

Open court

In a welcome move towards transparency in the elevation, confirmation and transfer of judges, the Supreme Court has begun to upload the decisions of the collegium, and the reasoning behind them, at the time that its recommendations are forwarded to the government. This initiates transparency in a contested process, when the judiciary and the executive have been at loggerheads over the Memorandum of Procedure. A proactive move by the judiciary is preferable to a powerful executive imposing its will, and it will help to dispel the miasma of rumour which has sometimes surrounded judicial appointments.

A case in point is that of Justice Jayant M. Patel, the senior-most judge of the Karnataka High Court, who resigned following his transfer to Allahabad. Justice Patel, who had ordered a CBI inquiry into the 2004 Ishrat Jahan encounter case in Gujarat, was due to be elevated to acting chief justice in Karnataka High Court following the retirement on Monday of the incumbent, S.N. Mukherjee. A 1993 judgment makes it clear that consent for transfer should be taken "unless there exist pressing circumstances making it unavoidable". In addition, the circumstances must be in "public interest". Yet, given the collegium's opacity, there are no answers to this question: What were the "pressing circumstances" and "public interest" that necessitated Justice Patel's move to the Allahabad High Court?

In a 2015 judgement rejecting the proposed National Judicial Appointments Commission, the Supreme Court recommended improving the transparency of the collegium system. Now, details of recommendations concerning initial elevation to the higher judiciary, confirmation as permanent judges of high courts, appointments of chief justices, elevation to the Supreme Court and transfers of judges and chief justices are to be uploaded. The resolution ushering in this change seeks to "ensure transparency and yet maintain confidentiality in the collegium system".

The collegium's recommendations for appointments to the Kerala and Madras High Courts are already on record, and detail the process by which candidates were vetted. The documents cannot be faulted on detail, though they are procedural and do not provide blow by blow accounts. The criticism has been made that the details were uploaded after the collegium took the decision, and the recommendations were on their way to the government. But if the collegium were to publish prior to the decision, it would impugn the objective of confidentiality, which its resolution specifies. It may not be practical to seek more details, such as transcripts of conversations, because that would condition the conversations themselves with the observer effect. The transparency delivered by the system is enough to prevent appointments that are clearly ill-advised. The apex court deserves to be congratulated for taking this important step towards more openness.

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