

# THE SUPREME COURT COLLEGIUM AND TRANSPARENCY: A NON-COMMITTAL RELATIONSHIP

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*The Supreme Court collegium in India, which is the determining authority for the appointment of judges to the higher judiciary, has often been derided for its secretive functioning and opaque practices. This paper provides an empirical assessment of the collegium's commitment to transparency through an examination of its published resolutions. A study of all the published resolutions, over a period of more than three years, shows that the practice of information disclosure by the collegium cannot be attributed with the value of transparency. The collegium has systematically failed to disclose critical information essential to an enhanced understanding of its functioning. An overwhelming majority of its decisions are not reasoned. The resolutions fail to provide a meaningful understanding of the considerations, based on which candidates are selected or rejected. While the step taken to publish the resolutions was in the right direction, the collegium has reneged on its declared objective of promoting transparency.*

A Commitment to be Transparent . . . . .	2	Source of Data and Framework of Analysis . . .	9
The Value of Transparency . . . . .	3	Assessing Transparency: Phase One . . . . .	11
Contextualizing Transparency . . . . .	5	The Dithering Deferrals . . . . .	22
The Nuts and Bolts of the Appointment Process . . . . .	8	Assessing Transparency: Phase Two . . . . .	23
		Conclusion . . . . .	24

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An earlier version of this article appeared in EPW Vol 56 Issue 22.

## I. A COMMITMENT TO BE TRANSPARENT

When the Indian Supreme Court decided to strike down the constitutional amendments, establishing the National Judicial Appointments Commission in *Supreme Court Advocates-on-Record Assn v Union of India*,<sup>1</sup> it quite clearly admitted the severe flaws in the functioning of the collegium. It also admitted the need for meaningful reform in how the collegium functioned. This led to another judicial order wherein the Court sanctioned a process of public consultation to seek suggestions on the trajectory of reform.<sup>2</sup> Seemingly inspired by this spirit of reform, on October 3, 2017, the Supreme Court Collegium, presided by J. Dipak Misra,<sup>3</sup> decided to publish the resolutions of the collegium concerning the appointment of judges to the High Courts and Supreme Court, the appointment of Chief Justices to the High Courts, and the transfer of High Court judges. The succeeding Chief Justices have continued the practice of publishing the minutes. However, there has been a substantial regression in the extent of information disclosed since October 2019, when the collegium headed by J. Ranjan Gogoi drastically changed the manner in which resolutions are published.

At the time of initiating the practice of publishing resolutions, the declared objective was ensuring transparency in the collegium system while also maintaining confidentiality.<sup>4</sup> The collegium also explicitly stated that its decisions will be published along with reasons.

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<sup>1</sup> See *Supreme Court Advocates-on-Record Assn v Union of India* (2016) 5 SCC 1 (Supreme Court of India). Since 1993, by force of a series of judicial orders, judges in the Supreme Court and the High Courts are appointed by a judicial collegium headed by the Chief Justice of India. For the appointment of Supreme Court judges, the collegium consists of the Chief Justice and the four senior-most judges of the Supreme Court. For the appointment of High Court judges, the collegium consists of the Chief Justice and two senior-most judges of the Supreme Court. The Constitution was amended to establish a National Judicial Appointments Commission, which would have substituted the collegium. The composition of the Commission included the Union Minister for Law and Justice. This amendment was struck down by the Supreme Court, on the ground that it compromised the primacy of the judiciary in the appointment of judges. The Court held that primacy of the judiciary in appointment of judges is an essential component of judicial independence, and judicial independence, being a part of the constitutional basic structure, cannot be tinkered with. For more, see *Supreme Court Advocates-on-Record Assn v Union of India* (1993) 4 SCC 441: AIR 1994 SC 268 (Supreme Court of India) and *Special Reference No 1 of 1998, In re* (1998) 7 SCC 739 : AIR 1999 SC 1 (Supreme Court of India).

<sup>2</sup> *Supreme Court Advocates-on-Record Assn v Union of India* (2015) 6 SCC 408 (Supreme Court of India).

<sup>3</sup> The other four members of the collegium were J Ranjan Gogoi, J Jasti Chelameswar, J Madan B. Lokur and J Kurian Joseph.

<sup>4</sup> The term 'confidentiality' did not feature in the agenda of the meeting, but is mentioned in the decision taken at the meeting. It may be seen as an attempt to temper the expectations regarding how transparent the collegium was actually going to be. See 'Re: Transparency in Collegium System' (*Supreme Court of India*) <<https://main.sci.gov.in/pdf/collegium/2017.10.03-Minutes-Transparency.pdf>> accessed 31 January 2021.

This paper provides an empirical analysis of the collegium's resolutions by measuring the extent of information that has been shared through these resolutions. First, I discuss the basic attributes which shape the idea of transparency, and also ascertain the perspective from which the information shared in the resolutions is to be examined. The analysis is primarily focused on three issues: the collegium's consultative process, the Union Government's feedback on collegium recommendations, and the reasoning behind the collegium's decisions. For each of these broad issues, a determinative list of information is identified, which one would reasonably expect the collegium to share through its resolutions. The findings on transparency are based on the extent to which such identified information is actually shared through the resolutions.

We find that the collegium has used the practice of publishing resolutions mostly as a formality, without exhibiting any tangible measures of transparency. The information shared in the resolutions does not lead to an improved understanding of its functioning. It has particularly failed in indicating the reasons behind its decisions. Instead, generic platitudes have been used to sidestep the requirement of dealing with specifics. On certain other occasions, the linguistic expression has undergone a seemingly deliberate change, which serves the cause of obfuscation and not transparency.

## II. THE VALUE OF TRANSPARENCY

The collegium's commitment to be more transparent about the appointment process, by itself, provides us with sufficient reason to examine its policies in this respect. However, it is also important to recognize the democratic value of transparency, and how it ought to be a binding norm instead of a voluntary commitment. Transparency is not simply an end in itself, but it serves a utilitarian function in various contexts. One of the most significant benefits of increased transparency is that it contributes towards generating greater trust in institutions and in functionaries.<sup>5</sup> It is well established that judicial transparency contributes positively to public trust in judges.<sup>6</sup> While there have been limited instances of transparency having an adverse impact on public perception towards political institutions,<sup>7</sup> the findings are clear that the judiciary benefits from greater transparency about its functioning.<sup>8</sup>

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<sup>5</sup> Stephan Grimmelikhuisen and Albert Klijn, 'The Effects of Judicial Transparency on Public Trust: Evidence from a Field Experiment' (2015) 93(4) *Public Administration* 995.

<sup>6</sup> *ibid.*

<sup>7</sup> B Worthy, 'More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government' (2010) 23(4) *Governance* 561; J De Fine Licht, 'Do We Really Want to Know? The Potentially Negative Effect of Transparency in Decision Making on Perceived Legitimacy' (2011) 34(3) *Scandinavian Political Studies* 183.

<sup>8</sup> See JL Gibson and GA Caldeira, *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People* (1st edn, Princeton University Press 2009).

The Supreme Court of India has also recognized the principle of extending the reach of transparency, beyond the executive, to include the judicial apparatus along with the issue of judicial appointments.<sup>9</sup> The clearest implementation of this principle has been in the case of *Subhash Agarwal*, where the Court held that the office of the Chief Justice of the Supreme Court is subject to the Right to Information Act, 2005.<sup>10</sup> The ruling in this case was founded on the acceptance that transparency is important in the context of judicial appointments.<sup>11</sup> The Court also endorsed the idea that the judiciary's standard of transparency has a bearing on how its capacity to be independent is perceived.<sup>12</sup>

It is a fact that the judiciary depends on public perception for its functional relevance.<sup>13</sup> The judiciary's lack of coercive authority means that, to a great extent, it depends on the voluntary obedience of people for the efficacy of its decisions. The chances of people voluntarily submitting to a judicial authority increase when the judiciary enjoys public trust and confidence.<sup>14</sup> In this sense, the requirement of public trust in the judiciary is not merely a desirable element of a democracy, but an indispensable one.<sup>15</sup> Transparency is deemed to be an important element of good governance, and is supposed to elicit trust in people.<sup>16</sup> Some have argued that transparency is an essential component of any democratic structure, and that a commitment to transparency can be equated with a commitment to democracy.<sup>17</sup> The Indian judiciary also employs the rhetoric of trust to claim a position of moral authority in the constitutional scheme.<sup>18</sup> It regularly expects to be given the benefit of doubt with respect to its integrity and impartiality. Thus, norms of transparency, that have a clear role in bolstering the social legitimacy of the judiciary, ought to be regarded as an essential attribute of its institutional identity.<sup>19</sup>

<sup>9</sup> *SP Gupta v Union of India* 1981 Supp SCC 87: AIR 1982 SC 149 [84] (J PN Bhagawati).

<sup>10</sup> *Supreme Court of India v Subhash Chandra Agarwal* (2020) 5 SCC 481 (Supreme Court of India).

<sup>11</sup> *ibid* [44] (J DY Chandrachud).

<sup>12</sup> *ibid* [43] (J DY Chandrachud).

<sup>13</sup> See Edward J Schoenbaum, 'Improving Public Trust and Confidence in Administrative Adjudication: What an Administrative Law Judge Can Do' (2001) 21(1) *Journal of the National Association of Administrative Law Judiciary* 1.

<sup>14</sup> Tom R Tyler, 'Trust and Democratic Governance' in Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (Russel Sage Foundation 2003) 272.

<sup>15</sup> Shimon Shetreet, 'Judicial Independence and Accountability: Core Values in Liberal Democracies' in HP Lee (ed), *Judiciaries in Comparative Perspective* (1st edn, Cambridge University Press 2011) 6; Rangin Pallav Tripathy, 'Access to Justice and Judicial Performance Evaluation' (2015) 2(1) *NLUO Law Journal Special Edition on Access to Justice* 106.

<sup>16</sup> Grimmelikhuijsen and Klijn (n 5).

<sup>17</sup> James R Hollyer, B Peter Rosendorff and James Raymond Vreeland, 'Democracy and Transparency' (2011) 73(4) *The Journal of Politics* 1191.

<sup>18</sup> Rangin Pallav Tripathy and Chandni Kaur Bagga, 'Who are Our Judges? Assessing the Information Disclosure Practice of Indian Supreme Court Judges' (2020) 9 *Indian Journal of Constitutional Law* 92.

<sup>19</sup> As per Richard Fallon, social legitimacy stands for the extent to which the public supports and trusts the judiciary as being capable of discharging its functions. See Richard H Fallon Jr,

### III. CONTEXTUALIZING TRANSPARENCY

At the outset, it is important to distinguish transparency from the mere disclosure of information. A practice of disclosing information must fulfil certain qualitative attributes to be recognized as a practice of transparency. In fact, it is quite common for ‘information disclosure’ to be used as a tool to avoid transparency. One way to do so is to hide pertinent information within an avalanche of data.<sup>20</sup> Another way is to share irrelevant information which is not sought by any of the stakeholders.<sup>21</sup>

One of the fundamental purposes of transparency is to generate trust and credibility among the stakeholders. Transparency must facilitate an enhanced understanding, among the stakeholders, of the matters considered relevant by them. Thus, one has to ascertain the utility of the shared information from the perspective of the stakeholders concerned. Unless the quantity, structure, and content of the information shared is oriented towards enhancing stakeholders’ understanding of the institution or process in question, transparency cannot be attributed to such disclosure. The additional information must lead to a more informed comprehension among them than what existed earlier. Rawlins identifies as many as 13 qualities, which organizations must incorporate in the information they share, to maintain transparency.<sup>22</sup>

In the context of the Supreme Court collegium, the adoption of this practice of ‘supposed’ transparency seems to be motivated by the stringent and valid criticism regarding its opaque functioning.<sup>23</sup> The adoption of a moral and

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*Law and Legitimacy in the Supreme Court* (The Belknap Press of Harvard University Press 2018) 21.

- <sup>20</sup> Rawlins explains how over sharing of information can be used as a tactic to hide information which is actually needed. He cites the example of legal teams burying an opposite party with mountains of documents to make it harder for relevant information to be located. See Brad Rawlins, ‘Give the Emperor a Mirror: Toward Developing a Stakeholder Measurement of Organizational Transparency’ (2009) 21(1) *Journal of Public Relations Research* 71.
- <sup>21</sup> Heimstädt and Dobusch contend that disclosure of information can be regarded as a characteristic of transparency only when the information shared is relevant from the perspective of the observer. The information must be needed by the observer for it to have any utility. See Maximilian Heimstädt, Leonhard Dobusch ‘Politics of Disclosure: Organizational Transparency as Multiactor Negotiation’ (2017) 78(5) *Public Administration Review* 727.
- <sup>22</sup> Rawlins (n 20). According to Rawlins, information ought to be inclusive, auditable (verifiable), complete, relevant, accurate, neutral, comparable, clear, timely, accessible, reliable, honest, and hold the organization accountable.
- <sup>23</sup> Prashant Bhushan, ‘Scuttling Inconvenient Judicial Appointments’ (2014) 49(28) *Economic and Political Weekly* 12; Markandey Katju, ‘One Way to Fix the Collegium is to Televisе its Proceedings’ (*The Wire*, 5 November 2015) <<https://thewire.in/law/one-way-to-fix-the-collegium-is-to-televisе-its-proceedings>> accessed 11 December 2020, Pradeep Thakur, ‘Collegium Lacks Transparency, Needs Reforms: Justice Shah’ (*The Times of India*, November 28 2016) <<https://timesofindia.indiatimes.com/india/Collegium-lacks-transparency-needs-reforms-Justice-Shah/articleshow/55656623.cms>> accessed 10 December 2020, Santosh Paul (ed), *Choosing Hammurabi: Debates on Judicial Appointments* (Lexis Nexis 2013).

constitutional high ground, in relation to the power of judicial appointments,<sup>24</sup> has also meant that it may not be entirely impervious to persistent criticism.

The fact that the collegium, despite its changing composition, has continued the practice of publishing resolutions suggests that we might be looking at the inception of an ‘institutional norm’, which cannot be discontinued at the personal whims of future collegium members. An institutional norm becomes an entrenched practice when it is not susceptible to periodic change with a change in leadership. No member of the collegium, which took the decision to publish resolutions in 2017, is in office any longer, but the practice of publishing resolutions has continued. On the downside, since October 2019, the collegium has minimized the scope of information disclosed in its resolutions. At present, it would be premature to qualify it as a practice of organizational transparency.<sup>25</sup> It also cannot be accurately characterized as a practice of ‘individual’ transparency, wherein individuals adopt practices with personal motivations, without there being any institutional tradition.<sup>26</sup> The uninterrupted continuance of the practice in future, along with an expansion in the scope of information disclosed, would provide more compelling evidence of the development of an institutional norm.

### A. The Public as the Important Stakeholder

As the attribute of transparency is to be assessed from the perspective of stakeholders, we first need to identify the relevant stakeholders in this context. There is a marginal informational deficit between the Union Government and the collegium. The friction between the executive and the collegium has centered on authority and not on access to information. The recommendations of the concerned High Court collegium are routed to the Supreme Court collegium through the Department of Justice, Government of India,<sup>27</sup> and it has access to all material, on record, about prospective appointees. The government

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<sup>24</sup> See *SCAORA 2016* (n 1) [394]-[396]. While striking down the executive’s claim to appoint judges, the Supreme Court has adopted the rhetoric of questioning the moral credibility of political functionaries. It has argued that the executive cannot be trusted to exercise the power of judicial appointments and is likely to misuse it.

<sup>25</sup> See Heimstädt and Dobusch (n 21). Heimstädt and Dobusch define organizational transparency as “systematic programs for information disclosure that meet information needs external to the organization.” The current practice falls short of this standard by various measures. So far, there has been no effort on the part of the collegium to solicit feedback from various stakeholders. The disclosure also lacks a system as there does not seem to have been a great deal of deliberation about the purpose and methodology of information disclosure.

<sup>26</sup> An initiative of individual transparency would be confined to the disclosure of information about oneself even though others are not sharing similar information to the public. An example of this would be if a judge decided to declare the assets and liabilities of all her family members (not simply the spouse) without a legal obligation to do so.

<sup>27</sup> The High Court collegium consists of the Chief Justice and two senior-most judges of the concerned High Court. The High Court collegium has the sole authority to initiate the appointment process of a judge in the concerned High Court.

is not dependent on the published resolutions to gain access to details about the selection process.

Though those in the legal profession (lawyers, judges in the district judiciary, etc.) are not always adequately informed, they have greater awareness about the working of the system than outsiders. That the insiders in an organization would have greater awareness is an evident fact. The same would apply in the case of any other organization as well. Just as the staff in a university would know more about the background of the members of its governing council than outsiders, lawyers are likely to be better informed about the background of judges. It is the general public which is often in the dark about the entire process.

For example, if the Supreme Court is considering a candidate from the Bombay High Court, those in the legal profession will invariably be aware as to which serving judge(s) in the Supreme Court, elevated from the Bombay High Court, will be consulted in the matter. On the other hand, a member of the general public, who is not an insider, will be clueless. She will have to put in extra effort to unearth that information either from publicly available sources or by speaking to those in the legal profession.

It is important to note that published resolutions are the only publicly available record concerning the process of judicial appointments. The collegium is quite aware that the public does not have access to any other documentation on the appointment of judges. Thus, one has to place a greater informational burden on the resolutions than one otherwise would. It means, at this moment in time, we ought to expect greater disclosure of information from the resolutions than we ordinarily would. The resolutions ought to serve as a self-sufficient explanatory account of the decisions taken by the collegium. They are not adequate if one has to search for information from other fragmented sources to obtain a comprehensive picture. As the resolutions are meant for the public at large, the sufficiency of the information ought to be tested on the yardstick of a 'lay person', and not that of a legal professional conversant with the institutional dynamics of the judiciary.

For an effective analysis, there need to be tangible indicators through which the claim of transparency can be assessed. This requires the identification of information, which is relevant in the context of judicial appointments, and which the public can reasonably have a legitimate expectation to be informed about. This paper identifies some minimum denominators in the context of judicial appointments in India, and then verifies if the resolutions published by the collegium incorporate these denominators. These denominators may be considered as 'indispensable factual details' to obtain any meaningful understanding of the decisions taken by the collegium. The checklist of relevant



information is specific to the constitutional context in India. In order to appreciate the contextual background of the identified parameters, it is pertinent to briefly outline the procedural framework through which judges to the High Courts are appointed.<sup>28</sup>

#### IV. THE NUTS AND BOLTS OF THE APPOINTMENT PROCESS

The bare text of Article 217 provides that while appointing judges to the High Courts, the President is required to ‘consult’ the Chief Justice of India, the Governor of the concerned State, and the Chief Justice of the concerned High Court. Since 1993, this arrangement has been upended in a manner where the collegium, headed by the Chief Justice of India, is no longer a ‘consulted’ authority but one which consults other functionaries while taking the final decision.<sup>29</sup>

According to the revised procedure, which is currently in place,<sup>30</sup> to give effect to the decisions of the Supreme Court in 1993,<sup>31</sup> 1999,<sup>32</sup> and 2015,<sup>33</sup> the process of appointments to a High Court is initiated by the Chief Justice of the concerned High Court in consultation with two of the senior-most judges of the same High Court (the ‘High Court collegium’). The names recommended by the High Court collegium are forwarded to the Union Minister for Law, Justice and Company Affairs, and shared with the office of the Chief Minister and the office of the Governor. The Governor, as advised by the Chief Minister, communicates her inputs on the recommendations to the Union Minister for Law, Justice and Company Affairs. The existing procedure does not contemplate any direct consultative dialogue between the High Court collegium and the State executive, or between the Supreme Court collegium and the State executive. Instead, the views of the State executive are taken into consideration by the Supreme Court collegium, while deciding on the recommendations made by the High Court collegium. Thus, the State executive performs the role of an ‘indirect consultee’ for the Supreme Court collegium.

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<sup>28</sup> This paper covers only the resolutions relating to appointment of High Court judges. See Section V.

<sup>29</sup> See *SCAORA 1994* (n 1).

<sup>30</sup> A Memorandum of Procedure has been drawn up to regulate the process of judicial appointments by the Department of Justice, Government of India, in consultation with the collegium. All appointments to the Supreme Court and the High Courts are supposed to be done as per this Memorandum. For the procedure about High Court judges, see ‘Memorandum of Procedure of Appointment of High Court Judges’ (*Department of Justice*) <<https://doj.gov.in/appointment-of-judges/memorandum-procedure-appointment-high-court-judges>> accessed 20 March 2021.

<sup>31</sup> *SCAORA 1994* (n 1).

<sup>32</sup> *Special Reference No. 1 of 1998, In re* (n 1).

<sup>33</sup> *SCAORA 2016* (n 1).



The Department of Justice ('DoJ'), acting under the Union Minister for Law, Justice and Company Affairs, operates as the 'coordinating agency'. It compiles the materials in relation to a proposed candidate (which are the recommendations of the High Court collegium, the views of the State executive, and inputs from the Intelligence Bureau) and forwards it to the Supreme Court collegium.

Upon receiving the compiled materials from the DoJ, the Supreme Court collegium follows a consultative procedure,<sup>34</sup> wherein it is obligated to consult such colleagues in the Supreme Court, who might be conversant with the affairs in the concerned High Court. The Supreme Court is also free to consult such other persons as it feels may provide useful assistance. Such persons may include serving judges in the Supreme Court/High Court, retired judges from the Supreme Court/High Court, members of the Bar, etc.

When the Supreme Court collegium takes the final decision on a particular candidate, the file is sent back to the Union Minister for Law, Justice and Company Affairs. If the Supreme Court collegium has decided to not appoint the candidate, the government has no other option but to accept the decision. However, if the collegium selects a candidate, the government may either accept the recommendation or return it to the collegium for a reconsideration. As per the existing framework, if the Supreme Court collegium reiterates its decision, the government does not have the option to reject the candidate. While the government may lack the express authority to reject a recommendation of the Supreme Court collegium, it is known to keep a file pending, at times for years, to negotiate with the collegium.<sup>35</sup>

## V. SOURCE OF DATA AND FRAMEWORK OF ANALYSIS

All resolutions of the collegium are published on the official website of the Supreme Court. The resolutions are uploaded as separate PDF documents. For the purpose of this study, all such documents were downloaded and scrutinized individually. The subject-matter of the resolutions can be categorized as:

1. Appointment of judicial officers/lawyers as additional judges in the High Courts;
2. Confirmation of additional judges in High Courts as Permanent judges;
3. Appointment of High Court judges/lawyers as Supreme Court judges;

<sup>34</sup> *SCAORA 1994* (n 1) [68]-[69] (J S. Verma).

<sup>35</sup> Bhadra Sinha, '16 Names Cleared by the SC Collegium for HC Judge Posts Stuck with Govt, 6 of Them Since 2019' (*The Print*, 28 January 2021) <<https://theprint.in/judiciary/16-names-cleared-by-sc-collegium-for-hc-judge-posts-stuck-with-govt-6-of-them-since-2019/593258/>> accessed 21 March 2021.

4. Transfer of High Court Judges;
5. Appointment of High Court Chief Justices.

The analysis in this paper only covers the appointment of additional High Court Judges. This category of decisions is taken by the Supreme Court collegium, in the form of considering the recommendations originating from the concerned High Court collegium. For other kinds of decisions, apart from the appointment of permanent judges to the High Courts, the Supreme Court collegium initiates the process on its own.

From October 3, 2017 to March 19, 2021, a total of 135 resolutions dealing with 477 candidates have been analysed. This time period overlaps with the tenure of three different Chief Justices – J. Dipak Misra, J. Ranjan Gogoi, and J. S.A. Bobde. During this time, other members of the collegium were <sup>36</sup> J. Jasti Chelameswar, J. Madan Bhimaro Lokur, J. Kurian Joseph, J. Arjan Kumar Sikri, J. N.V. Ramanna, J. Arun Mishra, and J. R.F. Nariman.

The data, and its analysis, has been divided into two distinct phases. The first phase is from October 3, 2017 to October 3, 2019. The second phase is from October 15, 2019 to March 19, 2021. This bifurcation becomes necessary as the collegium has followed different patterns of recording its resolutions in these two phases. While the disclosure practices of the collegium in the first phase were hardly satisfactory, the collegium has further regressed in the second phase by narrowing down the nature of information it discloses. Due to the severely limited nature of information shared by the collegium in the second phase, it would be futile to examine such resolutions through the same parameters which have been adopted for the first phase.

Keeping in mind the procedural framework in place for the appointment of judges to the High Courts,<sup>37</sup> the transparency practices of the Supreme Court collegium have been analysed under three categories:

1. Consultation with judicial colleagues;
2. Feedback from the Government (Union and State);
3. Final decisions along with reasons.

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<sup>36</sup> For appointing judges to the various High Courts, the collegium consists of the Chief Justice of India and two senior-most judges of the Supreme Court.

<sup>37</sup> See Section IV.

## VI. ASSESSING TRANSPARENCY: PHASE ONE

### A. Consultation with Judicial Colleagues

As we have noted,<sup>38</sup> when selecting a candidate for a particular High Court, the Supreme Court collegium is required to consult judicial colleagues in the Supreme Court, who are conversant with the affairs of the concerned High Court. One would expect at least the following two details from the resolutions published by the collegium: (i) the identities of the judicial colleagues consulted; and (ii) the views of the consultees.

Knowing the mere identity of the consultees would be futile without clarity on the content of their views. Thus, it would also be a reasonable expectation that the views of the consultee are mentioned with a clear sense of whether the views are positive or negative in relation to a prospective appointee. In an ideal scenario, the reasons for a negative or positive view should also be shared. However, the least we should know is whether the functionaries consulted are in favour of or in opposition to a proposed candidate.

Ascertaining the identities of functionaries, such as the Governor and the Chief Minister, is relatively easy for the general public even if they have not been named expressly. It gets more complicated when it comes to the identity of the ‘judges conversant with the affairs of the High Court’. For example, let us consider that the Supreme Court collegium is looking into appointments to XYZ High Court. The ‘colleagues conversant with the affairs’ of that High Court includes judges who served in the High Court, even though it was not their Parent High Court.<sup>39</sup> It also includes judges for whom XYZ was the parent High Court and those who served as Chief Justices in that High Court. Unless such colleagues are clearly identified by name, it becomes arduous for a lay person to ascertain their identities. Also, if and when the collegium consults other stakeholders, it would obviously be necessary to refer to them by name. Thus, for the sake of efficiency and ease, a reasonable practice would be to mention the names of all the consultees.

The Supreme Court collegium’s practice in this context is mostly unsatisfactory. The resolutions never clearly identify the ‘judges conversant with the affairs of the High Court’ who have been consulted. In fact, quite often, there is not even adequate clarity on how many judges have been consulted while taking decisions. The nature of their views is also not always clear.

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<sup>38</sup> *ibid.*

<sup>39</sup> The Parent High Court refers to the Court where a person first became a judge. So, if a judge was first appointed as a Judge in the Madras High Court and later transferred to the Gujarat High Court, the Madras High Court would be the Parent High Court of the judge.

## B. Views of Judicial Colleagues

Details of Consultation with Judicial Colleagues	In Numbers	In Percentage
1 Colleague consulted	35	9.70
2 colleagues consulted	66	18.28
Number of consultees not clear	226	62.60
No record of any consultation	34	9.42

**Table 1: Views of Judicial Colleagues**

The number of consultees is rarely mentioned expressly by the collegium. Instead, it often has to be inferred from the use of singular/plural nouns and other linguistic indicators.<sup>40</sup> In the absence of any such indicators, it is not possible to deduce the number of consultees from the resolution. It is also not always clear if all consultees have shared their feedback. In only 8.03% of the decisions, it is known for certain that all consultees have shared their feedback.<sup>41</sup>

While it is not always stated clearly by the collegium, it seems that in 9.42% of its decisions, no judges have been consulted due to the fact that there were no judges serving in the Supreme Court from the concerned High Court. This raises questions on the design of the consultative framework which has been established. At present, this framework is frustrated when there is no serving judge in the Supreme Court from a particular High Court, which happens quite frequently for many States.

The substantive content of the consultation is not shared by the collegium. Often, the collegium merely mentions that ‘some’ colleagues have been consulted. The reasons behind the omission of substantive content of these colleagues’ views may involve sensitive personal information concerning the candidate. However, it is difficult to make the same argument when it comes to the very fact of whether the consulted functionaries are in favour of a candidate or not. On the few instances where a description of the views of the colleague judges is shared, it has been through standardized and generic proforma statements.<sup>42</sup> The positive/negative substance of the views of the consultees has not been recorded by the collegium in its minutes.

<sup>40</sup> For example, one would infer that two judges were consulted when the collegium mentions the following: “while one of the two consultee-colleagues has offered no views about his suitability, the other colleague has found him suitable for elevation”. ‘Supreme Court of India’ (*Supreme Court of India*, 3 October 2017) <<https://main.sci.gov.in/pdf/collegium/2017.10.03-Madras-6%20JOs.pdf>> accessed 3 January 2021.

<sup>41</sup> Every such instance is when only one colleague judge has been consulted.

<sup>42</sup> The following proforma statement was quoted for as many as three candidates as constituting the views of a colleague judge in a resolution dated October 3, 2017 for appointment of judges

## 1. *The Revelations about Justice P. Ganediwala*

The lack of transparency about the consultative process is most evident in the case of J. P. Ganediwala of the Bombay High Court. In January 2021, in a case under the Protection of Children from Sexual Offences Act, 2012, J. Ganediwala created a stir, through her controversial and regressive interpretation of what constitutes ‘sexual assault’, by saying that groping the breasts of a minor without skin-to-skin contact does not constitute sexual assault.<sup>43</sup> The uproar led to a scrutiny of her background, and it was revealed that two ‘judges conversant with the affairs of the Bombay High Court’ had objected to her appointment.<sup>44</sup> The two consulted judges had provided detailed analysis of J. P. Ganediwala’s judgements from the lower courts, cautioning against her appointment on the ground that she lacked legal knowledge. However, the Supreme Court collegium resolution, dated January 16, 2019, recommending her for appointment does not make any mention of this. The resolution merely notes that the views of judicial colleagues have been taken into consideration, without specifying whether such views were in favour of or against her appointment.<sup>45</sup>

The case of J. Ganediwala came to limelight only due to a controversy. It is quite possible that there may be other judges who have been recommended by the collegium despite reservations from judicial colleagues. Unless the resolutions capture the nature of views being put forth by the consulted functionaries, it does not lead to any additional insight into the appointment process. It also facilitates an avoidance of scrutiny about the collegium’s selection of judges.

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in the Kerala High Court: “that his integrity is very good and to his knowledge Shri ABC carries good reputation as Judicial Officer; that he has found his intellectual acumen as befitting for a Judge of the High Court and that he is quite suitable for appointment as Judge of the High Court of XYZ”. ‘Supreme Court of India’ (*Supreme Court of India*, 3 October 2017) <<https://main.sci.gov.in/pdf/collegium/2017.10.03-Kerala-3%20JOs.pdf>> accessed on 3 January 2021.

<sup>43</sup> Mani Chander, ‘Why Bombay HC’s ‘Sexual Assault under POCSO Needs Skin-to-Skin Contact’ Observation is Deeply Problematic’ (*The Times of India*, 25 January 2021) <<https://timesofindia.indiatimes.com/india/why-the-bombay-high-courts-judgment-acquitting-man-under-pocso-is-completely-flawed/articleshow/80437238.cms>> accessed 1 February 2021.

<sup>44</sup> Bhadra Sinha, ‘Judge, Who Passed Controversial POCSO Orders, was Appointed Despite Reservation by 2 SC Judges’ (*The Print*, 30 January 2021) <<https://theprint.in/judiciary/judge-who-passed-controversial-pocso-orders-was-appointed-despite-reservation-by-2-sc-judges/595571/>> accessed 1 February 2021.

<sup>45</sup> ‘Supreme Court of India’ (*Supreme Court of India*, 16 January 2019) <[https://main.sci.gov.in/pdf/collegium/18-01-2019/4.2019.01.16-2\\_Advocates-Deferred\\_cases-BOMBAY.pdf](https://main.sci.gov.in/pdf/collegium/18-01-2019/4.2019.01.16-2_Advocates-Deferred_cases-BOMBAY.pdf)> accessed 01 February 2021.

### C. Feedback from the Government (Union and State)

The Supreme Court collegium's interface with the concerned State government and the Union Government happens at different stages of the appointment process and in different ways.<sup>46</sup> While there is a direct channel of communication between the Union Government and the Supreme Court collegium, there is no direct dialogue between the State government and the Supreme Court collegium. The views of the State government are forwarded to the Supreme Court collegium through the Union Government's DoJ. The collegium takes these views into consideration while deciding on the selection of candidates. As such, between the two, the Union Government has a much greater influence over the selection process, both in the structural arrangement and in practice. The Supreme Court collegium is free to take decisions contrary to the views of the State government, and there is no procedural recourse available with the State government in such a case. On the other hand, even if ultimately bound by the recommendations of the Supreme Court collegium, the Union Government can return a file for reconsideration and also stall files indefinitely.<sup>47</sup>

#### 1. *Feedback from the State Government*

Just as in the case of consultation with judicial colleagues, one would expect the Supreme Court collegium to disclose the substance of the State government's views in relation to individual candidates. The identities of functionaries, such as the Governor and the Chief Minister, are relatively easy to ascertain. It is not an effective barrier if they are mentioned merely by designation even though it would be preferable to mention them by name as well. As such, the Governor and the Chief Minister are not identified by name in any of the resolutions.

### D. Views of Chief Minister and Governor

Details of Consultation with Chief Minister/Governor	In Numbers	In Percentage
Concurred with the HC Collegium's Recommendation	162	44.88
Objected to the HC Collegium's Recommendation	10	2.77
Views of Chief Minister/Governor not clear	174	48.20
Views of Chief Minister/Governor not received	15	4.16

**Table 2: Feedback from the State Government**

<sup>46</sup> See Section IV.

<sup>47</sup> Sinha (n 35).

The collegium's policy, regarding recording the views of the Chief Minister and the Governor, has been highly inconsistent. There are many resolutions where it is clearly stated that the Chief Minister and the Governor have concurred with the recommendation of the High Court collegium. However, in many other resolutions, the offices of the Chief Minister and the Governor are not identified separately, and the collegium simply records the input of the State government.

Even more frustratingly, the collegium has been inconsistent in recording the nature of the views. In many resolutions, the collegium has clearly recorded the 'concurrence' of the Chief Minister/Governor/State government with the recommendation made by the High Court collegium.<sup>48</sup> In many other resolutions, the collegium has merely acknowledged that the views of the Chief Minister/Governor/State government have been considered, without stating clearly if the views are positive or negative in relation to the recommendation.<sup>49</sup> The views of the Chief Minister/Governor/State government are unclear in 48.20% of the recommendations.

In 4.16% of the recommendations, the views of the Chief Minister/Governor/State Government were not received by the Supreme Court collegium in time. There has been an objection by the Chief Minister/Governor/State government in relation to 2.77% of the recommendations.<sup>50</sup> While objections by the State government are not relevant in the same sense as that of the Union Government, it is still indicative of political opposition to prospective candidates or to the overall pattern of appointments. In such cases, it is essential that the government's grounds for objection be open to public scrutiny.

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<sup>48</sup> 'Supreme Court of India' (*Supreme Court of India*, 8 August 2018) <[https://main.sci.gov.in/pdf/collegium/20180808\\_1\\_pmt\\_judges\\_uttarakhand\\_final.pdf](https://main.sci.gov.in/pdf/collegium/20180808_1_pmt_judges_uttarakhand_final.pdf)> accessed 1 February 2021.

<sup>49</sup> 'Supreme Court of India' (*Supreme Court of India*, 26 March 2018) <[https://main.sci.gov.in/pdf/collegium/2018-march\\_7\\_pmt\\_Calcutta.pdf](https://main.sci.gov.in/pdf/collegium/2018-march_7_pmt_Calcutta.pdf)> accessed 1 February 2021.

<sup>50</sup> This was in relation to a batch of recommendations made by the Karnataka HC collegium. The objections of the Chief Minister were not in relation to individual candidates, but on the broader point of inadequate representation of a cross-section of society on the High Court Bench. The Governor questioned the efficiency of the candidates without specifying anybody in particular. Of the ten recommendations to which objections were raised, the SC collegium approved the appointment of five candidates. It rejected the appointment of one candidate and returned four recommendations to the HC collegium. However, the decision to return/reject certain candidates was seemingly taken on separate grounds as the SC collegium categorically dismissed the objections raised by the office of the Chief Minister and the Governor. 'Supreme Court of India' (*Supreme Court of India*, 4 December 2017) <[https://main.sci.gov.in/pdf/collegium/2017-December%204-10%20Advs-Karnataka\\_wm.pdf](https://main.sci.gov.in/pdf/collegium/2017-December%204-10%20Advs-Karnataka_wm.pdf)> accessed 10 December 2020.



## E. Feedback from Union Government

The DoJ is the focal agency of the executive in the matter of judicial appointments. Generally, it is seen that the DoJ gets to articulate its views in two contexts. First, when the Supreme Court Collegium is considering a recommendation made by the High Court collegium, it generally notes the views of the DoJ along with those of the Governor and the Chief Minister. Second, and more rarely, the DoJ returns certain recommendations to the collegium, requesting reconsideration. Thus, the following information is essential in this context:

1. Views of the DoJ at the time of initial consideration;
2. Views of the DoJ when requesting reconsideration of an appointment.

The objections raised by the Union Government perhaps constitute the most contentious dimension in the process of judicial appointments. The collegium system was created to prevent the executive from having a determinative role in the appointment of judges. Limiting the influence of the executive in the appointment of judges has been a non-negotiable assertion of the higher judiciary in India.<sup>51</sup> The supposed interference by the executive, in the appointment of judges to the Supreme Court and Chief Justices to the High Courts, has often caused widespread controversy.<sup>52</sup> Thus, it becomes important to analyse the manner in which the Supreme Court collegium and the Union Government have interacted in relation to the appointment of judges to the High Courts.

The Government of India, through the DoJ, has concurred with 12.74% of the recommendations made by the High Court collegiums at the time of the matter being considered by the Supreme Court collegium. In relation to 86.98% of the recommendations, the stance of the DoJ is not clear from the language used by the Supreme Court collegium. The collegium, in these cases, has merely noted that the views of the DoJ have been considered, without specifying the tenor of the views. At this initial stage, the DoJ has objected to only 0.28% of recommendations.<sup>53</sup>

<sup>51</sup> *SCAORA 2016* (n 1). In 2015, the Supreme Court struck down a constitutional amendment which sought to replace the collegium system with a National Judicial Appointments Commission. The major ground for striking it down was the fact that it interfered with the supremacy of the judiciary in the selection of judges. See (n 1).

<sup>52</sup> Aneesha Mathur, 'Gujarat Lawyers' Body to Move Supreme Court Over Centre Blocking Justice Kureshi Promotion' (*India Today*, 1 July 2019) <<https://www.indiatoday.in/india/story/gujarat-lawyers-body-supreme-court-justice-kureshi-promotion-1559500-2019-07-01>> accessed 12 July 2019; Anup Surendranath, Aparna Chandra and Suchindran Baskar Narayan, 'Ball's in Supreme Court' (*The Indian Express*, 27 April 2018) <<https://indianexpress.com/article/opinion/columns/indu-malhotra-woman-supreme-court-judge-k-m-joseph-chief-justice-of-india-dipak-misra-collegium-system-5153260/>> accessed 10 July 2019.

<sup>53</sup> This was in relation to the appointment of J Ravi Krishan Kapur of the Calcutta High Court. The Department of Justice had raised the issue of J Kapur's father, a practicing advocate at

The DoJ has requested a reconsideration in relation to 5.26% of the recommendations approved by the Supreme Court collegium. Most of the objections raised by the DoJ have been in relation to lawyers. Only 10.53% of the DoJ's objections pertained to judicial officers. Male lawyers constitute 84.21% of the candidates whose files the DoJ has returned to the collegium.

The collegium has not noted the reasons behind the objections raised by the DoJ in 85% of the cases. In 10.53% of the cases, the objections seem to have been based on the fact that, the proposed appointees had not attained the minimum age of 45 years,<sup>54</sup> on the date the High Court collegium recommended their name.<sup>55</sup> In relation to one objection by the DoJ, the collegium has clearly noted that no reason was cited for the objection.

## F. An Unequal Balance

At this point, it is important to remember that the collegium has committed to the idea of 'transparency', with a rider of confidentiality, and not to the idea of 'confidentiality', with a rider of transparency.<sup>56</sup> Thus, even if the collegium is choosing to not share the reasons cited by the DoJ in order to protect sensitive information of the candidates, nothing prevents it from clearly stating so in its resolutions. On most occasions, the resolutions merely note the fact of the objection without stating the reasons behind it. The disclosure of the reasons behind such objections may involve sensitive personal information concerning the candidates. Also, such reasons may not be related to a candidate's personal information. The collegium has not clarified its policy on what is considered 'sensitive personal information', and has not spelled out its threshold

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Calcutta High Court, not having furnished a required undertaking. The collegium dismissed the objection on the ground that the requirement of an undertaking from a practicing relative is in the nature of an administrative instruction and not a mandatory requirement. 'Supreme Court of India' (*Supreme Court of India*, 4 December 2017) <[https://main.sci.gov.in/pdf/collegium/2017\\_December\\_04\\_6\\_Advs\\_Calcutta\\_wm.pdf](https://main.sci.gov.in/pdf/collegium/2017_December_04_6_Advs_Calcutta_wm.pdf)> accessed 10 December 2020.

<sup>54</sup> According to the prevailing Memorandum of Procedure agreed to between the Government and the SC collegium, a lawyer must at least be of 45 years of age to be appointed as a Judge in the High Court. The Constitution does not prescribe an age requirement, but requires a minimum number of years in professional experience.

<sup>55</sup> The Misra collegium decided to return the recommendations to the Calcutta HC collegium. The SC collegium has usually overlooked such lacuna if the candidates have crossed the age limit of 45 years by the time their candidature is being considered by the SC collegium, even if the candidates were not 45 years old at the time of being recommended by the HC collegium. In its initial decision to accept the recommendation of the Calcutta HC collegium, the SC collegium had followed the same policy for one candidate and had decided to relax the age criterion for the other candidate. Also, there have been instances of other recommendations with similar lacuna where there is no record of the Department of Justice raising an objection. (One such candidate was recommended again by the Gogoi collegium when he had attained the age of 45 years and was subsequently appointed as a judge). 'Supreme Court of India' (*Supreme Court of India*, 8 August 2018) <[https://main.sci.gov.in/pdf/collegium/20180808\\_2\\_advs\\_calcutta\\_final.pdf](https://main.sci.gov.in/pdf/collegium/20180808_2_advs_calcutta_final.pdf)> accessed 12 December 2020.

<sup>56</sup> Re: Transparency in Collegium (n 4).

for choosing confidentiality over transparency. It has provided no explanation for its decision to conceal the details of the objections raised by the DoJ. While it is theoretically possible that every such instance involved sensitive personal information about a candidate, the collegium's propensity for opacity means that we cannot be entirely sure of that.

As a logical corollary to its decision of not sharing the reasons behind the objections raised by the DoJ, the collegium has also not reasonably explained its responses to such objections. No reasons have been cited for reversing its earlier acceptance of a candidate, and no reasons have been cited for persisting with a candidate.<sup>57</sup> The rationale for its response can be reasonably understood in only 15.79% of such decisions.<sup>58</sup> When the name of a prospective appointee is sent to the DoJ, after being cleared by the High Court collegium and then approved by the Supreme Court collegium, one would hope that the Supreme Court collegium would reverse its decision only in exceptional situations. However, due to the opaque practice of the collegium, of all cases where it has reversed its decision, the reasons for such reversal are unknown in 90% of cases.<sup>59</sup>

## G. Publishing Reasoned Decisions

The Supreme Court collegium not only resolved to publish its decisions, but also undertook to share the reasons for them.<sup>60</sup> It qualified its intention to share reasons with the condition of confidentiality. It is reasonable to expect that some kind of substantive explanation would suffice the requirement of a reasoned decision.

When considering a recommendation from a High Court collegium, the range of decisions taken by the Supreme Court collegium can be classified into the following alternative categories:

1. It has accepted the recommendation;

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<sup>57</sup> On certain occasions, while reiterating a recommendation, the collegium has noted that the objections of the Department of Justice are not based on any fresh material, but on materials already on record and considered by the collegium. The collegium has often used this as justification for persisting with a candidate. However, without the substance of the objections revealed, such justifications cannot qualify as 'reasons' for its decisions. Ignoring an objection on a technicality does not enhance the understanding of the public. 'Supreme Court of India' (*Supreme Court of India*, 16 January 2019) <[https://main.sci.gov.in/pdf/collegium/18-01-2019/5.2019.01.16-1\\_Adv\\_and1\\_JO-CALCUTTA-Combined.pdf](https://main.sci.gov.in/pdf/collegium/18-01-2019/5.2019.01.16-1_Adv_and1_JO-CALCUTTA-Combined.pdf)> accessed 12 December 2020.

<sup>58</sup> Two decisions concerning the age-limit requirement and one where the Department of Justice had not cited any reasons for its objection.

<sup>59</sup> There are 10 such instances, where the SC collegium has reversed its decision after receiving objection from the DoJ. The reasons for reversal are spelled out in only one case.

<sup>60</sup> Re: Transparency in Collegium (n 4).

2. It has deferred its decision on the recommendation;
3. It has rejected the recommendation;
4. It has returned the recommendation to the High Court collegium.

When considering a situation, where its recommendation has been returned by the DoJ, requesting reconsideration, the range of decisions can be classified into the following alternative categories:

1. It has reiterated the recommendation;
2. It has rejected the recommendation;
3. It has returned the recommendation to the High Court collegium;
4. It has deferred the decision.

In the eventuality of any of the above-mentioned decisions being taken, the expectation is that the collegium would furnish reasons for its decisions. The reasons need to be lucid enough to explain why the collegium decided in one manner and not in another.<sup>61</sup> Generic explanations, which do not underscore the specific grounds of a decision, are not helpful in understanding the reasoning behind any decision.

The Supreme Court collegium has completely failed to deliver on its promise of publishing ‘reasoned’ decisions. The reasons are evident in only 4.43% of the decisions taken by it. Most instances of reasoned decisions coincide with a decision to return or reject a recommendation from a High Court collegium. That does not, however, mean that decisions to reject or return a recommendation are often reasoned. Reasons have been given in only 10.81% of the cases where a recommendation has been returned or rejected. 75% of such reasons constitute a recommended candidate’s non-fulfilment of the ‘income criterion’ set by the collegium.<sup>62</sup>

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<sup>61</sup> For example, it would be relevant to understand why certain recommendations are returned to the HC collegium and certain other recommendations are rejected, especially when returning a recommendation has almost had the same effect as a rejection. Only in extremely rare instances has the name of a candidate been sent to the SC collegium a second time after having been returned once.

<sup>62</sup> There seems to be an income level, which the collegium requires, for lawyers to be considered for a High Court judgeship. Recently, there has been some controversy around an effort by the collegium to relax the income criteria. See Maneesh Chhibber, ‘Relaxing Income Criteria for judges’ Post is Case of Overreach by Supreme Court Collegium’ (*The Print*, 18 February 2019) <<https://theprint.in/opinion/relaxing-judges-income-criteria-feeds-doubts-over-supreme-court-collegium-system/194396/>> accessed 10 November 2019; Pradeep Thakur, ‘Supreme Court Collegium Dilutes Norms to Pick Judges’ (*The Times of India*, 2 April 2019) <<https://timesofindia.indiatimes.com/india/supreme-court-collegium-dilutes-norms-to-pick-judges/articleshow/68679530.cms>> accessed 11 November 2019.

25% of the reasons deal with a recommended candidate not fulfilling the ‘age criterion’.<sup>63</sup>

### 1. *Reasons as the essence of transparency*

The disclosure of ‘reasoned decisions’ is at the core of any commitment to transparency in the matter of judicial appointments. The decisions of the Supreme Court collegium are eventually public knowledge – when the appointees are notified by the government and when they assume office after taking oath. So, the public is already aware about who the Supreme Court collegium has recommended for judgeship. However, the public does not know ‘why’ a particular person has been selected and others rejected. The core of a transparent appointment process is not the disclosure of who is being appointed, which inevitably has to be notified to the public. The essence of transparency is to share the ‘reasons’ for which one candidate is preferred to others. Thus, it becomes important to learn both the criteria and the grounds, on which a particular candidate is selected and others are rejected. Without information explaining the selection of candidates, the published resolutions do not enhance our understanding of the appointment process, which ought to be the touchstone of any transparent practice.<sup>64</sup>

### 2. *Concerns of Privacy and Confidentiality*

It may be reasonable for the collegium to be mindful of the reputational interests of the candidates while sharing the reasons for its decisions. In particular, the reasons for rejecting or returning a recommendation may involve concerns of privacy and confidentiality. However, the collegium is expected to maintain a purposive balance between the objective of transparency and the need for confidentiality. Privacy should not become a ground for completely evading the requirement of a reasoned decision.

It would be disingenuous to contend that the reasons for the collegium’s decisions can never be revealed. For example, the Supreme Court collegium frequently defers taking a decision on recommendations received from the High Court collegiums. Mostly, the Supreme Court collegium does not explain the reason for deferring its decision. Unlike rejecting a candidate, which may involve damaging personal or professional details about them, deferring a decision may involve purely administrative factors, such as a lack of records, delay in receiving inputs from consulted functionaries, etc. In such cases, disclosing

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<sup>63</sup> This includes candidates who have either not attained the minimum age requirement or have exceeded the maximum age restriction.

<sup>64</sup> Rawlins (n 20).

the reasons for deferring a decision is unlikely to violate the privacy of any of the candidates.

There has been no conceptual clarity on what the collegium considers to be worthy of confidentiality. Also, there is no clear benchmark, which has been articulated by the collegium, to determine if a particular information ought to be published or concealed. Thus, there is a compelling need for the Supreme Court collegium to articulate a definitive policy on matters constituting ‘confidential’, ‘private’, or ‘sensitive’ information concerning a candidate.

It is important to remember that, in any case, privacy has not been recognized as an absolute right in India. The Supreme Court, while upholding the right to privacy as a fundamental right,<sup>65</sup> has categorically held that the right is not absolute or unrestricted. Reasonable restrictions can be imposed on the right to privacy on grounds of compelling public interest.<sup>66</sup> Judges in the higher judiciary have the power to influence the lives of millions of people in extremely significant ways. Therefore, the public has a right to be informed about the rationale through which such power is vested in certain individuals. The extent of authority vested with judges means that the claim of the public, to be informed about the appointment process, stands on a much better footing than claims of any candidate’s privacy, especially in the absence of a clear policy on the gradation of information concerning a candidate.

As we have already observed,<sup>67</sup> the claim of confidentiality ought not to become a permanent shadow over the need for transparency. The collegium ought to try for a more meaningful balance by avoiding either of these extremes.

### 3. *Critical Decisions*

Returning, rejecting, or reiterating a recommendation are perhaps the most critical decisions requiring a reasoned explanation. When the Supreme Court collegium returns or rejects a recommendation, whether at the first instance or in response to an objection raised by the DoJ, it is effectively either a disapproval of the decision by the concerned High Court collegium, or a reversal of its own decision to approve the recommendation. The reiteration of a recommendation essentially means that any objections, which the DoJ may have raised, are refuted. In all such cases, the reasons for such overruling, reversal, or reiteration comprise critical information, which should be shared if the objective is to be transparent.

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<sup>65</sup> *KS Puttaswamy v Union of India* (2017) 10 SCC 1 (Supreme Court of India).

<sup>66</sup> *ibid* [86] (J Abhay Manohar Sapre) and [73] (J Sanjay Kishan Kaul).

<sup>67</sup> See “An Unequal Balance” under Section VI.

However, the practice of the collegium leaves us with no better understanding of the situation. Instead of fostering transparency, it provides more grounds of mistrust in the decision-making process. The lack of reasoned decisions is especially baffling when, among the same batch of recommendations from a High Court collegium, some recommendations are accepted and the rest are returned/rejected without any assigned reason.

The collegium is also not forthcoming in sharing the complaints it receives against the proposed appointees. In its resolutions dealing with multiple recommendations, it often notes that complaints have been received, but rarely specifies the candidates against whom such complaints have been made.<sup>68</sup> The collegium has uniformly dismissed all such instances of complaints as lacking prima facie merit, without sharing the details of the complaints even once.

## VII. THE DITHERING DEFERRALS

A decision to defer delays the actual substantive decision. Instead of deciding on the merits of the recommendation received from a High Court collegium, the Supreme Court collegium uses this option to defer the decision-making to a later, unspecified date. Adopting this option has particular ramifications in relation to the appointment of additional judges. Such appointments relate to existing vacancies. On the other hand, appointment of permanent judges, from their position as additional judges, does not immediately affect the availability of workforce. Filling up vacancies in time is crucial for the continued capacity of courts to manage case load. Thus, one would hope that the collegium would not opt for deferrals in the absence of clearly stated reasons.

Out of every five substantive decisions taken by the collegium, one is a deferral, often without specifying any reason. The Misra collegium opted for deferral more often than the Gogoi collegium. Overall, the ratio of substantive decisions to deferrals is 2.66 for the Misra collegium and 6.3 for the Gogoi collegium. The Misra collegium has given reasons only in 5% of its deferrals, and the Gogoi collegium has not specified reasons even once.

It needs to be noted that that, there have been multiple deferrals in relation to the same candidate and, thus, the number of deferrals does not mean the candidature of as many persons has been deferred. It is also important to note that the number of deferrals does not mean that substantive decisions regarding

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<sup>68</sup> As it was impossible to identify the individual candidates against whom complaints have been made, it has been presumed that complaints have been filed against all candidates discussed in a resolution. This is a presumption of necessity. By this calculation, complaints have been made against 30.47% of all candidates recommended by different HC collegiums.



as many candidates are yet to be taken. In many cases, subsequent to the deferrals, final decisions have been taken by the collegium.<sup>69</sup>

### VIII. ASSESSING TRANSPARENCY: PHASE TWO

As is evident, between October 3, 2017 and October 3, 2019, the collegium has definitively failed in introducing substantially tangible measures of transparency through the publication of its resolutions. However, the collegium's practice after October 3, 2019 is even more disappointing. It seems to have reduced the entire exercise of publishing resolutions to a completely meaningless formality. This drastic change was initiated by the Gogoi collegium, in the resolutions published on October 15, 2019, during J. Gogoi's last month in office.<sup>70</sup> The other two members of the collegium at the time were J. S.A. Bobde and J. N.V. Ramana.<sup>71</sup> As the office of the Chief Justice will be occupied successively by J. Bobde and J. Ramana until August 6, 2022, a course correction by the collegium seems unlikely until then, at least.

After October 3, 2019, while the collegium has continued the practice of publishing resolutions, it has merely listed the names recommended by it for appointment without any other detail whatsoever. There has been no disclosure about the candidates, who have been recommended by the different High Court collegiums, and the decision taken in relation to the candidates whose names have not been recommended. There is no information regarding the other judges from the Supreme Court, who have been consulted in the matter of appointment, and the nature of their views. There has been no mention about the views of the Chief Minister or the Governor. Further, there are no details about any objections received from the DoJ. In essence, the published resolutions constitute mere communication of the final list of names recommended for judgeship without shedding any light on the process through which the final selection was done or the reasons behind the selection.

While the resolutions can still be found under the heading of 'collegium resolutions' on the website of the Supreme Court of India,<sup>72</sup> the files themselves

<sup>69</sup> For example, decision regarding the candidature of Mr Tirathankar Ghosh was first deferred on March 26, 2018 without assigning any reason. Subsequently, his candidature was approved by the SC collegium on December 4, 2018. Afterwards, he has assumed office in Calcutta High Court. Something similar happened to Justice Savitri Ratho of Orissa High Court.

<sup>70</sup> J Ranjan Gogoi retired from office on November 17, 2019. In a controversial development, within 1 year of his retirement, on March 16, 2020, he was nominated by President of India to the Council of States, the Upper House in the Indian Parliament. Accepting any kind of political office after retirement is quite uncommon in the Indian higher judiciary.

<sup>71</sup> The collegium for appointing Supreme Court judges also included J Arun Mishra and J RF Nariman.

<sup>72</sup> 'Resolutions of Collegium' (*Supreme Court of India*) <<https://main.sci.gov.in/collegium-resolutions>> accessed 3 January 2021.

have been retitled as ‘statements’. In another development, which comes across as deeply cynical, the documents uploaded do not mention the existing members of the collegium. Earlier, all resolutions were signed off by the existing members of the collegium. While it may appear harmless, such a practice compromises the archival quality of these resolutions. There is no official notification about the identity of collegium members, and it always has to be ascertained by looking at the seniority list on a given date. Determining the seniority list involves the filtration of judges based on a variety of factors, especially when it involves a batch of several judges appointed on the same day. Thus, this practice makes it much harder for someone, reading these resolutions ten or twenty years from now, to identify the authors of any particular resolution.

It is important to note that the collegium has never given any indication of its intention to change the pattern of the published resolutions. It has also not bothered to disclose the reason behind such a drastic and regressive step. There is speculation that the collegium’s decision was prompted by increased scrutiny of its decision-making.<sup>73</sup> If this is indeed true, then this move reflects an unhealthy comfort with secrecy that seems deeply entrenched in the judicial structure.

While the decision by the collegium to publish its resolutions was obviously a positive one, one has to wonder if the actual practice of publishing the resolutions has been reduced to token symbolism. As we have seen, the snippets of information shared by the collegium, through its resolutions, do not facilitate a better understanding of its functioning.

## IX. CONCLUSION

Initially, until October 3, 2019, the published resolutions of the Supreme Court collegium served the limited utility of making the collegium’s decisions public. Earlier, information about High Court collegium recommendations being accepted/returned/rejected was only accessible to those in the active circles of legal profession or the media. Similarly, one got to know about the tussles between the Supreme Court collegium and the DoJ only through media reports, or if one was active in the relevant circles of the legal profession. Through the published resolutions, the public had a more immediate and direct source for such information. However, even accounting for the latitude

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<sup>73</sup> Alok Prasanna Kumar, ‘Supreme Court Stops Uploading Collegium Resolutions on Website: Move is Major Self-Inflicted Wound, Smacks of Institutional Cowardice’ (*Firstpost*, 22 October 2019) <<https://www.firstpost.com/india/supreme-court-stops-uploading-collegium-resolutions-on-website-move-is-major-self-inflicted-wound-smacks-of-institutional-cowardice-7536991.html>> accessed 2 February 2020.

of maintaining necessary confidentiality,<sup>74</sup> the collegium failed to deliver on its promise of publishing reasoned decisions to ensure transparency.

It did not clearly state information regarding the colleague judges who were consulted. The public did not know how many colleague judges were consulted. It also did not clearly state if their views were positive or negative. We were left with no answers as to why certain recommendations were returned, while others were accepted. We had no knowledge of the reasons for which the DoJ had objected to the appointment of certain candidates. We were clueless about the grounds on which the collegium overruled the objections of the DoJ and also the grounds on which it accepted them. No reasons were given when decisions on certain recommendations were deferred. While there was a serious gap in terms of the reasons behind the decisions, we at least had better access to the decisional process of the collegium.

Since October 3, 2019, the collegium has retreated into a deeper cocoon of secrecy. Now, the public is merely informed about the final recommendations of the collegium without any other detail whatsoever. So far, there is no evidence of the collegium actively looking into the informational needs of various stakeholders. As the most basic purpose of any transparency initiative is to generate trust and credibility, the structure and content of shared information must be decided through a consultative dialogue and not through unilateral decisions.

In recent years, the Indian judiciary has faced scepticism about its capacity and willingness to discharge its constitutional role.<sup>75</sup> There have been judgments on extremely sensitive issues, which have provoked disappointment regarding compromised legal arguments,<sup>76</sup> and accusations of having caved in to majoritarian politics.<sup>77</sup> There have been concerns regarding the judiciary having different standards for different classes of people.<sup>78</sup> The judiciary has

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<sup>74</sup> See “Concerns of Privacy and Confidentiality” under Section VI.

<sup>75</sup> Pratap Bhanu Mehta, ‘SC was Never Perfect, but the Signs are That it is Slipping into Judicial Barbarism’ (*The Indian Express*, 18 November 2020) <<https://indianexpress.com/article/opinion/columns/supreme-court-arnab-goswami-bail-article-32-pratap-bhanu-mehta-7055067/>> accessed 4 January 2021; Anuj Bhunia, ‘The Crisis of Legitimacy Plaguing the Supreme Court in Modi Era is Now Hidden in Plain Sight’ (*Scroll.in*, 1 December 2020) <<https://scroll.in/article/979818/the-crisis-of-legitimacy-plaguing-the-supreme-court-in-modi-era-is-now-hidden-in-plain-sight>> accessed 4 January 2021.

<sup>76</sup> Faizan Mustafa and Aymen Mohammed, ‘Ayodhya Judgment is a Setback to Evidence Law’ (*The Indian Express*, 10 November 2019) <<https://indianexpress.com/article/opinion/columns/supreme-court-ayodhya-verdict-ram-mandir-muslims-hindu-babri-mosque-demolition-6112170/>>.

<sup>77</sup> HS Shylendra, ‘God as a Litigant: Examining the Contradictions and Biases of the Ayodhya Verdict’ (*EPW Engage*) <<https://www.epw.in/engage/article/god-litigant-examining-contradictions-and-biases>> accessed 4 January 2021.

<sup>78</sup> Alok Prasanna Kumar, ‘India’s Supreme Court Has a Class Bias and it Takes Whatever the Govt Says at Face Value’, (*The Print*, 27 May 2020) <<https://theprint.in/>

been perceived to be failing in its constitutional obligations, not only through some issues that it has decided, but also through the many issues which it has ignored.<sup>79</sup> The claim, that the Indian Supreme Court is facing a crisis,<sup>80</sup> is not merely a figment of imagination.

In light of this state of affairs, it is disturbing that the Supreme Court collegium has chosen to compromise the only measure of transparency that it has initiated in all these years. By refusing to address the crisis of public trust through transparent appointment practices, the collegium is endangering the judiciary's institutional capacity to discharge its functions. The judiciary's relevance is dependent on continued public support and trust. The lack of transparency has an adverse effect on how the judiciary is perceived by people.

In its current iteration, the practice of publishing resolutions definitely falls short of the threshold of transparency. The satisfaction of the stakeholders, with the transparency standards of an institution, is the crucial benchmark, and not that of the authorities who administer the institution.<sup>81</sup> The collegium's decision to publish its resolutions was the first step in the direction of making its functioning more transparent and in addressing the trust deficit it faces. It should not be a ceremonial step, but an effective one. It would be a wasted opportunity if the collegium does not use this platform to meaningfully address the issue of transparency and consequently, enhance the judiciary's credibility.

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opinion/indias-supreme-court-has-a-class-bias-and-it-takes-whatever-the-govt-says-at-face-value/430124/> accessed 4 January 2021.

<sup>79</sup> Mohan Gopal, 'The Supreme Court of India in 2020: The Year of Supreme Indifference' (*National Herald*, 2 January 2021) <<https://www.nationalheraldindia.com/india/the-supreme-court-of-india-will-be-remembered-more-for-what-it-failed-to-do-in-2020>> accessed 4 January 2021; Zaid Wahidi, 'SC Took Only 24 Days to Deliver Bhushan Verdict – Even as Kashmir, CAA Matters Await Decisions' (*Scroll.in*, 20 August 2020) <<https://scroll.in/article/970929/sc-took-only-24-days-to-deliver-bhushan-verdict-even-as-kashmir-caa-matters-await-decisions>> accessed 4 January 2021.

<sup>80</sup> Atul Dev, 'India's Supreme Court is Teetering on the Edge' (*The Atlantic*, 29 April 2019) <<https://www.theatlantic.com/international/archive/2019/04/india-supreme-court-corruption/587152/>> accessed 4 January 2021.

<sup>81</sup> Rawlins (n 20).