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Special article

Judging the judges

President Can Appoint A Judicial Commission Of Eminent Jurists

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The most crucial attribute of democracy is its rule of law. An independent and impartial judiciary has the responsibility to ensure that authority governs through the rule of law. The integrity of the judiciary therefore must clearly be above reproach. In India, particularly of late, it does not seem to be so.

Some lapses in the judiciary appeared always to be there. That was inevitable. Some years ago then Chief Justice of India (CJI) SP Barucha was reported saying: "Eighty per cent of judicial officers are honest." That restrained statement raised eyebrows. It acknowledged that twenty per cent were not. Since then the situation has deteriorated. Several high profile cases involving judges have erupted to attract public attention, create controversy.

Recently former CJI Sabharwal judged a case in which he reportedly allowed conflict of interest go unchecked, leading to alleged corruption. Allegations against the former CJI raised questions about whether former judges could be treated like ordinary citizens or not. According to an earlier Supreme Court ruling, no FIR could be registered against a serving SC or HC judge. But what would be the legal position regarding retired judges if they were charged with acts of corruption during their service as judges?

No protection

Senior advocate Anil Diwan, during the hearing of the Provident Funds scam case, in which judges of all three tiers of courts, including the SC, have been named, said that retired judges did not enjoy any protection. This view was reinforced by senior counsel and former Union Law Minister Shanti Bhushan, representing Transparency International in the same case. The bench said this aspect needed to be examined.

The growing criticism of the judiciary for its alleged lack of accountability is taking its toll. SC Judges are reportedly exhibiting frayed nerves and marked irritation in their utterances in court. Senior jurist AG Noorani wrote recently: "In no other apex court would one find such a persistent tendency of intemperate, sweeping and undignified comments by judges."

Examples are not difficult to summon. In a recent exchange in the SC during the PF scam

case, Justice Agrawal was reported describing senior counsel Shanti Bhushan as a “street urchin”. In another case involving VIP bungalows illegally occupied by important people, Justice Agrawal was quoted saying: “The whole government machinery is corrupt... They don’t apply their mind, rather they don’t have a mind to apply. They don’t have the guts to differ with the opinion of clerks.” He went on to say: “Even God will not be able to help this country!” Amazingly, Justice Agrawal is said to have remarked that the squatters occupying VIP bungalows should be arrested and given the “third degree”!

One may appreciate the strain that the judiciary is undergoing. One cannot sympathise with its plight. There are two broad truths that need to be recognised. First, that judges have eroded their public credibility due to their own conduct. Secondly, it goes against the principle of natural justice that public allegations against the member of a fraternity should be judged by other members of the same fraternity. Consider both aspects.

Often judges tend to be hypersensitive about their prestige and privileges. One may recall an incident some years ago at the Delhi railway station. A judge from a neighbouring state had not reserved his berth. Nevertheless, he expected the station master to provide him one. The station master could not oblige. The enraged judge set up a court on the railway platform itself and charged the station master with contempt!

Inversely, on some occasions when contempt of court has been committed, judges have remained inexplicably mute. During the Jain Hawala case, one of the petitioners, Vineet Narain, alleged in the journal he owned and edited that former CJI JS Verma and Justice Sen, who also sat on the bench hearing the Jain Hawala case, had visited the residence of one of the accused Jain brothers while the case was being heard. He went on to level against them the most damaging charges of bribery and moral turpitude.

The judges did not publicly react. The SC Bar Council lawyers filed a defamation and contempt case against Narain. During its hearing Justice Sen admitted he had visited the house of the accused but claimed he did not then know that the person was the accused. Yet, he did not withdraw from the bench after he came to know. Surprisingly, the SC rubbished the allegations and dismissed the case without punishing Vineet Narain! What was one to make of that episode?

Very recently, an even more astounding allegation has been made against judges. Indeed, it is what provoked this scribe to write this article. On 18 August, 2008, Nirmal Hoon, on behalf of Hungerford Investment Trust, wrote a letter to the Secretary of Chief Justice SS Nijjar of Calcutta High Court. The letter related to a case several decades old filed by the Hungerford Investment Trust against Turner Morrison and a host of other companies including Bennett Coleman and Company. The letter is on the court record and therefore a public document. In it, Mr Hoon refers to three sitting judges of Calcutta High Court accused of committing contempt of the SC. Apparently, these judges followed the judgment of Justice Kabir, who was then in Calcutta High Court, and ignored the Supreme Court which rejected his judgment in the Contempt Petition 80/2003, because it ignored oral evidence.

Calcutta High Court CJ Nijjar created judicial history by admitting a contempt petition against sitting judges. Justice Kabir meanwhile has been elevated and is now an SC Judge.

In the same letter, Mr Hoon makes even more damaging charges against several former Chief Justices of India. He accuses his business rivals of looting him of thousands of crores worth assets “with the active help and connivance of several judges, including three ex-CJIs BP Sinha, AN Ray, PN Bhagwati, who admittedly took extremely gainful employment under admittedly convicted criminals and unduly enriched themselves in crores and crores.”

Credibility destroyed

Days have passed since this letter came on public record. Why has Mr Hoon not been prosecuted? And if there is no need to prosecute him, why haven't the named former CJIs been investigated or prosecuted? This passes comprehension. It is this lax, permissive attitude that has all but destroyed the credibility of the judiciary.

Given this situation, will justice be seen to be done if the courts themselves deal with allegations made against serving or retired judges? That brings one to the second aspect. Who should judge the judges? Obviously, sitting judges and politicians who are themselves enmeshed in controversy lack the credibility to take impartial decisions. What, then, is the solution?

Judges are sworn to “uphold the Constitution and law”. The President is sworn to “preserve, protect and defend the Constitution and law”. If judges transgress the law the President must respond.

The President could appoint a Judicial Commission of eminent jurists to oversee the appointment, transfer and conduct of judges. And this Commission might be accountable solely to the President. This alone will alter the present system to restore credibility of the judiciary. This alone will partially restore the true spirit of our written Constitution.

The writer is a veteran journalist and cartoonist