accountability. With these issues at hand, the proposal for a constitutionally backed body was proposed in the *Lok Sabha*. It was accepted by every member. After the acceptance of the bill in the *Lok Sabha* it was placed before the *Rajya Sabha* the very next day where again there was almost a hundred percent acceptance. It was the eminent lawyer *Ram Jethmalani* who abstained from voting for the Bill. With this in place, the NJAC act was passed in 2014<sup>11</sup>.

#### National Judicial Appointments Commission

The National Judicial Appointments Commission was passed to replace the collegium system. It sought to effectively remove the issues and make better the procedure of appointment of judges to the High Court and Supreme Court of India. While the main issues with the collegium system included transparency and the power of appointing judges remained with the judges, the NJAC took a more practical approach. The act promoted the relationship between the executive and

the judiciary. It provided the President the power to reconsider the recommendations made by the commission. So essentially, two wings of the Indian democracy were included in the appointment of judges. The commission ensured more transparency and accountability, this was one of the major changes to be included with respect to the collegium system which was opaque and provided no amount of transparency or accountability. This would ensure that the executive would also be kept in loop regarding the appointments. Another major benefit the NJAC sought to provide was that it would remove the elements of nepotism and favouritism and appoint candidates based on merit and experience. This was a major step in the interest of justice when we consider the fact that the collegium system did not always appoint judges based on merit, but certain appointments were based on factors such as nepotism, favouritism, bribery etc. The benefits of the NJAC act are many, including a check on corruption and non-arbitrary appointment of judges to the High court and Supreme Court of India. The non-arbitrary selection was ensured because of the implementation of the power to veto by the members. The Act provides that if any two members of the commission do not accept a proposal or a recommendation then that person shall not be recommended for appointment. These were among the most prominent advantages of the NJAC over the collegium system<sup>12</sup>.

### Suggestions

1. Accountability and independence of the judicial bodies should be defined by keeping in view public interest. Judiciary as a branch of is not only obligated to disseminate the information it generates in the course of daily operation, but also plays a prominent role in the effective enforcement of this right. In that sense judges should respect the same standards in terms of access to information as other branches of the government.
2. Any legislation of Indian legislature has binding force on each organs including judiciary until the same is declared *ultra-vires*. As a guardian of Constitution judiciary has empowered only to check the Constitutionality of particular legislation on well founded grounds and to interpret the provisions. So long as any Act stands valid, it must be observed by the judiciary. Same is true in respect of R.T.I. Act 2005.
3. It should be specified in the Right to Information Act, 2005 that judiciary being a Public authority is liable for the disclosure of information. There should be no ambiguity regarding the responsibility of the judiciary under the Right to Information Act.
4. Draconian law relating to the contempt of Court should be amended and it can provide defence for the person making any disclosure against judiciary in good faith.
5. The problem arises when personal and vested interests come in to play. In the light of past events the judiciary faces an appeal by the people of the nation to assume responsibility and right-fully discharge its functions keeping in mind the oath to function "without fear and favour".

### Conclusion

The right to information is a fundamental right that the State must enforce and guarantee. The judiciary as a branch of government is not only obligated to disseminate the information it guarantees in the course of its daily operation, but also plays a prominent role in the effective enforcement of this right. In that sense, judges should respect the same standards in terms of access to information as the other branches of government. Although there has been some resistance or lack of interest on the part of judicial institution in accepting said standards, there is a broad consensus around the concept that the same requirements apply to them as to the public administration and therefore they have the obligation to provide access to information both in connection with their jurisdictional functions. The same is true with regards to transparency, since the judiciary has to comply with the same requirements as other state bodies.

### References :

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3. Rule of Law is defined as the degree of trust bestowed by agents on a society's rules and the extent to which they behave accordingly etc. Available at [www.govindicators.org](http://www.govindicators.org).
4. Article 124 of the Indian Constitution.

5. AIR 1976 SC 1207.
6. Extracted from autobiography of F.S. Nariman "Before memory fade: An Autobiography" chapter 16, Hay House, 2010, Union of India v Snakal chand Hathimal Seth, AIR1977SC2328.
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8. AIR1955 SC455.
9. 1967AIR1643.
10. 1973 (4) SCC 225.
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12. Ibid.