



## THREAT UNDERMINING INDEPENDENCE OF JUDICIARY

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### Abstract

Judiciary is one of the important pillars of democracy and to realise the true spirit of democracy the institute of judiciary must be independent. Independent judiciary means that the judges and the institute of judiciary are free from any kind of influence whether externally or internally. Independence of judiciary is necessary to ensure a system of checks and balances within different branches of government. People should have faith in justice delivery system of their country and this faith could be reassured by way of establishing a powerful and independent judicial system. The constitution makers envisioned a democratic nation through the guarantee of fundamental rights to its citizens and to guard and protect these rights an independent judiciary was established. Further, Supreme Court of India has time to time realised the need for its independence to protect the rights of people. However, this independence of judiciary is under threat now a days due to various factors. People's faith in judiciary is declining. This paper attempts to critically analyse some threats which are hampering the independence of judiciary. These threats are categorised into two broad headings which are external threats i.e. threats from the government due to which people lost their faith in system and government is using its power arbitrarily and other political and non-political organisation to serve to their

benefits, and internal threats which exist within the institute such as corruption and appointment through collegium which has resulted in nepotism to some extent. All these threats are eroding the very independence of judiciary and consequently hampering with the democratic spirits of the nation.

What is judicial independence?

We all somehow have a different meaning of independence. Is it not astonishing that there is a term "Fully Independent" as if the word independent did not in itself mean complete and absolute freedom? Black law dictionary defines independence as "not subject to control, restriction, modification or limitation from a given source".<sup>1</sup> Considering that there is no scope of conditionality or probability in the definition, why then is independence restrictive? This is extremely relevant when we talk about judicial independence. Judiciary being the backbone of a democratic country must be independent and free from all types of improper influences or supervision. Independent judiciary is the hallmark of democracy. The main reason to separate powers (i.e. Executive, Legislative and Judiciary) was to create a clear demarcation of powers assigned to each body and to maintain a system of checks and balances. It is difficult to come up with a standard definition of judicial independence as judicial independence is a concept which is perpetually developing with the changing needs of society and also with the change in the political atmosphere.

Judicial independence can be defined as the ability of individual judges and the judiciary

<sup>1</sup>Black Law's Dictionary



as a whole to perform their duties free of any influence or control by other actors.<sup>2</sup>

When we talk of judicial independence as an essential feature of a democratic nation, we need to understand what independent judiciary essentially means. Does it mean independence of judges or does it refer to the independence of the institution of judiciary? Actually, it means both.

Judicial independence means independence of all those who are responsible for imparting justice to the public at large i.e. the judges as well as the independence of judiciary as an institution. Neither could be preferred over the other. On one hand, if judicial independence is guaranteed at the institutional level but not at the individual level, individual judges can be forced to obey the wishes of the leadership of the judiciary, which may result in a less-than-wholehearted enforcement of the rule of law. In Chile and Japan, for example, the extent to which the judiciary as an institution commands obedience and conformity from its members has been blamed for producing timid judges who are unwilling or unable to rule against the government. On the other hand, if judicial independence is ensured at the individual level, individual judges will find themselves at liberty to pursue their individual preferences. Unchecked discretion of that kind not only invites abuse but also raises the likelihood that judges will decide cases in inconsistent ways, with the potential effect of undermining the predictability and stability of the law.<sup>3</sup>

Ideally, the Judiciary should work in a “political vacuum” for the benefit of the public at large because the judges are not directly or personally accountable to the legislation or to any political party. Political vacuum means that it should be free from all kinds of political interferences and should not propagate political agendas. Neither any political party nor the government should have any say in the working of the judicial institution. It could be debated that “political vacuum” is only possible in theory and not in practical world considering the leakage of power dynamic in every institution. However, the least we could do is to minimize the interference of only the government executives and that too to a limited scenario.

The common man notion of independent judiciary is that it must be free from governmental actors. However, if we take the broader perspective, it does not necessarily mean independence from Government only, it has to be independent from all kinds of economic and sectional interests. Many times, the much-vaunted independence from government may cleverly conceal partiality towards another particular interest. A judge has to be independent of himself. He should be shielded from the public opinion and should be able to deliver justice impartially and based on law.

In short, judicial independence means that judiciary must be insulated against and protected from sources of direct or indirect influence, coercion, threat or harassment from government, politicians, persons in

<sup>2</sup>Mia Swart, Independence of the Judiciary, Oxford constitutional Law (Feb. 05, 2020, 21:27), <https://oxcon.oup.com/view/10.1093/law-mpeccol/law-mpeccol-e339>

<sup>3</sup> David S. Law, Judicial Independence, Britannica (Feb. 05, 2020, 8:25 PM), <https://www.britannica.com/topic/judicial-independence>



authority, relatives, neighbours, interested parties, fellow judges, chief justices, judicial bodies, organizations or any private individual.

Why is judicial independence important?

To safeguard the ideal enshrined in the preamble of our constitution that is the sovereign, socialist, secular, democratic, republic and to secure all our citizens Justice, liberty, equality and fraternity it is important to maintain eternal vigilance to safeguard the independence of our judiciary which is the true foundation of a real democracy.

The concept of an independent judiciary exists for the benefit of citizens and not that of the judges. Judges are obliged to decide issues arising out of a dispute between two parties. In a trial before the judge there will always be a winner or a loser and one may or may not be pleased with the judgement. Our system of law believes in the concept of a fair trial and not in the concept of a favourable outcome. Judges' duty is to take into consideration the law of the land and the aspiration of nation and public at large.

An independent judiciary is not an end but is a means to an end. Our end goal is to have a fair and impartial justice system and an independent judiciary aids us in achieving this end. Some may say that this goal is impossible to achieve because justice depends upon the conscious of an individual judge and consciously or unconsciously a judge may be biased in his approach based on his personal lifetime experiences but when we speak of fair and impartial justice, we must ensure that these personal lifetime experience of judges have a less impact on

them and they should be impartial towards dealing with different cases we have to restore the faith of citizens in our justice system. Around 17766 cases are filed in India every day. This could mean two things, firstly we as a society have a lot of unresolved problems and secondly that we still have immense trust in our justice system to provide us an adequate solution. It could be concluded that even during these tough times, the citizens have considerable amount of faith in Judiciary but, people are beginning to lose faith due to influence of other external factors upon judiciary. To safeguard this faith of people on our justice delivery system it becomes very important to ensure an impartial and independent judiciary. Citizens should feel that they were dealt with fairly, that they received a fair trial, and a fair hearing. If this faith is lost the common objective of justice system will cease to exist. Judicial independence is important because it guarantees that judges are free to decide honestly and impartially, and in accordance with the law and evidence, without concern or fear of interference, control, or improper influence from anyone.<sup>4</sup> If the faith of people towards judiciary has been eroded, the basic concept of justice would be at stake.

Many jurists have emphasised on the importance of independent judiciary time and again. At the inaugural session of Supreme Court of India 28<sup>th</sup> January 1950, the First Chief Justice of India Harilal J Kania said that "political consideration should not influence appointments to the bench"<sup>5</sup>

Alexander Hamilton wrote in *The Federalist Papers* that "[t]he complete independence of the courts of justice is peculiarly essential in

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[https://www.bccourts.ca/documents/Why\\_is\\_Judicial\\_Independence\\_Important\\_to\\_You.pdf](https://www.bccourts.ca/documents/Why_is_Judicial_Independence_Important_to_You.pdf)

<sup>5</sup>Supreme Court takes seat: Simple ceremony at Delhi, Times of India.1950 Times of India, Jan. 29, 1950, P.3



a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”<sup>6</sup>

To secure the democratic principles of our constitution and to control the arbitrary use of power by other organs of the government, independent judiciary is necessary. Super as citizens must see to it that there should not be any circumstances which hampers the independence of judiciary so that our interest could be protected.

Views of constitutional makers on judicial independence?

Even during the Constituent Assembly Debates, our constitution makers had repeatedly focused on the need for an independent judiciary. They expressed their strong opposition against any kind of political interference in judicial matters and institution of judiciary. Though they wanted to have the system of checks and balances they would have never envisaged so much of political interference as we are experiencing today.

Jawaharlal Nehru evidently expressed his concern of executives controlling the judiciary wherein he said that the executive being the appointing authority of the

judiciary will begin to appoint judges of their own liking for getting decisions in their favor.<sup>7</sup>

Naziruddin Ahmed objected to the need for approval by the executive in regards to the administrative matter of the court in its judicial functions. “The President for all practical purposes will mean the ministry or the government of the day. The Supreme Court with whom vests the supreme authority of the judiciary should be absolutely independent of the executive in its internal matter”<sup>8</sup>

Z.H. Lari had expressed a similar opinion as that of Mr. Ahmad. He was of the opinion that “the necessity of having the approval of the President is in a way interference by the executive with the judiciary. The Supreme Court shall be competent enough to frame all the necessary rules and there is no necessity of securing the previous approval of the president”<sup>9</sup>

Shibbanlal Saxena while discussing about the appointment of judges of the Supreme Court had clearly stated that the Chief Justice of the Supreme court shall be completely independent of the executive and the highest tribunal of justice should be above suspicion and no executive should be able to have influence upon him. He also proposed that Chief Justices of High Court should be appointed on the advice merely of the Chief Justice of the Supreme Court so that they may

<sup>6</sup> Justice Sandra Day O’Connor, The importance of judicial independence, Stanford Lawyer(Feb. 05, 2020, 21:32), <https://law.stanford.edu/stanford-lawyer/articles/the-importance-of-judicial-independence/>

<sup>7</sup>Constitution Assembly Debates, Volume 8, [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/8](https://www.constitutionofindia.net/constitution_assembly_debates/volume/8)

<sup>8</sup>Id.

<sup>9</sup>Id.



derive their authority from the Chief Justice and not the Executive.<sup>10</sup>

These views of our Constitutional makers certainly narrate their vision of the Judicial System in independent India.

### ***The Supreme Court's view on judicial independence***

The Supreme Court being the highest court of justice in India has time and again emphasized the importance of Judiciary from all kinds of external factors. The Supreme Court has opined his view in the famous three judges' case.

Following are the three cases:

#### ***First Judge Case***

S.P. Gupta v Union of India, 1982 (famously known as First Judge case or Judges' transfer case)<sup>11</sup>

The primacy lays with the executive. It was laid down that in Clause 1 of Article 217 of the Indian Constitution the word consultation does not mean concurrence. Clause 1 Article 217<sup>12</sup> reads as follows (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years Provided that

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India<sup>13</sup>

Justice Bhagwati propounded the rationale for the said interpretation as follows "The power of appointment of Judges is not interested to the Chief Justice of India or the Chief Justice of the High Court because they do not have accountability to the people and if any rule or improper appointment is made they are not liable to account to any one for such appointment". This Judgement had struck down the independence of Indian Judiciary. There was general dissatisfaction with the appointment being made.<sup>14</sup>

*The Second Judge Case: Supreme Court Advocates on Record Association vs Union of India, 1993*<sup>15</sup>

A nine judge Constitution Bench Overruled the decision of S.P.Gupta, through this judgement the court corrected their mistakes by reducing both political and executive interference . 'Primacy' to appoint judicial members and 'best equipped' to appoint judicial members these two factors were the center of controversy those days. The elected government or the judiciary themselves who is to be considered apt for this role? The vagueness of Article 124 added more fuel to this ongoing debate. The Constitution gives President of India the power to appoint

<sup>10</sup>Id.

<sup>11</sup>S.P. Gupta vs Union of India, AIR 1982 SC 149.

<sup>12</sup>Indian Const. Article. 217

<sup>13</sup>Indian Const. Article. 224

<sup>14</sup>S.P. Gupta vs Union of India, AIR 1982 SC 149.

<sup>15</sup>Supreme Court Advocates on Record Association vs Union of India, Writ Petition (Civil) 1303, 1987.



Judges of Supreme Court “after consultation with such judges of the Supreme Court and of the High Courts”. Also, the appointment of Judges of High Court is done by the President “after consultation with the Chief Justice of India, the Governor of the State and. the Chief Justice of High Court”<sup>16</sup>

The judgement of the Second Judge case held that the Chief Justice of India has a primacy in the matter of appointment of Judges, but the Executive also has a considerate role in appointment. Supreme Court explicitly stated that the decisions on appointment of judges should be mutual and neither Judiciary nor executive will have an upper hand in the appointment process. The Judgement not only mentioned the Executive and Judiciary powers but also went ahead and distinguished amongst the role of Chief Justice of High Court and Chief Justice of India during the appointment process.<sup>17</sup>

### *Third Judge Case*<sup>18</sup>

The said case raised 9 prominent questions, contending almost every aspect of Judiciary and its independence. Both the First Judge case and the second Judge Case were taken into consideration. This is considered to be the most important opinion delivered by the Supreme Court in regards to judicial independence. The issues raised were as follows;

1. Whether Article 217(1) and 222(1) means “consultation” with a plurality of Judges in the formation of the opinion of the Chief Justice of India or “consultation” is the sole opinion of the Chief Justice of India? Supreme Court stated that “consultation” in

the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India.

2. Whether the transfer of Judges is judicially reviewable or is there a limitation on judicial review with respect to matters of transfer? Supreme Court held that the transfer of Judges is judicially reviewable only to an extent that the recommendation that has been made by the Chief Justice of India without consultation with the four senior-most puisne Judges of the Supreme Court.
3. Whether article 124(2) of the Constitution of India requires the Chief Justice of India to consult only the two senior-most Judges or whether there should be wider consultation according to past practice? Supreme Court clarified that in case of appointment of Supreme Court Judges consultation with 4 senior-most judges is required and in case of appointment of High court Judge consultation with 2 seniors most judges is sufficient.
4. Whether the Chief Justice of India can act in his individual capacity, without consultation with other Judges of the Supreme Court in regards to materials and information conveyed by the Government for non-appointment of a Judge recommended for appointment? Supreme Court refrained the Chief Justice of India from acting in his individual capacity and advised him to consult with other Judges of Supreme Court.
5. Whether the requirement of consultation by the Chief Justice of India with his colleagues, who are likely to be conversant with the affairs of the concerned High Court refers to only those Judges who have that High Court

<sup>16</sup>Indian Const. Article. 217

<sup>17</sup>Supreme Court Advocates on Record Association vs Union of India, Writ Petition (Civil) 1303, 1987.

<sup>18</sup>In re. Special Reference 1 of 1998, AIR 1999 SC 1: (1998) 7 SCC 739



as a parent High Court and excludes Judges who had occupied the office of a Judge or Chief Justice of that Court on transfer from their parent or any other Court? Supreme Court stated that the requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those Judges who have that High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.

6. Whether justification is required in case of departure from general order of seniority? The Supreme Court held that only a positive reason of recommendation is required. The Judges are not obligated to provide reasoning for any departure.
7. Whether the Government is entitled to require the opinions of the other Judges in writing in accordance with the Supreme Court judgment and that the same be communicated to the Government of India by the Chief Justice of India along with his views? Supreme Court stated that the view of the other Judges consulted should be in writing and should be transmitted to the Government of India by the Chief Justice of India along with his opinion.
8. Whether the Chief Justice of India has an obligation to comply with the norms and the requirement of the consultation process in making his recommendation to the Government of India? The Supreme Court held that the Chief Justice of India is strictly obliged to comply with the norms.
9. Whether recommendations made by the Chief Justice of India are binding upon Government of India, even if the

recommendation is without complying with the procedure? The Supreme Court explicitly expressed that any such recommendation will not be binding on the Government of India in any manner.<sup>19</sup>

This case highlights that the Supreme Court has put its trust on the existence of an independent judiciary, however in the course of this paper we will also see that the system of appointment has some fault within it.

### Threats to an independent Judiciary

The concept of an independent judiciary is very crucial to the functioning of a democratic nation yet very difficult to achieve in a practical sense. Various ills and evils are threatening this independent nature of the judiciary. Some factors are at the forefront and received a lot of criticism, whereas others have not received much attention of the critiques, and therefore seeped into the system to such an extent that now it becomes very difficult to eliminate those. We can categorize these factors into two broad headings:

- a) External factors: it includes the outside forces i.e. role of government in hampering judicial independence or the interference of other political or non-political organizations, etc.
- b) Internal factors: these are the internal matters of the institute of judiciary such as corruption, economic and social interests of the judges or their personal biases, etc.

We will discuss these factors in detail in the following section.

#### *I. External Factors*

<sup>19</sup>M A Rashid, Supreme Court Guidelines and Precedents, Universal



First, let us consider the external factors which hamper the independence of the judicial institution. It includes interference of the government that is the legislative and the executive, influence of political parties and the non-political organisations. It is said that the judiciary should be safeguarded from those who have a high stake in its decisions. Any political party may use the judiciary to fulfill its political agendas, therefore it becomes important to protect it from political pressure.

The present-day government may also exercise control over the judiciary in many forms such as appointments to the higher judiciary and transfers. Fixation of service conditions and provisions of facilities like housing, transport, etc.; appointments to various tribunals, commissions and posts after retirement are some of the ways to provide them benefits and hence existing control over them. Therefore, due to these factors a judge may wish to appease the government to avail other benefits. His decisions are influenced by political ideologies of the government, though he may not agree to such ideologies but for receiving those post-retirement benefits when he accedes to the policies of government.

The Government may also indulge in retro-active legislation and legislative decision to revert an unfavorable judicial decision or to forestall it. The common example of this may be the passing of THE MUSLIM WOMEN (*PROTECTION OF RIGHTS ON DIVORCE*) ACT, 1986. The Rajiv Gandhi government tried to nullify the impact of the Shah Bano case by inserting contradictory provisions. In *Shah Bano vs. Imran Khan* the

SC has held the secular principle for the protection of Muslim women. In the Supreme Court's decision in the said case it was held that a Muslim woman who was unable to maintain herself is entitled to maintenance from her husband even after the iddat period under section 125 of CrPC as against the Muslim personal laws where she is not entitled to be maintained after the iddat period.

Section 3 (1) (a) of the act made the following provision

- 1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to<sup>20</sup>

though the following provision has been interpreted broadly by the judiciary in *Daniel Latifi vs. Union of India* where the court laid down that this provision should be interpreted keeping in mind the previous judgment of the court and the word 'within Iddat period' should be read as during iddat period and husband has to maintain his wife during iddat period and also after that under section 125 of CrPC<sup>21</sup>, yet Prima Facie this provision laid down same provisions as that of Muslim personal laws. The reason for this act of government may be appended to their vote bank politics to appease one religion.

### ***Confrontation between Government and Judiciary***

In today's time one can make a fine distinction between matters where political stakes are involved and the matters where political stakes are not involved. The question arises why is there a distinction? Is such distinction beneficial for the public at

<sup>20</sup>THE MUSLIM WOMEN (*PROTECTION OF RIGHTS ON DIVORCE*) ACT Sec 3(1)(a)

<sup>21</sup>*Daniel Latifi vs. Union of India*, Writ Petition (Civil) 868, 1986



large? Or are these distinctions serving a political agenda?

Is there a common thread between Sahara-Birla, Bhima-Koregaon, Rafale, Aadhaar, Loya, Money Bill or between Ram Mandir Case, Triple Talaq Judgement? Is the alarming similarity between cases such as Abrogation of Article 370, Citizenship Amendment Act, Petition challenging Demonetisation and Electoral bonds evident to the public?

It could be a mere coincidence that agendas stated in the mandate of the ruling party and the decisions of Supreme Court comes at the same time. But the unprecedented press conference called by 4 Senior Supreme Court Judges directs otherwise, the Judges handed over media a letter stating “cases having far-reaching consequences for the nation and judiciary were selectively assigned to benches of preference without any rational basis”<sup>22</sup>. Justice Kurian Joseph, post retirement publicly spoke about the outside influence on the Chief Justice of India. This creates suspicion not only regarding the time when the judgement was delivered but all the other aspects comes under scrutiny such as the bench of judges, duration taken to deliver judgement, the approach of the judges. Prashant Bhushan, a senior lawyer in Supreme Court alleged that the government was blackmailing Misra political sensitive cases are being assigned to hand-picked benches with no senior judge on them so that the desired outcomes are achieved. He reaffirmed that the Chief Justice is clearly working under government pressure<sup>23</sup>

<sup>22</sup>Manu Sebastian, How Has the Supreme Court Fared During the Modi Years?, The Wire (Feb. 05, 2020, 20:32 PM), <https://thewire.in/law/supreme-court-modi-years>

## II. Internal Factors

Internal factors which are responsible for the erosion of the independent nature of the judiciary includes all those elements which constructs a judge’s personal approach and all those factors which corrode the image of the judiciary as a whole as an impartial institute and makes it a bargaining counter.

### • Corruption

The problem of corruption in the judiciary has taken many forms. It has to be taken a more serious note of, than in any other branch, and cannot be excused on the grounds that judges are bound to be affected sooner or later by the general phenomenon. Corruption in court may take many forms, direct or indirect, subtle and not so subtle, at the Judges level or unknown to him at the ministerial level below him, everything which is calculated to influence the Judge comes under this category.

Corruption also works in insidious ways. Favoring the form of lawyers which send briefs to the judges’ relatives, if they are practicing in the same or other court or courts, favoring the juniors or other associates of the Judges’ kith and kin, trying to be popular with the dominant section of the bar to earn their praise, trying to favor lawyers and law firms with a view to earn briefs or arbitration or opinion work after retirement are some to the damaging modes of corruption.

Prashant Bhushan, senior lawyer in December 2009 in the affidavit in response to the notice of contempt issued by Supreme

<sup>23</sup>Atul Dev, India’s Supreme Court Is Teetering on the Edge, The Atlantic (Feb. 05, 2020, 20:35), <https://www.theatlantic.com/international/archive/2019/04/india-supreme-court-corruption/587152/>



Court stated that out of the last sixteen to seventeen Chief Justices half have been corrupt and he also provided evidence to support his statement.<sup>24</sup>

The former Judge of the Calcutta High Court Justice Soumitra Sen was impeached by the Rajya Sabha for misappropriation of funds in 2011. He became the first judge in India to be impeached.<sup>25</sup>

Anupam Gupta a member of the Bar Association, a prominent lawyer and a legal columnist spoke at the meeting for the Bar Association of the Punjab and Haryana High Court on August 28<sup>th</sup> 1993 “No system of Justice, it has been said, can rise above the ethics of those who administer it when abuse of judicial power outgrows individual aberration and becomes an institution lifestyle, when judicial corruption ceases to be a mere rumor and develops into a universal perception, then judges scramble for ministerial favor and perks and state government and chief minister acquire greater clout over the court than the court has over them under the constitution. It becomes a moral and constitutional imperative to take action, in the celebrated lines of President Roosevelt, to “save the constitution from the court and the court from itself”<sup>26</sup>

Some of the recent examples in this regard could be recalled. In March, 2019 a former Supreme Court judge had made allegations on relatives of the then Chief Justice of India,

<sup>24</sup> Prashant Bhushan, My honest and bonafide perception, Outlook India (Feb. 05, 2020, 20:38), <https://www.outlookindia.com/website/story/my-honest-and-bonafide-perception/263230>

<sup>25</sup> Motion for removal of Justice Soumitra Sen [https://rajyasabha.nic.in/rsnew/Soumitra\\_Sen\\_Judge.pdf#page=409](https://rajyasabha.nic.in/rsnew/Soumitra_Sen_Judge.pdf#page=409)

<sup>26</sup> K. Mahesh & Bishwajit Bhattacharyya, Judging the Judges (1999).

Justice Gogoi for corruption and that they were taking bribes from the parties.<sup>27</sup> A FIR has been filed in CBI against justice SN Shukla from Allahabad High Court for favoring unjust admission process in a medical college in Lucknow in 2017-18 batch.<sup>28</sup>

The evil of corruption has taken over the judiciary and it is high time now for the caretakers to curb this evil and progress towards a better nation.

#### ● Faulty appointment mechanism

The judges to the higher judiciary are appointed through the system of collegium in which senior most judges of the Supreme Court have the power to appoint/elevate judges to the Supreme Court and to transfer the judges of High Court and Supreme Court. It consists of the Chief Justice and four other senior most judges of the Supreme Court. The foundation of this system has been laid in the three judge cases as discussed earlier. The power is vested in only one organ of the government and in such cases the chances of misusing it is more rampant and this is what is happening in our judicial system.

Dr. B.R. Ambedkar expresses his concern over the collegium system, though it was not a concept of collegium during those time but he described it as system of judges selecting judges, “to allow the Chief Justice practically a veto upon appointment of Judges is really to transfer the authority to the chief Justice

<sup>27</sup> Atul Dev, India’s Supreme Court Is Teetering on the Edge, The Atlantic (Feb. 05, 2020, 20:35), <https://www.theatlantic.com/international/archive/2019/04/india-supreme-court-corruption/587152/>

<sup>28</sup> Pradeep Thakur, Govt gives collegium ‘proof’ of nepotism in picks for HC judges, Times of India, Aug. 1, 2018



which we are not prepared to vest in the President or the Government of the day”.<sup>29</sup>

Justice Rang Nath Pandey of Allahabad High Court said, in his letter to PM Narendra Modi, that this system of appointment is very unfortunate. In the same letter he claimed that only criteria for selecting judges through collegium is nepotism and casteism. He also alleged that appointments are done in close chambers over cups of tea.<sup>30</sup>

These are the serious issues highlighted by Justice Pandey which demands immediate cognizance.

In 2013, the collegium of the Punjab and Haryana High Court — comprising the then chief justice (now Supreme Court judge) AK Sikri and justices Jasbir Singh and SK Mittal — had recommended the names of eight advocates to be promoted to the high court. The lawyers recommended for elevation were Manisha Gandhi (daughter of former chief justice of India AS Anand), Girish Agnihotri (son of former justice MR Agnihotri), Vinod Ghai and BS Rana (former juniors of Justice SK Mittal), Gurminder Singh and Raj Karan Singh Brar (former juniors of Justice Jasbir Singh), Arun Palli (son of former justice PK Palli) and HS Sidhu (additional advocate-general in Punjab)<sup>31</sup>

One-third of 33 senior advocates recommended for judgeship in India’s largest

high court — the Allahabad high court — are blood relatives of sitting or former Supreme Court judges or judges of the Allahabad high court. The list of 33 names allegedly includes the brother-in-law of a sitting Supreme Court judge and the first cousin of another judge. Sons and nephews of former Supreme Court and Allahabad high court judges have been recommended for judgeship apart from a senior advocate, who is a law partner of the wife of a senior Delhi politician.<sup>32</sup>

Also, we cannot shift this power to the executives as the history clearly demonstrates misuse of this power to serve the political benefits. Some of the Examples

#### Controversies:

- 1) January 1997 at the time of supersession of Justice Khanna by Justice Beg and the other in February 1978 at the time of the appointment of Justice Chandrachud to that August post. The formal supersession was explained away by the fact that Justice Khanna would have served for a very short term as a chief Justice, though earlier Judges were appointed to that post for a shorter period than Justice Khanna would have got. In the latter case 2 public men and advocates, joined in by no less a person then Late. Shri M.C.Chagla, opposed the

<sup>29</sup>Santosh Paul, Appointing Our Judges (2016)

<sup>30</sup>Aditi Singh, Collegium fraught with opaqueness, favouritism: Allahabad HC judge writes scathing letter to PM Narendra Modi, Bar and Bench(Feb. 05, 2020, 21:21 PM),

<https://www.barandbench.com/news/collegium-favouritism-justice-rang-nath-pandey-allahabad-high-court-narendra-modi>

<sup>31</sup>Shishir Tripathi, Supreme Court yet to acknowledge nepotism in judicial appointments, even as Centre seems intent on curbing it, First Post (Feb. 05, 2020,

20:43

PM),

<https://www.firstpost.com/india/supreme-court-yet-to-acknowledge-nepotism-in-judicial-appointments-even-as-centre-seems-intent-on-curbing-it-4871401.html>

<sup>32</sup> Olav Albuquerque, Nepotism hovers on India Judiciary, First Post (Feb. 05, 2020, 20:46 PM), <https://www.freepressjournal.in/analysis/nepotism-hovers-on-indian-judiciary-olav-albuquerque>



appointment of both Justice Chandrachud and Justice Bhagwati for no other reason than their decision in the Habeas Corpus Case.

- 2) In 1977, when Justice D.A. Desai who was then 5<sup>th</sup> in the seniority list of the Gujarat High Court was appointed as the Supreme Court Judge as if there were no such supersessions earlier.
- 3) When Justice Krishna Iyer, then the 6<sup>th</sup> and 7<sup>th</sup> puisne judge in the Kerala High Court, was appointed to the Supreme Court, he was 106<sup>th</sup> in the All India Seniority list of the High Court Judges no controversy was evoked by the said appointment.
- 4) In a recent case, when Justice Muralidhar expressed his anguish over failure of Delhi Police to register FIR against political leaders for making hate speech, the Centre notified the transfer of Justice Muralidhar to Punjab and Haryana High Court.

An attempt is made upon the citadel of justice that Judges will be appointed or preferred only when they are willing to toe the line of the executors and if they do not do so they will be shown the boot.

N.A. Palkhiwala “If the whole chapter of fundamental rights were to be deleted, the damage to the future of democracy and civil liberties would not be so great as would ensue for fragrant erosion of Judicial independence. The final guarantee of the citizens’ rights is not the constitution but the personality and intellectual integrity of the Supreme Court Judges”<sup>33</sup>

Justice HR Khanna former Judge of Supreme Court “in the context of independence of judiciary the appointment of the judge of the

Supreme Court merits special consideration. In view of the special rule which has been assigned to this court under the scheme of the constitution it is essential that only persons of the highest caliber are appointed judges of the court and that no other factor except that of merit alone should weigh in the matter of appointment. The law laid down by SC constitutes the law of the land. The fact that the court sets as the court of appeal against the judgement of the High Court makes it necessary that the judges of the supreme Court should be persons of high eminence and stature and command; such great esteem that even when the judgement of the high court is reversed on appeal by the supreme Court, the judges of the High Court should have a feeling that it has been done by a court which is not only higher court in legal sense of the term but also because it is composed of the judges whose acumen is, by and large, acknowledge to be superior to that of High Court Judges.

Could this be the “beginning of the downfall of judiciary”?

### Conclusion

If all these dynamics are to be changed it becomes important to provide for an independent body namely Judicial Commission which should be responsible for the appointment, transfer and conduct of the Judges. It should be made responsible for investigation and prosecution of judges on the charges of corruption and judicial misconduct. The commission should see to it that judges are performing their duties efficiently and be required to publish annual reports mentioning all the statistics of pendency and disposal of the cases. This

<sup>33</sup>K.S. Hegde, Crisis in Indian Judiciary (1973)



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would ensure an independent judicial system along with adequate supervision on the same.

To ensure independence of the judiciary and its freedom from any external pressure or internal influences, more rigid safeguards are needed to ensure the impartiality of judges and for the benefit of the nation. Suggestion by the Fourteenth Law Commission of India had barred the Judges of the Supreme Court and the High Courts from accepting any employment under the union or the state after retirement and the appointment procedure of the Judges of High Court should be modified so that the state executive has a lesser voice in the selection of judges

“Take away the impartiality of judiciary from judiciary and you take away the judiciary itself”

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