



## Decolonizing the Indian judiciary: Unraveling the ethical fabric for reforms

Sameer Harshad Pande

Research Scholar, Department of Political Science and Public Administration, Dr. Harisingh Gour Vishwavidyalaya, Sagar, Madhya Pradesh, India

### Abstract

The research paper falls under the ambit of challenges and solutions to the contemporary political issues in India. The research paper is a balanced critic to the problem of 'Uncle Judge Syndrome' in Indian judiciary. The issue has been highlighted by the law commission of India in their 230<sup>th</sup> report. The syndrome has been a part of 'the nepotism' discussion in judiciary which has also been skeptical about the collegium system. The research paper has discussed, along with data, the evolution of the system and the syndrome. The paper also asserts the importance to understand the colonial legacy and British-biased features of contemporary Judiciary which have neglected the astute heritage of ancient Indian Judiciary cutting itself apart from the people who seek justice, the only true objective of Judiciary.

**Keywords:** Uncle Judge Syndrome, Ancient judicial practices, collegium system, colonial legacy

### Introduction

Judiciary is one of the most pious and intellectual game-play to seek justice. In the process of proving and disproving, the churning of intellectual minds allows for newer dimensions of Justice. The outcome of this has led it to become a firm pillar, out of three, of democracy and State. Judiciary. The judiciary, according to Collins dictionary, is the system of courts that adjudicates legal disputes/disagreements and interprets, defends, and applies the law in legal cases. Whereas, judiciary, according to Britannica, in systematic and administrative sense is a branch of government whose task is the authoritative adjudication of controversies over the application of laws in specific situations.

In ancient times, judiciary was not a matter of power but a true process of justice therefore even kings were not above the Dharma and judicial judgements. The judgement and person allowed to judge were also subjected to their rights based upon their fulfillment of duties. It is also been observed that ancient India had the highest standard of any nation of antiquity as regards the ability, learning, integrity, impartiality, and independence of the judiciary, and these standards have not been surpassed till today. (Dhavan) There are many areas of judiciary which needs to be discussed along with the fact that modern Indian judiciary has not been a continuous evolution of the ancient past judicial system but the interrupted form of judiciary by the barbarian rulers of medieval times and un-British Britishers.

### Evolution of Judiciary in Bharat

Many of the sages *Rishis* of ancient times have written exponentially regarding *Dharma* and law. Some of them are can be known as the initial chief justice. Manu, Yajnavalkya, Katyayan, Brihaspati, Vachaspati Misra, Narada, Shukra, Gautam etc. Those gave the most important laws that prevailed and still prevailing in Bharat. The thought of family laws, property and crime, everything included in the evolution of the mankind, those writers have included many ideas which in today's term are utopian yet desirable.

For example, In the Mahabharata, it was laid down that A King who after having sworn that he shall protect his subjects fails to protect them should be executed like a mad dog. Kautilya has described the duties of a king in the *Arthashastra* thus making laws where in the happiness of the subjects lies the King's happiness, in their welfare his welfare; whatever pleases him he shall not consider as good, but whether pleases his people he shall consider to be good. There are many instances where punishments are laid down for the corrupt judges maintaining the judicial integrity. In the condition of any corrupt practice such as bribes by jurors, there laid harshest punishments to them. Thus, making judges accountable and very noble. There is still always the question which haunts the judiciary which is how to judge a judge, or how to keep judges accountable for their verdicts. In the eyes of public, a judge is God. But, in reality, as greater power comes greater responsibility, It is a tough job and always under the doubt of the people. Yet, whenever there has been a struggle to understand the social flux or political predicaments, the judiciary has been recommended by every one. The power is confined to mediate and to give justice.

### Colonial Mindset and Judiciary in India

Today's judiciary is the form of judiciary which Britishers have developed. The motive behind the judiciary was to codify the law and make it easy to rule over the Indian. Britishers attached their own Romanized western laws over the people of India. Many of the modern laws are still confusing and yet followed with the same mindset. For example- sedition law, preventive detention, the confused conditions of providing bails, the collegium system and many other.

The Britisher has a different mindset regarding Indians also known as 'White man's burden syndrome'. In the form of condescending, the Britishers tried to control the mindset of its colonies. With many methods, such as carrot and stick, doctrine of lapse, subsidiary alliance and by brute force, they showcased the believed and made-up doctrine of white man's burden. This also they used in Indian Judiciary. For

much period of time, Britishers didn't allowed Indians to judge Britishers. There were so many famous judges and of very composed and strong willed, but that was the case.

A judge is known for the work he does and the reputation he gets. He must not be a continuous judge for if he does any wrong there is no way to remove him from his position. The English doctrine of security of tenure and post retirement perks have been one of the colonial 'Gift' to Indian judiciary. Where a simple resignation of the post couldn't let him be judged thereafter even after being help and proved responsible for act of crime. Such situation was faced many times. The infamous trial of Nand Kumar of 1776 was one such case where the case of Nand Kumar against Warren Hastings was proved. Warren Hastings had taken 3.5 lakh from the widow of Mir Zafar. Yet, Warren Hastings removed the whole council and counter lodged case against Nand Kumar where without the just trial he was hanged. The un-British practices still in use can be observed in the case of Justice Soumitra Sen of Calcutta high court (2007) and Paul Daniel Dinakaran Premkumar (2009). Those judges when proved guilty, resigned before the verdict was passed, thus safeguarding themselves from any punishment. This allowed them, even today, to enjoy the post-retirement funds.

Allahabad high court has critically asked from where does the Indian judge or lawyer received their inspirations from? The answer is not from the jurisprudence of Indian civilization. The judges and advocates practicing only knows something of Roman Law and of the theories of western jurists but very little about the evolution of the law and jurisprudence of his own civilization.

The Judicial process which is in use today, is an edifice constructed without theoretical foundations, or rather on foundations supporting other structures in other lands. The Judiciary is not connected to the people, there is miscommunication between the voice of the people and the truth that is passed by jurors. The case of pending cases and the tedious amount of work put in is the reality. The burden of justice has been lifted by very few.

Another colonial mindset is that the moral and theoretical foundations of our penal code are foreign. Most of the case studies been done in classrooms and in discussion are of foreign origin. The people there have different cultures and ethos, based upon that, a crime there might not be a crime here and vice-versa. Taking this into consideration, Judiciary needs its students to least give a try to be connected with the culture and ethos of the land.

The true Indian jurisprudence is founded on theories which emphasis that rights are corollaries of the duties. Every verdict given let it be in the history of *Sankh-Likhita* story, the Ramayana, Mahabharat etc. everywhere the *dharma* is tested and checked upon the duties conferred upon the person. In failing that the *adharm* prevails causing the disruption of the society. Judiciary needs to understand this But, Today's society is far from it. People want rights without duties. Judiciary must be a method to make people aware of their duties first. It must be done with their actions.

### Judiciary issues and related data

The downfall of the character of the society and social standards, it has raised the judicial work. The facts given below will showcase the issues in the judiciary because of the colonial mindset. Regarding the representation of Women in Supreme Court of India, out of total 256 judges

appointed to the SC till date, there have been only 11 women. (Constituting a mere 4.2%). The same is the condition of women representation in all high courts which is 11.8% only. There has never been a women chief Justice of India. The first will be (Because of the seniority and complex collegium system) Justice Nagarathna. She will be become in October 2027 and only for 36 days.

There are around 4 Crore + cases pending in all the courts because there are only 15 judges per ten lakhs Indian. Around two crore 20 lakh people are under trials in India. The working days of Supreme court is said to be for just 190 days in a year.

### The guardian of constitution and interpretation

Judiciary is the custodian of the constitution and alike other pillars of democracy; judiciary has equal or more right to interpret constitution. But this right have been itself conferred with the guts of many judges. There has been a constant tussle between judiciary and legislature.

One of the reasons being that during the making of the constitution around 60-70 percent of the parliamentarians were themselves advocates and judicial people. The technicality was thus conferred upon the legislation made the laws self-tested. Later, that affected negatively on the judiciary as it was not upto them to interpret constitution. We observe that it was very late that India saw an overturn of 'doctrine of procedure established by law' into 'doctrine of rule by law'. There was a supreme control of legislature upon the interpretation of the constitution and therefore, till the famous case of Keshavananda Bharati (1973), there was no check on the art. 368 of the constitution which allowed legislation to amend constitution at will. Judiciary safeguarded this discretion with the case and introducing the doctrine of basic structure.

We also observe the form of committed judiciary. This concept of committed judiciary was from the colonial times were Britishers had a control over judiciary. This colonial mindset as discussed earlier in the episode of Nandkumar care (1776) and Warren Hastings. This commitment has caused dark days in the judiciary.

The two infamous of such incidents includes: first, the issue of promotion in the Supreme court. When in the first time of history of independent India when on 24<sup>th</sup> April, 1973, Justice AN Ray, was superseded other senior most judges by the government to appoint him as the Chief Justice of India. This is the classic case of super-succession of Art. 74 over Art. 123.

And the second infamous case of 28<sup>th</sup> April, 1976, the ADM Jabalpur case (Habeas Corpus Case) and Justice H.R. Khanna. Where the then Prime Minister of India was praised by the four other judge despites of the fact that there was a grave problem created by the government of India. The one to oppose it was Justice H. R. Khanna, who was later punished with his non-promotion to chief justice seat and instead his juniors were promoted.

Another issue that judiciary had to face is the overpowering of Legislature in amending the constitution. There are many instances where legislature, using its power to amend constitution with art.368 of the constitution, has neglected the reach of 'the custodian of the constitution'. The first Amendment of 1951 which added the ninth schedule which is out of reach of judicial review; The fourth Amendment of 1955; the 20<sup>th</sup> Amendment of 1966 which was regarding the recruitment of void judges; The 24<sup>th</sup> Amendment, 1971

which increased the power of the parliament to amend the constitution; the 38<sup>th</sup> Amendment of 1975 which increased the power of President and barred it from judicial review; the 39<sup>th</sup> Amendment, 1975 which decreased the power to keep a check related to disputes of elections of President, PM and Vice-President; the 42<sup>nd</sup> Amendment, 1976 which gave more importance to Directive Principles of State Policy (part IV) over Fundamental Rights (Part III); the 75<sup>th</sup> Amendment, 1994 which was after the reservation row and Post Indira Sawhney Case and the latest 99<sup>th</sup> Amendment, 2014 where National Judicial Appointment Commission was made.

### Judicial Over-Reach

There is also the question of How much limit is to be given to the legislature and independent Judiciary. There is a desperate need to provide an arm-stretching power to judiciary to provide justice to the common people. The trio must have check and balance over each other. but there is also a need to understand the importance of democracy in the whole process.

What judiciary we see today is the evolution from its dark times to the brighter times. This happened, for instance, in the constitutional interpretation and judicial power to recommend president to appoint judges by the efforts of 'the three Judges case.' Art. 124 (2) and Art. 217 (1) is related to the appointment of the judges of Supreme Court and High Court by the President of India who can take his decision based upon the consultation of the group of judges he sees fit.

*124(2) & 217(1) Every Judge of the Supreme Court/High Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose.*

The vague meaning of this article is most of the time discussed which later led to the formation of the Collegium System. The system is the necessary recommendation of Judges which has become 'the Hand and Seal' of the president. But that is not for the subordinate courts which are ruled by Art. 233 and 234.

The interpretation of the constitution allowed judicial chance to over-reach from Constitutional Interpretation into Constitutional Drafting and in minor sense from 'Consultation to the president to Concurrence by the president'.

The first judge case was in the year 1982 which the interpretation of the meaning of word 'Consultation' meant 'not binding but important'. The confusion was tried to be solved with the 121<sup>st</sup> Report by Law Commission of 1987 where there was recommended to form 'National Judicial Service Commission'. The bill (67<sup>th</sup> Constitutional amendment bill was tried to pass but got lapsed. The second judge case was in the year 1993 where the word Consultation was interpreted to 'concurrence'. The criteria of the recommendation were given on the judges with Seniority and 'Being Institutionally fit'. (This itself was not very sensible.) the discussion ended with the third judge case of 1998 which introduced the Collegium system.

The overall process but failed to develop a way where common man had something to say, neither was there any

check over nepotism and no means to understand the process of the appointment of the judges. There is also no way to judge any judge or to check his or her actions. The promotion or appointment became mere game of 'knowing and fawning'. This has spilled over the lower courts where we find a dangerous syndrome called 'Uncle Judge Syndrome'.

### Uncle Judge Syndrome

According to the Allahabad high court report itself this syndrome can be easily termed as "Every Third High Court Judge is an uncle". In simple terms, this syndrome is- as a judge refers to his colleagues as brother judges, they become uncle judges to his kith and kin. And the cases this kith and kin brings gets a clean chit or favors. This allows his to get more clients and get name and fame. Despite the strict regulation of the Bar Council of India, a judge's kin cannot practice in the same court. But this hasn't stopped his/her to practice in an uncle judge's court.

This syndrome was caught by Allahabad high court with the case of Raja Khan vs U.P. Sunni Central Wakf Board. Where the case was moved from Lucknow bench to Allahabad bench. Only to get it a verdict in the favour of the kin.

This kind of practice helps in faster growth in career; Increase in the number of clients; Less chance of new arrival of bright minds so less competition; brings biased judgements; creates distrust in judiciary; grows an evil grip of corruption and exploitation and Favoritism-nepotism.

There are few remedies that judiciary itself has tried for example the issue was presented in the 230<sup>th</sup> Report of The Law Commission of India where strict rules are made including no nomination in the same court. There is a provision in constitution Art. 222 which presents the solution of Effective transfer Mechanism. There is also the need to remove collegium system at least from the appointment in high courts and this can be done by introducing 'National Judicial Appointment Commission'. This commission was introduced in 2014 by the 99<sup>th</sup> Constitutional amendment Act. But Supreme court rejected it in its verdict in 2015. (Can be called as the 4<sup>th</sup> Judge Case) Supreme court rejects it by putting up the issues such as the act violates the Basic Structure which allows for independent judiciary; the process of NJAC is also too complicated and there is no veto power to the CJI and also allowing too much of the Government interaction too many times.

### Conclusion

The issue of independent judiciary with also having check and balance cannot be fulfilled until and unless judges believe themselves as judgeable and everyone believes in the constitution. Judiciary is the highest and most respected pillar of democracy in India. It has always put forth men that lived just and are ideals to every citizen. Still, there is a need to remove the colonial mindset and aiming towards the highest ideals which are truth and *dharma*.

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