

## THE CONTROVERSY OF JUDICIAL TRANSFERS: ADMINISTRATIVE OR DISCIPLINARY?

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### **Abstract**

*Out of the three organs of the government, the Judiciary is perhaps the most accessible and reachable institution that the vast majority of the country turns to almost every day. As the Guardian of the Constitution and the Upholder of Fundamental Rights, the faith of the people must be maintained in the Justice System. This faith is derived from transparency. One of the facets of maintaining transparency in our Justice System is the functioning of Judicial Transfers, especially Judges of the Higher Judiciary. While we do have a well-established system for transfers and appointments in the Indian Judicial System- the Collegium System- which is a careful balance of the authority of the Executive and Judiciary, this system is not without its flaws. Perhaps the most significant flaw in this system derives from its structure and procedures, and the potential of vested interests of a few to override the interests of the nation at large. The want for an open system is not a new one. The majority rightfully believes that more air in the system will cure many of the issues that are currently rotting in the system. The controversy of Judicial Transfers is not new; this issue goes back to the previous century, to the peak of the power struggle between the Parliament and the Judiciary in the 1970s. However, as our nation has progressed, so have our institutions and the demand for more transparency. This article aims to analyse the harmony between the system of checks and balance with respect to the design of judicial transfers in India, examine the controversy surrounding it, and attempt to provide a way forward.*

**Keywords:** Judicial Transfer, Collegium, Transparency, Public Interest, Executive

### **Introduction**

The Judiciary is a central pillar of our country, assisting in the smooth operation of democracy. The Judiciary has contributed to many positive changes in the functioning of the administration that have been welcomed by the population. This makes it all the more critical for the efficiency of a judge to be at its very best.

Transfers in any institution of the state function in a manner that bypasses monotony, improves productivity and efficiency, enhances the skillset by providing exposure, etcetera. In a judicial system, transfers become all the more critical as they become opportunities to beat the inherent

bias we all possess as human beings in order to provide a fairer judiciary. In the case of a transfer, all views of relevant parties must be considered.

All opinions with respect to any transfer should be expressed in writing to be considered by the Collegium. The recommendation is forwarded to the Union Law Minister, who is responsible for submitting the necessary papers to the Prime Minister. The Prime Minister then advises the President on the approval of the transfer.

While necessary, the issue of transfer and appointments has always been a contentious one. The authority of the Executive to make decisions such as these have always come forward as a point of contention, especially in circumstances where the Legislature and the Judiciary have opposing stances. Transfer orders become contentious when the Bar or sections of the public believe that the decision to move a judge from one High Court to another is motivated by a punitive motive. In general, the Supreme Court and the government do not reveal the reason for a transfer. For instance, if the reason is because of a negative opinion about a judge's performance, disclosure would jeopardize the Judge's performance and independence in the Court to which he is transferred. On the other hand, the lack of a reason sometimes leads to speculation about whether the transfer was done because of complaints against the Judge or as a form of disciplinary action for certain judgments that irritated the Executive.

On paper, the process is simple, unbiased and takes into consideration all stakeholders. In reality, the practice may deviate. As the largest democracy in the world, we pride ourselves on the administration of justice in the Indian scenario, but that is not to say that we have not grappled with issues concerning Executive authority and Judicial scrutiny concerning the matter of judicial transfers.

This article aims to examine the provisions that provide for transfers, study the exceptional but arbitrary nature of a few transfers to identify the issues at the heart of the transfers and attempt to provide a way forward.

### **Background of the study**

Transferring judges from one High Court to another is essential to the Judiciary's administrative functioning. The process of transfer of High Court Judges has been enshrined in the Constitution of India<sup>1</sup>.

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<sup>1</sup> INDIA CONST §222.

The most conspicuous aspect of the collegium system of judicial appointments and transfers is its obscurity. Transfer orders become contentious when the public believes that the decision to move a judge from one High Court to another is driven by a punitive motive. As a normative practice, the Supreme Court Collegium or the government do not reveal the reason for a transfer.

The language of the provisions of the Constitution in the current instance is not very clear and implies that the consent of a judge to his transfer is not necessary<sup>2</sup>. It cannot be overlooked that the ambiguity in this provision grants an unchecked power to the Executive to make changes in the administrative structure of the Judiciary. It has been acknowledged that the Executive could use this power to undermine judicial independence<sup>3</sup>. To that end, a series of judicial decisions attempted to clarify the matter, which has been analysed further.

It must be noted that these judicial opinions followed the height of the Legislature-Judiciary conflict of the 1970s.

### **The Indira Gandhi Precedent**

The peak of conflict between the Union Legislature and the Supreme Court was during the term of Mrs Indira Gandhi as Prime Minister when the Kesavananda Bharti verdict<sup>4</sup> was given. It would be apt to say that the series of events following this decision was the tipping point of Judicial Appointments in the history of Independent India.

On April 25, 1973, All-India Radio's five o'clock news bulletin announced that Justice AN Ray had been appointed the new Chief Justice of India upon Chief Justice Sikri's retirement. Justices Shelat, Hegde, and Grover were passed over for the position, bypassing the traditional norm of appointment as per seniority. All four judges resigned in protest, even though CJI Sikri was to retire the very next day. In 1977, Indira Gandhi Government chose to supersede Justice HR Khanna for the office of the Chief Justice of India- the lone dissenting voice in the ADM, Jabalpur case<sup>5</sup>- in favour of Justice MH Beg- who upheld the government's stance in the dispute.

While the Indira Gandhi government's attempts to curtail the authority and independence of the Judiciary- with Justice Khanna expressing that "*Mrs Gandhi has stuck a grievous blow to*

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<sup>2</sup> Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441.

<sup>3</sup> Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193 ¶74.

<sup>4</sup> Kesavananda Bharati v. the State of Kerala, (1973) 4 SCC 225.

<sup>5</sup> ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521.

*the independence of the judiciary*”- were effectively reversed in the advent of the Janata Party Government, the damage was done by establishing such a dangerous precedent.

The lesson from this is abundantly clear:

*“Were the appointment of the Chief Justice to remain in the hands of the Prime Minister, then the highest judicial institution of this country cannot but become a creature of the government of the day<sup>6</sup>.”*

### **Judicial Interpretation**

After the Emergency, the Supreme Court got the opportunity to interpret the provisions of Article 222 of the Indian Constitution in 1977<sup>7</sup>. Upholding the majority opinion in the case, Justice PN Bhagwati noted that transferring a judge from one Court to another has the potential to cause significant harm to the individual; the Judge’s consent to be transferred was part of the larger legislative scheme.

### **Three Judges Cases**

New events prompted the filing of what became known as the First Judges’ Case<sup>8</sup>, wherein the Court ruled that “consultation” with the Chief Justice must be “full and effective”. However, the argument that the CJI’s opinion should take precedence was rejected, even though such an opinion carries much weight.

In the Second Judges’ Case<sup>9</sup>, a nine-judge Supreme Court panel ruled that “consultation” means “concurrence.” This decision established the “Collegium” system. It stated that, as opposed to the CJI’s individual opinion, the institutional opinion formed in consultation with the two senior-most Supreme Court judges would be considered. The Third Judges’ Case<sup>10</sup> in 1998 expanded the Collegium to a five-member body comprised of the CJI and the four senior-most Supreme Court Judges.

### **K. Ashok Reddy Case<sup>11</sup>**

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<sup>6</sup> *‘Like A Breath of Fresh Air, In the Last Few Months, The Judiciary, Led by The Supreme Court, Appears to Have Found Its Independence, Writes Ashutosh’* ([/www.freepressjournal.in](http://www.freepressjournal.in), 2021) <<https://www.freepressjournal.in/analysis/like-a-breath-of-fresh-air-in-the-last-few-months-the-judiciary-led-by-the-supreme-court-appears-to-have-found-its-independence-writes-ashutosh>> accessed 19 September 2022.

<sup>7</sup> *Supra, note 3.*

<sup>8</sup> *S.P. Gupta v. Union of India*, 1981 Supp SCC 87.

<sup>9</sup> *Supra, note 2.*

<sup>10</sup> *Special Reference No. 1 of 1998, Re*, (1998) 7 SCC 739.

<sup>11</sup> *K. Ashok Reddy v. Govt. of India*, (1994) 2 SCC 303.

This case, filed before the Supreme Court, specifically dealt with the matter of the transfer of High Court Judges. The three-judge bench, which was also a part of the nine-judge bench in the Second Judges' Case, was satisfied that the Second Judges' Case adequately addressed all of the contentions raised in the case. The absence of norms and guidelines in Article 222 appears to be deliberate, as the power is vested in high constitutional functionaries, "and it was expected of them to develop requisite norms by convention in actual working," the Court ruled. Numerous non-exhaustive norms were developed to have functionaries follow them in order to regulate the exercise of their discretionary power in the matter of Judge transfer, including but not limited to:

- i. Consideration of the views of the Chief Justice of the High Court from which the Judge is to be transferred;
- ii. Consideration of the views of any Supreme Court Judge whose opinion may be relevant in that case;
- iii. Consideration of the views of at least one other senior Justice of a High Court or any other person whose views the CJI considers appropriate, among others.

This case also established that the power of transfer can only be used in the "public interest." Transfers made per the CJI's recommendation could not be viewed as punitive or undermining the Judiciary's independence.

Thus, the practice followed today is that of the Collegium, wherein the opinion of the Chief Justice is determinative. However, this has not come without its fair share of bypass attempts.

### **A Study in Arbitrariness**

Unfortunately, despite having the law laid down in leading judicial decisions, arbitrariness is not absent from judicial transfers.

### **A Chief Justice Transfer**

In November 2021, the Collegium recommended the transfer of Justice Sanjib Banerjee from the Madras High Court- where he was the Chief Justice- to the Meghalaya High Court- a recommendation that met with major controversy<sup>12</sup>.

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<sup>12</sup> *Supreme Court Collegium recommends transfer of Madras High Court Chief Justice to Meghalaya* (2021) The Hindu. Available at: <[www.thehindu.com/news/national/supreme-court-collegium-recommends-transfer-of-madras-high-court-chief-justice-to-meghalaya/article37405285.ece](http://www.thehindu.com/news/national/supreme-court-collegium-recommends-transfer-of-madras-high-court-chief-justice-to-meghalaya/article37405285.ece)> (Accessed: September 24, 2022).

At the time, Justice Banerjee began his 10-month term at the Madras High Court. He previously served as a judge on the Calcutta High Court. He is scheduled to retire in November 2023, which means that had he not been transferred out, he would have served as chief justice of a significant High Court for nearly two and a half years. He was transferred from one of the largest High Courts in the country to one of the smallest. While all high courts in the country are equal in law, transfers from larger to smaller courts are frequently viewed as punitive.

Justice Banerjee's decisions have frequently chastised the government. He issued several decisions criticising the government for handling the COVID-19 pandemic. During April's second wave of Covid-19 Assembly elections, he admonished the Election Commission for allowing large rallies, wherein he made the infamous "*Election Commission officers should probably be charged with murder*" remark<sup>13</sup>. In another case, he noted that the allegations that the Bharatiya Janata Party had misused voter Aadhaar details for campaigning appeared credible<sup>14</sup>. He also held that specific provisions<sup>14</sup> of the controversial Information Technology (Guidelines for intermediaries and Digital Media Ethics Code) Rules, 2021, issued by the BJP-NDA government at the Centre, would harm media independence and stayed the applicability of these rules<sup>15</sup>.

These and other decisions appear to have earned Justice Banerjee the reputation of an outspoken critic of right-wing policies and a staunch defender of secularism's constitutional foundation. Not known for supporting the government or the status quo, Justice Banerjee's observations during court hearings frequently made things for the political class in New Delhi inconvenient.

His transfer was also shrouded in secrecy. The collegium resolution recommending his transfer was passed on September 16 but was not made public until November 9. Multiple entities, including the Madras Bar Association and Justice K. Chandru, former Madras High Court judge, have questioned the one-and-a-half-month delay. His transfer raised concerns that "punishment transfers" that were frequent during the Emergency had hampered the independence of the Judiciary.

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<sup>13</sup> W.P.No.10441 of 2021.

Oral Observations: "Your institution is singularly responsible for the second wave of COVID-19. Your officers should be booked on murder charges probably".

<sup>14</sup> W.P.No.7588 of 2021.

Oral Observations: "There appears to be a serious breach by the sixth respondent political party (BJP) in how it conducted its campaign in Puducherry for the forthcoming Assembly elections."

<sup>15</sup> Digital News Publishers Association v. Union of India, W.P.Nos.13055 and 12515 of 2021, Order dated 16.09.2021 ¶3.

### **Transfer Of Justice Vijaya K. Tahilramani**

Justice Vijaya K. Tahilramani is a former Indian judge and prosecutor who last served as the Chief Justice of the Madras High Court. She holds a stellar record in upholding the principles of fairness and equality. She retired in 2019 after refusing to accept a contentious transfer from Madras to Meghalaya High Court. She famously upheld the convictions of several people for the rape of a pregnant Muslim woman during the Gujarat riots in 2002, criticising investigative authorities for their inaction in the case, and also refused parole for those convicted in the 1993 Bombay bombings.

Testament to her unbiased professional nature, she also declined a request from Devendra Fadnavis, former Chief Minister of the BJP Government in Maharashtra, to head an inquiry into the 2018 Bhima Koregaon incident, citing the fact that accepting the government appointment would be inappropriate for her as a sitting judge of the High Court<sup>16</sup>.

The Collegium's recommendation stated that the transfer was made "in the interests of better administration of justice". However, the lack of said "public interest" is evident in the case of Justice Tahilramani. The Judge has acted with dignity befitting a high office, has not been embroiled in any controversy, and has no close relatives practising in Tamil Nadu. The rationale behind the decision of the Collegium is devoid of merit.

The Judge slated to replace Justice Tahilramani was Justice A.K. Mittal, who was superceded in 2018 by a judge junior to him -Justice Surya Kant- to be "more suitable" for the position of Himachal Pradesh High Court Chief Justice. The Collegium's recommendation that he replace Justice Tahilramani, who has served as acting Chief Justice of the Bombay High Court three times, defies logic.

### **Karnataka To Allahabad: Justice Jayant Patel**

On September 25, 2017, Justice Jayant Patel of the Karnataka High Court resigned after being transferred to the Allahabad High Court. Justice Patel lost his chance to become chief justice of the Karnataka High Court, where he was the second-most senior Judge<sup>17</sup>. He would have been demoted to the third-most senior position on the Allahabad High Court. This was Justice Patel's second transfer. In 2016, he moved from Gujarat to Karnataka, where he served as a

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<sup>16</sup> 'Bhima Koregaon Violence: Bombay HC Turns Down State Request To Appoint Sitting Judge For Probe' (indianexpress.com, 2018) <<https://indianexpress.com/article/cities/mumbai/bhima-koregaon-violence-bombay-hc-turns-down-state-request-to-appoint-sitting-judge-for-probe-5058041/>> accessed 14 September 2022.

<sup>17</sup> Yamunan, S. (2017) *Supreme Court Collegium should explain why justice Jayant Patel's transfer was in public interest*. Scroll.in. Available at: <[scroll.in/article/852239/supreme-court-collegium-should-explain-how-justice-jayant-patels-transfer-was-in-public-interest](https://scroll.in/article/852239/supreme-court-collegium-should-explain-how-justice-jayant-patels-transfer-was-in-public-interest)> (Accessed: September 18, 2022).

puisne judge. How the transfer was carried out has raised severe concerns about judicial appointment transparency. Senior advocate Dushyant Dave claimed political interference in the decision and was eventually served a show cause notice by the Bar Council of India<sup>18</sup>. As Acting Chief Justice of the Gujarat High Court, Patel had directed the CBI to investigate the 2004 murder of Mumbai teenager Ishrat Jahan by Gujarat police officers<sup>19</sup>. They claimed that Jahan and her three companions were plotting to assassinate Gujarat Chief Minister Narendra Modi at the time. The investigation ordered by Patel resulted in the charging of several senior police officers, which embarrassed the state government led by Modi.

His transfer led to the abstention of work by lawyers in Gujarat and those of the Karnataka State Bar Association.

Although the Supreme Court clarified that the decision to transfer Justice Patel was unanimous<sup>20</sup> and in the ‘public interest’, no explanation was given as to how his transfer was in the larger interest of the public.

### **Justice Abhay Mahadeo Thipsay**

Despite twice refusing to consent to the transfer, retired Justice Abhay Mahadeo Thipsay of the Bombay High Court was transferred to the Allahabad High Court. Justice Thipsay, who holds an outstanding record as a Magistrate, Sessions Court judge, and High Court Judge and is highly regarded by lawyers in Bombay, was sworn in as a Judge in Allahabad High Court. The transfer of Justice Thipsay is the second instance in the aftermath of the Supreme Court’s decision in the NJAC case, which raised questions about the Collegium’s responsibility to principles of independence, fair treatment, natural justice, and accountability when transferring Judges<sup>21</sup>.

The issue of contention in his transfer is a series of verdicts given by him. The government vehemently opposed Justice Thipsay’s orders in these cases:

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<sup>18</sup> Saxena, N. (2017) *Why BCI’s show cause to Dushyant Dave should be immediately recalled?* Live Law. Available at: <<https://www.livelaw.in/bcis-show-cause-dushyant-dave-immediately-recalled>> (Accessed: October 21, 2022).

<sup>19</sup> Mandhani, A. (2017) *Karnataka HC judge justice Jayant Patel resigns*. Live Law. Available at: <<https://www.livelaw.in/karnataka-hc-judge-justice-jayant-patel-resigns>> (Accessed: October 21, 2022).

<sup>20</sup> Mahapatra D, ‘*Justice Patel’s Transfer Decision Was Unanimous: Supreme Court*’ (timesofindia.indiatimes.com, 2017) <<https://timesofindia.indiatimes.com/india/justice-patels-transfer-decision-was-unanimous-supreme-court/articleshow/60931835.cms>> accessed 15 September 2022.

<sup>21</sup> Subramanian, R. (2016) *Transfer of HC judges despite lack of consent raises questions over fairness of collegium*, The Wire. *Transfer of HC Judges Despite Lack of Consent Raises Questions Over Fairness of Collegium*. Available at: <[thewire.in/law/transfer-of-hc-judges-despite-lack-of-consent-raises-questions-over-fairness-of-collegium](http://thewire.in/law/transfer-of-hc-judges-despite-lack-of-consent-raises-questions-over-fairness-of-collegium)> (Accessed: September 24, 2022).

- i. Granted bail to actor Salman Khan in the hit-and-run case (which was later upheld by the Supreme Court of India)<sup>22</sup>.
- ii. Granted bail to Gujarat Deputy Inspector General D.G. Vanzara and Dr Narendra Amin, two accused in the alleged fake encounter of Sohrabuddin Sheikh, his wife Kausar Bi, and aide Tulsiram Prajapati in Gujarat,
- iii. Presided over the contentious 2002 Best Bakery case, which was transferred to Mumbai. As a judge of the Mumbai Sessions Court in 2006, Justice Thipsay sentenced nine of the accused to life imprisonment<sup>23</sup>.
- iv. Released detainees on bail under the Unlawful Activities Prevention Act<sup>24</sup> and the Maharashtra Control of Organized Crime Act.
- v. Ordered the disclosure of the call records of the accused in the 2006 Mumbai serial train blasts case despite the Prosecution's submission that the records were destroyed.
- vi. Granted bail to an undertrial in the Aurangabad arms haul case as the evidence did not show his involvement in the crime.

The transfer of Justice Thipsay raises ethical concerns because the reasons for transferring him, despite his objection, are not disclosed to the larger public. The decision to transfer him with less than a year until retirement borders on vindictive. Perhaps the gravest concern about Justice Thipsay's transfer is that the Collegium will be forced to cede ground to the Executive. There exist claims that his Annual Confidential Reports, dating back to his time as a magistrate, speak to his outstanding and efficient work.

Whatever the real reasons for his transfer, serious doubts have been raised about the proposition that plurality within the Collegium is an adequate safeguard against bias and arbitrariness<sup>25</sup>.

## **Recommendations**

### **Making Collegium Decisions Justiciable**

Judicial transfers are not justiciable, which means that a judge who is transferred cannot challenge the order in the Supreme Court unless the transfer was made without the Collegium's

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<sup>22</sup> Anand, U. (2016) *2002 hit and Run case: Same-day bail to Salman Khan justified, says SC*. The Indian Express. Available at: <<https://indianexpress.com/article/india/india-news-india/salman-khan-hit-and-run-case-sc-dismisses-petition-seeking-probe>> (Accessed: October 21, 2022).

<sup>23</sup> The State of Gujarat v Rajubhai Dhamirbhai Baria & Ors, Court of Sessions for Greater Bombay at Mazgaon, Sessions Case No. 315 of 2004.

<sup>24</sup> Jyoti Babasaheb Chorge v. State of Maharashtra, 2012 SCC OnLine Bom 1460 ¶33.

<sup>25</sup> *Supra*, note 21.

approval, which is an impossible prospect because under the 1993 order<sup>26</sup>. The President does not have the authority to appoint or transfer judges without the concurrence of the Chief Justice of India. The Collegium must initiate the transfer.

It is, therefore, recommended that such decisions be justiciable, with the institution of appropriate authority adjudicating the matter to ensure that equal protection of the law<sup>27</sup> and protection from arbitrary procedure<sup>28</sup> may be extended to those who work towards upholding the letter of the law.

### **Secrecy Of Decision Making**

Perhaps the most wanted reform in the Judicial Transfer is more light, transparency and public access. The lack of transparency and the absence of formal criteria for transfers have several concerning consequences. It is suggested that a structured process be put in place to determine the reasons behind a transfer or appointment recommendation by the Collegium.

The Collegium has frequently been admonished for its lack of transparency. *“I never understood as even a member of the collegium why a particular high court judge is being transferred,”* retired Supreme Court Judge Jasti Chelameswar told Bloomberg Quint in 2020<sup>29</sup>. Justice Chelameswar was the Supreme Court’s second-most senior Judge and a collegium member deciding on transfers during his tenure. Because the Collegium’s decisions are not made public, there is no public scrutiny of the circumstances that led to a decision. Furthermore, the Supreme Court has stated unequivocally that the Collegium is not required to justify its decisions.

It is imperative that the collegium system not consider itself above the safeguards and measures for transparency, accountability, and demographic representation that apply to India’s democratic pillars. This is a gaping hole in a system of governance that prides itself on its transparent and democratic functioning. Further, making these decisions publicly accessible will also lead to scrutinising unnecessary interference by the Executive. It will bring about the balance of checks and balances in the Judicial Transfer System.

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<sup>26</sup> *Supra, note 2.*

<sup>27</sup> INDIA CONST §14.

<sup>28</sup> INDIA CONST §21.

<sup>29</sup> BloombergQuint, ‘Justice Chelameswar On ‘Role Of Judiciary In A Democracy’ <[https://www.youtube.com/watch?v=\\_QjDxbcl788](https://www.youtube.com/watch?v=_QjDxbcl788)> accessed 17 September 2022.

### **Articulating Public Interest**

In the case of the transfer of Justice Jayant Patel, the reasoning given was “pressing circumstances” and “public interest” that necessitated his move to the Allahabad High Court. However, no explanation was provided concerning either of the aspects. In light of the circumstances surrounding Justice Patel’s transfer, it becomes all the more important to articulate and publicise what the Collegium means by “public interest” both in a generic and a situation-specific sense.

The faith of an ordinary man in the Judiciary must be maintained, and for that, the larger population must know the driving force and rationale of any such decision.

### **Conclusion**

While the current system is a careful balance of the Executive and the Collegium, that is not to say that this system does not have its flaws. It is time for a call for reform. Without a transparent process for judicial transfers, the collegium system lacks the credibility and legitimacy to be accepted by all stakeholders in the legal system. Transparency will not be established simply by stating that the collegium members will act transparently. It will have to be demonstrated by the process used by the Judiciary to select judges and, further, how the members of the Collegium are chosen.

While both the government and collegium judges are to blame for this conundrum, a blame game will not reach anywhere. The only solution to this mess is to make the system transparent.