

THE DINAKARAN IMBROGLIO: APPOINTMENTS AND COMPLAINTS
AGAINST JUDGES
By Prashant Bhushan

The Dinakaran episode has brought to the surface the vexed problem of the arbitrary and totally unsatisfactory manner of selecting and appointing judges as well as the unresolved problem of dealing with complaints of misconduct and corruption against judges.

These long simmering twin problems which lie at the heart of Judicial Accountability (rather, the lack of it), have erupted like a capped volcano, when the Forum for Judicial Accountability made several serious allegations against the Chief Justice of Karnataka, P.D. Dinakaran, after it became known that he had been recommended for appointment to the Supreme Court of India.

Normally, the secrecy and lack of transparency surrounding the appointment of judges of the higher judiciary ensures that citizens come to know of these appointments only after the Presidential notification is issued, announcing the appointments. However, this time, The Hindu newspaper got wind of the 5 appointments recommended by the Supreme Court Collegium (5 senior judges of the Supreme Court who have been assigned the power to select judges of the Supreme Court), which included the name of Justice Dinakaran. Soon after that, on 8/9/09, the Forum for Judicial Accountability, comprising of several senior and responsible Lawyers of Chennai (who had earlier successfully challenged the appointment of Justice Kannadasan as Chairman of the Tamil Nadu State Consumer Forum) wrote to the Collegium asking them to ensure that the recommended judges declare their assets before their appointments are notified. Simultaneously, they as well as several other senior and respected lawyers of Tamil Nadu approached the members of the Committee on Judicial Accountability (COJA) expressing serious misgivings about the integrity of Justice Dinakaran. COJA (in particular, Ram Jethmalani, Shanti Bhushan, Fali Nariman and Anil Divan all very senior and eminent jurists) wrote to the Collegium seeking a meeting with them. On 9th September, the Chief Justice met Fali Nariman and Shanti Bhushan where they apprised him of the complaints against Justice Dinakaran and handed over a detailed representation of the Forum for Judicial Accountability to the CJI.

The Forum followed it up with a further representation on 18/9/09 elaborating some of the Charges and adding some others. The Forum also wrote to the Law Minister and the Prime Minister as did COJA, asking them for a comprehensive and credible investigation into the charges. One of the charges was of him having acquired more than 300 acres of land in 3 villages of Tamil Nadu in his name, the name of his wife, daughter, and 4 companies. All these were incorporated on 23/8/01, with his wife, daughter and other close relatives as shareholders. It is also alleged that he has encroached upon another 150 acres of village common land as well as government land meant for distribution to landless dalit families. He had put all the more than 450 acres of land under a common fence. It was further alleged that he had acquired a lot of other expensive immovable property, including a commercial complex, in the name of his wife in 2001-2, where he is alleged to have recently spent over 2.5 Crores for

construction; a residential house in Anna Nagar, Chennai, in the name of his wife in 2004-5 for over 90 lacs.

There are several allegations about the ostensibly dishonest manner in which he dealt with a number of cases, in Tamil Nadu (while he was a judge there) and then as Chief Justice of Karnataka. In particular, there is an income tax case where he quashed the IT department's reopening of assessment of an assessee, (where the amount of tax and penalties involved were around 50 Crores) at the very first hearing, by falsely recording a concession of the Standing Counsel of the IT Department. The IT department in their appeal against Justice Dinakaran's order stated that the Standing Counsel had denied making any such concession and eventually the Division bench reversed Justice Dinakaran's order.

Then there are a number of cases involving mining leases in Karnataka, which were being heard by the bench at Dharwad because the mining areas fell within the territorial jurisdiction of the Dharwad bench. First, Justice Dinakaran withdrew these cases to himself by constituting a "Green bench" over which he presided and then withdrawing these cases on the basis that they involved mining in forest areas. He then proceeded to pass a series of very unusual orders, many for the benefit of the miners. In one case, he allowed a miner, Vinod Goel to lift over a lakh tones of iron ore on a writ petition filed by him in 2009, on the plea that he had mined the material prior to 1985 (when his lease had expired) and that he had not lifted the material for 24 years since the ore was worthless earlier! He passed several other suspicious orders in several other mining cases dealt with by his 'green bench'. All in all, the allegations form a formidable body of credible charges.

With the media getting wind of the representations against Justice Dinakaran, it soon became a full blown controversy, being played out in public glare. Coming as it did, on the heels of the Judges' asset declaration controversy, it was lapped up by the media, which after years of feeling suffocated by the fear of contempt of court, was now gleefully publicizing judicial scandals and controversies showing the lack of accountability of the judiciary.

Watching the brewing controversy from the sidelines so far, the Karnataka Bar which was not unhappy about the prospect of Justice Dinakaran being kicked upstairs, now got apprehensive about his staying back as the Chief Justice of Karnataka. On 17/9/09 the Advocates Association of Karnataka met in an emergency session and passed a resolution to the effect that Justice Dinakaran should desist from holding court in Karnataka till he was cleared of the charges against him. They threatened to boycott his court if he did not desist.

Members of COJA met the Law Minister on the 18th of September and asked him to get the Lok Ayukta of Karnataka (who happens to be a highly respected retired judge of the Supreme Court, Justice Santosh Hedge), to investigate the charges. They also asked him to consult Justices Katju and Ganguly of the Supreme Court who were Chief Justices of Tamil Nadu when Dinakaran was a judge there, and therefore should have been consulted in any case by the Collegium according to the Supreme Court's judgement in the Judges Appointment case.

As the COJA members were meeting the law Minister, a meeting of the Collegium is reported to have taken place to take stock of the situation. The collegium briefly considered how to deal with the representations, but reportedly could not arrive at any decision. They could not deliberate for long because the Chief Justice had to leave that evening for Australia. Justice Dinakaran who was to accompany him there, decided to recuse himself from the Australia trip in view of the fast paced developments, with the ground fast slipping from under his feet.

With such a major public furore on Justice Dinakaran's proposed appointment to the Supreme Court, there seems little doubt now that the collegium would be forced to consult Justices Katju and Ganguly. If they express a poor opinion of Justice Dinakaran's integrity, the chances are that the collegium would have to withdraw its recommendation re Justice Dinakaran. It would be exceedingly embarrassing for the collegium and the government to push through this appointment without a major scandal. But withdrawing his recommendation for the Supreme Court will still leave the problem of retaining him in Karnataka. What would happen if the Karnataka Bar makes good its threat of boycotting his court? Even transferring him to another High Court as Chief Justice might lead to the same problem there.

Eventually, there would be no option but to inquire into the allegations made by the Forum. But who would make the inquiry? Would the Chief Justice constitute an 'In-house' inquiry committee of 3 judges as done in a couple of previous cases? Would the public and the lawyers accept a committee constituted by a Chief Justice who had recommended Justice Dinakaran for elevation to the Supreme Court, and who is known to be his strongest backer? Unfortunately, there is no institution constituted by the laws in India to enquire into allegations against a judge. The only procedure under the Constitution to deal with judicial misconduct is impeachment, which needs to be initiated by a hundred MPs and has been found to be totally impractical and virtually useless. Even criminal investigations against judges have been barred by the Supreme Court through a judgement in Veeraswamis case, without the prior written consent of the CJI, which is hardly ever forthcoming.

The Dinakaran episode underlines the need to urgently put in place a Judicial performance (or Complaints) Commission, which could be entrusted with the inquiry of complaints against judges and empowered to take action against errant judges. This must be a full time body, independent of the government as well as of the judiciary, as opposed to an in-house Judicial Council, which is what the judiciary wants. Pandering to the sensitivities of the judiciary, the government proposed to institutionalize the in-house system through the Judges Inquiry Amendment Act 2006. This would however not work, for two reasons. Firstly, all in-house disciplinary bodies such as the Bar Council or the Medical Council have failed to rein in professional misconduct within their professions due to conflicts of interest. Moreover, sitting judges cannot be expected to devote adequate time to conducting such inquiries.

The Dinakaran episode also underlines the need to put in place a credible institution for the selection and appointment of judges. Earlier, when the power of appointment was with the government, judges were often being selected on partisan political considerations. After the judiciary took it over, by creatively reinterpreting the words, "appointed by the President in consultation with the Chief Justice of India", to mean,

“appointed by the collegium of judges in consultation with the President”, judges are being appointed on nepotistic considerations. One of the main reasons for the selections being arbitrary is the lack of any system. There is no criteria laid down for selecting judges. Though it is generally understood that we are looking for integrity and competence in a judge, it is not clear whether we are also looking for judicial temperament. And should we also not be looking for “an understanding and sensitivity to the problems of the common people in the country”?

The criteria for selecting judges needs to be discussed, debated and laid down. The method of measuring candidates against the criteria also needs to be formulated, as also the way of comparing merit among eligible or shortlisted candidates. None of this has ever been done. It is assumed that the members of the collegium can be trusted to pick out the best people without going through any of this exercise. But the collegium of sitting judges are so busy with their judicial work that they have no time to devote to this exercise. That is why one needs a full time body which can do this exercise of selecting judges, scientifically, fairly and transparently. Currently there is no transparency or public participation in the system. We need to put in place some system like the US system of confirmation hearings to ensure transparency and some degree of public participation in the appointments.

COJA had suggested that the Judicial Appointments Commission and the Judicial Complaints Commission could each be selected in the following manner: The Chairman selected by the collegium of all judges of the Supreme Court. Another member selected by a collegium of all Chief Justices of the High Courts. Another member selected by the Union Cabinet. Another member selected by the collegium of Leaders of opposition in the two houses of Parliament along with the Lok Sabha Speaker and the Chairman of the Rajya Sabha. A fifth member to be selected by a collegium of Chairman, NHRC, Chief Election Commissioner, Chief Vigilance Commissioner and the C&AG. Each member of each of the two Commissions would be full time members, having a tenure of 5 years, so that after their nomination by these collegiums, they could function independently of them. They would have an investigative organization under their control, through whom they could get the backgrounds of the prospective appointees or complaints against judges investigated.

Till we put in place a credible system of selecting judges and examining complaints against them, we will be seeing many more Dinakaran type episodes, each of which will contribute to the steady erosion of the integrity and public confidence in the judicial system. The lack of judicial accountability exemplified by the lack of a system of selecting judges and of dealing with complaints against them, has indeed led to the system gradually losing its integrity. The Campaign for Judicial Accountability is really a campaign for restoring the integrity of the Judicial System.