

## Justice denied to judge

This is yet another supersession of judges, not in the technical sense but in all other respects. Justice A.P. Shah, who retired from the office of Chief Justice of the Delhi High Court a week ago, was one of the finest judges in the country. He was also the senior most.

Yet he was not elevated to the Supreme Court. The bias of Justice S.H. Kapadia, the Supreme Court judge, against Justice Shah blocked the appointment. Justice Kapadia is a member of the five-judge collegium which selects judges for the High Courts and the Supreme Court. I believe all other four judges were in favour of Justice Shah. But they were helpless because the convention is to have a unanimous choice.



**Across  
the Palk  
Straits**  
By Kuldip Nayar

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When Indira Gandhi superseded in 1973 three Supreme Court judges - Jayanti Manilal Shelat, Kawdoor Sadananda Hegde and Amar Nath Grover - to appoint a junior judge, Justice Ajit Nath Ray as the Chief Justice of India, she punished them because of their independent outlook, not tagged to what she considered "progressive".

Justice Shelat had only a month to go for his retirement. But Justice Hegde had still two years left. A petition relating to Ms. Gandhi's election was pending in his court. He had found the affidavit given by her was against the facts. He, in fact, tried to help her but her advisors thought otherwise. Justice Grover resigned because he was senior to Justice Ray.

It was a blatant and outrageous attempt at undermining the independence and impartiality of the judiciary and lowering the prestige and dignity of the Supreme Court. Ms. Gandhi wanted to make the judiciary subservient to political pressures and dependent on government patronage and influence.

However, this was not the reason for the supersession of Justice Shah. In his case, his courage to stand up was his undoing. He had dared to cross Justice Kapadia's path when the two were on the bench of the Bombay High Court some years back. The collegium meeting, where the name of Justice Shah was discussed, was reportedly a noisy sitting, four judges on one side and Justice Kapadia on the other. He is said to have closed the discussion with the remark that the elevation would be over his dead body.

How could he have his way in the face of four other judges is still baffling. They do not seem to have put up a fight for Justice Shah. Whatever the truth, Justice Kapadia applied the veto.

I recall another instance of supersession. Justice Arjit Passayat blocked the appointment of Justice A.K. Patnaik, then the Madhya Pradesh Chief Justice, nearly one and a half years ago for reasons not known.

The latter is an outstanding judge who has stood by the people whenever he has found them aggrieved. Human rights activists and other members remember with admiration his famous judgment to stop building of the Narmada Dam after attaining a particular height until the oustees were rehabilitated. (The Narmada award is that the uprooted should be settled at new places six months before their lands are taken by the government).

Take another case of the collegium authoritative attitude. Justice Gyan Misra, a woman Chief Justice heading the Jharkhand bench, is high in seniority. When she was ignored both the President and the Prime Minister sent back her file for reconsideration, probably because the Supreme Court has not had any woman judge on the bench for the last four, five years.



Justice A.P. Shah: A victim of the system

The collegium still went ahead and appointed Justice C.K. Prasad, superseding Chief Justice Gyan Misra of Jharkhand. I am not questioning the excellent credentials of Justice Prasad but pointing out that a

woman judge was denied the Supreme Court slot.

One thing clear from these instances is that the collegium acts like a secret agency, opaque and bizarre in its selection. It should tell the reason why a particular judge was ignored. It is understandable when Justice Shah after retiring admits before the media that he couldn't "pretend not to be hurt" on not making it to the Supreme Court. This is the highest position that most in the legal fraternity seek.

Justice Shah's disappointment of missing the top position was natural. When Justice Kapadia and Justice Passiyat blocked the elevation of Justice Shah and Justice Patnaik the first two must give reasons for doing so. It should not be a capricious decision. It must be backed with reasons. It cannot be left to the bias or prejudice of the judge on the collegium comes to acquire.

The collegium comprises five senior-most judges from the Supreme Court for appointments to the apex court and the High Courts. The High Courts have a three-judge collegium for appointments to the lower judiciary, including the Sessions Judge. Shouldn't the decision be by a majority? There should be an effort to reach a consensus. But if that is not possible, one member should not have the final word.

The government can retrieve the situation to some extent by appointing Justice Shah as Law Commission's chairman. But Law Minister Veerappa Moily, respected for his integrity, is reluctant to do so lest Justice Kapadia, who is the next in line for the post of Chief Justice of the Supreme Court, should feel offended. Moily is unnecessarily bringing in the wishes of Justice Kapadia to a post which is entirely in the domain of the government. The Supreme Court has nothing to do with it.

I must admit that the judiciary in Pakistan has become an example of probity after the lawyers have won the battle for reinstating Chief Justice Iftikhar Chaudhary to the Pakistan Supreme Court. President Asif Ali Zardari arbitrarily appointed Justice Saqib Nisar as acting Chief Justice of the Lahore High Court and also elevated Justice Khawaja to the Supreme Court.

There was no consultation with Chief Justice Chaudhary. The two judges have refused to take oath because they want the appointment to be approved by Chief Justice Chaudhary. The entire nation has stood behind the Supreme Court chief and has blamed President Zardari for throwing the country into a constitutional crisis. Opposition leader Nawaz Sharif has criticized President Zardari's appointment as "the murder of democracy." Lawyers are again threatening strike.

What the Indian judiciary can learn from the Pakistan judiciary is that the judges, if not appointed through a correct procedure, refuse to take the oath of office. The Supreme Court specially needs to note it. The manner in which it has superseded Justice Shah is simply not acceptable. It is another matter that people cannot do anything.

This is an issue which parliament should discuss at its next sitting, particularly how to stop the judges of the collegium from settling their personal scores.