THE PLIGHT OF THE INDIAN JUDICIARY

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ABSTRACT

From being plundered under the Raj to being able to breathe as a Democracy and drafting a ‘magnum opus’ of a constitution, India, that is Bharat, has surely trailed a long way. However, there’s one organ of the establishment that has persisted even when atrocities lurked around the nation. That one machinery, irrespective of its correctness, has deemed to be perpetual to this country. Certainly, The Judiciary, well-known as the Interpreter of the Law of the land. This justice-delivery machine not only has aspired to shield the sanctity of the legal system, but also has gained a reputation in the eyes and mind of the people it solemnly affirms to guard. The hopes and aspirations of the people are best addressed by the quality of justice that its established judiciary is capable of delivering. In order to maintain this plausibility, Its independence comes out as a prerequisite. This paper shall lay emphasis on this particular notion of ‘Independence’ that remains inseparable whenever Judiciary is to be talked about. The journey of Judiciary as an organ of our beloved democracy, the quagmire it has dwelled in, the coveting acts of its fellow organs to encroach its realm.

INTRODUCTION TO THE INDIAN JUDICIARY

India has a quasi-federal\(^1\) structure with 29 States further sub-divided into about 445 administrative Districts. However, The Judicial system has a unified structure, a single-integrated Judiciary; The Supreme Court, the High Courts and the lower Courts constitute this structure. This unified-pyramidal character\(^2\) outshines as a prominent feature of the Indian Constitution, being in contradiction to the American and Australian models. The firm stance India’s courts have taken in upholding the values enshrined in its detailed and eloquent Constitution is universally recognised. Operating in one of the world’s most populous nations, it made serious efforts to turn access to justice into a reality and provide individuals with the tools to exercise their rights more effectively.

India comprises of a pluralistic society. Such a country, being large and diverse must have a system where the local initiative and a strong centre are blended. India has thus created a federal structure with a strong central government. The existence of The Indian Constitution is rooted in its freedom struggle which aimed for not only political independence, but also for social justice and sought to bring about a socio-economic revolution with rule of law. In the constitutional scheme, the judiciary occupies a pivotal position. The judiciary is the guardian angel of the Constitution and the vehicle which would help bring about the social revolution which the Constitution strives for.

“The judiciary was seen as an extension of the Rights, for it was the Courts that would

\(^1\) Federal Government by K.C. Wheare, 1951

\(^2\) Commentary on the Constitution of India” by P.K. Majumdar, R.P. Kataria. P.1633

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give the Rights force, the Judiciary was to be an arm of the social revolution upholding the equality that Indians had longed for during colonial days, but had not gained."³

The Constitution incorporates several provisions regarding the judiciary, which provide for:

1. The establishment of the Supreme Court of India, its constitution, organisation, constitutional jurisdiction and powers, qualifications for the appointment of judges, method of appointment, their conditions of service and security of tenure.⁴

2. The establishment of a High Court for each state or for two or more states, its constitution, organisation, constitutional jurisdiction and powers, qualifications for appointment of judges, method of appointment, their conditions of service and security of tenure;⁵

3. The vesting of effective administrative control in the High Court, over the subordinate judiciary, and in the matter of recruitment of personnel to the judicial services.⁶

The Supreme Court as the highest court of the country came into existence on the 26th January 1950, i.e. the date of commencement of the Constitution. Under the Constitution, the SC is the highest court of civil and criminal appeal and is also vested with original and advisory jurisdiction. The Court occupies a most vital and exalted position under the constitutional set-up, entrusted with the power to interpret and finally decide on all matters and disputes pertaining to the state, its various organs and the people of India. Further, its decision is binding on all courts throughout India. The High Court established for each state or groups of states, in relation to that territory, constitutes the highest Court of Civil and Criminal Appeal, review and revision. The Court is also invested with original jurisdiction to issue prerogative writs for enforcement of rights given to individuals under the Constitution and the laws.

India practices constitutional governance by rule of law. Be it legislature, executive or judiciary, all are the brainchild of the Constitution of India, 1950. In this democratic arena, the judiciary happens to be an impartial umpire that resolves conflicts within the boundaries demarcated by a Written Constitution.⁸

"Judiciary is the one of the three wings of the State that certainly has succeeded to inherit a privileged position from the words of the Constitution and spirit of the people that is beyond the reach of the other two wings namely the executive and the legislature."¹⁰

INDEPENDENCE OF JUDICIARY

"The principle of complete independence of the judiciary from the executive is the

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³ The Indian Constitution: Cornerstone of A Nation by Granville Austin (1999)
⁵ Article 214-231.
⁶ Article 233-237.
⁷ Introduction to the Law of Constitution by A.V. Dicey (1885) ; The Rule of Law Doctrine
⁹" Judiciary still the most trusted wing", the Hindu, May 09,2000
¹⁰ M.C. Setalvad Memorial Lecture delivered by Hon’ble Shri R.C. Lahoti, ChiefJustice ofIndia at The Gulmohar Hall, India Habitat Centre, Lodhi Road New Delhi On Tuesday, 22nd February, 2005
foundation of many things in our island life.....The Judge has not only to do justice between man and man. He also-and this is one of the most important functions considered incomprehensible in some large parts of the world-has to do justice between the citizens and the state.

- Winston Churchill

The framers of the Indian Constitution have formulated a proper synthesis between the British principle of Parliamentary sovereignty and the American principle of Judicial Supremacy.11 This blend brings out another vital facet of the basic structure of the Constitution which is an integrated and independent judiciary.12 Another notable feature of the Indian Constitution is that it accords a dignified and crucial position to the judiciary in India.

The existence of a Fearless and independent judiciary is thus founded in the constitutional structure in India. In the celebrated decision of the Supreme Court in S.P. Gupta v. Union of India13, the court held that:

“The concept of independence of the judiciary is a notable concept which inspires the constitutional scheme and constitutes the foundation on which the edifice of our democratic polity rests. If there is one principle which runs through the entire fabric of Constitution, it is the principle of the rule of law under the Constitution; it is

the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law thereby making the rule of law meaningful and effective”.

An independent judiciary is necessary for a free society and a constitutional democracy. It ensures the rule of law and realisation of human rights and also the prosperity and stability of a society.14 The objective of justice is deeply imbued in the Preamble of the Constitution of India. In fact, the judiciary does not only dispense justice between one individual and the other or between one group of people and the other, it also does justice in the controversies arising between individuals and States, also two or more States. All the above responsibilities can be discharged only when the country has an authoritative, independent and impartial judiciary.15

Then again, making its intention more concrete about the independence of judiciary, the Court held that:

“...The constitutional scheme aims at securing an independent Judiciary which is bulwark of democracy. ”16

This aspect of ‘Independence’ is not limited to the segregation of powers amidst the different organs of the life of democracy but it also plainly asserts that judges must be independent and free of their colleagues and

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12 Emphasising on the importance of judiciary in a democracy and good governance, Senior advocate of the High Court of Karnataka - S.P. Shankar.
13 1982(2) SCC 831
14 see also K. T. Shah, CONSTITUENT ASSEMBLY DEBATES, vol. VIII, 218-19
superiors in discharge of their judicial functions. The independence of the judiciary is a part and parcel of the discipline of law and of the eco-system of a constitutional state.

Independence of judiciary majorly depends on some several conditions like:

• Mode of appointment of the judges
• Security of their tenure in the office
• Adequate remuneration and privileges
• Jurisdiction of courts over all issues of judicial nature
• Principles of non-interference by other branches of government in judicial functions
• Entitlement of judges to certain entitlement of judges to certain fundamental freedoms, qualifications, selection and training of judges, their tenure, posting, promotion, transfer, immunities, privileges, disqualifications, discipline and removal and court administration.

SAFEGUARDING THE TENURE

If a judge's tenure is at the mercy of political masters, then it will have an adverse effect on the administration of justice. The things may appear good in theory, but in actual practice, it affects independence of judiciary. Judges will be hesitant to quash any illegal orders of a minister who has exerted a prime influence in his appointment and is important for his further stay in the courts. This would mean the administration of independence of judiciary. Thus security of tenure is a sine-qua-non of judicial independence.

The judges should be removed only for gross judicial misconduct, i.e., for the most serious offence, and that to through an especially cautious procedure. We should remember that fixity of tenure which is given to judges is not for the benefit of judges but in real sense it is for the benefit of the judged.

The independence of the judiciary depends to a great extent on the security of tenure of judges. If judges tenure is uncertain or precarious it would be difficult for him to

And in its ultimate analysis the concept and content of independence means, jurisdiction of courts over all issues of judicial nature, principles of non-interference by other branches of government in judicial functions,

perform his onerous duties of his august office without fear or favour. 22

For that reason the independence is to be protected at any cost. The only way to protect judicial independence is to provide judges security of tenure. Thus, the draftsmen of the constitution allowed removal only for the most serious causes and by the strictest Procedures.

APPOINTMENT & TRANSFER OF JUDGES

The Judges of the Supreme Court are appointed by the President under Article 124 (2), while the Judges of the High Courts are appointed by the President under Article 217 (1) of the Constitution.

Art 124 (2) provides that the President shall hold consultation with such of the Judges of the Supreme Court and of the High Courts in the State as he/she may deem necessary for the purpose. Art 217 (1) provides that the President shall hold consultation with the Chief Justice of India, the Governor of the State, and in case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.

The transfer of Judges from one High Court to another High Court is made by the President after consultations with the Chief Justice of India under Article 222 (1) of the Constitution.

The powers of the President are purely formal because in this matter he acts on the advice of the Council of Ministers. There was an apprehension that Executive may bring politics in the appointment of Judges. The Indian Constitution, therefore, does not leave the appointment of Judges on the discretion of the Executive. The Executive under this Article is required to consult persons who are ex-hypothesis well qualified to give proper advice in matters of appointment of Judges. 23

The appointment of judges is the prime and foremost link in the chain of judicial reform. As The father of Public Interest Litigation of India, Justice P.N. Bhagwati would say :

“We would rather suggest that there must be a collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be more broad based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and this last requirement is absolutely essential — it would go a long way towards securing the right kind of Judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity.”

CONSULTATION V. CONCURRENCE: THE CONSTITUTIONAL TUG OF WAR


23 (CAD Vol. 8. p. 285)
As per standard dictionaries, there is hardly any difference between “consultation” and “seeking opinion.” In fact, they are synonyms. Initially, the Court held that "the word 'consult' implies a conference of two or more persons or, an impact, of two or more minds in respect of a topic in order to enable them to evolve a correct or at-least a satisfactory solution. But the Court has 'decided' that they shall mean different things in law and made “consultation” equaling to “concurrency”. It does not, however imply or expressly mean that consultation has a binding effect. Justice Krishna Iyer said:

"Consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur."

Asserting his cautious views, Ambedkar’s Disclaimer on using the word “concurrency”:

“With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition.”

“The opinion of each of the three constitutional functionaries is entitled to equal weightage and it is not possible to say that the opinion of the Chief Justice of India must have primacy over the opinions of the other two constitutional functionaries. If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance, amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept his opinion. But as we pointed out earlier, it is only consultation and not concurrence of the Chief Justice of India that is provided in Clause (1) of Article 217.”

Till 1972, the practice existed to appoint the senior most Judge of the Supreme Court as the Chief Justice of India. This practice had somehow virtually been transformed into a convention and was followed by the Executive without any exception. In 1956, the Law Commission headed by the then Attorney-General M.C. Setalvad had criticized this practice and recommended that in appointing the Chief Justice of India the experience of a person as a Judge, his administrative competence and merit should

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24 According to Black’s Law Dictionary consultation means the act of asking the advice or opinion of someone where as concurrence means agreement or assent, Brayan A.Gamer, West Group, 7th edn.p.311,286.
25 R Pushpam v. State of Madras, (1953) 1 MLJ 88
26 Union of India v. Sankalchand Himathlal Sheth & Anr AIR 1977 SC 2328
27 Constituent Assembly Debates, 24th May, 1949; Vol. VIII
28 S.P. Gupta v. Union of India 1982(2) SCC 831 para 29
be judged and seniority should not only be the main consideration. Mr. A.N. Ray was appointed as Chief Justice of India superseding three of the senior colleagues, Justices Shelat, Hegde and Grover and eight hours after the swearing in ceremony of Mr. A.N. Ray, as the Chief Justice of India, the three Judges resigned from the Supreme Court. The appointment of a judge as the Chief Justice of India superseding senior Judges has been criticized as being against the judicial independence.  

Prior to 1990, there was a consensus that ‘consultation’ under Article 124(2) and Article 217 (1), did not necessarily mean ‘concurrence’. In the S.P. Gupta Vs. Union of India [1981 (Supp) SCC 87], majority took the view that the opinion of Chief Justice of India does not have primacy in the matter of appointment of Judges of the Supreme Court and the High Courts, and that the primacy lay with the Central Government.

Justice P.N. Bhagwati cautioned us by asserting:

“We can always find some reason for bending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation.”

Unmindful of his advice, this is precisely what the court went on to do a decade later in Supreme Court Advocates-on-Record Association v. Union of India30 (Second Judges case) where a majority in the 9-judge bench came to the conclusion that ‘consultation’ would mean ‘concurrence’ or ‘consent’. It was held that the appointment is ultimately an executive act, the constitutional doctrine of judicial review did not justify the primacy of the executive and that primacy of the opinion of the Chief Justice of India was essential, in view of the constitutional obligation of consultation with the Chief Justice of India. The judgment held that such a view safeguarded the independence of the judiciary even in the appointment of Judges.

It is often mistakenly argued that such an insulated process of judicial appointment is provoked and justified by the concerns raised by the inter-institutional tussles of the Emergency period and hence by virtue of separation of powers and rule of law, the appointments model is justified. The Supreme Court by then had already widened its jurisdiction, giving substantive remedies which were legislative in nature as evident from Laxmikant Pandey v. Union of India31 or Vishaka v. State of Rajasthan32. It substantively relaxed locus standi and procedures, with strides of judicial activism and populist tendencies as evident in the evolution of public interest litigation through the 1980’s. Therefore, the shift from SP Gupta case to the Second Judges Case must not be misinterpreted as redemptory post-Emergency shift towards judicial independence and insulation from authoritative political influence. It was rather evidence of an active and opportunistic judiciary while weak coalition governments were in power at the Union Government.

The Supreme Court gave its Advisory Opinion on October 28, 1998 in Third (III) Judges Case [(1998) 7 SCC 739], clarifying the scope and extent of the size of the

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29 (See kuldeep Nayyar, suppression of Judges; Palkhiwala, Our Constitution Defaced and Defiled; Kummaramangalam Judicial appointments.)

30 (1993) 4 SCC 441
31 1984 AIR 469, 1984 SCR (2) 795
32 AIR 1997 SC 3011
Collegium as well as the manner in which the Chief Justice of India will hold consultations with other Judges. It clarified that the Chief Justice of India will form a Collegium’ of senior most Judges for consultation regarding the appointment of Judges or transfer of Chief Justice or Judge of High Court. It also held that the opinion of the Chief Justice of India would have primacy. This judgment resulted in a Memorandum of Procedure laying down the detailed process and procedure of appointment of Judges to High Courts and the Supreme Court, which is being presently followed.

After commencement of the Constitution of India, a fresh Memorandum of Procedure (MoP) for appointment of Judges to the Supreme Court and High Courts were framed. The MoP was revised in 1971 and 1983. This was further revised in 1994 and 1998 after the Judgments in the Second and Third Judges cases respectively with approval of Chief Justice of India and Prime Minister. Currently, all appointments to the Supreme Court and the High Courts are made as per the MoP framed pursuant to the Supreme Court Judgment of 6.10.1993 read with the advisory opinion of 28.10.1998.

In December 2015, the Supreme Court ordered the government to revamp the 1999 MoP and finalise a new one after consultations with the Chief Justice of India (CJI). The order came after the Centre, through its then-Attorney General Mukul Rohatgi, sought to draft the MoP stating that it was an administrative responsibility, which fell within the executive domain. The MoP was first drafted in June 1999 and laid down the procedure to be followed under the collegium system for appointing judges to the higher judiciary. The Centre has minimal say in such appointments.

In October 2017, a bench of justices AK Goel and U U Lalit said that though the Supreme Court fixed no time limit for the finalisation of the new MoP, the issue cannot linger on for an indefinite period. It issued a notice to the Attorney General to respond to the issue while hearing a petition of advocate RP Luthra. A Supreme Court bench of justices Sanjay Kishan Kaul and KM Joseph took cognisance of the burgeoning vacancies in high courts on December 6 last year. The bench said that as on December 1, 2019, there were only 669 judges in 25 high courts against a sanctioned strength of 1,079.33

NJAC: A SHORT-LIVED COMMISSION

“Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach and by the restraint, dignity and decorum which they observe in their judicial conduct.”34

The Indian Judiciary is an anomaly. In no other country of the world is the judiciary, so insulated from the will of the executive and legislative branches, and , as an extension of this, from the will of the people. In time, this has turned the judiciary’s position as the champion of the people into something of a

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34 Words of Justice P.B.Gajendragadkar in regards to the NJAC
contradiction, as the least accountable branch of government has styled itself the most responsive to the people.

There is need for a National Judicial Commission (which is independent of the executive and the judiciary) with an investigative machinery under its control, which can investigate complaints against judges and take disciplinary action and initiate action against them. The Campaign for Judicial Accountability and Reforms calls upon all sections of society to put pressure on Parliament and the government to bring a suitable Constitutional Amendment Bill for this purpose.

There is now an imperative demand from the public that matters dealing with appointments and other misdemeanours by Higher Judiciary needs to be carried out by an Independent Body using transparent criteria, instead of the present unsatisfactory mechanism shrouded in secrecy and controlled by a small cabal. It is for this reason that National Commission to Review the Constitution headed by former Chief Justice of India Mr. Justice Venkatachaliah has also advised the constitution of a National Judicial Commission. A mechanism like a National Judicial Commission will be able to impress upon the concerned judge either to desist from such activities or remit that office in disgrace.

In 1987, the setting up of a National Judicial Services Commission (NJSC) was recommended by the Law Commission in its 121st Report. It prescribed that the Commission must be a body of experts drawn from various interest groups in close touch with the administration of justice such as judges, lawyers, law academics and litigants and include the Chief Justice of India, the three senior most judges of the Supreme Court, three Chief Justices of High Courts according to their seniority, Minister for Law & Justice, and an outstanding legal academic.

Following this, The Constitution (67th Amendment Bill), 1990, was introduced to provide an institutional framework for a national judicial commission. The recent National Commission to Review the Working of the Constitution had suggested the establishment of a National Judicial Commission under the Constitution with the Chief Justice of India as Chairman and two senior-most judges of the Supreme Court, the Union Minister for Law and Justice, and one eminent person nominated by the President after consulting the CJI as members.

Finally, The centre proposed a body responsible for the appointments and transfers of the judges in the country that came to be known by the name of The National Judicial Appointments Commission (NJAC). The according to the NJAC, the commission would replace the old collegium system for the appointments of judges. In the proposed NJAC act, the commission would have six members — Chief Justice of India (Chairperson), two other senior judges of the Supreme Court next to the Chief Justice of India, Union Law Minister and two eminent persons chosen by the a committee formed of CJI, Prime Minister and the leader of Opposition. A five- judge bench of the Supreme Court declined to accept the National Judicial Appointments Commission (NJAC) act and the 99th Constitution Amendment act, saying its as “unconstitutional and void”.

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This commission, consisting of the judicial and the executive branch, was charged with the responsibility of making recommendations or appointments of judges based on a procedure that ensures transparency and judicial independence. India follows the Judiciary-executive model of appointment. Unfortunately the discussion on judicial independence in India has come to be understood largely in terms of non-politicization of the appointment process. To rethink the doctrine of judicial independence or separation of powers in the context of the JAC is to think of these doctrines in terms of collaborative and inter-institutional processes which are transparent and accountable. The proposed JAC Bill in India was therefore not a move back to the older executive-judiciary model but a step towards a new institutional niche, an institutionalisation of the executive-judiciary model through the JAC.

THE CONTROVERSIAL TRANSFERS: PUBLIC INTEREST OR PUNISHMENT?

The issue of transfer of High Court judges have raised numerous controversies from time to time. The framers of the constitution wanted that the transfer from one High Court to another should not be by way of punishment. They intended that this weapon should not be used to punish a judge but for public purpose and public interest. The transfers were challenged several many times on the ground of malafide intentions. Elaborating on the above mentioned contention, a few case studies make it clear as to why a transfer of a judge should unveil a reason so as to evidently showcase the public interest.

JUSTICE TAHILRAMANI

Justice Vijaya Kamlesh Tahilramani was the senior-most High Court judge in the country who decided to quit after the Supreme Court Collegium transferred her from the chartered High Court to a relatively small High Court of Meghalaya. In 1982, V. K. Tahilramani joined the Bar. She has served as a Government Pledger and Public Prosecutor for Maharashtra. She became Acting Chief Justice of Bombay High Court on 5 December 2017 and then the Chief Justice of MHC.

The collegium, headed by Chief Justice Gogoi, had recommended transfer of Justice Tahilramani, who was elevated as the Madras High Court's Chief Justice on 8 August, to the Meghalaya High Court. Though she was due to retire from service on October 2nd, 2020, the sudden transfer to a much smaller High Court has upset her, she said at a dinner meeting. Refusing to accede her request for reconsideration of the transfer, the Supreme Court said "the Collegium has carefully gone through the representation and taken into consideration all relevant factors."

The Campaign for Judicial Accountability and Reforms condemned the decision of the Supreme Court collegium to not disclose why it recommended the transfer of Madras High Court Chief Justice Tahilramani to the Meghalaya High Court. The group urged the top court to restore the faith in the judiciary by immediately disclosing the reasons for transfer of High Court judges and resolving to disclose detailed reasons for all transfers in the future.
“It is incumbent upon the collegium to make clear the reasons for such transfer and dispel any doubts about its independence and fairness. Refusing to do so serves no institutional purpose and instead weakens the institution of the judiciary by making it less transparent.”

The transfer has provoked a barrage of criticism against the collegium and its opaque process of appointments and transfers. Tahlirramani is the senior-most among the High Court judges currently holding office. The Madras High Court is considered a prestigious court, with a long history. In terms of size, it has a sanctioned strength of 75 judges compared to just three in the Meghalaya High Court.

Over the decades, the Supreme Court has recognised the importance of judicial transfers in the High Courts and the effect that such transfers have on the administration of justice. Given the experience of the Emergency era, when transfers were used as a form of punishment by the executive, the Supreme Court, through what is now known as the “Three Judges cases”, has monopolised transfer powers in its collegium.

By law, a judicial appointment or transfer is made through orders of the President. But Article 222 of the Constitution as interpreted by the Supreme Court has put in place an implicit restriction on the President by making the concurrence of the chief justice of India a condition for the transfer. No transfer order can be issued by the President without the advice of the chief justice of India. However, the consultative process that had been put in place to guard the judiciary against arbitrary transfers has been criticised over the years for itself becoming arbitrary.

The case of Justice Tahlirramani fits into this framework where the public is left with no information on why the transfer was made. As a result, it is unclear why her transfer to a smaller High Court was necessary. The Supreme Court held in the 1994 case that a transfer could only be made in public interest for the better administration of justice. What was the public interest in transferring Justice Tahlirramani to Meghalaya? The collegium resolution gives no answer. The resolution merely states that it is being done for better administration of justice.

Legal luminaries like former Madras High Court Judge K Chandru have criticised Justice Tahlirramani for resisting the transfer, arguing that no High Court is lesser than another. While this is true given that they all have similar powers under the Constitution, a transfer without delineating proper reasons has an inherent danger to be seen as a punishment.

Justice Tahlirramani has just over a year of service left as a High Court judge. The question hangs in the air: Was it imperative to transfer her at this point?

**JUSTICE JAYANT M PATEL**

Justice Jayant M Patel of the Karnataka high court had resigned after the Supreme Court collegium transferred him to the Allahabad High Court. He declined his consent to be transferred and instead put in his papers. Since he holds a constitutional post, there was no question of anybody accepting or not accepting his resignation, Justice Patel said. The decision to transfer Justice Patel within 20 months of being appointed to Karnataka HC has prompted protests from lawyers at the Gujarat High Court, where he
practised law and was elevated to the Bench as an additional judge in 2001.

Justice Patel would have been a relatively junior judge in the Allahabad HC. Justice Patel was the second senior-most judge in the Karnataka HC and tipped to become the chief justice after incumbent SN Mukherjee’s retirement. People familiar with the development said the SC collegium decided to transfer Justice Patel. On the Contrary, It was expected that Justice Patel will be elevated to SC in case he was not made chief justice of Karnataka as SC has no representation from Gujarat since Justice AR Dave demitted office.35

Justice Patel was not obliged to give any reason for his resignation. He resigned only saying that he wanted to be “relied from the institution.” Maybe his transfer was reason enough, but was there any reason for his transfer? A judge is not a plaything nor is the process of his transfer a non-productive activity undertaken independently of rules simply for the thrill of meddling with the institution. In not citing any reason, Justice Patel pointed to the pointlessness of reasons in an area outside the boundaries of judicial freedom where private opinion, not law, humour not sense or wisdom and arbitrariness not regularity of procedure governs.

In this case, we must presume, as the Collegium of judges has decided, that for reasons unknown, the transfer was for good cause and the principle of independence of judiciary mandates we keep silent and hold our peace.

THE CYCLICAL SYNDROME OF DELAY, ARREARS & PENDENCY

The challenges and impediments suffered by the Indian Judiciary can very well be blanket-labelled as a syndrome wherein a looping-effect of delay in administration of justice, the piling arrears hindering with the procedure of courts and the pendency of cases that has left a blot of backlogs. Experiencing a docket explosion and pendency of cases doesn’t add much to the surprise as the machinery of justice is being squeezed from every side. To provide a person with a rough count, there are 60,444 cases pending in the Supreme Court, and 44.42 lakh cases in various high courts. At the district and subordinate court levels, the number of pending cases stand at a shocking 3.32 crore, as per the latest stats of 2020.36

Clearing India’s huge backlog of legal cases isn’t quite tough - 6000 new judges could do it.37 Pointing out the very issue faced in the appointment of judges and vacancy that creates a void which might take a year to fill up, considering the fact that it takes that much amount of time to appoint a civil judge. Ignoring the aforementioned count of appointment, it shall be apt to suffice that the


36 https://njdg.ecourts.gov.in/hcnjdgnew/ (Data from High Courts of Bombay, Delhi and Madhya Pradesh is not available on NJDG as these High Courts are not shifted to Case Information System NC 1.0 developed by eCommittee, Supreme Court of India.)

37 See 245th Report, Law Commission of India - Arrears and Backlog : Creating Additional Judicial (Wo)manpower
The number of sanctioned judges is adequate and if all the sanctioned judges were appointed, mounting pendency and huge delays would be history. There can be no excuse for keeping judicial positions vacant while the nation suffers because of this neglect. As underwhelming as it sounds, the apex court holds merely three women judges under its ambit, even in such modern times where gender diversity still prevails as a hurdle.

The efficacy of Courts remain under a dark-cloud of doubt when not even a single High Court or Subordinate Court in the country is working at full capacity. No significant improvement in this key parameter has often been a blame aimed at the Collegium that appoints the Guardians of the judiciary. At the current “Case Clearance rate”, an assumption that has been forebode in the mind of Justice V.V. Rao is that it might take a whooping 320 years to clear the pendency of suits in India. While further stating that:

"If one considers the total pendency of cases, in the Indian judicial system, every judge in the country will have an average load of about 2,147 cases,“ 39

The National Judicial Data Grid (NJDG), which makes latest consolidated figures of district-wise pending cases merely a click away for litigants to keep up with, has shown dramatic numbers. To blur the bifurcation between civil suits and criminal proceedings, 23,12,099 on-going cases for over 10-20 years of a bracket represent only the 6.95 per cent of the total pendency that is lurking in the subordinate courts of our country. Eventually it becomes rather easier to absorb the other statistics when we start off with the gravest of all. Now, just to put the fellow slices together to the pie, 1,12,43,801 is the count of cases that remain stagnant for about a year, 93,81,382 for over 1-3 year span and lastly, over a crore proceedings that have existed without a judgement for about 3-10 years. 40 If just the numbers are being talked about for a moment, 80 per cent of the citizens of this nation would be hesitant to approach the courts, naturally. The Judicial system seems to have become irrelevant for the common citizens, and this is responsible for many ills plaguing our nation, like disrespect for law and corruption.

With the High Courts capable of housing a strength of 1079 judges, the judicial machinery settles for just 680 judges, constantly working with that inevitable burden that has accumulated over the years. The researcher would be leaning on one side if the reformatory actions aren’t highlighted that come out as a brainchild of the Law Commissions and various National Reports. From the release of ‘The Arrears Committee Report of 1949” to the Report of Supreme Court on ‘Access to Justice’ of 2016, a lot of efforts and ideas can be witnessed but the condensing comparisons of the reports with reality surely tell us that these Judicial reforms till now have largely been piecemeal in nature. Being humbled by the notion of Justice being grafted on the slate of the Preamble does not ensure its application, it is when the Cornerstones of the legal system -

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38 Justice Indu Malhotra, Justice Indira Banerjee & Justice R. Banumathi.
40 https://njdg.ecourts.gov.in/njdgnew/?p=main (Fresh data as of July 11th, 2020)
Independence, Fairness and Competence - blend in together, the notion can be vested with its actual meaning.

In order to catalogue every reform that has been put forward for the sole idea of covering the entire bandwidth of the Judiciary, we need to take a cursory glance at the reports that have been formulated over the years. As far as one can jog their memory, The Civil Justice Committee headed by Justice Rankin in the year 1924-25 remains at the starting line of the inception of such reforms. The reflection of what comprised this report can very well be seen in the Fourteenth Report of the Law Commission presented in 1958.

Eliciting its views in collaboration with the public opinion, The Commission arrived the conclusion as under:

“It was generally agreed that the Code of Civil Procedure is an exhaustive and carefully devised enactment, the provisions of which if properly and rigidly followed are designed to expedite rather than delay the disposal of cases. Delay results not from the procedure laid down by it but reasons of the non-observance of many of its important provisions, particularly those intended to expedite the disposals of proceedings.”

The report stands as the harbinger of the legal maxim Justice delayed is Justice denied back in the time when our judiciary was at infancy. Bringing to limelight issues like the congestion of work at the High Court level, delays and arrears leading to miscarriage of justice and increment in the cost of litigation, etc. The major finding of the report still remains that the delay in decision of these cases is as old as the law itself. It succinctly examined the root cause of the problems that existed within the judicial realms while advertising several reforms that hold relevancy even today. Reallocation of the flux of cases from the High Courts to the lower courts seemed necessary in order to spread the workload more homogeneously. It seeks to upscale the powers at Magisterial level in order to target the congestion faced at the levels of courts above it. To deal with the arrears, which was provided with a meaning as to cases not disposed within the time limit, a certain time period was allocated to each level of Court which was to ensure the speedy disposal of cases. These aforementioned arrears were to be dealt with the aid of temporary additional courts that could serve as the handmaid of the functioning of the Judiciary. This idea was to be fuelled by a team of reserved judges driven to revamp the way things worked in the Court-house at the said time. In a nutshell, The fourteenth report can very well be summed up as the instrument of enlargement when it came to ‘Access to Justice’.

CONCLUSION

Absence of even an atom of justice is a worrying omen for the idea of a welfare state that exists in a healthy democracy. The present condition of the Judiciary in the country somehow appears to be in a sort of aestivation, a dormancy. The psychological equivalent of what lungfish do to get themselves through the dry season. A faint resentment can be witnessed in the indigent masses when it comes to acquiring their rights and claiming what’s fair, through the routes of Judiciary.

In order to ensure a robust judiciary, several facets need to be covered, hasty and imperfect legislations to be avoided, ample
distribution of workload. The crux of the idea of Rule of law lies deep within the soothing folds of Justice, which can be both seen and administered, simultaneously. Erosion of this idea has a consequential effect which dilutes the rights that aregrafted with utter guarantee in the pages of our Constitution.

The need of independent judiciary is deeply rooted in the conception of written constitution. Because the written constitution is considered basic law of the Land and requires some authority to interpret it, in absence of such authority the constitution would create disorder than order in the society. Hence, independent judiciary is not only necessary but indispensable.

Prior to the Collegium era, the Supreme Court had the opportunity to address the issue of arbitrary transfers in the Sankalchand case, where the transfer of a judge from Gujarat to Andhra Pradesh was challenged. The court held there was no power to transfer out of whim, caprice or fancy of the executive. Transfer of a Judge was not to be used as a tool to “bend a judge” to the executive’s way of thinking. Nor was it a punitive measure for a judge who “does not toe the line of the executive” or has fallen from its grace. Transfer was meant only to subserve public interest. And, executive intrusion in the process was taken care of through effective consultation with the Chief Justice of India, proving to be an institutional protection, straight-jacketing the exercise of the power of transfer. This consultation, to satisfy normative function, required the Chief Justice not only to collect vital information from responsible channels and directly familiarise himself with requisite data to take an action for the furtherance of public interest, especially for the cause of an efficient judicial system, but also informally ascertain from the judge concerned if he has any personal difficulty or there are any humanitarian grounds on which transfer may not be sanctioned.

While there is no evidence to suggest that these judgements contributed to the transfer, the norm of the Supreme Court collegium not to make public the reasons for transfers is contributing to an erosion of the judiciary’s credibility and its image of being independent in its functioning from the executive. Further, this invariably makes the High Court judges look subordinate to the Supreme Court collegium.

Furthermore, The collegium system prefers practising lawyers rather than appointing and promoting judges of the subordinate judiciary, which often comprises a rather diverse pool of candidates. As a result, the composition of the high courts becomes, literally, an “old boys’ club” featuring largely male, upper-caste, former practicing lawyers. This culture fuses its way further into the system as this is the pool from which Supreme Court judges are drawn. Needless to say, the same judges will also find themselves within the topmost ranks of seniority in the Supreme Court, who then decide future appointments to the high courts, creating a self-perpetuating cycle of privilege.

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4) https://www.bloombergquint.com/opinion/the-collegium-should-reveal-its-reasons-for-justice-jayant-patels-transfer

PIF 6.242 www.supremoamicus.org
The Researcher recommends that there needs to be a shift from the seniority-based appointment practice towards a merit-based appointment. Meritorious quality of appointment is central to the aims and objectives of such legislation and this cannot be left to be stipulated by delegated legislations. Provisions asserting this may be clearly stated in the bill similar to Constitutional Reforms Act of 2005 in the United Kingdom where Section 63(2) states that the “Selection must be solely on merit.” and Section 63(3), “A person must not be selected unless the selecting body is satisfied that he is of good character.” Hence, The creation of a Judicial Appointments Commission is not a step back to the original constitutional position in the Constitution of India, 1950 but rather, a concrete opportunity to create a new participatory and transparent method of appointment to the judicial positions in line with contemporary constitutional design. This reform would restore parity between executive and judiciary in appointment of judges, which is constitutional and in conformity with rule of law and separation of powers.

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