

## Judging The Judges

Recent cases underline the need for independent Constitutional bodies for the appointment of judges as well as for investigating complaints against them. These cannot be in-house bodies of judges and must be completely independent of the judiciary as well as of the government.

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Recently, the judiciary has been greatly in the news, but for all the wrong reasons. A string of judicial scandals have erupted in the recent past, starting with Chief Justice Sabharwal's case, and then going on to the Ghaziabad district court Provident fund scam, the 15 lakh cash-at-judges-door scam of Chandigarh, and the Justice Soumitra Sen case of Calcutta. Some of these have arisen due to the lack of transparency in the selection and appointment of judges. In many cases, persons of doubtful integrity come to be appointed and confirmed through a totally secretive, ad hoc, arbitrary and non-transparent process of selection and appointment through a Collegium of judges of the High Court and the Supreme Court. Unfortunately however, we are finding that these rotten eggs who come to be appointed, get confirmed, even when they are found by the Collegium to have been of doubtful integrity, and are not removed even when a judge's committee has found them guilty of criminal misappropriation and criminal breach of trust, and even after the Chief Justice of India has recommended their impeachment and removal. All this, discloses a very serious problem with the present system of selection, appointment and removal of judges.

### The Case of Justice Ashok Kumar

In the case of Justice Ashok Kumar, who was appointed an additional judge in April 2003, the Collegium of three senior judges of the Supreme Court unanimously decided not to confirm him as a permanent judge in August 2005 because of adverse reports regarding his integrity. Despite this, he was given extensions as additional judge, and finally came to be confirmed in February 2007 on the Chief Justice's recommendation, which was made without consulting other members of the Collegium of judges, in complete violation of several judgements of the Supreme Court. These had clearly laid down that in a matter of appointment of judges, the Chief Justice cannot act alone and must go along with the majority view of the Collegium of senior judges of the Supreme Court. The 9 Judge judgment also provided that an appointment made without consulting the Collegium was challengeable and could be struck down in a judicial proceeding. The memorandum of procedure laid down by the law ministry also made it abundantly clear that in such matters the Chief Justice must consult the Collegium of senior judges, as well as those other judges who have come from the same High Court in which the proposed appointment is to be made. Thus, Justice Ashok Kumar's appointment, was clearly contrary to the Constitution, and the law laid down by the Supreme Court itself. Though Justice Ashok Kumar's confirmation as a permanent judge was challenged by senior advocates of the Supreme Court, unfortunately the court has upheld his

confirmation on the basis of very dubious reasoning. While the Court berated the previous Chief Justices for having given extensions to Justice Ashok Kumar as additional judge for political considerations, it found nothing wrong with his confirmation, despite the fact that it was done without consulting the Collegium and after his integrity was found doubtful by the previous Collegium of judges when it had considered the matter. Moreover, nothing had changed subsequently to cast any doubt on the finding of the previous Collegium.

Thus the Supreme Court, missed the opportunity to judicially correct the administrative illegality in confirming a judge whose integrity had been found to be doubtful, and that too without consulting the Collegium of senior judges of the Court. Such judicial behaviour of the Supreme Court only confirms the growing public perception that the recent crisis of credibility and integrity of the higher courts is largely a result of improper appointments due to extraneous considerations which are facilitated by the totally non-transparent manner in which judges are selected and appointed.

### **The case of Ashwini Kumar Mata**

The problems created by the lack of transparency in the appointment of judges is exemplified by the presently proposed appointment of Mr. Ashwini Kumar Mata who has recently been recommended for appointment as Judge to the Delhi High Court. Mr. Mata has recently purchased one floor of a house in Safdarjang Enclave from a builder who had an agreement with the owner of the plot that he would construct the building and hand over three floors to the owner. The remaining two floors would remain with him which he could sell only after handing over possession of the three floors to the owner. Despite the fact, that the builder had not completed the construction of the building and not handed over the possession of the floors belonging to the owner to him, Shri Mata entered into an agreement for purchasing one of the floors which was to go to the builder from him. Shri Mata thereafter used his agreement with the builder to seek mutation (getting his name recorded as owner) of that floor in his name. In his application, he attached a copy of his agreement with the builder, containing the forged signatures of the owner, Mr Joshi. When this was discovered by Mr. Joshi, he made a complaint to the police regarding the forgery. Eventually, at the instance of a magistrate, an FIR came to be registered and an investigation began into this forgery. The act of forgery became clearer when Mr. Mata filed a different version of the same agreement in arbitration proceedings which he had initiated. In this version of the agreement, the signatures of the owner were not there.

We learnt about these facts only after the recommendation for the appointment of Shri Mata had already been sent to the Law Ministry by the Collegium of the High Court. We thereafter sent a representation to the collegiums in the High Court and the Supreme Court. We learnt that Mr. Mata responded to our representation and said that the criminal investigation by the police had exonerated him. We however found, that the police report had been given hurriedly after our representation, without even waiting for the forensic examination of the forged signatures, and is dishonest. We have thereafter sent another representation to the Supreme Court and the High Court collegiums detailing the misconduct of Mr.Mata and pointing out why it is not possible for the signatures of the owner to have been forged without Mr. Mata's knowledge and consent.

We have pointed out in our representation that even if it is not certain that Mr. Mata participated in the forgery of his agreement with the builder, it is better to err on the side

of caution by not appointing him, instead of being faced with a situation as that with regard to Justice Soumitra Sen of the Calcutta High Court.

### **The Case Of Justice Soumitra Sen**

Justice Sen has been recommended to be removed by impeachment by the Chief Justice of India, for the offence of misappropriating funds received by him as a court receiver and thereafter for giving false explanations to the High Court. The Chief Justice made this recommendation after a report of a committee of three Judges, who after carefully examining the facts came to the conclusion that he had committed several acts of serious misconduct. Though these acts of misconduct were the subject matter of proceedings pending against him in the Calcutta High Court, yet he came to be appointed during that time, due to the lack of transparency in the matter of appointments. Though the report of the judges committee was submitted a year ago, and the Chief Justice's recommendation for the removal by impeachment of Justice Sen was made five months ago, the government has not made any attempt to proceed with his impeachment.

This is despite the fact that the government has proposed a bill to amend the Judges Enquiry Act by which this very procedure for initiating impeachment proceedings is being sought to be given statutory status. The inaction of the government in Justice Sen's matter displays the complete lack of seriousness on the part of the government in enforcing judicial accountability. In these circumstances, the Campaign for Judicial Accountability and Reforms has prepared an impeachment motion against Justice Sen and is sending it to all the political parties with the request that they should have it signed by their MPs so that it could be presented to the Chairman Rajya Sabha for proceeding with his impeachment.

### **The Disclosure Of Assets By Judges**

Recently, vide their order dated January 6, 2009, the Central Information Commission directed the Supreme Court to disclose, to an RTI applicant, whether judges of the Supreme Court have been disclosing their assets to the Chief Justice as required by the Code of Conduct unanimously adopted in the Chief Justice's conference at the Supreme Court in 1999. This order came to be made because the information officer of the Supreme Court had refused to disclose this information, saying that this information is not with the Supreme Court registry. Thereafter, it was submitted on behalf of the Supreme Court that the disclosure of assets by judges has been made to the Chief Justice in his personal capacity on the condition of confidentiality, and therefore information on this cannot be disclosed under the Right to Information Act.

Embarrassingly, the Supreme Court has now challenged the order of the Central Information Commission before the High Court by means of a writ petition. All this could have been avoided if the Chief Justice had chosen to disclose the information about which judges were complying with their own Code of Conduct. It is inexplicable as to why the Chief Justice or other judges of the Supreme Court are unwilling to disclose their assets, particularly when they had themselves directed even candidates contesting elections to publicly declare their assets. This, they had held, was necessary because the people had a fundamental right to know of the antecedents of those who were seeking to govern them. On the same logic, do the people not have the right to know the antecedents of judges who seek to decide their fate every day.

The Supreme Court's non-transparent attitude on the disclosure of assets is in line with the judiciary's steadfast refusal to allow any transparency in the matter of appointment of judges, or for that matter, in the judiciary as a whole. The courts as well as the government have refused to disclose any information about the manner of appointments and transfers of judges of the High Court and the Supreme Court. They have challenged every decision of the Central Information Commission asking them to disclose such information, in the High Court, which has promptly stayed the orders of the Information Commission. The Delhi High Court has been refusing to disclose information even about appointments of other employees. Information about the expenditure of the High Courts or even about pending judgements in the High Courts have been refused to be disclosed. Rules have been framed by several High Courts in violation of the RTI Act. These rules prohibit the disclosure of financial and administrative information. Things have come to such a pass that the Central Information Commission has had to request the High Court through a judicial order to bring their rules in line with the RTI Act.

All these recent cases underline the need for transparency in the functioning of the judiciary and in particular transparency in the matter of appointment and removal of judges. They also underline the need for independent Constitutional bodies for the appointment of judges as well as for investigating complaints against them. These cannot be in-house bodies of judges and must be completely independent of the judiciary as well as of the government. Most importantly, they must function with complete transparency. It is unfortunate that both the judiciary and the government have been opposing the creation of such independent Constitutional bodies. The time has come for the people of this country who are the real stakeholders in an honestly functioning judiciary to assert themselves and demand the creation of such appointment and complaints commissions.

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