

## **TRANSFER AND TRANSPARENCY**

(A shift from complete opaqueness in the proceedings of the collegium to absolute transparency with respect to transfer of High Court Judges)

- *SRIJITA JANA & VIKASH KUMAR BAIRAGI\**

### **INTRODUCTION**

*“Selective transfers always give rise to canards and the transferred Judge suffers character assassination.”*

- *Justice D Desai*<sup>1</sup>

Arbitrary transfer of High Court Judges in India has a strong nexus with the opaqueness of the collegium system of ‘*Judges appointing and transferring Judges*’ that came into force after the Third Judges case.<sup>2</sup> Due to the discrepancies in judicial appointments and transfers, the collegium system has always remained mired in controversies. However, it has come back under the scanner due to the recent Justice Jayant Patel transfer issue.<sup>3</sup> Justice Jayant Patel of the Karnataka High Court resigned<sup>4</sup> from the office, after he was transferred<sup>5</sup> to the Allahabad High Court from the Karnataka High Court when he had only 10 months of service left.

In the backdrop of the National Judicial Appointments Commission (NJAC)<sup>6</sup> being struck down by the apex court of India, the collegium system was reinstated. In the words of Justice J. Chelameshwar, the collegium system lacks transparency, objectivity and accountability.<sup>7</sup> Mainly the collegium system has two flaws:

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<sup>1</sup> *S P Gupta v President of India* (1981) Supp (1) SCC 87.

<sup>2</sup> *In re Special Reference* 1 of 1998.

<sup>3</sup> Special Correspondent, ‘HC judge Jayant Patel resigns’ *The Hindu* (Ahmedabad, 26 September 2017) <[www.thehindu.com/news/national/hc-judge-jayant-patel-resigns/article19754051.ece](http://www.thehindu.com/news/national/hc-judge-jayant-patel-resigns/article19754051.ece)> accessed 20 October 2017.

<sup>4</sup> The Constitution of India 1950, art 217(1).

<sup>5</sup> The Constitution of India 1950, art 222(1).

<sup>6</sup> *Supreme Court Advocates-on-Record Assn v Union of India* (2016) 5 SCC 1.

<sup>7</sup> Dhananjay Mahapatra, ‘Sr SC Judge Rips into CJI-headed Collegium’ *The Times of India* (Delhi, 3 September 2016).

*First*, the judicial proceedings are kept within the exclusive domain of judicial circles and are not revealed to the public.

*Secondly*, the grounds on which Judges are appointed and transferred are not uniform and have no common criteria because each time the material considered by the collegium may be different.

The second cause of arbitrary transfer of Judges is the dichotomy between transferring a judge in public interest and transferring him by way of punishment; the first cause being the opaqueness of the collegium system. In all the Judges' cases related to transfer<sup>8</sup> and appointment of Judges, the Supreme Court has observed that judicial transfers can be effectuated exclusively on the ground of '*public interest*' and this ground in itself, is a safeguard against arbitrary transfers. The definition of public interest has a wide sweep, which can be easily used as a protecting veil to hide political agendas and merely mentioning that a transfer has been effected in the interest of public is an incomplete argument.

Recently, the Supreme Court Collegium has resolved to post every detail and minutes of the collegium's meetings on the Court's official website<sup>9</sup> regarding recommendations on judicial appointments, transfers and elevations for public consumption. The online disclosure of Collegium proceedings will help in checking arbitrary transfer of the judges from one High Court to another, as it will try to arrest the opaqueness to an extent. However, the online updates that are disclosed on the SC website are not a complete solution in itself because it has some major loopholes. The authors took a glance at the recent resolutions related to the appointment of Judges to the Madras High Court on the official Supreme Court website. The authors reached to a conclusion that the updates merely disclose the names of the selected candidates for appointment. The reasons backing the appointments are very sketchy, vague, and are based on unreliable sources. In this context, it is well assumed that the disclosure of proceedings related to transfer is likely to be in the same manner. Thus, the need of the hour is to give sufficient reasons and lay down some common criteria, so as to promote an intergenerational unity in the collegiums; because the inputs taken

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<sup>8</sup> *SP Gupta v President of India* (1981) Supp (1) SCC 87; *Union of India v Sankal Chand Himatlal Sheth* (1977) 4 SCC 193.

<sup>9</sup> Supreme Court Collegium, 'Re: Transparency in Collegium System' (*Supreme Court of India*, 3 October 2017) <<http://supremecourtofindia.nic.in/collegium-resolutions>> <<http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-Minutes-Transparency.pdf>> accessed 22 October 2017.

into the consideration by the collegium for recommending or appointment or transfer may differ each time from one collegium to another one. As far as recommendation of transfer is concerned, the resolutions should also disclose such material that can conclusively prove a reasonable nexus between the public interest and the transfer.

The third element that makes transfer of HC Judges not only arbitrary but also punitive in nature is that the transfer of Judges is non-consensual in nature. Many international conventions, foreign Constitutions, international statutes have made consensual judicial transfers as binding and it is high time that the Indian judiciary incorporates the same view.

Despite repeated attempts to reduce the opaqueness of the collegium system, in light of the recent Justice Jayant Patel controversy, the question arises as to how shall the independence of judiciary be achieved if judges are arbitrarily transferred without their consent and not in the interest of the public? To answer this question, the authors have put forward certain arguments to address the issues.

## **TRANSFERS OF JUDGES: A THEORETICAL PERSPECTIVE**

### **A CORRECT AND COHERENT THEORY**

The theory covers all the facts and principles which it seeks to explain; that it does not lead to contradictions, incongruities, absurdities and anomalies; that it is easy to work in practice and avoids needless complications and over-elaborations. However, the correct theory of the President's power to transfer a High Court Judge must be evolved on the fundamental assumption that any theory that destroys the independence of judiciary must be rejected as opposed to the undisputed position that the independence of the judiciary is a basic feature of our Constitution.<sup>10</sup>

*Firstly*, the correct theory must be based on the facts; whereas the tenure of office of persons in the service of the Union or the State is during the pleasure of the President or the Governor, the tenure of office of a High Court Judge is during good behaviour. Further, the relation between the Union Government and its servants is that of a master and his servant. Hence, a Government servant is under an obligation to obey all lawful orders of his superiors. The master-servant

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<sup>10</sup> HM Seervai, *Constitutional Law of India*, vol 3 (4th edn, Universal Law Publishing 2010) 2803.

relationship does not subsist between a High Court Judge and the Union Government that appoints them. Justice Desai accepted this contention, which is as follows:

*“The rejection of Mr. Seervai’s argument that a High Court Judge cannot be transferred without his consent, should not be read as a negation of his argument that there is no master and servant relationship between the Government and High Court Judges. In general, the relationship of master and servant imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done.<sup>11</sup> A servant undertakes to serve his master and to obey his reasonable orders within the scope of the duty undertaken. The Government has no power or authority to direct what particular work a High Court Judge must do and it can certainly not regulate the manner in which he must do his work in the discharge of his official functions. A High Court Judge is also not bound, nor does he undertake, to obey an order of the Government within the scope of his duties.”<sup>12</sup>*

Secondly, there is a fundamental difference between the members of an all India Service, an I.A.S., for instance, and a High Court Judge. A member of I.A.S. holds his office at the pleasure of the President, and our Constitution makes no provision for securing the independence, whereas it makes the most elaborate provisions for securing the independence of High Court Judges of which tenure during good behaviour is the corner-stone.<sup>13</sup> A High Court Judge is not a member of an All India Judicial Service. The habit of quoting speeches from the Debates in the Constituent Assembly has led to a speech of Dr. Ambedkar being referred to in the context of the transfer of Judges. That speech contained the following words:

*“The Drafting Committee felt that since all the High Courts so far as the appointment of judges is concerned, form now a central subject, it was desirable to treat all the judges of the High Courts throughout India as forming one single cadre like the I.C.S. and that they should be liable to be transferred from one High Court to another.”<sup>14</sup>*

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<sup>11</sup> *Halsbury’s Laws of England* (3rd edn, 1954) vol 25, para 871.

<sup>12</sup> *Union of India v Sankal Chand Himatlal Sheth*, (1977) 4 SCC 193.

<sup>13</sup> HM Seervai, *Constitutional Law of India*, vol 3 (4th edn, Universal Law Publishing Co 2010) 2809.

<sup>14</sup> *SP Gupta v President of India* (1981) Supp (1) SCC 87.

*Thirdly*, it harmonizes the President's power to transfer a Judge and a Judge's right to tender his resignation<sup>15</sup>, which would destroy the President's exercise of the power by removing the public purpose which alone can justify the transfer.

The authors are of the view that the correct and coherent theory of the power of transfer a High Court Judge should be rightly implemented, because non-consensual transfer is, in its essence, punitive. A Judge by giving his consent cannot obtain a transfer if it is against the public interest; but such consent deprives the transfer of its punitive character, and its coercive effect to the Government's line.

## **PRINCIPLE OF NATURAL JUSTICE**

To invoke the principle of natural justice in the case of transfer of a Judge under Article 222(1) if otherwise it is permissible to make the transfer without his consent, will be, stretching the principle, to a breaking point. It will lead to many unpractical, anomalous and absurd results and will have inevitable repercussions in the order of transfers made in other branches of service under either the Union or the State.

## **ANALYSIS OF CONSENT: HOHFELDIAN THEORY OF RIGHT**

Justice Desai in the Sankalchand Case has interpreted Article 222 (1) by comparing it with the Hohfeldian theory of 'Right'. He considered that the 'power' vested in the President to transfer Judges as under article 222(1) shall not remain a 'power' in the true sense of the term as the power shall become a 'liability' if the concept of consent is imported in the meaning of power.

H.M. Seervai has countered this argument of Justice Desai by literally interpreting the word 'may' as embodied in Article 222(1). Article 222 (1) stipulates that the President 'may' transfer a Judge and 'not shall' transfer a Judge. The presence of the word 'may' is a testament to the fact that the President must exercise the power to transfer Judges in a liberal fashion and the consent of the Judges must be a condition precedent to the exercise of this power.

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<sup>15</sup> The Constitution of India 1950, art 217(1).

## TRANSFER OF JUDGES: ISSUES AND CHALLENGES

### CAN JUDGES BE TRANSFERRED WITHOUT CONSENT?

H.M. Seervai arguing in the Sankalchand case, contended that on a proper construction of Article 222(1) in the context of the basic principle of independence of the Judiciary, consent must be read as a necessary requirement in that article. His second contention was that since transfer of a Judge involves a fresh appointment in the High Court to which he is transferred, such transfer cannot be made without the consent of the Judge.

In the *S.P. Gupta Case*, it was held that Article 222(1) does not inherently contain the word 'consent' and when the Constituent Assembly intended that there should be consent, it has explicitly mentioned the word in clear terms in the Constitution. To establish this rationale, Article 222(1) was compared with Article 127(1) which stipulates that the power to hold sessions of the Supreme Court in the absence of the quorum of the Judges of the Supreme Court can be exercised only if the CJI obtains the previous consent of the President and not otherwise.<sup>16</sup>

The 80<sup>th</sup> Law Commission Report recommended<sup>17</sup> that in order to prevent the abuse of power of transfer, no Judge should be transferred without his consent from one High Court to another unless a panel consisting of the Chief Justice of India and his four senior most colleagues find sufficient cause for such course.

In the Second Judges case, it was held, "*There is nothing in the language of Article 222(1) to rule out a second transfer of a once transferred judge without his consent but ordinarily the same must be avoided unless there exist pressing circumstances making it unavoidable*'. Now the question is, '*What were the unavoidable circumstances and the cause that necessitated the transfer of Justice Jayant Patel when this transfer was supposed to be his second one?*'

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<sup>16</sup> *Union of India v Sankal Chand Himatlal Sheth* (1977) 4 SCC 193.

<sup>17</sup> Law Commission of India, 'Method of Appointment' (Law Com No VIII, 80th Report) <<http://lawcommissionofindia.nic.in/51-100/Report80.pdf>> accessed 25 October 2017.

## A COMPARATIVE ANALYSIS WITH RESPECT TO CONSENT IN JUDICIAL TRANSFERS

The Constitutions and legislations of various countries have reiterated the view that consent of Judges is a *sin qua non* for transferring them.

S. No.	Country	Relevant Article of Transfer
1.	UK	Sec 5(2) of the Senior Court Act, 1981 <sup>18</sup> specifies that, 'The puisne judges of the High Court shall be attached to the various Divisions by direction [given by the Lord Chief Justice after consulting the Lord Chancellor]; and any such judge may <i>with his consent</i> be transferred from one Division to another by direction [given by the Lord Chief Justice after consulting the Lord Chancellor], but shall be so transferred only with the concurrence of the senior judge of the Division from which it is proposed to transfer him.
2.	Thailand	Transfer of Judges and Justices <i>without their consent is prohibited</i> except for timing as provided by the law and promotion, or in the case of disciplinary action or being a criminal defendant, or prejudicial to an ongoing trial, unavoidable necessity, or <i>force majeure</i> , as provided by law. <sup>19</sup>
3.	Romania	The Status of Judges Act in Romania specifies that transfers of judges are only possible <i>with the express consent</i> of the individual concerned. <sup>20</sup>
4.	Albania	Transfer of judges may <i>not be done without their consent</i> , except when the need for reorganization of the judicial system requires it. <sup>21</sup>
5.	Slovak Republic	A judge may be transferred to another court <i>only with his consent</i> or on the basis of a decision of a disciplinary senate. <sup>22</sup>

<sup>18</sup> The Indian Constitutional Reform Act 2005, sch 4(1).

<sup>19</sup> Constitution of Thailand 2007, s 197.

<sup>20</sup> Status of Judges Act 2004, s 63.

<sup>21</sup> Constitution of Albania 1998, art 147(5).

<sup>22</sup> Constitution of Slovak Republic 1992, art 148(1).

The convention operating in Britain,<sup>23</sup> where a similar pattern of government prevails, is very relevant in the Indian context can be adapted suitably to meet the conditions prevailing here. The Supreme Court has emphasized the importance of conventions to interpret constitutional provisions in the following words:

*'It was said that we must interpret Art. 75(3) according to its own terms regardless of the conventions that prevail in the United Kingdom. If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with, a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed.'*<sup>24</sup>

## **INTERNATIONAL CONVENTIONS ON TRANSFER OF JUDGES**

The Vienna Convention on the Law of Treaties was concluded in 1969 advocates the expression of the *pacta sunt servanda* principle in international law. According to this principle, given in Article 26 of the VCLT, every treaty signed by a country is binding on it and the obligations imposed by treaties must be performed by the country in good faith. *Article 51(c)* of the Constitution (read with Article 253) to supports above conventions. Article 51(c) directs the state to 'endeavour to' 'foster respect for international law and treaty obligations'.

Many international conventions adopted and recognised that consent is prerequisite for the transfer of Judges as follows:

Montreal Convention, 1983<sup>25</sup> unanimously adopted at the final plenary session of the First World Conference on the Independence of Justice that:

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<sup>23</sup> MP Jain, *Indian Constitutional Law* (7th edn, LexisNexis 2015) 130.

<sup>24</sup> *UNR Rao v Union of India* (1971) 2 SCC 63.

<sup>25</sup> Montreal Declaration on Universal Declaration on the Independence of Justice 1983, s 218.

*“Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their consent, but such consent shall not be unreasonably withheld.”*

Beijing Statement<sup>26</sup> of principle of the Independence of the Judiciary in the LAWASIA region adopted under Article 30.

*“Judges must not be transferred by the Executive from one jurisdiction or function to another without their consent, but when a transfer is in pursuance of a uniform policy formulated by the Executive after due consultation with the judiciary, such consent shall not be unreasonably withheld by an individual judge.”*

IBA Minimum Standards of Judicial Independence, 1982<sup>27</sup> states that,

*“The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge’s consent, such consent not to be unreasonably withheld.”*

Siracusa Principles<sup>28</sup> - Principles on the Independence of the Judiciary:

*“Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their freely given consent.”*

## **TRANSFER IN PUBLIC INTEREST V. PUNITIVE TRANSFER**

Are Judges actually transferred by way of punishment?

In the *Sankal Chand* case, H.M. Seervai contended that if a Judge misbehaved, he could be impeached according to the provisions of the Constitution rather than transferred by way of punishment. The Court rejected this contention ruling that, “*It is not every misbehaviour or misconduct which may be sufficient to impeach a Judge and indeed it would be difficult to prove*

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<sup>26</sup> Beijing Principles of the Independence of the Judiciary in the Lawasia Region 1982, art 30.

<sup>27</sup> International Bar Association, Code of Minimum Standards of Judicial Independence 1982.

<sup>28</sup> Siracusa Principle of Draft Principle on Independence of Judiciary 1981, art 9.

*such misconduct or misbehaviour in the manner provided by the Constitution in a large variety of cases”.*

In other words, what the Court meant was that, since impeachment of a Judge is sometimes not practically feasible, a quick fix solution to discipline an errant Judge is to transfer him. This logic of the Court is itself in contradiction of ‘public interest’. This logic would mean that a Judge who is corrupt who indulges in frequent favouritism and thus fails to deliver justice in one High Court shall be transferred to another High Court so that he is freely allowed to vitiate the atmosphere of another High Court.

### **PUBLIC INTEREST SUFFERS IF THE JUDGE TO BE TRANSFERRED RESIGNS**

The authors think, if the transfer of a HC Judge compels him to resign then such transfer shall be not only become punitive but it shall also violate public interest, the only ground on which a Judge may be transferred. Recently Justice Jayant Patel resigned post his transfer was recommended. That his resignation came in as a result of his transfer makes his transfer contradictory to public interest.

### **BRINGING ON MORE TRANSPARENCY TO JUDICIAL TRANSFERS**

#### **A REASONABLE NEXUS BETWEEN PUBLIC INTEREST AND TRANSFER**

Public Interest has been defined in the Black's Law Dictionary<sup>29</sup> as “*Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government.*”

In the Constitutional Assembly Debates, Dr. B.R. Ambedkar gave at least two instances of transfers that would purely be in public interest:<sup>30</sup>

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<sup>29</sup> Bryan A Garner, *Black's Law Dictionary* (6th edn, Oxford University Press) 19.

<sup>30</sup> Constitution Assembly Debates, vol XI, 580.

- I. One judge being transferred from one High Court to another in 'order to strengthen the High Court elsewhere by 'importing 'better talents which may not be locally available.
- II. It might be desirable to import a' new Chief Justice because it might be desirable to have a man unaffected by local politics or local jealousies.
- III. Further, the *Sankal Chand case*<sup>31</sup> had laid down another instance where a particular Judge is not pulling on well with the Chief Justice and his colleagues in the High Court.
- IV. A High Court especially a small one, needs the services of a Judge proficient in a particular branch of law.
- V. For the purpose of national integration.<sup>32</sup>

When the collegium recommends transfers, just mentioning the criteria of public interest is not sufficient. The collegium resolutions should also contain such inputs that can establish a reasonable nexus between the transfer and the public interest. This means that when a Judge is transferred from one High Court to another High Court to what extent shall the transfer serve the interests of the public should be elaborately mentioned in the collegium's resolutions.

## **PERFORMANCE**

To establish how far the transfer is in the interest of the public, the collegium must consider the following parameters:

- I. No of judgements delivered.
- II. Quality and nature of judgements (his past judgements that may decide that how far his transfer may help sort out the public interest in the concerned state).
- III. The ability of the Judge to quickly understand and adapt to the ethos and working culture of the High Court to which Judge is about to get transferred.

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<sup>31</sup> *Union of India v Sankal Chand Himatal Sheth* (1977) 4 SCC 193.

<sup>32</sup> Law Commission of India, *Method of Appointment* (Law Com No VIII, 80th Report).

## LOCAL RELEVANCE

If the Judge is wholly unfamiliar with the language of the State to which he is transferred, it is possible in some cases that it will affect his efficiency.<sup>33</sup>

## PAST BACKGROUND

- I. Experience as a lawyer (if the person had been a lawyer before becoming a judge) and as a judge.
- II. Integrity as a Judge.

The individual members of the collegium shall consider each of these parameters before recommending a transfer but not in objective way. They should substantiate with written reasons in the resolutions that how far they have considered each of these parameters before recommending a name. All such resolutions should be recorded and disclosed on the official SC website as the SC has already taken the step to disclose the resolutions on the website. Justice Chelameshwar had made a strong pitch for mandatory recording of reasons for selecting a person for appointment as a judge of the SC or HCs, or transferring a judge from one HC to another.<sup>34</sup>

## ONLINE DISCLOSURE OF COLLEGIUM PROCEEDING

*“In the darkness of secrecy, sinister interests, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial 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.”*

- Jeremy Bentham<sup>35</sup>

In a historic move to ensure transparency in judicial appointments and transfers, the Supreme Court Collegium, led by Chief Justice of India Dipak Misra, has resolved to post every detail and minutes of the collegium's meetings on the court's official website regarding recommendations on judicial

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<sup>33</sup> *SP Gupta v President of India* (1981) Supp (1) SCC 87.

<sup>34</sup> Dhananjay Mahapatra, ‘Sr SC judge rips into CJI-headed collegium’ *The Times of India* (Delhi, 3 September 2016).

<sup>35</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1st edn, Clarendon Press 1789) 108.

appointments, transfers and elevations for public consumption.<sup>36</sup> The information posted online will also ‘indicate’ reasons for the recommendation or rejection of a name for judicial appointment, transfer and elevation to High Courts and the Supreme Court. The Supreme Court has also started taking concrete action by already posting its October 3, 2017 recommendations for judicial appointments to the Madras High Court and the Kerala High Court under the tag ‘Collegium Resolutions’. This was undoubtedly an unprecedented effort in bringing transparency in the collegium system. The authors looked at the updates that were uploaded on the official website of Supreme Court and personally found many loopholes in the present system. The loopholes that authors have reasoned are as follows:

*Firstly*, the system is voluntary for the Supreme Court and there is no statutory provision that guarantees that the judges will really adhere to the rules of this proposal. Something that is purely voluntary and does not have a statutory or legal compulsion is highly unlikely to be successfully implemented. Long back in 2010, the Delhi High Court upheld an order empowering a citizen to seek details of assets of judges of Supreme Court and High Courts under the RTI ACT, 2005.<sup>37</sup> Prior to this judgement in 2009, the SC judges under the helm of K.G. Balakrishnan adopted a resolution to make a public disclosure of their assets and liabilities on the official website of the Supreme Court.<sup>38</sup> That this resolution has largely remained on paper is proved by the fact of the twenty-seven present SC judges, only fourteen judges have disclosed their assets.<sup>39</sup> No legal sanction being attached for non-compliance against judges who do not disclose their assets on the SC website has made the whole endeavour futile. However, it is equally true that the decision of the Delhi High Court Judgement<sup>40</sup> prevails as the law of the land as it has not been appealed against in the Supreme Court. A mere resolution even if it passed by the Hon’ble Supreme Court cannot be a complete solution unless it is made binding on judges. Therefore, the need of the hour is to give a statutory recognition to the Supreme Court’s resolution of making public disclosure of

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<sup>36</sup> Krishnadas Rajgopal, ‘Now, SC Collegium to Make Judges’ Appointments transparent SC Collegium to Make its Recommendations Public’ *The Hindu* (Ahmedabad, 6 October 2017) <[www.thehindu.com/news/national/sc-collegium-to-make-its.../article19807802.ece](http://www.thehindu.com/news/national/sc-collegium-to-make-its.../article19807802.ece)> accessed 8 October 2017.

<sup>37</sup> *Secretary General, Supreme Court v Subhash Chandra Agarwal* AIR 2010 Del 159.

<sup>38</sup> Dhananjay Mahapatra, ‘Supreme Court Judges to Disclose Assets’ *The Times of India* (Delhi, 27 August 2009) <<http://timesofindia.indiatimes.com/india/Supreme-Court...to-disclose-assets.../4938536.cms>> accessed 2 October 2017.

<sup>39</sup> Murali Krishnan, ‘#JudgesNetWorth: Assets of 13 Supreme Court judges yet to be published on SC website’ (*Bar & Bench*, 2 October 2017) <<https://barandbench.com/assets-supreme-court-judges/>> accessed 2 October 2017.

<sup>40</sup> *Secretary General, Supreme Court v Subhash Chandra Agarwal* AIR 2010 Del 159.

judicial deliberations because as long as it does not assume the character of a law passed by Parliament or prescribes penalty for non-performance, the resolution shall largely remain illusory.

*Secondly*, the resolution of the SC said, “*The decisions henceforth taken by the Collegium indicating the reasons shall be put on the website of the Supreme Court, when the recommendation(s) is/are sent to the Government of India, with regard to the cases relating to initial elevation to the High Court Bench, confirmation as permanent Judge(s) of the High Court, elevation to the post of Chief Justice of High Court, transfer of High Court Chief Justices / Judges and elevation to the Supreme Court, because on each occasion the material which is considered by the Collegium is different*”.<sup>41</sup> The recent update that was uploaded on the official website of Supreme Court<sup>42</sup> regarding the elevation of judicial officers to the Madras High Court has put forward very vague reasons for appointment. The recommendation for elevation to High Courts was made on the basis of one-liner laudatory phrases like ‘very good integrity’ or ‘good reputation as Judicial Officer’ ‘intellectual acumen as befitting for a Judge of the High Court’ or ‘quite suitable for appointment as Judge of the High Court’.

*Thirdly*, the resolution had not mentioned any concrete ground for elevation to the High Courts. Just mentioning the number of collegium members who have expressed views in favour of such elevation, the marking of judgements of the candidates as ‘Good/Average’ by the Judgment Committee<sup>43</sup> are indeed very vague. How can the Judges who delivered average quality judgements be elevated as permanent Judges by the collegiums? Concrete and reliable grounds of appointment may be describing the number of judgements delivered, the quality and impact of the judgements, experience, past background of the Judge as a lawyer or as a Judge.

*Fourthly*, when one of the candidates was rejected, no ground of rejection was mentioned. Only that one collegium member has not found him suitable for elevation, that his name was rejected by the Collegium of the Calcutta High Court and the Government of West Bengal were mentioned.

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<sup>41</sup> Supreme Court Collegium, ‘Re: Transparency in Collegium System’ (*Supreme Court of India, 3 October 2017*) <<http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-Minutes-Transparency.pdf>> accessed 10 October 2017.

<sup>42</sup> Supreme Court Collegium, ‘Appointment of three Judges of Kerala High Court’ (*Supreme Court of India, 3 October 2017*) <<http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-Kerala-3%20JOS.pdf>> accessed 25 October 2017.

<sup>43</sup> Supreme Court Collegium, ‘Appointment of three Judges of Madras High Court’ (*Supreme Court of India, 3 October 2017*) <<http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-Madras-4%20JOS.pdf>> accessed 25 October 2017.

Moreover, the recommendation had mainly relied on the reports of the Intelligence Bureau that is hugely susceptible to executive pressure and influence.

Thus, above-mentioned contentions lead us to the conclusion that the SC Collegium Resolutions are only providing some sketchy and imprecise reasons for recommendation. No exhaustive list of reasons, no uniform set criteria, for recommendation was provided.

## CONCLUSION

There have been endless controversies related to transfer of Judges in India, the recent most being the Justice Jayant Patel controversy. The opaqueness of the collegium system is invariably linked to the irregularities in judicial transfers. Thus, if the collegium incorporates the elements of *glasnost* (transparency and openness) and *perestroika* (reform and reconstruction)<sup>44</sup> automatically the transfer procedure will become more transparent and accountable. The SC has already decided to disclose judicial proceedings on its official website and thus it is a very welcome step. However, this resolution of the SC is voluntary in nature with no legal or statutory basis and thus the resolution is likely to not be properly implemented. Mere disclosure of collegium resolutions is not the remedy to the malady. Disclosure of proceedings should also include uniform criteria, concrete reasons, reliable sources and valuable inputs for recommendation of transfer. In this way, the opaqueness of the collegium proceedings may be reduced to an extent and this in turn will help to ascertain whether the transfer of a Judge is really in the interest of the public or not.

The transfer of a judge without his consent is essentially punitive, because it inflicts pain damage or loss regardless of the fact that a Judge is just, honest, and upright or that he is unjust, dishonest and unrighteous. A Judge can be punished only by impeachment under Article 124(4)<sup>45</sup> and not by way of transfer. Since, transfers by way of punishment is clearly outside the purview of Article 222(1), and non-consensual transfers are inherently punitive, the authors are of the view that the Supreme Court should reconsider its previous views and declare non-consensual transfers violative of the basic constitutional tenet of the independence of judiciary.

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<sup>44</sup> *Supreme Court Advocates on Record Assn v Union of India* (2016) 5 SCC 1.

<sup>45</sup> Constitution of India 1950, art 124(4).

The authors would end this article by quoting Justice Krishna Iyer, ‘*Even so, the creed of judicial independence is our constitutional ‘religion’ and, if the executive use Article 222 to imperil this basic tenet, the Court must ‘do or die.’*<sup>46</sup>

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<sup>46</sup> *Union of India v Sankalch and Himatlal Sheth* (1977) 4 SCC 193.