Harming the nation

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The first blow to the independence of the judiciary came in 1973 with the supersession of the three senior-most judges of the Supreme Court because they had ruled against the government. Two years later, the setting aside of Indira Gandhi's election by the Allahabad High Court eventually led to the Emergency and a large number of political opponents being detained without any trial under the infamous Maintenance of Internal Security Act, 1975 (MISA). Several high court judges struck down these orders. Sixteen of them were transferred without their consent. The names of 40 more judges to be transferred were leaked, clearly indicating that any adverse ruling would not be tolerated.

On April 28, 1976, in the ADM Jabalpur case, the Supreme Court held that, during the Emergency, no detention could be challenged in any high court even if it was mala fide and illegal. Justice H R Khanna dissented from this much criticised majority view and paid the heavy price of being denied the office of Chief Justice of India; he was superseded by Justice M H Beg. For thousands of persons, who were detained, the door to judicial relief was closed. They remained in jail without a trial till the Emergency was lifted in 1977.

After the Emergency, Justice N L Untwalia recorded with "utmost responsibility" that these transfers "had shaken the very foundation and structure of an independent judiciary throughout the country". In addition to damaging the judiciary, the 42nd Amendment drastically cut down the powers of the high courts and the Supreme Court. Jurist H M Seervai called this amendment "outrageous" but mercifully, Mrs Gandhi was voted out in 1977 and the new Janata government undid most of the constitutional damage.

From 1977 till 1980, the Supreme Court partly reclaimed its prestige by a series of landmark decisions. In 1980, Mrs Gandhi came back to power and the assault on the independence of the judiciary was renewed by a controversial letter written by the government itself requiring, as a condition of appointment, the consent of newly appointed judges to be transferred to the other high courts.

The transfer policy was unfortunately upheld in S P Gupta v. Union of India, popularly called the First Judges' Case, which granted the executive the final say in judicial appointments. Armed with this power, Mrs Gandhi effectively rejected the recommendation of the CJI no less than five times in 1983 alone. After her untimely demise in 1984, only two recommendations were not accepted between 1985 and 1991.

Alarmed at the executive interference, the Supreme Court devised the collegium system in 1993, giving itself the primacy and the final say in the appointment of the high court and Supreme Court judges. The governments — at the Centre and the states — also had important consultative roles because, as the Supreme Court noted, it would often be aware of certain antecedents or information relating to the individual candidates, which may require particular recommendations to be reconsidered.

This process enabled the executive to raise their objections and require the collegium to reconsider the name of the particular candidate. However, if the collegium reiterated its recommendation, the candidate has to be appointed without demur. This method continued until the 99th Amendment to the Constitution, which proposed a National Judicial Appointments Commission (NJAC) to substitute the collegium. Unfortunately, the proposed amendment had several drafting flaws, which led to the NJAC being held unconstitutional and the restoration of the

collegium system.

In the past, judgments, which invalidated any policy or reforms proposed by the government, were responded to by appropriate amendments. This method was rightly followed by Jawaharlal Nehru, amending the Constitution 17 times in 15 years (1950-1965), to overcome adverse judicial verdicts and implement legislation mainly relating to the zamindari abolition and agrarian reforms. These amendments, to the credit of the Supreme Court, were mostly upheld. The unfortunate response of Mrs Gandhi was not merely to overrule the judgments but to attack independent judges as well.

In 2014, the clear majority of the BJP-led alliance provided a golden opportunity to repair the past damage as it was not hamstrung by the compulsions of coalition politics. Respecting the judiciary would have enhanced the prestige of the government. Sadly, the new tactics are either deliberate inaction and, in some cases, outright violation of constitutional norms. The last few years have seen a huge rise in the number of vacancies reaching a staggering 40 per cent level at the high courts. The Supreme Court will soon witness a large number of vacancies as well. It has been reported that more than 140 candidates approved by the collegium are pending with the government.

Apart from inaction, what is more worrisome is a deliberate refusal to implement the decisions of the collegium. An additional judge is recommended to be made permanent by the collegium but the shocking response is to make him an additional judge again even after reiteration. When the name of one high court chief justice is recommended for elevation to the Supreme Court, untenable reasons are given for not appointing him particularly when six vacancies exist.

Strangely, the issue of regional representation and lack of SC/ST candidates was not seen as an objection to the clearance of the candidate from the Bar. And the direct correspondence with the Karnataka chief justice to reinvestigate a complaint that had already been found to be untenable by the collegium was a serious transgression of constitutional propriety. On May 2, the collegium has sadly deferred the decision of the appointment of Justice K M Joseph despite its earlier decision affirming his suitability.

Woe betide a government that refuses to learn the lessons of history. The assault on the judiciary between 1973-1984 actually did more harm to the nation. In the end, we cannot today have an independent judiciary unless the collegium system is respected and the decisions of the collegium are implemented without delay. If the ruling party finds the collegium system distasteful, the remedy is to pass another constitutional amendment and replace it with a Judicial Appointments Commission that will pass constitutional muster.

The model recommended by the Venkatachaliah Commission can be implemented to replace the collegium. But it is impermissible to not amend the Constitution but simultaneously and consistently adopt a confrontational attitude with the collegium. For the present, the collegium must assert its independence before its own importance is eroded by repeated inaction and deliberate defiance. Lord Hewart famously remarked that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Under our Constitution, the judiciary must not only be independent, but should manifestly and undoubtedly be seen to be independent. And the responsibility for that rests primarily with the collegium.

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