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Judging the definitions of judges

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Two diametrically opposite concepts about judges continue to prevail in the Supreme Court while deciding issues about the judiciary itself. One is that of judges being hermits or the role of renunciation. The other is of judges being in dynamic touch with the relevant players of power to ensure their advancement and prosperity.

Even since the hermit principle was judicially announced by Justice Fazal Ali in the first judges case (S.P. Gupta vs Union of India), the Indian judiciary is caught in a serious problem of image vs realpolitik. This is so because the use of the hermit principle leads to an autocratic role for the judiciary. Whatever the judiciary does must necessarily be correct and command unquestioned obedience. Internally its Chief Justice is in the same position vis a vis the judges.

Problems arise when judges are seen to act to the contrary. Then the realpolitik principle reflects honest reality and leaves public space for concepts of transparency and accountability in judicial functioning. The Supreme Court's decision in High Court of Rajasthan vs R. C. Paliwal, concerning the powers of Chief Justices of high courts, is once again haunted by the hermit principle. The result is an enunciation of autocratic and unquestioned power in the hands of a Chief Justice in the public-funded administration of a high court by declaring judges as "hermits who have no desire or aspiration having shed it through penance."

The problem started in the Rajasthan High Court as a plain service matter between two streams of staffing the post of deputy registrar. A vacancy occurred in the post of deputy registrar on February 1, 1992. On February 28, 1992 the Chief Justice of the High Court amended the Rules to promote on March 6, 1992 a person to the post who did not belong to the cadre of private secretaries to the judges. This was challenged. A practical solution was worked out of allowing the person promoted by the Chief Justice to finish his short term and retire. After this the promotions were to be made interms of the rules prior to the February 28, 1992 amendment.

But the petition challenging the promotion threw up a simmering discontent of a more serious problem of judicial administration. The petition pointed out that several district courts, directly under the supervision and control of the high court itself, were having vacancies because the judicial officers concerned were being brought on deputation to the posts of deputy registrars and above. This entailed a two-fold suffering. One to the litigating public facing vacant courts and, secondly, to the staff of the high court which

could man these posts. It seems eight judicial officers of the district courts could come on deputation to the High Court.

Several public issues of the administration of justice by the high court were involved: the efficient use of the taxpayer's money for high court administration; the application of mind by the high court before creating the deputation posts; the public care shown by the high court in ensuring that the posts of those on deputation are filled in so that the litigants do not suffer while the deputationists get more pay and promotion chances; the democratic principle of participation by the judges of the court in the amendment of high court rules of administration as against the autocratic principle of a chief justice amending the rules in his chamber all alone. Legally the issue centred on the interpretation of the word "Chief Justice" in Article 229 of the Constitution which states that appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court. Do the words Chief Justice mean an institution or a person? The Supreme Court judgment does not say what the division bench of the high court did or did not do on this score. The division bench however sought facts. It asked the high court registrar to find out from the districts concerned about the judicial posts lying vacant, whether the normal staff of the high court could man the posts sought to be filled in by deputationist judicial officers and to put this before the full court.

The Supreme Court knocked down all this by holding that the words "Chief Justice" in Article 229 meant the person alone. He could run the administration as he wanted subject to judicial review. Further he had the absolute power to constitute benches, allot cases and administer the court. The apex court did not refer anywhere to the constant refusal of the Supreme Court judges themselves, from the first (1981) to the third judges case (1993), to give absolute power to the Chief Justice of India in the matter of appointment of high court and Supreme Court judges. Worse, the Supreme Court judgment in giving absolute power to the Chief Justice of high courts relied on the entire "archives" of British administration of high courts as if the Constitution did not usher in any change. The third reason of preventing internal strife by giving absolute power is also misplaced.

Internal strife can be suppressed by absolute power till it erupts or it can be prevented by regulated airing and teamwork of judges in which a Chief Justice wins respect to be able to command. The problem of allocation of matters is a serious one in the apex court itself. Unfortunately the judgment gave a lecture to high court judges throughout the country on being hermits while leaving Chief Justices wholly unaccountable, even when a Chief Justice has been foisted from another high court by ignoring the senior-cum-meritorious ones with integrity.

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