# SUPREME COURT
## IN POLITICAL ROLE

***HOW JUDICIARY TURNED TIDES IN NATIONAL AFFAIRS***

**M J ANTONY**

BlueRose ONE .com
Stories Matter
New Delhi • London

**BLUEROSE PUBLISHERS**
India | U.K.




For permissions requests or inquiries regarding this publication, please contact:

BLUEROSE PUBLISHERS
www.BlueRoseONE.com
info@bluerosepublishers.com
+91 8882 898 898
+4407342408967

ISBN: 978-93-7018-247-9

Cover Design: Aman Sharma
Typesetting: Pooja Sharma

First Edition: June 2025

# Contents

*Chapter 1*

# Meddler in politics or guardian of rights?

IT is a truth universally acknowledged that politics colours every aspect of modern life. Even art, history, religion and science are not free from its shadow. This is so especially where money and power are involved. Judiciary cannot stand in isolation from events outside the courts. Some jurists call the Constitution a political document, and the Supreme Court a political institution. The constitutional courts often turn into political battlefield. They play a powerful role in citizens' lives. Some judges used to claim long ago that they don't read even newspapers lest their decisions should be swayed even subliminally. But now they admit that they watch the media but are not influenced by it. The Supreme Court has interfered on its own in several socio-political issues based on media reports, without waiting for a formal petition. The oft-repeated words of US judge Benjamin Cardozo continue to be relevant: "The great tides and currents which engulf the rest of men do not turn aside in their course and do not pass the judges by."

It is also self-evident that political problems are best solved in the political field. Judiciary should not be dragged there nor should judges wade into political whirlpools. But this is only an aspirational thought. The judges might like to confine themselves dealing with civil disputes between citizens, corporate battles, debt recovery, easements or other routine matters. Democratic constitutions do not let them live in

that comfort zone. Economic and political disputes often morph into legal questions and present themselves in the constitutional courts. Their verdicts have lasting consequences.

Moreover, clever rulers who cannot solve knotty problems use the court as cat's paw, asking the judges to handle the political hot potatoes. Thus judiciary is compelled to stay in the intersection of law and politics. The Supreme Court has often become an arena of politics in disguise. Judicial pronouncements sometimes have equal or more impact than legislative decisions on polity as courts can invalidate Acts of Parliament.

In other major democracies like US and UK, the courts have stepped into political quagmire and made dramatic changes in those countries. The US Supreme Court had upheld slavery leading to civil war, stalled Roosevelt's New Deal programmes during the World Wars, ruled that racial segregation in schools was unconstitutional and passed controversial judgments on abortion which is a political issue in that country. UK has no written constitution, and Parliament is supreme. Still, the Supreme Court there has intervened in the Brexit case in 2017 and even ruled that use of the royal prerogative is subject to judicial review. Though the judiciary is supposed to be the weakest of the three branches of government, courts have become major players in the political field in recent times. Their judgments have had serious political consequences and affected government decisions.

In India, judicial interventions in political questions have been far more phenomenal than in other countries. Court orders have often dominated and shaped national politics.

The Supreme Court has contributed to the fall of governments, jailed union cabinet ministers, virtually legislated on social and religious issues. It has quashed President's rule imposed by the federal government after dismissing state governments and reinstalled the sacked regime. It has set deadlines for state elections, indicted Governors and Speakers. Legislative proceedings were also interfered with by the court, though Article 212 of the Constitution bars it. Apart from being an adjudicator or umpire in disputes, the court has offered advice sought by Presidents, played hybrid roles like acting as a mediator in tangled inter-state disputes.

Though the court is generally reluctant to enter into political tumult, it has strongly defended its interference when the situation demanded. In 1977, shortly after the infamous Emergency was lifted, the court stated in *State of Rajasthan vs Union of India* that "every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can therefore fail to be political. A Constitution is a matter of purest politics."

The court has tried to douse political fires like when street protests erupted in Delhi over farm laws and Citizenship Amendment Act (CAA) in 2019-2021. It appointed a panel to report on the Manipur turmoil in 2023 when the central and state governments allowed the ethnic conflict to go on for months. A team of judges visited refugee camps there on a peace mission in March 2025. The court has intervened in problems arising from Covid-19 pandemic and the exodus of migrant workers. However, such extraordinary interferences did not provide a complete solution. In the absence of government cooperation they had only an analgesic effect.

While creaking with millions of cases in backlog, it has also found time to stray into fringe issues. It has dealt with petitions to stop ragging in colleges and beauty contests. On November 30, 2016, the court ordered all cinema halls to play the national anthem before screening a film "for the love of the motherland". In 2018, it stepped back and made it optional for cinema owners. In a study by the respected US journal, *Foreign Policy,* the Indian Supreme Court found a place in the "The world's most meddlesome supreme courts".

The judiciary has acquired enormous power under the Constitution for over seven decades. Some jurists believe that the founding fathers did not fully envisage the impact of what they were drafting. It is natural that the Constitution makers could not foresee all the developments yet to come. Therefore, the Supreme Court had to give new meaning to the provisions of the Constitution so that they do not get stuck in the dreary sand of conformism. The new generation of judges never tire to reiterate that the Constitution is a living document. They have tried to adapt to the changing needs of society by giving contemporary interpretation to constitutional provisions.

If India is claimed to be the largest democracy, the Supreme Court is often described as the most powerful court. The founding fathers have unwittingly armed the court with tremendous powers in the Constitution. The court has also acquired more power by interpreting the constitutional provisions. Even outside the Constitution, conventions have conferred extraordinary powers on Supreme Court judges.

It could be argued that the Chief Justice of India (CJI) is the most powerful judge under any Constitution. As the Master

of the Roster, the CJI is the sole individual who can choose the judges he/she likes on a bench, allocate work to that bench, decide the number of benches and their strength, when to decide writ petitions and appeals before the court, set the date for hearing them or *not* list them at all, keeping high-stake political questions in the limbo. Since the CJI knows the brethren personally, all these factors tend to make scholars suggest that the decision of a bench is rather predictable, even without the help of AI. The CJI, along with four senior-most judges, decide who will be elevated to the Supreme Court and the 25 high courts and who will be transferred – all decisions taken behind curtains.

Despite this enormous power and multiple jurisdictions, it is the common belief that the higher judiciary in India shows its might when the political executive is seen to be weak; and it becomes ambivalent and vulnerable when the executive is strong. The political history of the Supreme Court has ample evidence to support this assumption, especially during and after the 1975 Emergency. This cynical evaluation is sustained by commentators even now.

The members of the Constituent Assembly believed in the traditional doctrine that elected representatives of the people made laws for the nation. The unelected judges' role was only to apply the written law to the cases before them. Judiciary was believed to be the weakest arm of the government as it had "neither the sword nor the purse". Former US President Andrew Jackson once taunted the US Chief Justice: "John Marshall has made his decision, now let him enforce it."

This view was reflected in the speech of Jawaharlal Nehru while addressing the Constituent Assembly: "Within limits

no judge and no Supreme Court can make itself a Third Chamber. No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament. If we go wrong here and there, it can point it out; but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately, the whole Constitution is a creature of Parliament."

When Jawaharlal Nehru became the interim Prime Minister of India, this view led him headlong into major conflicts with judiciary. In the first one and a half years, there was a series of judicial setbacks to the avowed socialistic policies promised by the Congress. It had pledged land reforms, Zamindari abolition, nationalisation of industries and reservation for backward classes in employment and education. The Supreme Court and some high courts gave judgments that stonewalled the Congress agenda. Further, the Supreme Court expanded the scope of the fundamental rights to freedom of expression while the ruling party wanted to regulate the press. The court set aside censorship of two magazines – the left-wing *Crossroads* and the right-wing *Organiser*. Certain judgments of the high courts regarding the rights of citizens detained under state laws irked the central government further.

Nehru and B R Ambedkar could not take these setbacks lying down. They wanted to stop communal propaganda rampant then, when the country was recovering from the worst riots in the sub-continent after the Partition. So they put curbs on freedom of expression. The courts were striking down Zamindari abolition and land reforms laws. Judgments were setting aside reservation for the backward classes in

education and employment. They wanted to protect affirmative action.

The Congress party had massive majority in the provisional Parliament and Nehru was a political colossus. Any reform could be forced through. Nehru immediately started moves to amend the Constitution, which he had only months before helped to draft. Ambedkar supported him. There was no elected Lok Sabha. Rajya Sabha did not exist. Parliament was sitting in the same composition as the Constituent Assembly, relying on a transitory provision in the Constitution. When the Constitution came into force on January 26, 1950, the Constituent Assembly became the Provisional Parliament of India. It was "provisional" until the first elections under the new Constitution took place. The first general elections after Independence were scheduled to be held between 25 October 1951 and 21 February 1952.

Nehru, who was interim Prime Minister, could not wait for a full-fledged Parliament. He steamrolled the first constitutional amendment in the House invoking Article 368 on 10 May 1951 and hastily enacted it on June 18, 1951. The Amendment Act significantly changed the contours of the fundamental rights. It restricted right to property and freedom of expression. Freedom of expression was already restricted in the original Constitution. But after the *Crossroads* and *Organiser* judgments, more grounds were added to curtail it: friendly relations with foreign governments, incitement of an offence, public order.

The Nehru government's master stroke was to implant a Ninth Schedule in the Constitution. Laws listed there were immune from judicial evaluation. The Statement of Reasons

of the Amendment Act said: "Challenges to agrarian laws or laws relating to land reform were pending in courts and were holding up large schemes of land legislation through dilatory and wasteful litigation." Land reforms laws were thus shifted there to ring-fence them from judicial assault. Though the original laws shielded from judicial review related to land reforms, the central and state governments have conveniently shoved other legislations too to this protective list. Government take-over of a company (101) and the Kerala Chitties Act (149) have also found place in the schedule for no apparent reason. Though it started with 13 laws, the schedule has now bloated to 284 laws. The amendments were challenged in the Supreme Court, but a five-judge constitution bench unanimously upheld the amendments in October 1951 *(Shankari Prasad vs Union of India)*. It ruled that the provisional Parliament was competent to amend the Constitution under Article 368.

Indira Gandhi employed more drastic methods to overcome disconcerting judicial decisions. As Prime Minister, she asserted the government's power to amend the Constitution even as the Supreme Court advanced its power of judicial review. This was a point of frequent discord between the two arms of the state for decades. This friction intensified when her political and economic programmes were questioned in the Supreme Court. The Congress under Indira Gandhi was facing internal troubles in late1960s and the Supreme Court was giving judgments adverse to her socialist policies. The nationalisation of 14 banks was struck down in *R C Cooper vs Union of India (1970)*. The scrapping of the covenant with former princes to retain their privileges and privy purses was also held unconstitutional by the court in *Madhavrao Scindia vs Union of India (1971)*. In addition, the Supreme Court

restricted the power of the government to amend the Constitution in two major judgments – *Golak Nath (1967)* and *Kesavananda Bharati (1973)*.

These decisions came at a time when the Grand Old Party was facing a split for the first time in its history. Indira Gandhi was heading a minority government in 1967. She had to depend upon the Left parties for survival. Faced with such existential challenges, she called the first mid-term election. Before the March 1971 Lok Sabha elections, her Congress party manifesto mentioned the judicial setbacks. The campaign highlighted the need to overcome such hurdles put up by the Supreme Court before economic and social reforms. She also wanted Parliament to be supreme.

She won a landslide victory at the polls. Then she passed a series constitutional amendments and laws to surmount the judgments, just like her father Nehru did in the early days of the Republic. The 24th amendment granted power to Parliament to amend any part of the Constitution. This was meant to negate the *Golak Nath* judgment barring all amendments to the Constitution. In order to neutralise the Bank Nationalisation judgment, 25th amendment was passed which asserted that adequacy of compensation for takeover cannot be challenged and the Directive Principles of State Policy must take a higher place than the fundamental right to property. By the 26th amendment, Privy Purses were abolished.

More radical changes in politics triggered by court judgments occurred during the Emergency declared in 1975. Indira Gandhi's election from Rae Bareli, Uttar Pradesh, in 1971 was declared void by the Allahabad high court on 12 June 1975 on the charge of electoral corruption. On appeal, the

Supreme Court granted conditional stay, letting her continue as the Prime Minister, but without the power to vote in Parliament. Meanwhile, Jayaprakash Narayan was leading a protest movement against her. She retaliated by invoking Article 352 which empowered the government to clamp Emergency. Though the official reason given was "internal disturbances", the high court decision unseating her was the real cause for this drastic action.

She began to make far-reaching changes in the Constitution so that the writ courts would not interfere in the decisions of the state. The 39th and 42nd amendments were the most sweeping ones; the Constitution was haemorrhaged. According to these omnibus amendments, election to the Prime Minister and the Speaker of the Lok Sabha shall not be called in question. The constituent power of Parliament would be unlimited. While Nehru sponsored amendments for political and economic reasons, Indira Gandhi mauled the Constitution with a series of amendments to stay in power. Only some amendments reached the Supreme Court for its scrutiny as most were revoked by the Janata Party government which came to power in 1977 after her defeat at the polls.

A turning point in the political history of the Supreme Court was the five-judge constitution bench judgment in *ADM Jabalpur vs Shiv Kant Shukla (1976)* in which it had ruled that citizens had no fundamental right to life and liberty during Emergency. This decision had deeply dented the court's credibility. As if to repair the damage, it expanded its role by delivering a number of affirmative judgments since 1979. Public interest litigation (PIL) was crafted by the judges that enabled them to probe political

corruption of various hues. It began to haul up the executive for its wrongs.

One eternal question asked about judiciary is whether the judges can extricate themselves from their ideologies and prejudices while deciding sensitive cases. Another such concern is about their independence from political pressures. Therefore, their appointments, confirmation and transfers deserve to be discussed in detail. Their post-retirement role as Governors, Rajya Sabha members and chairmen of commissions of inquiry in which the ruling party has high stakes is another subject of intense public debate.

The role of the court in dealing with malfeasance in government, corruption in elections, religious and social questions has critical importance in the destiny of the nation. The change in the behaviour of Speakers and Governors has mattered significantly in the federal framework. Several such crucial aspects of the role of the court in politics are expanded in the following chapters. To start with, it is helpful to appreciate how the Supreme Court acquired such enormous political power and expanded its involvement in public life, unknown to any other judicial system.

## *Chapter 2*

# Rise of judicial power

HOW the framers of the Constitution unwittingly handed over enormous powers to the higher judiciary is a favourite subject of discussion among political pundits. The Constitution makers, who wrote the wordiest Constitution in the world, could not have envisaged every scenario and changing political mores in the womb of time. Judiciary had to meet new situations, and in the process of creative interpretation, its power grew incrementally.

Broadly speaking, it can be stated that the court acquired political clout in four or five noticeable ways. Some powers were derived from the Constitution itself and others by judicial interpretation. There are short but powerful provisions in the Constitution which confer extraordinary authority on the Supreme Court. It can decide writ petitions invoking fundamental rights of citizens; it is the highest court of appeal; it has a powerful role in the appointment of judges of the Supreme Court and high court. It can correct its own mistakes in review petitions and curative petitions.

Article 141 says that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The principles laid down by the court should be followed by all courts and orders passed should be obeyed not only by the authorities all over the country but also by those who are not parties to the case. What the court says is final, right or wrong. Former CJ of US Supreme Court Robert Jackson is often quoted in this context: "We are not final because we

are infallible; we are infallible only because we are final". Another CJ of US, Charles Evans, also explained the situation there: "We are under a Constitution, but the Constitution is what the judge says it is."

**Mandate for 'complete justice'**

Under Article 142 the Supreme Court may pass such decree or order as is necessary for doing "complete justice" in any matter pending before it. The phrase is elastic and therefore controversial. When there is a legislative vacuum this inherent power can be used. The court has asserted that "No enactment made by Central or State legislature can limit or restrict the power of this court under Article 142... What would be the need of 'complete justice' would depend upon the facts and circumstances of each case" *(Delhi Judicial Services Assn, 1991)*. In the Ayodhya judgment (2019), the constitution bench invoked this extraordinary power to settle the rights of the rival parties. When the governors unduly delayed assent to bills passed by state assemblies, the court set a timeline for their signature (2025). The creation of the Collegium system to appoint and transfer judges of the constitutional courts was another instance.

Article 143 confers advisory jurisdiction on the court. The President of India may obtain the opinion of the court on any question or fact of law. The bench must consist of at least five judges. The President is not bound to act according to the opinion rendered by the court. However, the opinion has persuasive value and it is cited in the courts and other judgments. The court can decline to give its opinion on a matter referred to it. In the Ayodhya dispute, the government sought the opinion of the court whether a temple existed at the site of Babri Masjid in Ayodhya. The

judges asked the government whether it would comply with its opinion if given. The government could not give a commitment. So the court declined to give its opinion. Recently, the President referred14 questions on powers of judiciary in relation to Governors.

According to Article 131, the Supreme Court has exclusive and original jurisdiction in disputes between states or between states and the Union. This power has been invoked in matters of river water sharing and disputes over state borders. These squabbles have taken political colour and led to shut-downs and violence. But in recent times, some states have taken various grievances against the Centre to the Supreme Court, provoking disquiet over cooperative federalism.

**Power of judicial review**

The most significant power conferred on the Supreme Court is the power of judicial review. This allows the court to examine the actions of the other wings of the state so as to determine whether they are constitutional or not. The Constitution expressly confers this power of judicial review in Part III of the Constitution which is titled the Fundamental Rights. These Articles (12-35) are the "Bill of Rights" of India, guaranteeing the right to freedom and right to life, among others. The architects of the Constitution could not have imagined that the rights listed in this part would grow to become as pervasive and formidable as they are now. This power of judicial review has often turned out to be political power.

Article 13 declares that all laws in force immediately before the commencement of the Constitution would be void if they are inconsistent with the provisions containing the

fundamental rights. More significantly, it goes on to say that the State shall not make any law which takes away or abridges any of the fundamental rights. Any law made in contravention of this mandate shall, to the extent of the contravention, would be void. The court thus received enormous power to interpret the words and phrases in all laws on the touchstone of the fundamental rights. This power of interpretation has triggered numerous conflicts between judiciary and the government when essentially political and economic questions were to be decided.

The words and phrases in the statute cannot embrace all developing situations; there are bound to be vacuums and crevices. The words could also be expounded in different ways. Article 19 grants the freedom to assemble peaceably and without arms; to form associations or unions; to move freely throughout the territory of India; to reside and settle in any part of the territory of India; and to practise any profession, or to carry on any occupation, trade or business. Most of them have restrictive clauses. For instance, the government can impose "reasonable restrictions" on the freedom of expression invoking security of state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation, incitement to offence or sovereignty or integrity of India.

One could discern a tyranny of elusive words here. What is reasonable will vary from judge to judge, from time to time and from government to government. 'Decency' and 'morality' are extremely flexible terms. Writing about the term 'reasonable', CJI Patanjali Sastri wrote in *State of Madras vs V G Row (1952):* "In evaluating such elusive factors and forming their own conception of what is reasonable, in

all the circumstances of a given case, it is inevitable that all social philosophy and the scale of values of the judges participating in the decision should play an important part."

**Public interest litigation**

The Supreme Court expanded its power by inventing Public Interest Litigation (PIL) in the 1980s which few other courts in the world did. The concept is supposed to be dormant in the Constitution but the court breathed new life into it. PIL has changed the role of the court. Through PIL it could examine almost every aspect of governance, including political corruption. This extraordinary power, which the judges bestowed unto themselves, has been the bugbear of the government and all authorities under it. PIL is a vast field and is dealt with in the next chapter. The Supreme Court has also used its extraordinary powers to intervene *suo motu*, on its own, when it noticed outrageous incidents of human rights violations. Such incidents, often triggered by political dog whistles, have occurred very often.

**Media and public opinion**

While talking about the source of power of the court, an unrecognised factor is the arrival of the vibrant media. In the early days there were hardly any full time legal correspondents covering the proceedings and judgments. Some lawyers were appointed part-time but they were unfamiliar with the ways of modern journalism. The Shah Commission of 1977 trying the bigwigs of the Indira Gandhi coterie was the turning point. The public was tickled by the daily revelations of the atrocities of the Emergency regime. Newspapers realised that full time correspondents needed to be appointed for covering top courts. Thus professional reporters started descending on the court and airing

proceedings hour to hour. They now report what the judges said during the hearing. Such observations often become "Breaking News", though they have no binding value. But the way they are presented by the media to the public has turned the tide of litigation and even political events. After the introduction of live-streaming of court proceedings, the entire system has changed and the public can watch the goings-on on their smart phones, though they may not understand it fully. Then there are court-reporting web sites and legal magazines too. "Publicity is the very soul of justice", said Jeremy Bentham, and "it keeps the judge himself, while trying, under trial."

**Mind your language**

One controversial source of power is the power to punish those who are accused of contempt of court. Articles 129 and 215 of the Constitution empower the Supreme Court and high courts respectively to punish people for contempt. The Contempt of Courts Act of 1971 takes care of the details. Under this law, the Supreme Court and the high courts have been endowed with the power to punish those who disobey its orders or subject it to scurrilous criticism intending to scandalise or tends to scandalise or lower or tends to lower the authority of any court. The Supreme Court and the high courts, which are described as "courts of record", have special powers in this respect. The exercise of this power has been extremely contentious because several political bigwigs have been let off by explaining away their utterances while ordinary persons have been punished. This subject has been dealt with in more detail in a later chapter.

**Public support judicial activism**

Despite the court enhancing its own powers, there was not much outrage among the public. In fact, the people seem to welcome the trend. They trust the judges more than the politicians, whose stock has suffered a free fall. When the government authorities do not respond to people in distress, the aggrieved persons and social activists approach the court. As the volume of laws increases and the government shows authoritarian instincts, the citizens move courts to protect their rights. The backlash against judicial incursions comes mostly from politicians who fear encroachment of their own powers.

Constitutional scholars make muted objections to judicial activism as many of them go by the letter of the law. These strict constructionists have wondered what would happen if the political actors got even and made incursions into the judicial territory, ignoring the principle of separation of powers. After all, judiciary also have plenty of fault lines. Former President Pranab Mukherjee, in his autobiography, *Presidential Years,* draws a scary picture of the growth of judicial power: "Perhaps, the judiciary extends its mandate out of overenthusiasm. But it is still not justifiable, even though some people welcome it. In some countries, people initially welcomed military or dictatorial rule, as they were dejected with the current state of affairs. Military rulers were felicitated by the public. However, over a period of time, people got to see the real face of such regimes and realised the dangers they had put themselves into. Similarly, judicial overreach may sound attractive in the early stages, but the long-term impact may not be conducive to parliamentary democracy."

## *Chapter 3*

# PIL: A sword and a shield

PUBLIC interest litigation (PIL) has played an immense role in politics, chasing the corrupt and protecting the weak. It makes headlines every day. It is at present the most visible source of power of the Supreme Court. PIL has extensively changed the political landscape since 1979. This innovative arm of the judiciary is peculiar to the Supreme Court of India. Judges are said to be timid innovators. But the launch of PIL by the Supreme Court judges belied that assumption. How the judges turned out this concept which was not in the Constitution makes a fascinating story that deserves to be told.

The term PIL was used for the first time by V R Krishna Iyer and P N Bhagwati in *Fertiliser Corporation Kamgar vs Union of India (1981).* Soon thereafter, Bhagwati, (who later became CJI), gave concrete shape to the concept in the judgment *S P Gupta vs Union of India (1982).* PIL opened the door of the court to the indigent, illiterate and the oppressed, eliminating procedural hurdles and court expenses. Earlier, only a person directly affected by a wrong done by the state could move the court. That principle, called *locus standi*, was relaxed in PIL. A post card from an aggrieved prisoner, a conscientious citizen, an NGO or even a letter to the editor of a newspaper was enough to move the court.

The concept of PIL was explained by Bhagwati in the *S P Gupta* judgment thus: "Any member of the public or social action group acting bona fide" could move a high court or

the Supreme Court seeking remedy on behalf of those who, due to social or economic or any other disability, could not approach the court. But the petitioner must have sufficient interest in the matter and should not be a busybody or a meddlesome interloper. While diluting the procedural rule of *locus standi*, the court asserted that "procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by procedural technicalities." At the same time, the legal aid movement was strengthened to provide lawyers free to the petitioners who could not afford them. Court fee rule was also waived. Some commentators recalled Emperor Jahangir's "chain of justice" with golden bells at the Agra fort. It is said that even the humblest subject could tie his petition to the chain and pull it up. He will be heard by the Emperor.

Those pioneering judges who crafted this extraordinary jurisdiction had to face fierce disapproval from their brethren in 1980s. The dissenters, including sitting judges, made pot-shots against it from public forum and in their orders. When the court ordered the UP government to provide toilets, fans and other basic facilities in Agra resettlement home for women, Justice E S Venkataramiah (later CJI) remarked that the court seemed to be running the administration of that institution. A division bench of Justices Fazal Ali and Venkataramiah raised ten questions throwing doubts on the rationale of PILs in *Sudip Majumdar vs Union of India (1983)*. Though they referred their misgivings to a constitution bench, the issue was closed in 1994 as the PIL movement had come to stay.

Critics of PIL and "judicial adventurism" attack it from various fronts. PIL takes up a lot of time of the Supreme

Court, judges dive into matters in which they are not experts and they pass orders which cannot be implemented, it invites publicity mongers and interlopers. In answer, the defenders point out that the time is not wasted as the issues brought before the court benefited a large number of people, most of whom cannot approach the court due to poverty, ignorance and physical distance from the seat of justice.

The media played a significant role in the PIL movement from the start. A news report in the *Indian Express* about the Bihar police gouging out the eyes of alleged criminals and pouring acid ("Ganga jal") in them was taken up by the court. The hapless persons were brought to the court by their lawyer Kapila Hingorani. Justice Bhagwati ordered medical help to them at Delhi AIIMS. A reporter of the same paper bought a woman, Kamala, from Dholpur, Rajasthan, to highlight trafficking in women. That was also taken up as a PIL and orders were passed to protect such women. Both these instances were later adapted in Bollywood movies. In the *Hussainara Khatoon* set of orders, more than 40,000 prisoners detained without trial for decades in Bihar jails were released turning a letter of a lawyer to the court into a writ petition.

**PIL extends to larger field**

In the beginning, PIL was meant only to help the weaker sections of society who could not approach the court. The expansive interpretation of life and liberty helped uphold the human rights of prisoners, child workers, bonded labour and other deprived segments of society. The orders emphasised socio-economic rights like the right to livelihood, right to work, shelter and education. However, PIL later covered a

larger area, most consequential being corruption in government and in elections.

While the PIL movement grew like a banyan tree and gave shelter to the disadvantaged, in recent times a lot of weeds have grown under it. Busybodies have burdened the court with frivolous petitions. Politically inspired petitions wearing constitutional cloak have made their way to the court. There have been PILs praying to bring back Kohinoor to India, ban beauty contests and wearing red dresses all over the country. The judges have noted the recent flow of self-serving cases. In one instance, the Supreme Court ordered an advocate from UP to deposit ₹5 lakh as cost for hearing his "frivolous" plea that the Bombay high court Chief Justice did not say 'I' while taking his oath of office. One bench dismissed a PIL arguing that the theory of evolution propounded by Charles Darwin was wrong as well as Albert Einstein's theory of relativity.

One of the reasons for the rise of PIL is the lack of debate in the legislature before passing laws. As a result, those affected persons take to the streets. When they fail again they move PILs. Thus the debate on legislation moves from Parliament to the courts. The citizens have to use law to defend themselves against unjust laws. This is when PIL becomes a sword as well as a shield. It makes the judiciary look as if it is a party in contest for power. That is why the court gets a pre-eminent role in the politics of the land.

## *Chapter 4*

# On trail of corruption

TELEVISION viewers and newspaper readers who learn about new scams every other day might tend to think that corruption is a modern vice and early communities were free from it. However, venality in all aspects of public life was prevalent since humans lived in organised communities. It has thrived despite all efforts to control it. Prof Upendra Thakur, a researcher on classic India, has written *Corruption in Ancient India*, in which he has shown that the evil was ubiquitous in early societies. He cites irrefutable evidence from Jataka tales, Rigveda, Puranas, Arthashastra, and writings of law-givers like Manu and Yagnyavalka and travellers such as Alberuni and Hiuen-tsang. He concludes that "from all accounts it is clear that the more the ancient sages taught the virtues of life, the more the depth of moral deterioration followed in all walks of life in successive ages." Ancient Rome and Greece were no exceptions. An African leader once said that corruption in public life is as natural as ticks on dogs. People can only take care that the parasites don't grow bigger than the dogs.

The Supreme Court has tried to tackle corruption through PIL with indifferent results. There have been hundreds of major political or financial 'scams' in India since Independence in 1947. The number has been swelling regularly and the subjects were astounding. In 2024, there arose a *'kitchdi'* scam in Maharashtra. It surfaced after the police found irregularities in awarding contracts for

providing *khichdi* (steamed rice and pulses) to migrants during the Covid pandemic.

As PILs bloomed in the 1990s, allegations of political corruption also came within its net. Government contracts, distribution of natural resources and defence deals came under judicial scanner. Union Ministers like A Raja, Bihar chief minister Lalu Prasad, UP chief minister Mayawati faced the heat of corruption charges. The government and political leaders protested that PIL was trespassing into legislative and executive fields. On the other hand, the judges justified their orders stating that they had a duty to act when citizens came to them with complaints of violation of their fundamental rights. When the government failed to protect their rights, the court could not stand as mute spectators, they stated in judgments and from public platforms. There were also voices from the bar defending the court's intervention. Noted jurist F S Nariman wrote in his book *God Save Supreme Court*: "If judges are to get off the backs of parliamentarians, politicians and bureaucrats, those who claim the right to govern must come up with a much better record of performance." Edmund Burke said in 1771: "I like a clamour whenever there is abuse. The fire bell at midnight disturbs your sleep, but it keeps you from being burnt in your bed." PIL began to cover a wide variety of governance issues brought before the court by activists. Here are some prominent ones.

**Jain Hawala case**

This case was one of the earliest PILs which shook politics of the 1990s. Two news reporters in a Hindi daily newspaper, *Jansatta*, broke the story of a huge scandal in which top political leaders were named in Hawala transactions. One

journalist brought the issue to the Supreme Court in the form of a PIL *(Vineet Narain vs Union of India).* According to the petition, an office-bearer of a terrorist organisation in Kashmir was arrested in Delhi. He was interrogated by the police. It led to raids at the residential and business premises of Surendra Kumar Jain, his brothers and relatives. During the raid, CBI seized two diaries and notebooks which contained details of black money payments to persons, identified only by their initials. However, the needle of suspicion pointed to several influential politicians and top bureaucrats. Soon thereafter, the CBI became lax in its investigation. Some of the officers who conducted the probe were mysteriously transferred from their posts. Amid the suspicion of high level corruption involving national security, Vineet Narain and others sought a full probe into the murky affair.

The court took up the case earnestly and passed several interim orders. CBI officers were examined in camera by the presiding judge, Justice J S Verma (later CJI). The case created such a sensation in the country that Verma was on the cover of *India Today* magazine titled "Mr Justice". It carried his interview while the case was on. The court monitored the progress of the investigation, devising new procedures that set precedents for future scam trials. It asked the CBI not to report the progress of the investigations to "the person occupying the highest office in the political executive."

The proceedings lasted several months. BJP heavyweight L K Advani, whose initials were purportedly found in the diaries, resigned from Parliament stating that "I listened to my conscience". But when the cases were taken up by criminal

courts, they collapsed and the accused persons were acquitted for want of legal evidence. Diary entries without corroboration did not constitute valid evidence.

The final judgment was delivered in December 1997. It was path-breaking as it laid down more than 30 directions to insulate CBI from "extraneous influences." The court gave Central Vigilance Commission (CVC) "superintendence over CBI functioning." transferring that power from the government to the CVC. Later developments, however, showed that the objectives of the judgment were not achieved. In the following years, CVC was rendered toothless and it became an advisory body of sorts. The Hawala judgment came with a bang but ended with a whimper.

The role of the CBI was so suspect in later years that Justice R M Lodha (later CJI) famously called it a "caged parrot" and "its master's voice" (in the 'Coalgate' scam narrated below). A glance at the record of the CBI justified the comment. Prosecution on corruption charges against Bihar leader Lalu Prasad, UP leaders Mayawati and Mulayam Singh Yadav, swung according to their use for the government at the Centre. On 21 March 2013, Mayawati said: "I have been a victim of the misuse of the CBI. Be it BJP or Congress, both have misused CBI." On 3 April of the same year, Mulayam Singh also lamented that "no one can fight the Congress because if one does, one is sent to jail or is chased by the CBI." The situation has apparently not changed as the events in the following decade showed. There is a reverse situation when a public prosecutor can withdraw criminal and corruption cases with the consent of the court. The government prosecutor has sometimes withdrawn cases

against powerful persons when the political weathercock changed direction.

**Favouritism in discretionary quota**

There was a time when misuse power was punished by the political party to which they belonged. Or the people voted them out. But now they face PILs. In 1996, for instance, the Supreme Court made stinging remarks against Shiela Kaul, Minister for Housing in the Narasimha Rao government. In a PIL moved by lawyer Shiv Sagar Tiwari it was alleged that as union minister she allotted from her discretionary quota some 50 shops in prime localities in New Delhi to her close relations and friends, violating the norms set by the government. The petition alleged anomalies in the allocation of government accommodation, including out-of-turn allotments and unauthorised occupation. The court set aside the allotments and Shiela Kaul was ordered to pay Rs 60 lakh as exemplary damages for the alleged misdemeanours. However, it was waived by another bench of the Supreme Court on her review petition in 2002. The new bench, while quashing the damages imposed on Mrs Kaul, stated that “the direction to launch criminal prosecution on the basis of the CBI investigation is not being altered in any manner and if any criminal proceeding has already been instituted, that must take its own course on the materials produced". The PIL haunted her to the end of her life. In 2013, the 99-year-old Kaul moved the Supreme Court again, challenging the 2012 order of a CBI Special Judge who ordered her to appear in court in an ambulance to respond to the charges of out-of-turn allotments. Kaul's counsel contended that she was incapable of giving rational answers due to "impaired"

understanding as diagnosed by AIIMS. She died soon thereafter.

Around the same time, another PIL tormented Satish Sharma, Congress leader and Petroleum Minister at the Centre. This petition originated from a front page report in the *Indian Express* in 1995 under the caption "Petrol and Patronage Flow Together". It alleged that the Minister allotted petrol pumps arbitrarily in favour of his relatives, friends and kith and kin, and even to his driver. Common Cause, a public spirited NGO, moved a PIL. The Supreme Court quashed allotments of 15 petrol pumps issued from the discretionary quota *(Common Cause vs UOI,1996)*. In this case also, the court ordered the Minister to pay Rs 50 lakh as exemplary damages to the public exchequer. Further, it also directed the CBI to register a case against Sharma.

Writing the judgment, the bench presided over by Justice Kuldip Singh emphasised that "the Government today – in a welfare State – provides a large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases, contracts, quotas and licences etc. The government distributes largesse in various forms. A Minister who is the executive head of the department concerned distributed these benefits and largesse. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the peoples' property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people."

However, in 1999, another bench hearing the review petition of Sharma, recalled the order of Kuldip Singh (who had by then retired), imposing the fine of Rs 50 lakh. It

stated that the earlier order was a "serious miscarriage of justice." This time the court's view was that the petitioner in this case was Common Cause, which had not applied for allotment of petrol outlet. There has to be an identifiable claimant whose interest was damaged by the act of a public officer. Compensation can be awarded only to a person who had suffered loss. This constricted view was in direct contradiction to the court opinion in the Shiela Kaul case. This judgment did not refer to the Shiela Kaul case in which the court had rejected the argument that only a person who had suffered an injury could move the court against the government.

The story ended with yet another anti-climax. The special court discharged the Congress leader in all 15 cases, accepting the closure report filed by the CBI. The investigating agency had filed the closure report as the Home Minister refused sanction for his prosecution as required under the Prevention of Corruption Act. The court, however, said the cases against the other accused persons, not protected by the sanction provision in the laws, would continue.

**Scam trials dislodge governments**

Cases of political corruption examined by the Supreme Court have had the potential to bring down governments. They have acted as powerful tools of propaganda in the hands of Opposition parties though the allegations may not have stood the scrutiny of the courts in the end. The furore over an arms deal with a Swiss firm, known as Bofors in 1980-90, brought down the Rajiv Gandhi government. The FIR in the case was quashed by the Delhi high court. Around the same time, another scandal broke out involving

the former Prime Minister V P Singh and his son, spiced with the involvement of a godman, Chandraswami. Like the Bofors story, this "St Kitts affair" also fizzled out.

In the Manmohan era, more sleaze was reported which led to the decline and fall of the Congress and its government. One major PIL dealt with by the Supreme Court was the "2G Spectrum scam". A report of the Comptroller and Auditor General (CAG) on 2G spectrum allocations in 2008 estimated a loss of Rs 1.76 lakh crore to the exchequer. It was filed by the Centre for PIL. During the hearing Union Telecom Minister A Raja and DMK leader Kanimozhi were jailed. After prolonged hearing, the Supreme Court in February 2012 cancelled all the 122 telecom licences allocated in 2008 as they were held arbitrary. The court stated that Raja had virtually gifted away spectrum, scarce natural resource, to select companies. The shock order and media reports of the proceedings slowed down the economy, foreign investment became shy and investor confidence was deeply affected for some time. The Supreme Court intervention fuelled the 'India Against Corruption' movement led by Anna Hazare. BJP took full advantage of the scandal to come to power in the 2014 Lok Sabha election. But the whole affair ended up in an anti-climax in 2017. No one was found guilty and the special court ultimately stated that it was all based on "rumour, gossip and speculation". The judgment said that "a huge scam was seen by everybody where there was none."

During the same period, when the general election of 2014 was approaching, another scam ('Coalgate') blew up in the face of UPA II government. In a draft report in March 2012, the CAG accused the government of "inefficient" allocation

of coal blocks between 2004 and 2009. It estimated that it resulted in the allotted firms getting a windfall of Rs 10.7 lakh crore. The Supreme Court ruled that coal blocks allocated between 1993 and 2010 were illegal *(M L Sharma vs Principle Secretary, 2014)*. A bench presided over by Chief Justice R M Lodha termed the allocation of 214 out 218 coal blocks as "fatally flawed". The court said that the beneficiaries of the illegal process must suffer the consequences. More than nine years later, the CBI informed the court that 56 cases were registered on the illegal coal block allotments but till then there were only three convictions. Several FIRs and charge sheets have been filed but the progress in the prosecution was tardy.

# Chapter 5

## Restraint on election speeches

INDIA conducts the largest popular election in the world. In the 2024 parliamentary elections it had nearly a billion voters and 1.5 million polling stations. Polling officials go through jungles, up snow-covered mountains and wade through rivers, carrying voting machines on the back of horses and elephants. They set up polling booths in inaccessible areas. The world's highest polling booth is at Tashigang, Himachal Pradesh, situated at 4,650 metres above sea level. It had 52 voters in 2024. In the same year, polling officials trekked 25 km into the Gir forest in Gujarat, the last surviving natural habitat of Asiatic lions. There was only one voter, a temple priest.

As it is the biggest democratic exercise in history, there are formidable problems before the Election Commission of India (ECI). Its chief Rajiv Kumar said before the 2024 elections: "The daunting challenges in conducting free and fair elections are four-fold, the 4Ms: muscle, money, misinformation, and Model Code of Conduct violations." After the elections, the public added one more to the list – the integrity of ECI itself. The Representation of the People Act (RPA) tries to combat corruption. Section 123 deals with bribery, threats, undue influence, appeals on the ground of religion, caste, community or language.

The first place to register complaints is ECI. Those who are dissatisfied with its decision move the high courts, and then appeal to the Supreme Court. The numerous questions

raised by them remain in legal limbo for years, as the courts move at a glacial pace. By the time they are answered, the terms of the winning candidates often expire. The quashing of Indira Gandhi's election in 1971 from Rae Bareli constituency in UP was a rare exception. The judgment came exceptionally fast. Her election was declared void by the Allahabad high court on 12 June 1975 on the charge of electoral corruption. On appeal, the Supreme Court granted conditional stay. That led to the 1975 Emergency.

The second time when a leading politician suffered through court order was in 2023. It was Indira Gandhi's grandson and Congress leader Rahul Gandhi. He was totally disqualified following conviction in a criminal defamation case. He was campaigning in Kolar, Karnataka, in the run-up to the 2019 general election. He played on the name Modi, leading to the filing of a criminal defamation case against him. Gandhi was found guilty on March 23, 2023 by a court in Surat in Gujarat. The court sentenced Gandhi to two years simple imprisonment, which is the maximum punishment under the Indian Penal Code. The more serious consequence of the sentence was that any elected representative sentenced for any offence for a period of two years or more faces immediate disqualification under Section 8(3) of RPA. So Rahul was disqualified from the Lok Sabha. He could not have returned to the Lok Sabha for eight years. He was also ousted from his official residence. The Gujarat high court dismissed his appeal. But the Supreme Court stayed his conviction and made him eligible to attend Lok Sabha.

There were mavericks who seem to delight in litigating against top leaders invoking election laws. One such case was

*Dhartipakar Madan Lal Agarwal vs Rajiv Gandhi (1987).* The Supreme Court dismissed his appeal stating that the allegations were vague. Dhartipakar had also challenged the election of Presidents like Neelam Sanjiva Reddy in 1977 and K R Narayanan in 1997. Charan Lal Sahu, a Supreme Court lawyer, is reputed to have challenged the election of seven presidents. Only two were left without contest in court – Dr Radhakrishnan and Pratibha Patil.

**Religious appeals**

The standard of politicians on the campaign trail has deteriorated fast in recent decades. Unabashed invocation of religious sentiments and nurturing vote banks based on caste and class are some of the overt vices that taint electioneering these days. Neither the political leadership nor the Election Commission has helped stem the descent. Being a highly religious nation, politicians do not fail to use faith as a big vote-catcher. Though appeals on the ground of religion are a corrupt practice mentioned in Section 123 (3) of RPA, it is profusely used by candidates. In this land of hero worship, party workers often deify their candidates.

An early decision by a constitution bench involved the appeal of a candidate in the name of cock which is an integral part of religious ceremonies of certain tribal people *(Shubnath Deogam vs Ram Narain (1960).* He was a candidate of the Jharkhand Party seeking autonomy for the tribal area. He used cock as his election symbol and distributed leaflets appealing in the name of the bird. In a poem, it was depicted as urging the tribal voters to give it food in the shape of votes, as it served them even at the cost of its life. If cock did not get votes, people would suffer eternal miseries. The court

held that it was a religious appeal prohibited under Article 123. The election was set aside.

In *Jagdev Singh vs Pratap Singh (1965)* a constitution bench unanimously ruled that the use of the word 'Om' on a flag is not a religious symbol. The judgment said that "it is difficult to regard Om, which is preliminary to an incantation or to religious books, as having religious significance...To Om high spiritual or mystical efficacy is undoubtedly ascribed, but its use on a flag does not symbolise religion, or anything religious." Yet another constitution bench considered the objection to the use of Dhruva, or pole star, as a religious symbol in *Ramanbhai Patel vs Dabhi Ajit Kumar (1965).* The judgment said that Dhruva received a boon from God that it would shine permanently in the sky. That would not give it divinity along with crores of deities in the Hindu pantheon, the court said. In *Indira Gandhi vs Raj Narain (1975),* the Supreme Court held that the Congress party symbol 'cow and calf' was not a religious one.

In two cases that came before the Supreme Court, candidates of Telugu Desam used posters depicting its founder N T Ram Rao as reincarnation of Lord Krishna, blowing conch shell with verses from the Gita. The high court invalidated his election on the ground of appealing in the name of religion. The Supreme Court upheld the verdict in *Kalamata Mohan Rao vs Narayana Rao (1996).* In another case, *Kanti Prasad vs Purshottam Patel (1969)* the election of a candidate from Mehsana, Gujarat, was set aside because of the speeches made by his supporter which amounted to corrupt practice. Among other things, the speeches referred to recurring natural calamities and attributed them to divine displeasure caused by cow slaughter permitted by the

Congress government. Threatening voters with divine displeasure was the ground for invalidating the election of a candidate from Madhya Pradesh *(Narbada Prasad vs Chhaganlal, 1968).* To vote for Congress amounted to cow slaughter, according to the speeches.

Two major judgments in election cases which received fierce criticism were delivered by a bench presided over by Justice J S Verma (later CJI) in December 1995. The issue involved the meaning of Hindutva, Hindu and Hinduism. The court stated that the words Hinduism or Hindutva are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India. The terms cannot be "assumed to mean or equated with narrow fundamentalist Hindu religious bigotry." Unless the context of a speech indicates a contrary meaning or use, in the abstract, these terms are indicative more of a "way of life" of the Indian people and are not confined merely to describe persons practising the Hindu religion as a faith, the judge wrote (*Dr Ramesh Prabhoo vs P K Kunte, 1996).* Justice Verma reiterated the view in another election case, *Manohar Joshi vs Nitin Patil (1996).* The court has not reconsidered its view despite requests filed in petitions.

The above selection of court decisions show variations in the views of the judges according to the facts and circumstances of the cases before them. Times change, the tone and diction of the campaigners change, the perspectives of judges and composition of the benches also differ. The poisonous speeches, which provoked revulsion among reasonable persons a few decades ago, do not shock the voters now.

**Model code of Conduct**

The Election Commission has vast powers to regulate the conduct of the elections under Article 324. However, ECI has faced several challenges over the decades. One charge against it is that it is tardy in enforcing the Model Code of Conduct. When the ECI announces the schedule of elections, it also imposes the code. The courts are silent on its enforceability. The aggrieved party can only complain to ECI and seek its intervention. But its record on this front is poor as the governments and political parties disregard them. It is also accused of favouring the rulers.

The appointment of the Chief Election Commissioner and other commissioners has been embroiled in controversy in recent times. The composition of ECI matters a lot as the commission is considered gatekeepers to the vital democratic exercise. Earlier the appointment was done unilaterally by the President, on the advice of the government. Since the role of the ECI came under a shadow, a few PILs were moved in the Supreme Court dealing with the appointment of election commissioners. They had sought issuance of directives to the Centre for setting up a neutral selection panel for recommending names to the President (*Anoop Baranwal vs Union of India, 2023).* A five-judge constitution bench of the Supreme Court suggested that the selection of these persons should be by a collegium consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha and the Chief Justice of India. This was intended to confer independence on the commission. The government did not follow the court's formula. On the other hand, it passed a law in December 2023 removing the Chief Justice from the selection panel, substituting him with "a Union

Cabinet Minister to be nominated by the Prime Minister". The opinion of the Opposition leader can now be disregarded.

# Chapter 6

## Know your candidate

SINCE the performance of ECI failed to inspire confidence, the Supreme Court was saddled with the additional task of cleansing the election process, especially in choosing candidates. The irony is that the government had resisted the role of the court in reforming elections. Nevertheless, the court has passed consequential judgments one after the other, some of which are discussed below.

It is well known that there is an undesirable number of members in Parliament and state legislatures who have criminal background and have amassed wealth by illegal means. Their percentage was growing steadily over the decades. Data produced in the Supreme Court in February 2025 showed that 251 of 543 Lok Sabha MPs faced criminal cases. Among them, 170 were charged with offences that were punishable with imprisonment of five years or more. Earlier, politicians had sought the help of shady characters in winning elections because they held strong influence in their respective areas. They had gained power by getting things done to help the poor and illiterate people in their needs when government agencies failed them. The 'Robin Hoods' also provided instant justice when the police and courts dithered. The local people held them as anti-heroes. Soon they found that instead of playing second fiddle to politicians, they could join mainstream politics. Thus they built their own vote banks. It was a case of tail wagging the

dog. Added to this were the usual concoction of caste, religion and all the rest which make a winning formula.

Political parties plead that they select candidates looking into their "electability" or "inability". Thus they seem to put the blame on the electorate for sending them to legislative bodies. Another argument put forward by the parties is that there is "vendetta politics" by the rivals. They file frivolous complaints to thwart their opponents and the victims have to wait endlessly for being declared innocent by courts of law. There is some irony here. Since prosecution in courts takes too long, lakhs of innocents are in jail for years awaiting a final judgment. They cannot vote as Section 62(5) of RPA says no person can vote if confined in prison. But a charge-sheeted leader can contest election from jail. A few of them did so and won in the 18th Lok Sabha elections while over four lakh undertrials held in different prisons were barred from voting.

**Court fills gaps in law**

One major effort asserting the right of voters to know the antecedents of candidates started with the filing of a PIL in the Delhi high court by the Association of Democratic Reforms (ADR), an electoral advisory group. ADR pointed out that the 170$^{th}$ he Law Commission had made several recommendations to combat the evils besetting elections. The petition referred to the findings of the N N Vohra Committee of the Ministry of Home Affairs. The 1993 report read in part: "There has been a rapid spread and growth of criminal gangs, armed senas, drug Mafias, smuggling gang, drug peddlers and economic lobbies in the country which have, over the years, developed an extensive network of contacts with the bureaucrats/government

functionaries at the local levels, politicians, media persons and strategically located individuals in the non-state sector. Some of these Syndicates also have international linkages, including the foreign intelligence agencies." The petitioners, including People's Union of Civil Liberties, requested the high court to implement the suggestions of the Law Commission. It asked ECI to get the details of the candidates and make them available to the voters so that they can make the right choice. The court ruled in favour of the petitioners and stated that the background of the candidates should not be kept in the dark. It asked ECI to get the details and make them available to the voters, so that they can make the right choice.

The government appealed against this to the Supreme Court, arguing that the high court and the ECI did not have the power to pass such orders and the voters have no right to information. The Supreme Court rejected the government stand. It asserted its power of judicial review when the law is silent on certain vital aspects. The judgment said: "This court would have ample power to direct the Commission to fill the void, in the absence of suitable legislation, covering the field and the voters are required to be well-informed and educated about contesting candidates so that they can elect proper candidate by their own assessment. It is the duty of the executive to fill the vacuum by executive order because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field." The Supreme Court thus confirmed the

ruling of the high court, with certain modifications *(Union of India vs ADR, 2002).*

Having failed in the court, the government was quick to bring an ordinance, and later a law, to amend the RPA, to overcome the impact of the judgement on politicians. The amended Section 33B stated that no candidate can be compelled to furnish any information other than criminal record of any offence punishable for two years or more in a pending case. No other additional information of educational background or assets can be furnished. The same petitioners moved the Supreme Court challenging the amendment. The court stood by its earlier judgment and held that the amendments were illegal and void *(2003).* The judgment asked: "In a vibrant democracy is it not required that a little voter should know the bio-data of his/her would-be rulers, law-makers or destiny-makers of the nation?"

**Convicts lose seat**

Another major judgment for cleansing elections was *Lily Thomas vs Union of India (2013).* According to it any MP, MLA, or MLC who is convicted of a crime and sentenced to a minimum of two years in jail would lose his/her membership in the House immediately. The bar would apply to nominated members also. Cornered by this ruling, politicians devised a ruse: they started to leave certain inconvenient columns blank. One PIL, *Resurgence India vs ECI (2013),* sought clarification on this point. After a long discussion, the court laid down a set of directions which may be summarised as follows: The voter has the elementary right to know full particulars of a candidate. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the right to know of the citizens. Therefore, the

returning officer can very well compel a candidate to furnish the relevant information.

Some candidates left blank spaces while filing affidavits. So the court stated that it would render the affidavit nugatory. It is the duty of the returning officer to check whether the information required is fully furnished at the time of filing the nomination paper. The officer can reject incomplete papers. In a later case, *Krishnamoorthy vs Sivakumar (2015)* the court was more emphatic. If the requisite information was not given, indubitably, there was an attempt to suppress it and misguide and keep the people in dark. "This attempt undeniably and undisputedly is undue influence and, therefore, amounts to corrupt practice," the judgment said.

In *Public Interest Foundation vs Union of India (2018)* a five-judge constitution bench of the Supreme Court lamented the state of politics and advised law-makers to change legislation to tackle criminalisation of politics. It then passed elaborate orders: the nomination form must give, in bold letters, the criminal cases pending against the candidate, the candidate must inform the political party about the criminal cases pending against him/her, the political party shall put up on its website the aforesaid information, the candidate as well as the political party shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media – at least thrice after filing of the nomination papers.

**Contempt of court petitions**

The above directions were not followed by political parties and candidates. ECI appeared helpless to implement them. So a contempt petition was moved before the Supreme

Court in *Rambabu Singh Thakur vs Sunil Arora (2020)*. The court stated that it was a grave issue. "We have noted that the political parties offer no explanation as to why candidates with pending criminal cases are selected as candidates in the first place," the judges wrote. Then they passed more directions exercising the extraordinary powers of the court under Article 142. Among the long list: the political parties were told to upload on their website detailed information regarding individuals with pending criminal cases, the details shall be published within 48 hours of the selection of the candidate or not less than two weeks before the first date for filing of nominations, whichever is earlier and the political party concerned shall submit a report of compliance with these directions with the ECI within 72 hours of the selection of the candidate. Failure to do so would attract contempt of court action.

The orders of the Supreme Court were continuously bypassed, leading to another contempt of court petition *(Brajesh Singh vs Sunil Arora, 2021)*. The complaint was that the directions issued in the *Rambabu* judgment a year earlier were not followed in the Bihar election of 2020. The court again lamented that the menace of criminalisation in the political system was growing day by day. It imposed fine on certain mainstream parties which did not follow the earlier directions. There was a note of despair in the judgment: "This court, time and again, has appealed to the law-makers to rise to the occasion and take steps for bringing out necessary amendments so that the involvement of persons with criminal antecedents in polity is prohibited. All these appeals have fallen on deaf ears. The political parties refuse to wake up from deep slumber. However, in view of the constitutional scheme of separation of powers, though we

desire that something urgently requires to be done in the matter, our hands are tied and we cannot transgress into the area reserved for the legislative arm of the State. We can only appeal to the conscience of the law-makers and hope that they will wake up soon and carry out a major surgery for weeding out the malignancy of criminalisation in politics". The court then issued more directions.

**Special courts at snail pace**

Though the Supreme Court had asked the government to set up special courts to deal with legislators, the trial of politicians proceeded at sluggish pace in subordinate courts. Therefore, elected representatives continued till the end of their five-year period even if there were serious criminal cases pending against them. The Supreme Court tried to remedy this situation by speeding up the trial. The Supreme Court had sent a directive as far back as in 2014 that cases against political candidates must be completed within a year, failing which the matter should be reported to the Chief Justices of the respective high court. In 2017 it directed the central government to prepare a scheme for setting up courts exclusively to deal with criminal cases involving politicians. The court monitored the progress of the special courts occasionally with the help of a senior lawyer to assist it. This lawyer reported to the court in May 2024 that candidates with criminal cases won more seats in the 17th Lok Sabha than those who led lawful lives. The report showed that the special courts were moving slowly. In November 2021, more than 4,400 criminal trials have been held up, some for decades, because law-makers had approached high courts and got interim stay. Some dated back nearly 40 years. Most are stuck at the stage of framing of criminal charges. There

seemed to have been a pattern – transfer of cases/judges, quick closure of investigations, courts blindly accepting the probe reports. State governments also withdrew cases against favourite politicians exercising their power under the Criminal Procedure Code. The court continued its efforts to prosecute legislators and parliamentarians with criminal record in a time-bound manner. It passed a slew of directions in this regard in the PIL, *Ashwini Kumar Upadhyay vs Union of India* in 2023.

**Disproportionate assets**

Yet another problem the court tried to tackle was the rise in disproportionate assets of politicians. Those with ordinary means often get rich quickly after they are elected. This was the theme in the PIL, *Lok Prahari vs Union of India (2018).* This public interest organisation approached the court with data requesting the court to direct the government to amend the election law to control this venality. The judgment agreed that when "the assets of a legislator or his/her associates increase without bearing any relationship to their known sources of income, the only logical inference that can be drawn is that there is some abuse of the legislator's constitutional office."

The court stated that it was necessary to have a permanent institutional mechanism dedicated to the task of periodically collecting data of legislators and their respective associates and examine in every case whether there is disproportionate increase in the assets and recommend action in appropriate cases. "Further, data so collected by the said mechanism, along with the analysis and recommendation, should be placed in the public domain to enable the voters to take an

informed and appropriate decision, if such legislator chooses to contest any election in future."

**Cash is king**

It is almost impossible to win elections without large funds to support candidates. However good a candidate may be, without money to support the campaign, s/he is likely to lose in the poll fray. Crorepatis have edged out honest candidates. A rush of black money precedes every election. Participants in rallies are often paid daily wages. During the 2024 general elections, according news reports, "a wave of demonstrations swept through at least at five places" in Andhra Pradesh because many people were not paid in exchange for their votes as promised by the political parties. Women there who were gifted saris for votes threw them at a candidate's house as the clothes were of poor quality.

A few PILs were moved in the Supreme Court to break the hold of money. But all the erudite judgments in them have failed to wipe out the evil. It has only taken different shapes and forms. However, the principles laid down them may be of interest to students of electoral integrity. One question on election expenditure relates to the separation of shares of the political party and its candidate. Though Section 77 of RP Act deals with election expenditure and authorises ECI to fix a ceiling on it, in practice it is difficult to implement the directions of the authorities. The Supreme Court has grappled with this issue in some major cases but despite all the pious intentions, it has failed to clear the mess.

In the first major case dealing with this issue, *Kanwar Lal Gupta vs Amar Nath Chawla (1975)*, the court had held that "a party candidate does not stand apart from his political party." Therefore, if the candidate knowingly takes advantage

of the expenditure incurred by the party which sponsored him, it would be reasonable to infer that he impliedly authorised the political party to incur such expenditure. He cannot be heard to say that he has not incurred the expenditure, but his political party has done so. Soon after this judgment, Parliament rushed to amend Section 77 of the RPA to overcome the judgment. It was enacted that any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any individual shall not be deemed to be incurred or authorised by the candidate.

The new law was challenged in a PIL, *Nalla Thampy Terah vs Union of India (1985)*. This public spirited citizen moved the court alleging that Section 77 allowed political parties to spend unlimited monies for the election of the candidates sponsored by them. It sanctioned serious discrimination between one political party or individual and another on the basis of money power, and it not only permitted but encouraged and legitimised the influence of big money in the electoral process. A constitution bench dismissed the petition, writing a long judgment, observing that "Election laws are not designed to produce economic equality amongst citizens."

In 1996, another PIL was moved pleading to curb the money flow *(Common Cause vs Union of India)*. It was contended that the mandatory provisions of law are being violated by the political parties with impunity. During the proceedings, the government revealed that most of the political parties had failed to file returns regularly and some of them did not file it at all. The judgment analysed the funding of elections in

detail and passed seven directions. They are more honoured in breach than in observance.

**Electoral Bonds held illegal**

Efforts to control election expenditure and provide transparency in campaign finance have continued to this day, but the goal has evaded so far. Long ago, every transaction above Rs 20,000 had to be reported to the ECI. Most donations were then in cash and unaccounted. The government therefore introduced Electoral Bonds, but it faced several challenges. Several writ petitions were moved in the Supreme Court by the Association of Democratic Reforms (ADR), CPM and others. According to them, sweeping changes were made to the Reserve Bank of India Act, 1934, the Representation of the People Act, 1951, the Income Tax Act, 1961, the Companies Act, 2013 and the Foreign Contribution Regulation Act, 2010 that enabled the issue of Electoral Bonds. Corporate entities could make unlimited contributions secretly to political parties. Even foreign companies were allowed to donate to political parties which threatened country's autonomy.

A five-judge Constitution bench on February 15, 2024 unanimously declared the scheme unconstitutional. The court found that the scheme was arbitrary, violated the voters' right to information, and facilitated the quid pro quo culture. "Information about funding of political parties is essential for the effective exercise of the choice of voting," the judgment underlined. "There is also a legitimate possibility that financial contribution to a political party would lead to quid pro quo arrangements because of the close nexus between money and politics." The court also ordered disclosure of names of buyers and receivers of the

bonds since 2019. However, sceptics pointed out several flaws in the way the court dealt with the case. There was no stay for seven years and several elections had taken place since then. So the political parties had already received payments.

# Chapter 7

# Calling all voters

A large number of voters are reluctant to go to the polling stations for various reasons. The voter turnout in 2024 was 65.79 per cent. Many people are undecided or do not see any suitable candidate. For those reluctant voters, the Supreme Court devised a way to express their cynicism. In the judgment *PUCL vs Union of India (2013)* the court provided an alternative in the voting machine. The court directed the ECI to provide another button in the EVMs called "None of the Above" (NOTA). The judgment explained its decision thus: "Giving the right to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. When the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity." This provision has become popular and it has often secured more votes than the victory margin of the winning candidate.

**Freebies and guarantees**

The most extravagant propaganda used by political parties to attract voters is the promise of freebies and guarantees. Though such offers are not always judicially manageable,

there were attempts by the Supreme Court to draw a line as they are a threat to fair and free elections. Before the 2006 Assembly election, DMK promised in its election manifesto colour TV sets to every house which did not have it. The purported intention was to provide recreation and general knowledge to women, especially in the rural areas. The party won the election and proceeded to implement its promise. A writ petition was filed in the high court arguing that it was an impermissible burden on state exchequer, but it was dismissed (*S S Balaji vs Tamil Nadu, 2013).*

In 2011, there was another Assembly election in the state. This time freebies were in loads – grinders, mixies, fans, laptop, 4 gm gold thalis, Rs 50,000 cash for women's marriage, 20 kg rice and free cattle. AIADMK won the election and Balaji moved the high court again, arguing that it was bribe and corrupt practice. The Supreme Court transferred the petition to itself and dismissed it. The court stated that if the schemes are for public purpose and the expenditures are approved by the Financial Bill, the court cannot interfere in them. It asked the ECI to frame guidelines on this intricate issue in consultation with all political parties and include them in the Model Code of Conduct. The ECI did so and issued 'Instructions to political parties on manifestoes' in April 2015. These invocations made little difference on the ground. So a new PIL was filed in the Supreme Court in January 2022 *(Aswini Kumar Upadhyaya vs ECI).* The court asked the Government counsel to ascertain from the Finance Commission if there is any way to stop state governments and political parties from promising and distributing "irrational freebies" to manipulate voters. However, the court has not passed its

final judgment, and freebies continue to shower before every election.

**News management**

The traditional method of election campaign is speeches delivered in maidans. When literacy rate increased, mass media like newspapers and television entered the field. The new entrant is the social media, which is running out of control. The damage done by it to the electoral process, sometimes manipulated from abroad, is beyond accurate estimation.

News management is an important branch of election campaign. Readers of newspapers and magazines and viewers of TV channels are fed propaganda in the form of news, very often twisting facts, suppressing or fabricating data. By disguising advertisements as news content, people become unwitting victims of politicians and media organisations. The Press Council of India had found in 2010 that individual journalists and specific media organizations financially benefitted in this manner. 'Paid news' contaminated not only democratic elections, but also the media. Apart from misleading readers, paid news also helps candidates hide their election expenditure. The money spent on it is not shown in the returns to keep it below the stipulated level. The Supreme Court judgment, *Ashok Chavan vs Madhavrao Kinhalkar* (2014), reinforced the power of the Election Commission to inquire into such allegations.

Another aspect of news management is the string attached to advertisements. Most news organisations depend heavily on government ads to survive. Therefore the government can favour those media outfits which support it. It can also deny ads to those critical of it and starve them out of existence.

The government had employed several methods in the past to make the press fall in line with it. The Supreme Court struck down the Newspaper (Price and Page) Act, 1956, which imposed restrictions on newspaper pricing and advertisement space. The court ruled that these restrictions violated the fundamental right to freedom of speech *(Sakal Papers Ltd vs Union of India, 1961)*. Similarly the court invalidated the Newsprint Control Order, which imposed restrictions on the number of pages a newspaper could publish *(Bennett Coleman vs Union of India, 1973)*. When the government imposed a steep hike in customs duties on newsprint in 1981, it was also struck down as an indirect attempt to control the press *(Indian Express vs Union of India, 1985)*.

The Supreme Court has attempted to regulate the rampant use of government ads for propaganda. Pictures of leaders stare at citizens from everywhere, trumpeting the achievements of the government and offering more pie in the sky. This issue was taken up through PILs in the Supreme Court by two NGOs, Common Cause and the Centre for PIL. They alleged that public funds were being wasted and misused for glorification of political personalities. The NGOs conceded the beneficial aspects of government ads – they conveyed information to the citizens with regard to various welfare measures as also their rights and entitlements. But in the garb of communicating with the people, they took undue political advantage. The government opposed the PILs arguing that these are matters of policy and executive decisions and the court should not lay down binding guidelines.

The court then set up a three-member committee to suggest solutions to this problem. It made several recommendations. The court then issued guidelines to the governments in its judgment, *Common Cause vs Union of India (2015)*. It stated that the advertising campaigns must be related to government responsibilities and the contents must be presented in an objective and fair manner. Only the photographs of the President, the Prime Minister, Governors, Chief Ministers shall be used. In later orders, the court allowed the use of the photographs of the Chief Justice of India, Union and state ministers. The court also barred the use of party symbols. It further stated that the distribution of government ads to the media should be fair and non-discriminatory, and should not patronise media houses. Further, the ads must be politically neutral, avoid glorification of political personalities, or project positive impression of the party in power, or negative impression of parties critical of the government.

**Electronic voting machines**

In the first election held in 1952 voting was done by stamping on paper ballots. Polling and counting of votes were sometimes marred by violence by party agents and goons, who indulged in "booth capturing", destruction of ballot boxes and a variety of malpractices. The defects in the ballot paper system led to the first case of its kind in the Supreme Court in 1971. The allegations were incredible. Balraj Madhok, a Jan Sangh candidate from the South Delhi parliamentary constituency, lost to Congress (I) leader Shashi Bhushan. Madhok alleged that the election was rigged by using an 'invisible ink'. According to him, millions of ballot papers were chemically treated and the symbol of

the Congress candidates in those ballot papers was mechanically stamped by using an invisible ink. As a result of the chemical treatment of those ballot papers, the mark put at the polling booths disappeared after a few days and the stamp mechanically placed earlier emerged. He asserted that there was a conspiracy between the ruling party of Indira Gandhi and the Election Commission. The matter reached the Supreme Court. It asked the trial judge to examine a cross section of the ballot papers. He reported that the allegation has no basis. The Supreme Court therefore dismissed the petition in *Balraj Madhok vs Shashi Bhushan (1972).*

The ballot paper method was found to be inefficient and unwieldy in this large country. Therefore it was replaced in a phased manner by Electronic Voting Machines (EVM). Reliability of EVMs was contested by political parties, especially the losers. The shadow of doubt has never left EVMs. One major legal challenge was moved before the Supreme Court by Subramanian Swamy of the BJP in 2012. He argued that the EVMs used in India did not meet international standards, it was open to hacking. He wanted a modification in the procedure as a safeguard against tampering of results. He suggested 'paper receipt' or 'paper trail' in use in some countries *(Subramanian Swamy vs ECI, 2013).* ECI insisted that the EVMs use such high-end technology that they are beyond hacking. The Voter Verifiable Paper Audit Trail (VVPAT) system was tamper-proof. The court was in favour of the modified system.

Just ahead of the 2019 general elections, the Supreme Court took another step to clear persistent doubts about EVM. In this case, *N Chandrababu Naidu vs Union of India (2019),* the

petitioner wanted verification of half of the VVPAT slips in each constituency. The court increased the random verification and fixed at 5 per Assembly Constituency or Assembly segments in a parliamentary constituency. There was another plea in 2024, just before the general elections, to modify the EVM method or revert to the ballot paper system. The PILs moved by ADR and others were dismissed with strong remarks against the petitioners: "The credibility of the ECI and integrity of the electoral process earned over years cannot be chaffed and over-ridden by baroque contemplations and speculations," the court said.

# Chapter 8

## Speaker, a political soul

THE role of the Speaker of the Lok Sabha and state legislative assemblies under the Constitution is somewhat anachronistic. They need not resign from their political party once elected Speaker, unlike in England. Their alignment with their party is evident in their decisions, especially when they exercise adjudicatory functions like disqualification of defectors. They are basically political creatures and are elected on party tickets. After Parliament or the assembly is constituted, they are chosen to the post where they are supposed to act in a non-partisan manner. This puts them in an anomalous position. They normally belong to the ruling party. Their political future belongs to the party which gave them tickets for the election. They may have to go again to the party leadership for the next election.

This unique position makes them behave in unconstitutional ways. They have not always behaved like the epitome of impartiality or the true guardian of the traditions of parliamentary democracy in knotty situations. The Supreme Court has made harsh observations against the conduct of the Speakers at crucial times in several judgments. Instead of being umpires in political games, they have often played partisan roles. The Supreme Court has even called for diluting the power of Speakers and substituting the post with an independent Collegium. But no government has heeded this call as they think that the Speaker can be made to act as their agent.

There have been a few exceptions in the past. The first Speaker of the Lok Sabha, G V Mavlankar, was a staunch Congressman but he resigned from the party when he was elected Speaker in 1950. Since then no Speaker has followed this hallowed British tradition. Nehru elected Sardar Hukum Singh of Shiromani Akali Dal as Deputy Speaker in March 1956. Though he was only one of the two MPs of his party, Singh was unanimously elected to the post. Congress had 364 out of the 489 seats when Nehru proposed his name. Singh did not canvass his candidature. He said, "It has come to me unasked for." Later he joined the Congress and became Lok Sabha Speaker in 1962. In 2004, Somnath Chatterjee, a CPM veteran, was elected Speaker but did not resign from the party. In fact, the party expelled him in 2008 for not resigning when it asked him to do so during a confidence motion supporting Prime Minister Manmohan Singh. He said: "As Speaker I could not be dictated to by the party, as I am expected to be neutral."

The neutrality of the Speaker is constantly under a suspicious cloud. In recent times, even the Supreme Court has questioned their impartiality. It is not uncommon for an elected representative to become a Speaker and then a minister in the government. Gurdial Singh Dhillon served two terms as Speaker of the Lok Sabha. Prime Minister Indira Gandhi asked him to resign from the office of the Speaker on 1 December 1975 and was sworn in the same day as the Minister of Shipping and Transport. Former President Pranab Mukherjee, writing about Speakers in his autobiography, *The Presidential Years*, revealed that "there have been cases when the Speaker, who should be non-partisan, threatened that he would act against the interests of the ruling government in case he is not made the chief

minister. This happened in at least two instances in Manipur and is indicative of the failure of the constitutional machinery."

The peculiar position of the Speaker could lead to constitutional crises. In 1992, H Borobabu Singh, elected on a BJP ticket, was chosen Speaker of the Manipur assembly. He disqualified an MLA. The Supreme Court set aside the disqualification. However, Singh refused to obey the order. He maintained that the Speaker's decision on disqualification was final under the anti-defection law and not subjected to judicial review. When the Secretary of the Legislative Assembly, Manilal Singh, took steps to implement the Supreme Court's orders, he was sacked and denied salary and benefits. Another person was appointed in his place. Manilal Singh moved the Supreme Court. It stayed the Speaker's orders. The court then summoned Borobabu Singh for contempt of court. When he still refused to appear before the court, a five-judge constitution bench ordered the Union government to produce him before it. *(I. Manilal Singh vs Borobabu Singh, 1994).* The long-drawn-out drama continued for a whole year. Finally, Borobabu Singh appeared before the judges. There was no apology or punishment; the crisis just blew over.

**Benefits of inaction**

There are many ways to thwart the provisions of the anti-defection law. One way is to sit over petitions against disqualification of defectors. It gives time to the beneficiary party to add more defectors through money and misuse of investigative agencies to reach the two-third threshold set by the law. The Supreme Court has criticised these dubious delays which smacked of politics. For example, if defections

happened in the first year out of the five-year term of the House and Speaker does not take a decision for the next four years, the Speaker's ruling is of little consequence except for its academic value. This tactic benefits the defectors as well as the government which they prop up.

The Supreme Court described this trend a "question of great constitutional importance" in *S A Sampath Kumar vs Kale Yadaiah (2016).* The court also questioned, "Why a Speaker, who is a member of a particular political party and an insider in the House, should be the sole and final arbiter in the cases of disqualification of a political defector". In this case, petitions against disqualification of Telangana MLAs were filed before the Speaker on 23/8/2014. But till 8/11/2016 no decision was forthcoming. Similar instances have occurred in other legislatures also. The crucial question was whether a constitutional court can pass orders when the Speaker delays decision on disqualification petitions for an unreasonable period. Therefore the question was referred to a constitution bench.

A three-judge bench, in *Keisham Meghachandra Singh vs Speaker, Manipur (2020)* considered the role of the court in such situations and pointed out that the issue had already been settled by a five-judge constitution bench in 2007 in the case, *Rajendra Singh Rana vs Swami Prasad Maurya.* The court stated in that judgment that "when a Speaker refrains from deciding a petition within a reasonable time, there was clearly an error which attracted jurisdiction of the high court in exercise of the power of judicial review".

Following that constitution bench judgment of 2007, the Supreme Court asserted in the Manipur case that the presiding officers of state assemblies and Parliament have to

decide on disqualification petitions within three months except for the existence of an extraordinary circumstance. The reason for the short period is justified thus: "This period has been fixed keeping in mind the fact that ordinarily the life of the Lok Sabha and the Legislative Assembly of the States is five years and the fact that persons who have incurred such disqualification do not deserve to be MPs/MLAs even for a single day if they have infracted the provisions of the Tenth Schedule (anti-defection law)."

**Trim Speaker's powers**

The judgment further stated that courts have the power to intervene if the proceedings are delayed. Thus the court rejected the claim of the presiding officers that their decision is final according to the anti-defection law. The court noted that "the Speaker being an authority within the House and his tenure being dependent on the will of the majority therein, likelihood of suspicion of bias could not be ruled out." Therefore, the court recommended that Parliament consider taking away the power of the Speakers to disqualify members. It said: "It is time that Parliament has a rethink on whether disqualification petitions ought to be entrusted to a Speaker as a quasi-judicial authority when such Speaker continues to belong to a particular political party either de jure or de facto. Parliament may seriously consider amending the Constitution to substitute the Speaker of the Lok Sabha and Legislative Assemblies as arbiter of disputes concerning disqualification which arise under the Tenth Schedule with a permanent tribunal headed by a retired Supreme Court Judge or a retired Chief Justice of a High Court, or some other outside independent mechanism to ensure that such disputes are decided both swiftly and impartially, thus giving

real teeth to the provisions contained in the Tenth Schedule."

Earlier also, the court had urged Parliament to "reconsider strengthening certain aspects of the Tenth Schedule, so that such undemocratic practices are discouraged (*Shrimanth Patil vs Speaker, Karnataka Assembly, 2019).* In this case, the court upheld the disqualification of 17 legislators but allowed them to contest elections again. The Speaker had disqualified them till the expiry of the terms of the Assembly. The court stated that the Speaker is not empowered to disqualify any member till the end of the term. His order was held to be unconstitutional. The judgment delineated the role of the Speaker in some detail. It clarified that s/he can examine whether resignation of the members was voluntary and out of free will. Once their action is genuine, the Speaker has no option but to accept the resignation. "It is constitutionally impermissible for the Speaker to take into account any extraneous factors while considering the resignation. The satisfaction of the Speaker is subject to judicial review."

The court went on to emphasise the neutral role of the Speaker. "We need to note that the Speaker, being a neutral person, is expected to act independently while conducting the proceedings of the house or adjudication of any petitions. The constitutional responsibility endowed upon him has to be scrupulously followed. His political affiliation cannot come in the way of adjudication. If the Speaker is not able to disassociate from his political party and behaves contrary to the spirit of neutrality and independence, such person does not deserve to be reposed with public trust and confidence."

The court regretted "the conduct and manner in which all the constitutional functionaries have acted in the current scenario. Being a constitutional functionary, the Constitution requires them and their actions to uphold constitutionalism and constitutional morality. In this regard, a functionary is expected to not be vacillated by the prevailing political morality and pressures. In order to uphold the Constitution, we need to have men and women who will make a good Constitution such as ours, better."

It was in this context that the court called for a second look at the anti-defection law. It said: "There is a growing trend of the Speaker acting against the constitutional duty of being neutral. Further, corrupt practices associated with defection and change of loyalty for lure of office or wrong reasons have not abated. Thereby the citizens are denied stable governments. In these circumstances, there is need to consider strengthening certain aspects, so that such undemocratic practices are discouraged and checked." Despite these calls to the law-makers, they have not taken up the issue in Parliament so far. The inaction would therefore benefit them in a future scenario.

# Chapter 9

## Governor no longer 'rubber stamp'

UNLIKE the Speakers who are active in politics and elected as candidates of political parties, Governors are selected from among elder statesmen, able administrators and eminent personalities. They are not elected; they are appointed by the President on the advice of the Prime Minister. The Governors owe allegiance to the Constitution and not to any political party. They are expected to be wise counsellors to the government, stay above political rivalries and not to court controversies. At least that was the norm in the early days.

The role of the governors has become controversial in recent times because of their conflict with elected governments. The R S Sarkaria Commission on the federal structure had observed in 1983 that "the role of the Governor had come in for attack on the ground that some Governors have failed to display the qualities of impartiality and sagacity expected of them." The commission recommended that a politician from the ruling party at the Centre should ideally not be appointed Governor of a state ruled by an opposition party. But the sage advice has not been followed by ruling parties.

In theory, a Governor will act as a safety valve against hasty legislation and compel the state government and legislature to take a second look at it. Governors, whose role is very small in the constitutional framework, seem to have aggrandised their power in the new context creating unsavoury situations. There is a debate among jurists over

the necessity of having Governors at all, which is a hangover from the colonial era. DMK founder C N Annadurai is reported to have twisted a Tamil proverb to say that "a state does not need a Governor just as a goat has no use of a beard."

The Supreme Court has repeatedly clarified the role and powers of Governors in noteworthy judgments, but there was no full stop in the volatile conduct of Governors. The earliest judgment was delivered in 1974 by a seven-judge constitution bench in *Shamsher Singh vs State of Punjab.* The case arose when two judges of the subordinate courts who were on probation were terminated by the Punjab government in the name of the Governor. They challenged their termination in the high court invoking the constitutional provisions related to the Governor. According to them, the Governor as the constitutional or the formal head of the State can exercise power and functions of appointment and removal of members of the subordinate judicial service only personally. The state government contended that the Governor exercised such powers only on the aid and advice of his Council of Ministers and not personally.

Having lost in the high court, the judges moved the Supreme Court. It dismissed their appeals. While doing so, the constitution bench elaborately dealt with the role of the President and Governors. It stated: "The President as well as the Governor is the constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in

spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion."

Another important judgment was delivered by a five-judge constitution bench in *Hargovind Pant vs Raghukul Tilak (1979).* Tilak, who was a member of the Rajasthan State Public Service Commission during 1958-59, was later appointed as Governor of Rajasthan. The question in this appeal was whether the office of the Governor was an "employment" under the Government. The Supreme Court said no. Therefore the appointment was held valid. "Howsoever wide and expansive a meaning one may give to the words 'employment under the Government of India', the office of Governor cannot come within that term," the constitution bench judgment said.

Another decision of 2013 was explicit on the Governor's role. In *State of Gujarat vs Justice R A Mehta* the Supreme Court cautioned that "the Governor acts only upon the aid and advice of the Council of Ministers. If this was not the case, democracy itself would be in peril. The Governor is not answerable to either House of State, or to Parliament, or even to the Council of Ministers, and his acts cannot be subject to judicial review. In such a situation, unless he acts upon the aid and advice of the Council of Ministers, he will become all powerful and this is an antithesis to the concept of democracy."

In the lead opinion of Justice J S Khehar in the Arunachal case discussed earlier *(Nabam Rebia)*, three propositions of law are clearly laid down — first, the Governor has no power to unilaterally summon an Assembly session unless the government has, in his view, lost its majority; second, he cannot take steps relating to disqualification of the Speaker;

and third, he is barred from unilaterally sending messages to the Assembly on any matter. The judgment reiterated the view that the Governor is bound by the "aid and advice" of the elected Council of Ministers. He has discretion to act on his own in certain matters, like inviting the leader of the majority party to form a government.

**Pleasure of the President**

As long as the same party was at the Centre and the states, it was smooth sailing. But the situation changed since 1960s when the monolith Congress split and coalition governments of various hues at the Centre and the states became the norm. Now the gubernatorial appointments are political and made with a purpose. Though their term is normally five years, Governors can be removed for political expediency. Under Article 156, Governors hold their office during the "pleasure" of the President. They know that their tenure is tenuous as he/she can be removed any time by the President on the advice of the central government. This is evident when a new government comes to power after the general election. It is usual to see change of Governors appointed by the previous regime. When the Congress-led UPA government came to power in 2004 there was a major shuffle of governors. When the NDA formed government in 2014, seven were nudged to quit and two were removed.

Normally the Governors resign on their own, as they would find it difficult to work with an unfriendly Centre. Some of them wait for a call from Delhi to pack up. But there was one Governor who fought a futile battle in the Supreme Court alleging that he was threatened to be dismissed from the post if he did not resign voluntarily. This petition, first of its kind, was filed by the Governor of Uttarakhand,

appointed by the UPA government *(Aziz Quereshi vs Union of India)*. When the NDA government came to power, according to him, the Union Home Secretary repeatedly called and asked him to quit. The official also threatened the Governor with dismissal if he did not leave on his own. Quereshi then moved the Supreme Court. The court issued notice to the Union of India and the Home Secretary. However, since a new Governor was appointed by the Centre, the petition became infructuous for all practical purposes. Only the constitutional question of appointment and removal of Governors under Article 156 of the Constitution remained, which has been referred to a five-bench Constitution bench.

The Supreme Court had to deal with the issue of removal of Governors when there was political turmoil following elections. A new government with sweeping majority tends to change Governors and appoint their own favourites. This happened after the elections in 2004, leading to another important decision on the status of Governors. The Congress was back in power after eight years of wilderness. In six months, the Congress-led coalition (United Progressive Alliance, UPA) juggled Governors in some 17 states. The President, acting upon the advice of the Council of Ministers, removed the Governors of Goa, Gujarat, Haryana and Uttar Pradesh in July 2004. The issue was taken to the Supreme Court in the PIL, *B P Singhal vs Union of India (2010).* It was prayed that those Governors may be reinstated.

The five-judge constitutional bench summarised the law in detail. It emphasised that "the Governor holds office during the pleasure of the President. Therefore, the President can

remove the Governor from office at any time without assigning any reason and without giving any opportunity to show cause." However, the discretion is hedged in by other factors. "Though no reason need be assigned for discontinuance of the pleasure resulting in removal, the power under Article 156(1) cannot be exercised in an arbitrary, capricious or unreasonable manner. The power will have to be exercised in rare and exceptional circumstances for valid and compelling reasons. What would be compelling reasons would depend upon the facts and circumstances of each case."

It went on to say that a Governor cannot be removed on the ground that he is out of sync with the policies and ideologies of the Union Government or the party in power at the Centre. Nor can he be removed on the ground that the Union Government has lost confidence in him. "It follows therefore that change in government at Centre is not a ground for removal of Governors holding office to make way for others favoured by the new government."

Any removal as a consequence of withdrawal of the pleasure will be assumed to be valid and will be open to only a limited judicial review. If the aggrieved person is able to demonstrate prima facie that his removal was either arbitrary, malafide, capricious or whimsical, the court will call upon the Union Government to disclose to the court the material upon which the President had taken the decision to withdraw the pleasure. If the Union Government does not disclose any reason, or if the reasons disclosed are found to be irrelevant, arbitrary, whimsical or malafide, the court will interfere.

**Change in governors' role**

The stature of Governors has fallen as indicated in recent cases dealt with by the Supreme Court. Though the actions of Governors are protected from judicial scrutiny, situations have developed in which the court had to cross the protective fence. This is because the gubernatorial posts are given these days usually to leading politicians who have lost elections serially and become unproductive to the party in power. Very often they create nuisance within the party. So the party leadership packs them away, conferring on them a Governor's post. The offer is irresistible as the post is largely ceremonial with little work or responsibility. They are pejoratively called "rubber stamps", signing bills passed by the state legislature and cutting ribbons at inaugural functions. The rewards are high, set out in the Governors (Emoluments, Allowances and Privileges) Act 1982. All Governors are not politicians who crossed the expiry date. Some are retired bureaucrats, diplomats or intelligence officers who have done favours to the ruling party when they were in active service.

The additional attraction of Governor's post is the immunity they enjoy from any criminal prosecution under Article 361(2) of the Constitution. Kalyan Singh, who was the UP chief minister when Babri Masjid was demolished, was protected from standing trial as he had become the Governor of Rajasthan. In the 2017criminal case, *State vs Kalyan Singh,* the Supreme Court stated that being the Governor, Kalyan Singh "is entitled to immunity under Article 361 of the Constitution as long as he remains Governor of Rajasthan. The Court of Sessions will frame charges and move against him as soon as he ceases to be

Governor". Kalyan Singh died later and there was no trial. The immunity provision is under challenge in the Supreme Court in a case involving a former Governor. A contractual worker in the Raj Bhavan had complained of sexual harassment by the Governor. She submitted in her petition that she was left remediless because of the blanket immunity. According to her the immunity is available only while discharging the duty as Governor. Moreover, if the immunity continues till the Governor demits office, investigation would be stalled and evidence would be lost.

**Breakdown in relationship**

When the party in power at the Centre and the respective states are different, crises have arisen in various states. In Kerala and Tamil Nadu, Governors have refused to read out the budgetary speeches. They maintained that they did not agree with the contents, like the achievements of the state government and criticism of the central government. They have even walked out of the House.

Recently the Governors in Opposition-ruled states have been stalling the work of elected governments. Therefore, several state governments have moved the Supreme Court in their feud with the Governors. They allege politicisation of Raj Bhavan. The perennial conflict involves even simple issues like who should administer the oath of office to newly elected legislators. The West Bengal Governor had filed a defamation suit against Chief Minister Mamta Banerjee. Kerala Governor Arif Khan was about to dismiss a cabinet minister. Tamil Nadu governor R N Ravi in fact dismissed a minister. At the Governors' Conference on 4 August 2024 in Delhi, West Bengal Governor C V Ananda Bose proclaimed that the concept of passive Governors has lapsed

and the concept of active Governors was in. They are no longer "rubber stamps". According to him, while the elected Chief Minister should be the "front face" of the government, the nominated Governor should be in the background as a "friend, philosopher and guide" to the elected representatives.

**Delay in signing Bills**

A new dimension of the conflict arose when Governors delayed signing Bills passed by the legislature. The Constitution does not prescribe a time limit for the Governor to give assent to Bills passed by the Legislative Assembly. Article 200 only asks the Governor to act "as soon as possible". This constitutional gap was used by Governors of Opposition-ruled states to frustrate the decisions of elected governments. The Governors were accused of defying the popular will and stalling governments' welfare schemes. The Governors of Tamil Nadu, Kerala and Telangana among others were using this loophole to prevent the implementation of laws since 2020.

The discontent then moved to the Supreme Court. It took up the issue in the complaint of the AAP government in Punjab. Governor Banwarilal Purohit had withheld assent for four Bills on the ground that the Assembly sessions which passed them were invalid. In its judgment, the three-judge bench asserted that a Governor did not hold "veto power" over Bills and he could not be at liberty to keep a "Bill pending indefinitely without any action whatsoever". If he withholds assent to a Bill, he must return it "as soon as possible" with a message to the legislature to reconsider it. A Governor sitting over the Bill without doing anything would be acting against the Constitution. Such actions undermined

the legislative process and the supremacy of the elected representatives (*State of Punjab vs Principal Secretary, 2023).*

The court passed a definitive judgment on the same subject in the petition, *State of Tamil Nadu vs Speaker (2025).* It prefaced the discussion with a caustic remark: "While the framers of the Constitution set out with a vision that the Governor would be a 'constitutional head, a sagacious counsellor and adviser to the Ministry', someone who can 'pour oil over troubled waters', what has unfolded before us has been quite the opposite, as this court has been called upon to calm the troubled waters." Narrating the facts, the court stated that Governor R N Ravi showed "scant respect" to its earlier judgment in the Punjab case. It exercised its extraordinary power under Article 142 to clear ten Bills in the waiting list, one of them for five years. Expanding its power of judicial review, the court set a timeline to sign bills. A bill passed by the Assembly should be granted assent in a month. If the Governor sends the Bill to the legislature again, the assent must be given in three months. Even if the Bill is sent to the President, as some Governors artfully did, the three-month limit must be followed. The judgment said the Governor must perform his role with dispassion, "guided not by political expediency but by the sanctity of the constitutional oath." He must be the catalyst and not the inhibitor.

Governors have thus invited embarrassing situations when their actions or omissions were brought for consideration before constitutional courts and they were told to do or not to do a thing. However, there were strong opposition to judicial interference. Kerala Governor Rajendra Arlekar immediately questioned the verdict. Arlekar, who had earlier

held back Bills passed by the Left Front government, called the ruling a case of "judicial overreach" and contended that the matter should have been decided by Parliament or referred to a larger bench. Vice President Jagdeep Dhankar fiercely criticised the court for acting as a "super parliament". Another ruling party member fumed: "If one has to go to the Supreme Court for everything, then Parliament and State Assembly should be shut."

**Sanction to prosecute ministers**

When ministers are embroiled in corruption charges, the sanction of the Governors is required under criminal law to prosecute them. This would lead to a conflict if the Governor is appointed by the party ruling at the Centre and the minister involved is in the Opposition-ruled state. Two prominent cases from the past may be recalled here: Bihar Governor A R Kidwai allowed the CBI to prosecute Chief Minister Lalu Prasad, and Governor H R Bhardwaj accorded sanction to prosecute B S Yediyurappa, both against the advice of the state cabinet. The ministers resigned.

A five-judge constitution bench pronounced a decisive judgment on the question of Governor's discretionary power to sanction prosecution of ministers in the case *M P Special Police vs State (2004)*. The question for consideration was whether a Governor could act in his discretion and against the aid and advice of the Council of Ministers in a matter of grant of sanction for prosecution of ministers for offences under the Prevention of Corruption Act and/or under the Indian Penal Code. The Council of Ministers did not grant sanction. The high court upheld the decision. On appeal, the Supreme Court endorsed the Governor's sanction to prosecute two ministers of Madhya Pradesh and set aside the

Council of Ministers' refusal to grant sanction. The judgement said that if sanction is withheld "there would be a complete breakdown of the rule of law," and even democracy would be at stake. "It would then lead to a situation where people in power may break the law with impunity safe in the knowledge that they will not be prosecuted as the requisite sanction will not be granted."

# Chapter 10

## Making and breaking governments

THE decline of the two constitutional offices narrated in the last two chapters has had a baleful impact on the polity at critical times. Their integrity is tested mainly when no party gets majority after elections and coalition governments are toppled by external forces by engineering defections. The Supreme Court has decried their role in several cases.

One of the banes of Indian democracy since the second decade of the Republic was the frequent floor-crossing by elected representatives for money and power. This vice was manifested in detesting forms like corralling legislators in distant resorts to avoid their switching to rival parties, 'poaching' and 'kidnapping' of legislators, offering turncoats plum posts, parading supporters before Governors for head counts. It has contributed to the political vocabulary the phrase 'Aaya Ram, Gaya Ram'. It is named after a Haryana legislator who reportedly switched sides three times in a week in 1967. The voters are often helpless after the election; in fact many of them re-elect the same turncoats from the new party. They go by caste or charisma of a leader, not by merit. The voters have no right to recall rogue legislators as in England.

When such poll vaults became so contagious, the Rajiv Gandhi government passed the anti-defection law in 1985, adding the Tenth Schedule to the Constitution. After watching the working of the law, everyone is now agreed that

it is full of loopholes. The law was amended in 2003 to provide an exception to disqualifications if the defectors formed two-thirds of a party and merged with another party. Former vice-president Venkata Naidu caustically remarked that the law allowed "wholesale" defection but not "retail" defection. No political party has spoken about a simple amendment which would say that the electorate could call back the defector.

Apart from the ambiguities in the law, what make things worse are the dubious roles played by the Speakers and Governors. These constitutional dignitaries, as we have seen, were often hard-boiled politicians and in many instances played dubious roles when coalition governments became more common since the late 1960s and state and central governments were ruled by different political parties. Supreme Court judgments attempting to settle disputes over the rulings of the Speaker and the orders of the Governor would fill up thousands of pages of law journals. Though the decisions of the presiding officers of legislative houses and Governors are normally beyond judicial scrutiny, the court has broken the barrier often and ordered floor tests amidst constitutional crises created by defections.

The constitutional validity of the Tenth Schedule was assailed before a five-judge Constitution Bench of Supreme Court in 1992. It upheld the law in *Kihoto Hollohan vs Zachillhu.* One of the main contentions of the petitioners was that every legislator has a fundamental right to freedom of expression and conscience. The elected representatives have a right to dissent from their political party's stand and they have a right to follow their own conscience and judgment. This was a fundamental principle of parliamentary

democracy, they argued. However, the majority on the bench stated that freedom of speech and conscience are not absolute but subject to reasonable restrictions. Political defection motivated by lure for power and money is corrupt practice. A member of the House cannot claim immunity under Article 105(2). The court further stated that the Speaker, while exercising powers under the Tenth Schedule, acted as a tribunal and his order is final. So the order is subjected to judicial review in limited circumstances. The court also rejected arguments based on the meaning of 'split', 'merger' and 'defections'.

Breaking deadlocks and restoring constitutional propriety often became the burden of the Supreme Court. It had to lay down detailed procedure for floor tests in the House, though the legislature has its own rules. Constitutional pundits were once aghast at this judicial encroachment, but this has been accepted as a necessary means of getting out of political logjams. The court took these extraordinary measures, despite Article 212 of the Constitution which states that "the validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure." It goes further and clarifies that "no officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers."

Floor test has been the norm suggested by commissions which had gone into the question of testing the majority. The Administrative Reforms Commission in 1969, the

Committee of Governors in 1971 and the Sarkaria Commission in 1988 had recommended floor test in the event of hung assembly. The celebrated Bommai judgment of 1994, delivered by a nine-judge constitution bench, endorsed it *(S R Bommai v Union of India).* That judgment is authoritative on several aspects of the powers of the President, Governors and formation of state governments when there is political uncertainty. It is one of the most quoted decisions as it discussed centre-state relations, judicial review of orders of the President, secularism and a bunch of other constitutional questions.

The Supreme Court ruled in this case that if the state government resigns or is dismissed or loses majority, the Governor must first take steps to form an alternative government. He cannot straightaway advise the President to impose central rule invoking Article 356. The court then reiterated the floor test formula: "There could be no question of the Governor making an assessment of his own. The loss of confidence of the House was an objective fact, which could have been demonstrated, one way or the other, on the floor of the House. In our opinion, wherever a doubt arises whether the Council of Ministers has lost the confidence of the House, the only way of testing it is on the floor of the House except in an extraordinary situation where because of all-pervasive violence, the Governor comes to the conclusion and records the same in his report that for the reasons mentioned by him, a free vote is not possible in the House."

Another important aspect of the judgment is its assertion that the court would have the power to mould suitable relief according to the facts of the case and the political

circumstances of the time. It could declare as void action taken by the President and "restore the Council of Ministers and the Legislative Assembly as they stood on the date of the issuance of the Proclamation."

Some of the glaring instances when state governments collapsed due to defections and President's rule was imposed for some time are summarised here, shorn of the clutter of facts enmeshed in the constitutional questions. These cases show the extent to which the Supreme Court would stretch its authority through judicial review to ensure the establishment of stable governments when the constitutional functionaries and elected representatives fail the people.

**Floor tests becomes the norm**

The rioting in the Uttar Pradesh Assembly in 1997 is one of the darkest chapters in the democratic history. It was seen on television by public as cameras were allowed inside the House. The trouble brewed since the 1996 Assembly elections in which no party got a clear majority. The coalition government collapsed midway. Within the Assembly, law-makers threw mikes, chairs and sound boxes not only at each other but also at the Speaker. At least two cabinet ministers along with 50 others were injured and a woman member was seen bleeding under a table. Replacing BSP leader Mayawati, Kalyan Singh became the Chief Minister. But his government was dismissed by Governor Romesh Bhandari as loyalties of MLAs were shifting by the hour. Without following the norm of floor test, the Governor swore in Loktantrik Congress leader Jagdambika Pal as the Chief Minister. Kalyan Singh challenged Bhandari's decision in the Allahabad high court. It held that the Governor's action was unconstitutional. The dispute

then reached the Supreme Court. It ordered a floor test to determine the majority. The court also gave specific instructions about how the test should be conducted. "The only agenda for the special session will be to have a composite test between the contending parties to see which of the two claimants for chief ministership has a majority in the house, *Jagadambika Pal vs Union of India (1998).* Kalyan Singh won this time with clear majority. The order in this case has been followed by the Supreme Court in several later instances.

**Midnight move to topple government**

Another major case was from Bihar, in which a constitution bench declared the Presidential declaration of dissolving the Bihar Assembly in 2005 unconstitutional. In the March 2005 state election, no party got simple majority. Governor Buta Singh on 22 May 2005 wrote to President A P J Abdul Kalam describing the situation on the ground. He referred to "serious attempt to cobble a majority; winning over MLAs by various means; targeting parties for a split; high pressure moves; offering various allurements like castes, posts, money etc.; and horse-trading." The Governor recommended dissolution of the assembly. The Union Cabinet accepted the recommendation at 11pm. The decision was then faxed to Moscow at 1.52 am where President Kalam was staying for the night. The President, who was on a four-nation tour of Europe, was reportedly woken up in the middle of the night in his hotel room and requested to sign the declaration of dissolution. He did so without seeking time for assessment of the situation. The President's approval was faxed back to New Delhi at 3.50 am.

The ruling UPA government at the Centre was accused of preventing the formation of a BJP-JDU government by these midnight manoeuvres. The presidential proclamation was challenged in the Supreme Court by four candidates who were elected to the dissolved Assembly *(Rameshwar Prasad vs Union of India, 2006)*. The judgment severely criticised the Governor for making allegations of horse-trading without sufficient evidence to support them. He could not have assumed that there was no legitimate realignment of political parties; there was blatant distortion of democracy by induced defections through unfair, illegal, unethical and unconstitutional means. The judgment stated that the dissolution of the Assembly could not be justified on the "suspicion, whims and fancies of the Governor." Nor could the power of judicial review be limited. The court thus struck down the President's order. But it did not revive the Assembly as a new election was under way by the time the judgment was delivered. As an aftermath of the criticism, Governor Buta Singh resigned hesitantly.

**SC restores deposed governments**

The Supreme Court has stretched its powers in rare instances and restored governments which were toppled by devious means. While doing so, the court criticised the process of imposing President's rule and reversed the decision of the Centre in two prominent cases. In the cases of Arunachal Pradesh and Uttarakhand, the Supreme Court allowed the return of Congress governments in quick succession, creating judicial history.

The case that came from Arunachal Pradesh saw bizarre events in 2015 when Congress leader Nabam Tuki was the Chief Minister and his brother Nabam Rebia was Speaker of

the Assembly. Jyoti Prasad Rajkhowa was appointed Governor by the BJP government. The clumsy tale of defections and political skulduggery lasted over a year, beginning with the rebellion of 21 Congress MLAs. When Rebia was dislodged, he moved the Supreme Court. A constitution bench assembled, mainly to test the discretionary power of the Governor in such uncertain times. While the Supreme Court was hearing the matter, President's rule was imposed. The theatre of the absurd continued. The Supreme Court, by its final judgment in July 2016, restored the Tuki government in *Nabam Rebia vs Deputy Speaker.* The Tuki government eventually resigned ahead of the floor test as he realised he did not have the numbers. Pema Khandu became the new Chief Minister.

The constitution bench of the Supreme Court criticised the role of the Governor. The five-judge bench, describing the happenings leading to the crisis, said it was a "thrashing given to the Constitution and a spanking to governance." The Governor, it said, was not an "all-pervading super constitutional authority" and he could not ask the Speaker to discharge his functions as he (Governor) directs. In this case, the Governor used his constitutional authority to ostensibly favour an "invalid breakaway group" of MLAs disqualified under the anti-defection law.

"The Governor must remain aloof from any disagreement, discontent or dissension, within political parties. The activities within a political party, confining turbulence, or unrest within its ranks, are beyond the concern of the Governor. The Governor must keep clear of any political horse-trading, and even unsavoury political manipulations," said one of three separate but unanimous judgements

Within months of the Arunachal turmoil the court revived the government of Uttarakhand, which was replaced earlier by President's rule. The sacked Chief Minister Harish Rawat moved the high court against the President's rule. The court quashed the President's rule after making scathing remarks against the central government. The BJP government at the Centre appealed to the Supreme Court against the high court order and its observations. The court ordered floor test in the Assembly. It laid down detailed procedure in an unprecedented manner. Rawat ultimately won the trust vote.

In certain instances, it would seem that the court had taken over the role of running the legislative house. In March 2005 no political party got majority in the Jharkhand Assembly election. This resulted in a contest between the United Progressive Alliance (UPA) led by Shibu Soren and the National Democratic Alliance (NDA) led by Arjun Munda. Each of them claimed chief ministership. The Governor invited Shibu Soren to form the government. Arjun Munda contested the Governor's decision and approached the Supreme Court. It ordered a "composite floor test" advancing the date for the test set by the Governor to avoid underhand operations. The court ordered video recording of the proceedings. The court warned all parties that any disturbance during the floor test would be viewed seriously and asked the pro-tem Speaker to announce the result "faithfully". The chief secretary and the Director General of Police were directed to ensure that all elected legislators attended the proceedings without interference by anybody. Arjun Munda comfortably won the vote of confidence, bringing the curtains down on the fortnight-long political drama (*Anil Kumar Jha v Union of India, 2005).*

**Sleepless night for judges**

The imbroglio in Karnataka after the Assembly elections in May 2018 led to night-long drama in the Supreme Court. BJP emerged as the single largest party with the Congress and JD(S) strong contenders for power. The facts are too complex as in all other cases. But this case is notable as the hearing went on from midnight till dawn. Governor Vajubhai Vala had allowed BJP under the leadership of B S Yeddyurappa to form the government. The swearing-in was to take place at 9 am. The opposition cried foul and rushed to the Supreme Court at night to stop it *(G Parameshwara vs Union of India, 2018).* Three judges, Attorney General and senior counsel were woken up. The judges sipped hot tea during the hearing. Every minute counted. Suggestive of the sign of the times, at one stage the judges asked: "Does that mean all the suitcase exchange is possible before they are sworn in?" The court laid down detailed procedure for the floor test and gave protection to the MLAs. However, Yeddyurappa resigned 10 minutes before the trust vote, sensing the situation. He thus became one of the shortest-serving chief ministers with less than three days in office.

Earlier too, the Supreme Court had to deal with the mess in Karnataka *(Balchandra Jarkiholi vs B S Yeddyurappa, 2011).* In its judgment, the court stated that the proceedings adopted by the Speaker did not meet "the twin tests of natural justice and fairplay." It went to say that "extraneous considerations are writ large on the face of the order of the Speaker." He acted in "hot haste" in disqualifying the members by not giving the defectors sufficient time to present their case. Narrating the events, the court stated that this was "further incidence of partisan behaviour on the part of the Speaker".

There are several judgments critical of the role of the Governors and Speakers in such tumultuous times. They highlighted the defects in the anti-defection law. The absolute power vested with the Speaker to decide on members' disqualifications, without setting any time limit to do so, have often rendered the law ineffective. The court had called for an impartial tribunal to decide disputes over disqualification. The court also did not escape blame. Some legal scholars pointed out that it had allowed floor tests in a hurry or dragged on court proceedings allowing hectic political manipulations.

The ineffectiveness of the anti-defection law and the partisan behaviour of Speakers and Governors in critical moments would remind us of the warning of B R Ambedkar about the working of the Constitution. In his speech on 25 November 1949 before the Constituent Assembly, while finalising the Constitution, he said: "...however good a Constitution may be, it is sure to turn out bad because those who are called to work it happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depends are the people and the political parties they will set up as their instruments to carry out their wishes and their politics."

## *Chapter 11*

# Limits of legislative privileges

POLITICIANS are a noisy lot, whether they campaign in elections or debate in the legislative houses. Parliament and state legislature often turn into arenas of shouting matches or even contact sport. The law-makers are also oversensitive to criticism from others. They invoke the ill-defined law of privileges and contempt of the House to silence those who comment or write critically about legislative proceedings. Speakers, journalists and even judges have been targeted in the past. Privileges claimed by the people's representatives are not codified. They do not want it to be codified because then it would be subjected to the fundamental rights of the citizens. This limbo has caused frequent conflicts between members of the House among themselves and critics outside.

The powers, privileges and immunities of either House of Parliament and of its members are laid down briefly in Article 105 of the Constitution. Similarly Article 194 deals state legislatures. The Constitution has accorded special privileges and powers to parliamentarians and legislators "to maintain the dignity and authority of the Houses". But there are no clear rules to decide what constitutes breach of privilege or the punishment it attracts. The legislature and it presiding officers have claimed that they are the final arbiters in this matter. This has created bizarre situations when presiding officers, armed with resolutions passed by the majority in the House, have taken harsh measures against

opposing voices. There have been mass expulsions of Opposition MPs from the Lok Sabha.

The claim of privileges and immunity had a bumpy legal ride from the dawn of the Republic. In the earliest Supreme Court judgment reported on this subject *(G.K Reddy vs Nafisul Hasan, 1954),* the Speaker of the UP Assembly ordered the arrest of an assistant editor of *Blitz,* once a mass circulation tabloid from Mumbai. He was arrested in Mumbai in 1952 and taken to Lucknow to be produced before the Speaker to answer a charge of breach of privilege. He was not produced before a magistrate within 24 hours of his arrest as mandated by the Constitution. So the Supreme Court ruled that the journalist was in illegal detention and ordered his immediate release.

**Speaker summons judges**

The first major case when the Supreme Court was called upon to contend with questions related to the limits of the power of the legislature arose in 1964. A Socialist Party worker, Keshav Singh of Gorakhpur, distributed pamphlets accusing a member of the ruling Congress party in UP of bribery and corruption. The Assembly passed a resolution to administer a reprimand to Keshav Singh for contempt of the House and breach of privilege. He was summoned to the House, but he repeatedly refused to attend it pleading that he could not afford the travel fare to Lucknow, a distance of about 300 km. The Speaker then issued a warrant against him. He created scenes all the way. He lay down on the platform of the Lucknow railway station and then resisted the marshals' attempt to bring him to the Assembly. When he was brought to the bar of the House, he turned his back on the Speaker and refused to take part in the proceedings.

He did not answer any question put to him. He was reprimanded by the House.

Chief minister Mrs Sucheta Kripalani then moved a resolution in the Assembly seeking his imprisonment for seven days; it was easily passed and he was taken to jail. On his sixth day in jail, a lawyer on behalf of Singh moved a habeas corpus writ petition before the Allahabad high court alleging that he was deprived of his personal liberty without authority of law. The two-judge bench ordered him to be released on bail. The Assembly hit back and passed a resolution ordering that both the judges and his advocate be brought in custody before the House.

The two judges, on their part, filed a writ petition in the high court itself to quash the resolution of the Assembly. The House lost no time and issued warrants to enforce its resolution. The full bench of 28 judges of the high court then assembled and stayed the resolution of the Assembly. The legislators relented a little and withdrew its order to arrest the two judges, but asked them to appear in the House to justify their judgement against the House. Considering the political and constitutional issues involved, the Nehru government moved a Presidential reference under Article 143 (1) of the Constitution. The Constitution bench stated, among other things, that no contempt was committed by the two judges and the full bench had the power to pass interim orders. More importantly, it held that parliamentary privilege would yield to the fundamental right to personal liberty *(Keshav Singh vs Speaker)*. Reacting to the ruling, the conference of presiding officers held in Mumbai in 1965 stated that the Supreme Court had "reduced legislatures to the status of inferior courts". They demanded a

constitutional amendment clarifying that the legislatures have exclusive authority to punish contemnors. Their request has not been heeded till now.

**Law-makers in the dock**

In the earlier cases, most of the conflicts involved the fundamental rights, especially freedom of speech and expression exercised by journalists and critics of government. But later, the Supreme Court had to deal with the conduct of the law-makers themselves. These judgments reflected the deterioration in the standards of people's representatives.

When parliamentarians are caught in a disagreeable situation, the first legal defence raised is constitutional immunity from judicial proceedings under Article 105(2). Article 194, referring to state legislature, is identically worded giving protection to its members. One of the most untenable judgements on the claim of privileges was *P V Narasimha Rao vs State (1998)*. A five-judge constitution bench had ruled in that case (known as JMM bribery case) that an MP who accepted bribe for voting in the House was immune from prosecution, but the bribe-giver had no such advantage. Unfortunately, it remained the law for 26 years till it was overruled by a seven-judge constitution bench in *Sita Soren vs Union of India* mentioned below.

The privilege issue continued to simmer. Nine years after the JMM judgment, another scandal broke out involving the law-makers. It is known as the "Cash for Query" case. Investigative journalism and sting operations were in full swing at that time. A TV channel telecast 10 Lok Sabha MPs and one Rajya Sabha MP accepting cash in exchange for raising questions in Parliament. After an enquiry by the committees of the House, these MPs were expelled. They

moved writ petitions. A unanimous judgment, *Raja Ram Pal vs Speaker (2007)*, asserted the court's power to examine the conduct of elected representatives in the House. It said that there ought to be no doubt that when Parliament or state legislature claims privilege, "it is the court which has the authority and jurisdiction to examine, on grievance being brought before it."

However, there were apparent differences in views in the JMM judgment and the Raja Ram judgment. This led to a decision to review both to harmonise them and settle the law on privileges. The seven-judge decision declared that all law-makers are subjected to the same law. Houses of Parliament or legislatures are not "islands". The court emphasised that the offence of bribery was complete when the bribe was accepted. It did not matter whether vote was cast in the agreed manner or if the vote was cast at all *(Sita Soren vs Union of India, 2024)*.

**Violence in the House**

There have been violent scenes in several state assemblies in the past, seen by television viewers. In 1996, Opposition members in the Gujarat Assembly were beaten up by plainclothesmen inside the House. In 1997, voting took place in the UP Assembly after security men locked up the Opposition outside the House. There was extreme violence in the House, which was telecast. One woman legislator, bleeding profusely, was found hiding under the table and pleading for mercy even as she was beaten with mikes. Such incidents led to the question of privileges in the House. Two leading judgments affirmed that the court can intervene in exceptional situations.

In *State of Kerala vs K Ajith (2021),* the court asserted that criminal acts within a legislature would not be protected by invoking privileges. The law was made clear while dismissing an appeal of the Kerala government which wanted to withdraw prosecution of six members of the Assembly who indulged in disorderly behaviour when the budget was being presented in the House in 2015. The MLAs climbed over to the Speaker's dais and damaged furniture and articles causing a loss of over Rs 2 crore. The Secretary of the Legislative Assembly filed cases against them under various sections of the Indian Penal Code and the Prevention of Damage to Public Property Act 1984. The cases dragged on for five years and were stuck mainly on the question of legislative privileges. Meanwhile, the party to which the unruly members belonged came to power and one of them even became the Education Minister. The new government wanted to withdraw the cases to protect its party leaders. It advised its public prosecutor to withdraw the cases. The trial court and the high court rejected his application. The state government then appealed to the Supreme Court.

The judgment delivered said: "Privileges and immunities are not gateways to claim exemptions from the general law of the land, particularly as in this case, the criminal law which governs the action of every citizen. To claim an exemption from the application of criminal law would be to betray the trust which is impressed on the character of elected representatives as the makers and enactors of the law." Rejecting the argument invoking the right to freedom of speech of the members and their right to protest, the court wrote: "Committing acts of destruction of public property cannot be equated with either the freedom of speech in the legislature or with forms of protest legitimately available to

the members of the Opposition...Acts of vandalism cannot be said to be manifestations of the freedom of speech and be termed as 'proceedings' of the Assembly."

Another judgment of the Supreme Court in *Ashish Shelar vs Maharashtra (2022)* further analysed in detail the law on privileges. It arose again due to the ruckus in the Assembly followed by suspension of 12 members for one year. The suspended MLAs moved the Supreme Court, which ruled that the suspension for a year was "unconstitutional, illegal and irrational". It would impact the democratic set-up, leave constituencies unrepresented. A one-year suspension is not only punitive action but worse than expulsion. The ruling is yet another reminder to legislative bodies that their functioning is subject to judicial scrutiny.

## *Chapter 12*

# Judges with political genes

SINCE what Supreme Court judges write is the last word on the Constitution their political and social background makes a lot of difference to the destiny of the nation. In the early days of the Republic, several judges appointed to the Supreme Court were active in the freedom movement when they were young. Many in the Constituent Assembly were lawyers. George Gadbois, an American scholar who wrote the book *SC Judges From 1950-89*, stated that 14 were active in the freedom struggle and four were jailed for participating in stirs like the Salt Satyagraha. More than 20 had contested elections after Independence or were active in politics. Most of them belonged to the Congress Party; some were in the Socialist Party. There were a few Communists and trade unionists.

Lawyers were then the main reservoir of higher judiciary and they were often members of one party or the other. When such persons are elevated to the bench, they do not shed their sympathies easily. Their predilections can be read between the lines of their judgments. V R Krishna Iyer, who had straddled both politics and judiciary with ease, is reported to have said that "law without politics is blind; politics without law is deaf." Justice Chinnappa Reddy, another eminent judge during that period, said: "Politics is no crime. Does it mean that only the True Believers in the political faith of the party in power for the time being are entitled to public employment?"

Some judges have returned to politics even before their judicial term was over or soon after retirement as we shall see. However, once they become judges they normally keep away from the thickets of politics. It is expected of them to follow constitutional propriety by keeping away from politics and politicians and avoid commenting on current affairs.

In spite of this unwritten rule, several of them are seen stealthily crossing the virtual fence, as they have politics in their DNA. They claim that politics plays no role in their decision-making process. They insist that when they sit on the constitutional high chair they become arbiters of justice. However, their judgments reflect to some extent their political and ideological leanings, especially when high octane political, economic or social questions come before them.

There was an easy passage from politics to law and back in the early days. One of the earliest such example was Justice Mehr Chand Mahajan, the third Chief Justice of India. Before Independence, he was a judge of the Punjab high court. While serving as a judge, Maharaja Hari Singh of Jammu and Kashmir called him to become his Prime Minister. He accepted the request and became the first Prime Minister of Jammu and Kashmir in October 1947. Mahajan continued as the Prime Minister till 5 March 1948. In October 1948, he became a judge of the Supreme Court. In 1954 he became the Chief Justice. Despite his political role, he was highly respected as a judge and is remembered for many important judgments.

Some prominent Supreme Court judges who kept away their black robes to test political waters deserve mention. Koka Subba Rao was a judge of the Supreme Court between 1958

and 1967. Rao was CJI for nine months only. Three months before he reached the retirement age of 65, he surprised the nation by resigning the top judicial post and agreeing to contest the fourth presidential election in 1967 on behalf of the United Opposition. This created intense controversy as his entry into the political arena was thought to have coloured the judgments delivered by him earlier. It was even alleged that he had held discussions with Opposition parties while holding the Chief Justice's office. His action cast a shadow on his judgments. He was defeated by the Congress candidate, Zakir Husain.

Kawdoor Sadananda Hegde from Karnataka was associated with the Congress between 1952 and 1957. With the party support, he was elected to the Rajya Sabha in 1952. He abruptly resigned from the Rajya Sabha and took judgeship in the Mysore high court which existed then. Later he became the chief justice of the Delhi and Himachal high courts. In 1967 Hegde was appointed to the Supreme Court. He was part of the 13-judge constitution bench which delivered the majority judgment in the *Kesavananda Bharati* case, famous for laying down the Basic Structure doctrine in 1973. Since his judgment went against the Indira Gandhi government's policy he was superseded by a junior judge, A N Ray, who became the Chief Justice. On hearing this news on radio, he immediately resigned. After the Emergency, he joined the Janata Party and won the Lok Sabha seat from Bangalore South constituency. He was made the Speaker of the House. After the collapse of the Janata government he joined BJP when it was founded in 1980. He became its vice president for a short while, but he lost the election contested as the BJP candidate. He turned a philanthropist and established several medical and educational institutions.

The political and judicial career of V R Krishna Iyer is a fascinating story told many times. As an activist lawyer in the 1940s, he defended several communists when the Communist Party of India was banned. As a result, he was dubbed as a communist. He was imprisoned for a month in 1948 on a fabricated charge of giving legal assistance to communists and providing hideouts. The then Madras government released him as there was no evidence to prove the charges. He has denied he was a communist, though he had sympathy with the ideology. Iyer was elected to the Kerala Assembly in 1957 as an Independent candidate and became the home minister in the E M S Namboodiripad cabinet, the first communist government chosen by ballot. He lost two elections after that. In 1968 he was appointed judge of the Kerala high court. His appointment to the Supreme Court in 1973 surprised everyone. It created a furore in the Bar. Soli Sorabjee, famous lawyer, led the attack on Iyer alleging that he was a known leftist or Marxist. Many lawyers rallied against the appointment. According to a news report of the times, he was booed at the oath-taking.

However, the critics soon became his admirers observing his unbiased conduct in the court and the quality of his judgments. In the end he proved to be one of the greatest judges of the Supreme Court. When he died in 2014 after completing 100 years, Sorabjee wrote in *New Indian Express*: "Krishna Iyer had all the attributes expected of any judge: erudition, quickness of mind, good memory for case law and patience in deciding cases." After retirement in 1987 he stood for presidency as the combined Opposition candidate. BJP was reluctant to support him. Its leader, L K Advani, wrote to him that "you are a handmaiden of the Soviet

Union and therefore we are not in a position to support you." Iyer lost to R Venkataraman, the Congress candidate.

A judge who was soaked in politics and easily hopped from judiciary to politics and back was Baharul Islam who was in the Supreme Court,1980-83. He was in Socialist Party before joining the Congress in 1956. He held several party posts before his appointment to the Gauhati high court. In 1962 and 1968 he was elected to the Rajya Sabha as Congress candidate. In 1972 he quit Rajya Sabha to join the Gauhati high court. He retired in March 1980 and was back in politics. Nine months later he was appointed to the Supreme Court. In January 1983, six weeks before his retirement, he resigned to contest from Barpeta (Assam) Lok Sabha constituency. This created huge controversy as only a month earlier, he had written a judgment which granted reprieve to the then Congress chief minister Jagannath Misra of Bihar, who was facing trial on several criminal charges. The election could not be held due to civil unrest. Congress then accommodated Islam again. In May 1983, he was nominated to the Rajya Sabha.

Hans Raj Khanna, whose portrait is hanging in Court 2 of the Supreme Court, also waded into politics for a brief while, but was not successful. He hurt Indira Gandhi's pride twice. He tilted the balance in the *Kesavananda Bharati* case (7:6) and introduced the concept of Basic Structure of the Constitution. During the 1975 Emergency, Khanna struck another blow by writing a lone dissent in *ADM Jabalpur* case (also called the Fundamental Rights case). He ruled that fundamental rights could not be abridged even during Emergency. He paid the price for challenging the executive and was superseded by his junior, M H Beg, who had given

judgments in favour of the government in Kesavananda and the Fundamental Rights cases.

Khanna resigned immediately and was hailed as a hero after the Emergency was lifted in 1977. After two years he accepted the offer of Prime Minister Charan Singh, who headed the Janata Government, to join the cabinet as Law Minister. He resigned three days later, after getting a glimpse of the chaotic coalition politics. The Janata experiment failed and after nearly three years Indira Gandhi came to power again. Now the Opposition requested him to contest against Giani Zail Singh for President. He agreed, but was thoroughly defeated. That was the end of his political career.

There have been other Supreme Court judges who were less prominent but also had political background. For example, Justice G L Oza (1985-89) was a very active worker of the Socialist Party. In 1952 he had contested against Congress in the Madhya Pradesh Assembly election and got defeated. M P Thakkar was active in the Socialist Party and trade unionism before arriving in the court. P B Sawant was another who was active in politics and the trade union movement.

The era of judges with manifest political background seems to be over. However, they show their allegiance to certain ideologies in their post-retirement conduct. At an event organised by the legal cell of right-wing VHP in Delhi on 8 September 2024, it was reported that 30 retired judges of the Supreme Court and high courts were present. PTI, quoting sources, said it was an internal meeting organised by the legal cell which discussed a range of issues including the disputes over Varanasi and Mathura temples, the Waqf (Amendment) Bill, cow slaughter and religious conversion.

Justice Hemant Gupta, who retired from the Supreme Court in October 2022, defended his attendance stating that he participated in the event as a "citizen of India" to discuss current issues.

It is not just the political background of the judges that is eagerly watched by the public. There are several indefinable and elusive factors which affect judicial decisions. The political context of the cases before the court is an important influence. Changes in the economic philosophy could also affect judicial opinion. The composition of the benches is another factor that impacts the outcome. The influence of the electronic media is subtle but substantial. Social media is another new challenge to the judicial mind. This is "trial by media" in a new toxic form.

Some judges might claim that they are not swayed by the political winds outside. Some others admit that it is not absolutely true. In the Kesavananda judgment, H R Khanna put forward the ideal situation thus: "That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest."

Justice P N Bhagwati, brother judge of Khanna and part of the Fundamental Rights bench, had a different and candid view on the claim of judicial neutrality. Writing his long dissenting judgment on the inequity of death sentence, Bhagwati observed as follows in *Bacchan Singh vs State of Punjab (1982)*: "It is now recognised on all hands that

judicial conscience is not a fixed conscience; it varies from judge to judge depending upon his attitudes and approaches, his predilections and prejudices, his habits of mind and thought and in short all that goes with the expression 'social philosophy'. We lawyers and judges like to cling to the myth that every decision which we make in the exercise of our judicial discretion is guided exclusively by legal principles and we refuse to admit the subjective element in judicial decision making. But that myth now stands exploded and it is acknowledged by jurists that the social philosophy of the judge plays a not inconsiderable part in moulding his judicial decision and particularly the exercise of judicial discretion. There is nothing like complete objectivity in the decision-making process and especially so, when this process involves making of decision in the exercise of judicial discretion. Every judgment necessarily bears the impact of the attitude and approach of the judge and his social value system."

The religious faith of the judge could arguably influence his/her court judgments. Several Supreme Court judges have been great devotees of various gods and godmen, though they would claim that their piety would not affect their judicial decisions. Chief Justice D Y Chandrachud found himself stung by continuous diatribe when he disclosed towards the end of his term that he had consulted the Deity before deciding the Ayodhya case. P N Bhagwati, another CJI, once claimed that he was "only writing what my god dictated. Bhagwan (Sathya Sai Baba) held my hand as I put pen to paper."

Then there is another question, debated by psychologists and neuroscientists – whether humans have free will at all.

Some of them believe that a person's will is not completely free of external influences. There is an unconscious process while taking a conscious decision. Genetics and environment factors that may be outside of a person's control may affect the independence of mind. Judges may carry confirmation bias. It is now accepted that it takes six years for human brain to reach approximately 95 per cent of its full growth. It is exactly during that period when morals or bigotries are hard-wired into it by elders. As a wit remarked, if you want to change a person you must start from his grandmother. Once the brain is fed preconceptions and prejudices, even university education would not change the mindsets. All these have deep implications for judicial decision making. Only artificial intelligence (AI) may be free from external factors. It has also other advantages. It can read all legal writings and judgements in nano-seconds and deliver a judgment without interference from the political executive or a deity. It can also tell lawyers what to expect from the judge before whom he/she had argued. What AI lacks is ethical considerations and contextual understanding.

# Chapter 13

# Appointments, transfers, impeachment

WE have seen how members of the higher judiciary make deep impact on the political direction of the nation, society and individual rights. Since so much power is wielded by judges, their selection and appointment is critically important. Politicians have tried not to yield to this rival centre of power. This has resulted in a war of nerves for decades between the judiciary and the government on choosing judges. There are as many opinions as there are jurists suggesting a satisfactory system to recruit judges for constitutional courts.

Most democratic countries have established rules or conventions for selecting judges to the constitutional courts. The process is largely transparent. Politicians play a significant role in it. The Constitution of India does not lay down a detailed procedure for selection of judges. Article 124(2) merely says that the President shall appoint judges of the Supreme Court "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." Article 217 refers to high courts and states that the President shall consult the Chief Justice of India and the Governor of the state in the case of judges of high courts. The details were left to conventions grown over the decades and the good sense of the government and the top judiciary.

In the early days of the Republic, the choice of judges did not create much controversy. The judiciary represented by

the CJI proposed the names and they were generally accepted by the government. Merit was the main criterion but there was a convention by which region, caste, community and religion of the candidate were considered in view of the rainbow diversity in the country. However, a satisfactory equilibrium has never been achieved. In fact, the balancing on thin ice has caused heart-burn in several cases. In 2024, data cited by the Law Minister in the Rajya Sabha and attributed to the chairman of the National Confederation of Dalit and Adivasi Organisations, pointed out that 3 per cent of judges are SC, 2 per cent are ST and 12 per cent are OBC. The 14th Law Commission report on judicial reforms in 1958 had deprecated the regional and communal considerations, which it called extraneous factors, prone to be influenced by political considerations. However, such criteria still exist behind the veils.

Since the background of judges reflects in their decisions, certain degree of lobbying by various political interests is unavoidable. Though the lobbying is ordinarily subtle, the back-stage manoeuvres often leak out. Some former judges have spilt the beans in their autobiographies and some others in interviews. The American scholar, George Gadbois, has recorded their experience in his book, *Judges of the Supreme Court*. Several saucy bits in the book indicate that the judges are also not above the failing of "packing the court" with their favourites, just like the executive.

In 1988, retired Chief justice Y V Chandrachud told Gadbois that the government was desperately looking for judicial candidates who would support it in general. The government would look at a judge's decisions and antecedents, whether he was close to Opposition groups.

Those who did not fit in with the government's ideology were rejected. In one case, Mrs Gandhi frankly told Chandrachud that the candidate was "not likely to be helpful to us". P N Bhagwati, another Ex-CJI, also told Gadbois that the government wanted judges who were favourable towards it, especially in the high courts where election petitions were being heard. Bhagwati said that his experience with the government concerning appointment of judges was "absurd and humiliating". Another retired judge, Chinnappa Reddy, thought that the government carefully examined the nominee's past — if he was pro or anti-government. According to him, choosing judges trying to please the government was the "new ethos" of the Supreme Court, and this was happening especially in big political cases.

A desire to cherry-pick helpful judges is innate in politicians' nature. Pandit Nehru said long ago: "If courts proved obstructive, one method of overcoming the hurdle is... the executive which is the appointing authority of judges begin to appoint judges of its own liking for getting decisions in its own favour." His daughter attempted to follow this policy. Since the late 1960s the Supreme Court delivered important judgments disrupting Prime Minister Indira Gandhi's social and economic policies. The decisions in the *Golak Nath* case (1967), the nationalisation of 14 banks (1970), abolition of privy purses and the *Kesavananda Bharati* case (1973) rendered a heavy blow to her ideology. This led to the evolution of the theory of "committed judges". Indira Gandhi and her close political associates propounded it to secure the judiciary. The main campaigner for this strategy was Mohan Kumaramangalam, her cabinet colleague and confidant.

Kumaramangalam explained the reason for this policy in the Lok Sabha during the debate on the 24th Constitution amendment in 1971. He asserted that the law would "clear the road blocks" to reforms erected by the Supreme Court. According to him, Supreme Court judges had an "inbuilt conservatism born out of the class from which they come," namely the propertied class. He repeated this view in May 1973, while defending supersession of three senior-most Supreme Court judges by appointing A N Ray as CJI. When choosing the chief justice, he said, "The government is entitled to look into his philosophy and outlook and decide that we must have a forward-looking and not a backward-looking man".

Thus the seniority principle, followed by convention, was discarded, not on the ground of quality, but on commitment. For the first time, selection of judges was openly coloured by political and ideological considerations. The majority judges who shot down legislation on bank nationalisation and privy purses were called supporters of status quo and corporate hegemony. So they were superseded at the time of appointing chief justices. Allegations of packing the court became common. When Mrs Gandhi returned to power in 1980 after the fall of the Janata Government, she alleged that the previous government had made several appointments on political basis. Moreover, her Law Minister Shiv Shankar came out with a set of proposals reviewing the method of choosing and transferring high court judges. It upset the legal fraternity.

**Evolution of Collegium**

This was the beginning of a judicial struggle to clear the complicated situation. The court passed three judgments on several aspects of appointment, transfer and confirmation of judges. The first one, often referred to as the "First Judges Case" *(S P Gupta vs Union of India, 1982),* granted primacy to the executive. There was a furore over this ruling, especially because Indira Gandhi, who wanted committed judges, was in power with big majority. Constitutional scholars asserted that the decision would destroy the independence and neutrality of judiciary by handing over the crucial power to the executive. Some even described it as an example of judicial timidity and capitulation before the executive. After years of protestations, the First Judges Case was brought before a nine-judge bench for reconsideration (SC *Advocates on Record Assn vs Union of India, 1993*). In this "Second Judges Case", the court overruled the earlier decision, the primacy of the executive was taken away and the judiciary wrested the power to itself. It also introduced the controversial Collegium system. It was based on the belief that the selection should best be left to the judges who are familiar with their kind.

The Second Judges Case judgement proposing the Collegium was based on weak constitutional foundation. Opposition against it grew shriller from all sides. This new crisis led to the Presidential Reference under Article 143. This became the "Third Judges Case" (1993). In this case, the Collegium was expanded to consist of five seniormost judges with the Chief Justice as the head. The working of this Collegium was also assailed by the government and the legal community.

While the acrimonious debates continued, the BJP government passed its first constitutional amendment in 2014 as soon as it came to power. It introduced the National Judicial Appointment Commission (NJAC). By this 99th constitutional amendment, it was proposed to set up a commission consisting of six members: CJI, two senior-most judges of the SC, Union law minister and "two eminent persons" to be selected by another high power committee consisting of the Prime Minister and the leader of the Opposition. Any two members could veto the decision of the committee. The matter was brought before a five-bench constitution bench. It struck down the NJAC Act (SC *Advocates-on-Record vs Union of India, 2015).* It was held that the law violated judicial independence, which is part of the basic structure of the Constitution. The court stood by the Collegium system. The judiciary could not risk being caught in a "web of indebtedness" towards the government. The 4:1 majority judgement read: "It is difficult to hold that the wisdom of appointment of judges can be shared with the political executive. In India, the organic development of civil society has not as yet sufficiently evolved."

The ruling party and some Opposition politicians assailed the judgment as it led to a system in which "judges appointing judges". The judiciary had its defendants. They pointed out that the judiciary is only one of the many players involved in the process. Many authorities are involved, including the Union law ministry, state governments, Governors, high court collegiums, intelligence bureau and lastly, the topmost executive, who are all designated to examine the suitability of a candidate.

The discord has had crippling consequences for all players. The recommendations the Collegium is not always followed up by the government. If the government disfavours a candidate the file is kept aside for a long time. The delay provokes much discontent in the legal community as it disrupts the seniority of the judges who are on the line of elevation. Such long pause also enables the government to influence the choice of future CJIs. Some high courts were left with woefully poor strength and the litigants suffered. The court could only express its grievances in a dignified manner. But 2022 onwards some judges began to drop their reticence and express their frustration openly in the court. Verbal jousts followed.

The strain between the executive and judiciary flared up in December 2022. The then law minister Kiren Rijiju told Parliament that the problem of appointment will remain as long as a new system is in place. Vice President Jagdeep Dhankhar also remarked in the Rajya Sabha that the Collegium system was against the will of the people. These statements came shortly after Chief Justice D Y Chandrachud observed in the court that the government was sitting over the list of candidates sent by the Collegium. The confrontation escalated for some time before it subsided. But the debate surfaces often at frequent intervals.

**Transfer of high court judges**

The 25 high courts in the country have a sanctioned strength of 1,122 judges. Every year, some hundred judges have to be selected. The appointment of high court judges is of high importance as they deal with fundamental rights of citizens and political questions in their respective states. Many of them are future candidates for judgeship in the Supreme

Court. Therefore their selection and appointment inevitably lead to tussle between the judiciary and the political executive behind the scenes. The secrecy surrounding the process also casts a deep shadow over their choice and appointments. The names of candidates are kept secret, which only the judges in the Collegium and the government know. The government enjoys an undue advantage as it can be selective in providing information about the candidate. Even the Collegium judges may not be told the entire background of the candidate which the government gathered through its agencies. The names are declared only after the selection process is over. By then, it would be too late for public scrutiny of the candidate's suitability.

The problems besetting appointment of judges also envelop transfer of high court judges. In the initial period of the republic, judges of the high courts were transferred out of necessity, or expediency and it happened only rarely. The judges requested or consented to the transfer. This changed substantially in the 1970s, especially during the 1975 Emergency. During this dark period, Indira Gandhi flouted conventions and transferred 16 of them at one go without their consent. The then CJI Ray, who was gifted the top judicial post superseding his seniors, meekly consented to the ruthless step. More were in the red list. She used transfers as a political tool to harass judges who passed orders unfavourable to her, especially in fundamental rights matters.

Transfer of high court judges is prone to attract controversies. Since the judges who are transferred usually remain silent due to the respected traditions of the judiciary, speculations in public ride roughshod over facts. Some

transfers are painted with the brush of politics. This tendency is reinforced as the government and the Collegium keep silent about the reasons for the transfer. It discloses only sketchy details on the court website.

Some judges have resigned after the transfer order. The bar associations of the transferred high courts have protested against their courts being "dumping grounds" when judges are sent there for obscure reasons. High court judges normally obey the marching orders and rarely move the Supreme Court. The only significant exception was *Union of India vs Sandal Chand (1977).*This judge of the Gujarat high court was transferred to the Andhra Pradesh high court. Though he joined the new high court, he filed a writ petition in the Gujarat high court challenging his transfer. It held that the transfer was wrong as the CJI was not consulted. The government appealed to the Supreme Court. It laid down certain principles to govern transfers under Article 222 of the Constitution. A transfer could be ordered only in public interest and it could not be punitive. Consultation with the CJI must be full and effective and the independence of judiciary must be protected.

**Politics of impeachment**

When a judge of the Supreme Court or a high court is accused of misconduct there are few effective steps to remove him or her. The judges have been provided several safeguards to make them free from external pressures. But the very same protections have come in the way of a remedy against delinquency. Some judges embroiled in sleaze are quietly told to resign to save embarrassment. Others have been transferred to another high court. Some others have been taken out of judicial work till retirement. Another

option used is to initiate an "in-house" inquiry in the court. All these soft options have been found futile in practice.

The only way left then is impeachment. This is a long-drawn-out process. No judge has been impeached so far, though some of them reached the brink. The President has the power to remove a judge for proved "misbehaviour or incapacity", according to Article 124(4). The Constitution does not explain the phrase. The procedure is laid down in the Judges (Inquiry) Act 1968. It is a hybrid method with judicial and political roles playing in a convoluted way. In practice, politics plays a decisive role. This is because a motion to impeach a judge must be approved either by the Speaker of the Lok Sabha or the Vice President/Chairman of the Rajya Sabha. If the approval is obtained, the complaint has to be examined by a three-member committee. The panel's finding then goes before Parliament. The judge is removed only if a two-thirds majority of MPs present and voting in favour of the motion or an absolute majority in each House. Only two judges out of seven so far have been found guilty for their "misbehaviour" by the committee.

There was only one instance of impeachment trial of a SC judge. But it was the parliamentarians who defeated the resolution. The Supreme Court judge involved was Justice V Ramaswami. He was the Chief Justice of the Punjab and Haryana high court between 1987 and 1989. Then he was elevated to the Supreme Court. After that the Accountant General of Punjab and Haryana made a report in which the judge was accused of several financial irregularities. It included purchase of carpets, furniture and other items, favouring certain suppliers and misuse of perks. There were strident calls for his impeachment. The then Chief Justice

Sabyasachi Mukherji tried to avoid impeachment that would bring disrepute to the court and give a handle to politicians. He first asked him to go on leave. Then the CJI set up an internal committee to investigate the allegations. The judge took a defiant stand. Ultimately, a motion of impeachment was signed by 108 Lok Sabha members and submitted to the Speaker. He constituted a committee to probe the charges according to the procedure. Its report was submitted in Parliament. The judge was found guilty of 11 charges. The motion was put to vote and a hot debate followed. But the Congress members abstained at the time of voting, resulting in the defeat of the motion in 1993. How the judge pulled off this victory is still a matter of speculation, but what was clear was that politics was in full play. Ramaswami was not given any work by the CJI till his retirement three years later. He retired in 1994 with all the benefits, taking advantage of the defeat of the impeachment motion.

Judges who faced impeachment have realised that they cannot defend themselves without political backing. Parliament heard the defence of a Calcutta high court judge, Soumitra Sen, in 2011 after the enquiry committee found him guilty of misappropriation of funds in his custody when he was a lawyer and appointed receiver by the high court. He refused to resign and made an emotional speech in Parliament, setting out his case of innocence. However, Rajya Sabha voted to impeach him. Before the resolution was confirmed by the Lok Sabha, he resigned, sensing that he had no support from the MPs.

## *Chapter 14*

# Shadow on post-retirement career

MOST judges of the Supreme Court fade away from public view after retirement. They cannot practise in any court, unlike high court judges, many of whom join the bar and earn a fortune which they missed while sitting on the bench, getting only a fixed salary and perks. Resourceful Supreme Court judges have a hybrid way to retain the prestige and paraphernalia to some extent and also add wealth in their sunset years. They preside over inquiry commissions or tribunals. Many of them take up arbitration work of big corporates or build "chamber practice" by giving opinions to corporate clients. But accepting government assignments invites criticism. Former judge Krishna Iyer has written in his book, *Justice at Crossroads,* the danger of post-retirement jobs: "During the career of judges, many carrots are held out to deflect judicial performance from the path of rectitude. Judicial afternoons and evenings are sensitive phases; the incumbent being bothered about post-retiral prospects. The executive plays upon this weakness to bend the integrity or buy the partiality of the elderly brethren."

Eminent jurist H M Seervai, in his book *Constitutional Law of India,* wrote that in important cases involving governments, consciously or unconsciously, the judges have allowed their judgements to be deflected by the thought of their career prospects. There are largesse galore with the governments like post-retirement posts, lucrative jobs for their children and discretionary allotment of plots.

Despite such warnings, some judges have invited disapproval by becoming Governors; a few got nominated to the Rajya Sabha after delivering judgments that the government cherished. Several headed straight to preside over tribunals waiving a well-deserved rest after their long judicial stints in the top court.

The first Law Commission in its 14th report had unanimously expressed its opinion that the practice of judges looking forward to or accepting employment under the government after retirement was undesirable as it could affect the independence of the judiciary. It recommended a constitutional bar against judges accepting office under the government.

Post-retirement jobs of judges have been highly controversial from the start. Ambition has a morally corrupting influence on individuals. It causes them to commit wrongdoings and do whatever it takes to get power. Their judgments on political questions become suspect. In the Constituent Assembly, several members wanted to prevent it. B R Ambedkar, on the other hand, short-sightedly felt that there was no need for the prohibition as the judiciary dealt with disputes between citizens and seldom between citizens and the government. A large section of conscientious judges and jurists nevertheless continue batting for the elusive "cooling off" period. They perceive that the government would not pass a law to that effect as it is the gainer in the existing system. The government is the main litigant as well as the appointing authority in tribunals. It has the rule-making power to influence the composition of the tribunals. The government maintains that several laws required judges to preside over tribunals and commissions. On the contrary it

is argued that any competent lawyer can do the job reserved for a retired judge.

Several retired judges told Gadbois (the American scholar) that post-retirement employment with government was undermining the independence of judiciary. Former Chief Justice Y V Chandrachud said some judges were looking for post-retirement positions and writing judgments with that in mind. Another former Chief Justice, P N Bhagwati, was of the opinion that judges hankered after a good retirement job as it enabled them to have rent-free house, car, driver, allowance and status. R S Pathak, another CJI, said judges with shorter terms tended to be more pro-government as they were looking for some suitable position after retirement. Yet another Chief Justice, M Hidayatullah, quipped: there are two kinds of judges ~ those who are forward-looking and those who look forward.

**Governorship under cloud**

Among the most prestigious constitutional posts coveted by ambitious judges in their twilight years is the governorship of a state. Few such migrations have been above criticism. The career of Hidayatullah, who was 52 when he was elevated to the Supreme Court, was somewhat an exception. Though he was against post-retirement appointment, he accepted invitations under exceptional circumstances. Hidayatullah has the distinction of serving as the 11th Chief Justice of India (1968-1970), Vice President (1979-84) and Acting President two times, when President Zakir Husain died in 1969 and when President Zail Singh went to the US for medical treatment in 1982. He declined to run for President despite requests from as varied persons as Indira Gandhi, Jayaprakash Narayan and other Opposition stalwarts.

However, he agreed to become Vice President in 1979 after the collapse of the Janata government.

The first Supreme Court judge to be appointed Governor of a state was Saiyid Fazal Ali. His judgment in the A K Gopalan case was one of the earliest delivered against the Nehru government. There could be no allegation of quid pro quo in view of his judgment against the government. Nevertheless, his selection was criticised by many including the then Attorney General of India, M. C. Setalvad. In his autobiography, *My Life, Law and Other Things*, Setalvad observed: "Such appointments were bound to impair the independence of the highest judiciary. Judges of the Supreme Court had from day to day to deal with the correctness and validity of the executive and legislative acts of the Union and State governments and they would clearly be subject to executive influence if they looked forward after retirement to preferment as Governors or any other executive office."

There was furore when Fathima Beevi, the first woman judge of the Supreme Court, was appointed Governor of Tamil Nadu in 1997 after her retirement in 1992. In this new innings her first four years went by without any disturbance as she generally avoided public appearances in the true tradition of a judge. She had good rapport with the DMK chief minister M Karunanidhi. It was believed that he had sponsored her Governorship. However, when DMK lost the Assembly election and J Jayalalithaa's AIDMK won an impressive victory in 2001, Fathima Beevi's role as Governor mired her in controversies. She gave oath of office as Chief Minister to the former film star in a hurry though Jayalalithaa was barred from contesting election as she was

convicted in a corruption case. She did not consult any authority at the Centre or the NDA alliance partners. Worst of all, she approved the arrest of Karunanidhi in the most humiliating circumstances. Karunanidhi now wanted her to be removed. She sensed the mood of NDA at the Centre and quietly left the post. Fathima Beevi did not give any explanation for her conduct; it was Jayalalithaa who said, "Fathima Beevi was a retired judge of the Supreme Court; nobody needed to teach her law."

While Fathima Beevi was embroiled in controversy towards the end of her gubernatorial career, the appointment of Palanisamy Gounder Sathasivam, the first and only CJI to become Governor, was decried from the start. He retired in 2014 and was soon appointed Governor of Kerala. His appointment was assailed by citing a judgment related to 2002 Gujarat riots delivered just before his retirement. In interviews to newspapers he asserted that he felt nothing wrong in accepting the post to serve the people of Kerala. He said that he did not lobby for the post. The appointment of Justice Syed Abdul Nazeer as Governor of Andhra Pradesh within weeks of his retirement on 4 January 2023 drew sharp criticism from Opposition parties and commentators. They cited several judgments favourable to the government, including the Ayodhya verdict.

**Judge to law-maker**

We have seen earlier the career of Baharul Islam, once an active Congress worker, who was nominated to the Rajya Sabha two times. Another dignitary who changed course was Shiv Shankar, the powerful law minister and confidante of Indira Gandhi. He was a judge of the Andhra Pradesh high court before he joined the Congress party and won Lok

Sabha election in 1980. He courted controversy for his attempts to control the judiciary by proposing controversial policies in the selection and transfer of judges.

Two Chief Justices were nominated to the Rajya Sabha after their retirement. Both invited severe criticism. Ranganath Misra, who had strong connections with the Congress, was elected to the Rajya Sabha in 1998 with party backing. He was the first CJI to become a Rajya Sabha member after retirement. His nomination was challenged in the Orissa high court and the Supreme Court without success *(Ananga Udaya Singh vs Ranganath Misra, 2002).* The nomination of the 46th Chief Justice, Ranjan Gogoi, to the Rajya Sabha was mired in intense controversy. In his autobiography, *Justice for the Judge*, he has countered the charges against him: "I did not even remotely think there was anything wrong in accepting the offer (nomination) or that it would be inviting the kind of adverse comments that eventually cropped up, including opinions that the Rajya Sabha seat was a quid pro quo for judgments delivered in the Rafale and Ram Janmabhoomi cases. Even in my wildest imagination, if it had occurred to me that people would have publicly aired their 'views' and 'thoughts' in such a manner, I would probably have thought twice before accepting the nomination."

## *Chapter 15*

# Inquiry commissions on decline

GOVERNORSHIP and Rajya Sabha nominations do not demand hard work. But heading inquiry commissions is no bed of roses. They might have to take on political bigwigs whose wrong-doings have to be probed threadbare. They have to face brickbats from several quarters. In the process they tend to singe their reputation along with that of the judiciary. The government often uses inquiry commissions to wriggle out of an awkward situation, letting public memories fade or to settle scores with the Opposition leaders. The credibility of such commissions has suffered immensely. Now there are very few inquiry commissions, especially those involving political misfeasance. The governments these days resort to other means to defuse scandals. Judges have also declined to take up the delicate task.

The Commissions of Inquiry Act was passed in 1952 mainly to probe corruption in high places. The government tends to choose judges to head inquiry commissions for various reasons. Supreme Court judges retire at 65, when their mental faculties are still sound. Their judicial experience can be utilised for public good. A judicial commission carries more credibility and respect than other panels of experts. For all these reasons retired Supreme Court judges were preferred to head inquiry commissions. In the early decades, inquiry commissions attracted respect and credibility to some extent. Judges considered it as an honour to preside

over them. P B Gajendragadkar, after retiring as CJI in 1966, chaired seven inquiry commissions, a record of sorts.

Despite all these arguments, inquiry commissions were invariably caught in controversies from the start. Instituting a commission is perceived as "vendetta politics". The initiative in the appointment of personnel rests entirely with the executive and it is unlikely to set up a probe into its own actions. The government of the day is likely to choose a judge who would give a report convenient to it. The findings are not binding on the executive. The government may reject the inquiry report or dump it in the record room. Few reports have been acted upon.

**Assassinations and mystery deaths**

One would normally expect that inquiry into assassinations and mysterious deaths would be free from politics and sentimental bias. But commissions that had probed deaths of legendary figures have failed to clear the cloud of doubts surrounding them. The assassination of Mahatma Gandhi and the death of Netaji Subhash Chandra Bose are some of them. Mahatma Gandhi was shot dead in New Delhi on 30th January 1948. An inquiry commission was set up only in 1966, because of an uproar provoked by certain revelations made at a meeting in Pune. It was held to felicitate three accused persons who were released in 1964 after serving life sentence. The assassination was probed by a retired judge of the Supreme Court, Jeevanlal Kapur. The commission completed its work in 1969 and its report was released to the public in 1970. It indicted those responsible for Gandhi's security with negligence.

Two inquiry commissions had probed the circumstances of the death of Netaji Subhash Chandra Bose in a plane crash

in August 1945. The first one was appointed in 1970. It was headed by G D Khosla, retired Chief Justice of the Punjab High Court. He submitted his report in 1974. However, it did not end the different theories floating about. So the government appointed retired Supreme Court judge Manoj Kumar Mukherjee in 1999 to probe it further. He submitted his report to the government in 2005; it was tabled in Parliament in 2006. However, the government rejected the findings.

Retired Justice K K Mathew probed the death of L N Mishra, a Congress heavyweight and confidante of Indira Gandhi, in a bomb blast at Samastipur railway station in 1975. The judge gave no definite finding. Deen Dayal Upadhyaya, president of the Jana Sangh party, was found dead on the railway track near Mughalsarai in February 1968. Justice Y V Chandrachud (as he was then) conducted an inquiry and found that it was the work of thieves; but the party leaders still believe that it was a political murder. A commission headed by Supreme Court judge M P Thakkar inquired into the assassination of Prime Minister Indira Gandhi in 1984. When the report was submitted to the government in 1989, it decided not to place them on the table of the Lok Sabha, as required by the Act. It even amended the law in 1986 allowing it to do so legally. But the contents of the report began to appear in certain newspapers. *Indian Express* got the full reports and published the details along with trenchant comments. Parliament was rocked for weeks over the government's behaviour and the contents of the report. Sixty-three MPs were suspended for the remainder of the week. Prime Minister Rajiv Gandhi unsuccessfully tried to quell the misgivings.

Two commissions went into the assassination of Rajiv Gandhi, who died in a suicide bombing at Sriperumbudur in Tamil Nadu during an election campaign in May 1991. It was inquired into by two judges separately. Retired Supreme Court judge, J S Verma's report in 1992 narrated a series of strange security lapses on the part of the state police. It also blamed the then Central Government for failing to protect the former Prime Minister. Moreover, there was a deliberate attempt to destroy evidence. The other report by Milap Chand Jain, former Chief Justice of the Delhi high court, pointed fingers at various important figures and agencies.

**Corruption under scanner**

The most challenging assignment for an inquiry commission is to investigate corruption in high places. The first financial scam of mega size (the word scam entered the lexicon only in the 1960s) was the Mundhra affair of 1957-58. It was triggered by Feroze Gandhi, son-in-law of Prime Minister Nehru and husband of Indira Gandhi. The allegation was that Life Insurance Corporation, nationalised a year earlier (1956), had bought shares at inflated prices from six loss-making companies belonging to Haridas Mundhra to bail them out. The Kolkata-based industrialist had considerable influence in the Congress as he was among those who funded the ruling party. Following national furore, the government ordered an inquiry under the Act in 1958. M C Chagla, Chief Justice of the Bombay high court, was the one-man commission. The case generated great interest among the public as the Finance Minister, RBI Governor and LIC chairman were called to depose before the commission. Added to that was the rupture in the Nehru family.

Unlike other commissions Chagla allowed the public to know the full extent of the financial misconduct. The crowd which came to hear the proceedings was so large that people sat on the lawns where loudspeakers were set up. The judge submitted his report in a month, another record. In later years commissions trundled along for decades. (The negative record is held by the Liberhan Ayodhya Commission of Inquiry, which got 48 extensions and lasted 17 years). Chagla reported that Mundhra had sold fictitious shares of his concerns to LIC. The industrialist was later sentenced to 22 years but did not spend much time in prison. The case was a huge embarrassment for the Nehru government and it led to the resignation of his Finance Minister T T Krishnamachari. Chagla wrote in his memoirs, *Roses in December,* that "Nehru was very angry with me and didn't hesitate to show his displeasure."

The first commission to inquire into allegations against a Union Minister was headed by Supreme Court Justice S K Das. It was Nehru who wanted the probe against K D Malaviya, Minister of Mines and Fuel, in his cabinet. Das was selected for the task while he was a sitting judge. His report led to the resignation of Malaviya in 1963. The Dalmia-Jain Commission of Inquiry was headed by retired Supreme Court judge Vivian Bose. It involved irregularities committed by top industrialists in the Dalmia-Jain group of companies. Its report found several fraudulent transactions by the companies involved. In 1963 the Nehru government appointed an inquiry commission to probe into charges against Partap Singh Kairon who was Chief Minister of Punjab from 1956 to 1964. The commission was presided over by S R Das, a retired CJI. In his report submitted in

1964, he upheld some charges against Kairon but exonerated him in most others.

In 1967, the commission presided over by retired Supreme Court judge Rajagopalan Ayyangar indicted Bakshi Ghulam Mohammed, who ruled the State of Jammu and Kashmir as Prime Minister for eleven years from 1953 to 1964. A commission headed by former Supreme Court judge T.L. Venkatarama Iyer was appointed in 1967 by M P Sinha who was the first non-Congress CM of Bihar. The judge found against six former ministers. When the coalition collapsed and a new coalition with Congress took charge of the government, it appointed another commission against the previous set as a payback. It was presided over by former Supreme Court judge, J R Mudholkar. K N Wanchoo, retired CJI, was appointed by the West Bengal government to inquire into alleged improper conduct of five ministers. In his report published in 1975, some of them were found guilty of exercising undue influence and indulging in nepotism but some others were absolved.

**Emergency crimes go unpunished**

The Shah Commission is the most famous of all commissions of enquiry as it probed the excesses committed during the1975 Emergency. The Janata Party government which came to power after the defeat of Indira Gandhi in 1977 elections appointed retired Supreme Court judge J C Shah to probe the atrocities committed during the Emergency and to nail the guilty. The hearing ran for weeks in Delhi in full glare of the media. The judge, who had an unimpeachable reputation for judicial integrity, submitted a three-volume report in 1978 which was not acted upon.

When Indira Gandhi returned to power in1980 the report was made unavailable.

There have been several other commissions arising from the Shah Commission report during the Janata regime. One headed by retired Supreme Court judge, P Jaganmohan Reddy, found the then Haryana chief minister Bansi Lal guilty on several counts. The Janata government appointed the same judge in 1977 to head the commission to enquire into the mysterious Rustom Nagarwala case of 1971. Nagarwala, a retired army man, was accused of swindling State Bank of India of Rs 60 lakh by mimicking the voice of Indira Gandhi and her trusted aide, P N Haksar, while speaking to the head cashier. Nagarwala was speedily convicted and he died in jail soon thereafter.

The Janata government appointed sitting Supreme Court judge A C Gupta to head a commission in May 1977 to probe Sanjay Gandhi's three Maruti automobile concerns. The report was submitted two years later. It made scathing remarks about the Maruti affairs, asserting that all legal requirements were flouted and an atmosphere of fear was created to intimidate officers, dealers and depositors who did not follow the line of the Prime Minister's son. However, no action was taken by the coalition government, which had become weak due to internal squabbles and the rise of Indira Gandhi.

There was another abortive attempt to prosecute the collaborators of the Emergency. The government passed the Special Courts Bill in May 1979. Two special courts with high court judges were set up to try offences mentioned in the Shah Commission report. They began hearing the cases in June. After more than six months of the proceedings, they

declared themselves "without jurisdiction" on technical grounds. Some critics linked this odd demise of the special courts experiment to the return of Indira Gandhi with a landslide victory in the January 1980 election.

**Loss of credibility**

Meanwhile, the commissions were becoming tainted with dark shades of politics. Ministers indicted did not resign as in the case of members of the Nehru cabinet. Those indicted in the reports dubbed them as vendetta politics. Cynics put judicial inquiries on par with police investigation. Public spirited petitioners now request for court-monitored probes or appointment of "special investigation team" (SIT). Supreme Court judges themselves have decided to avoid taking up commissions. Therefore such commissions on political matters are rare these days.

The loss of credibility eroded gradually and steadily. Governments were accused of handpicking judges to conduct inquiries and rejecting reports not to their liking. State governments weaponised the law against local rivals. The Central Government was not far behind. There was a time when scams sprouted every month, like the purchase of artillery guns from AB Bofors, a Swedish firm, and the HDW submarine contract with a German firm. There were wheels within wheels in the complex details of the scams. The Thakkar-Natarajan Commission, set up in 1987 by the Centre, sank in public esteem. It consisted of two sitting judges of the Supreme Court, M P Thakkar and S Natarajan. Thakkar's earlier probe into Indira Gandhi assassination had already invited bitter comments. This new commission was to investigate the alleged involvement of an American detective agency, Fairfax Group, in the flow of illegal money

to tax havens abroad. The commission was assailed right from the start. Though it was earlier announced by the government that the inquiry would be conducted with the two judges sitting in the Supreme Court, and it would be open, it was shifted to the residence of Thakkar. The media was barred from the proceedings. A number of illegalities and improprieties were alleged against the commission. When the report ultimately became public, its credibility was questioned on several counts.

The Justice Kuldip Singh Commission into allegations against the Janata Party Chief Minister of Karnataka, Ramakrishna Hegde, was subjected to no-holds-barred attacks by the media and politicians. The commission in his report in 1990 indicted Hegde on several grounds. Arun Shourie, then editor of the *Indian Express*, and its owner Ramnath Goenka wanted the report to be analysed by an expert. Y V Chandrachud, retired CJI, undertook the task and he wrote a scathing three-page critique on the report. It pointed out several inconsistencies and flaws. This analysis was reported in full in the newspaper. It also wrote a stinging editorial titled "If shame had survived". It said in part that after the appraisal by Chandrachud, "if there had been any sense of honour or shame the judge would have vacated his seat." The then CJI Sabyasachi Mukherjee was incensed at the language of the editorial and issued *suo motu* contempt of court notice to the editor, Shourie. After 24 years of lying in the registry, the issue was finally heard by a five-judge Constitution bench. It dismissed the petition declaring that when a sitting judge is appointed as a commissioner he does not carry with him all the powers and jurisdiction of the court. The commission is not a court, its finding did not

have the status of a "judgment" and a member of the commission is not a "judge".

The perils of presiding over an inquiry commission could become agonising for the judge himself. One of the several such examples is the episode in which retired Supreme Court judge, K Venkataswami, resigned from two government panels simultaneously under bizarre circumstances. In 2001 he was appointed one-man commission to inquire into a defence deal scam, following a sting operation by *Tehelka* magazine. He was also appointed to chair the Authority on Advance Rulings on Customs and Excise. This created tumult in Parliament and outside. The opposition Congress alleged that it was an open dole from the government to get a good certificate to the ruling party in the *Tehelka* expose. The judge quit both posts. The commission continued the work under another retired judge, S N Phukan. He immediately tumbled into another muddle. He was accused of travelling in a VVIP defence aircraft, when Defence Minister George Fernandes was under a probe. The journey to Mumbai and Pune was purportedly to study weapon systems though the team accompanying him had no knowledge about the subject. Ultimately his commission was disbanded by the Congress government. After such debacles, judges have stopped taking up the risky assignments.

**Probing bloody riots**

Riots are so endemic in this country that several books and movies have chosen them as their gory theme. Every riot is followed by an inquiry commission. Its report comes much after the mayhem has faded from public memory or a new communal frenzy has overshadowed it. Mostly, the lengthy

reports are not believed by the public and are seen as slanted in favour of one party. They are stacked in the record room of the home ministry of the state. However, retired judges have taken the risk to survey the bloody incidents and their aftermath.

Ranganath Misra, the judge who later became the CJI, was the sole member of the commission of enquiry into the 1984 anti-Sikh riots in Delhi and other places following the assassination of Indira Gandhi. In 1985, Prime Minister Rajiv Gandhi gave the task to Misra, then a sitting judge. His report concluded that the violence was an involuntary reaction stemming from a deep sense of grief and that the "spontaneous reaction of the people (had) soon transformed itself into riotous activity with participation and monitoring thereof by anti-socials due to passivity of the Delhi Police". The Commission gave clean chit to the Congress Party and its leaders asserting that they had not participated in the riots, even though "some persons belonging to the Congress Party on their own did indulge or participate in the riots for considerations entirely their own". These remarks were strongly refuted by civil liberty organisations and the media, whose members have since written eye witness accounts of the riots in which an estimated 3,000 Sikhs were brutally murdered.

Inquiry commissions can contradict each other on the same occurrences depending upon the perceptions of the presiding judge and the government of the day. Ranganath Misra's findings noted above were diametrically opposite to the conclusions of the Nanavati Commission which went into the anti-Sikh riots. Retired judge G T Nanavati was appointed by the BJP-led NDA government in 2000 to probe

the same anti-Sikh riots. He found "credible evidence" against Congress leaders in the 2005 report submitted to the A B Vajpayee government.

There were also contrary reports on the Gujarat riots of 2002. The Nanavati Commission submitted its report in two parts — one in 2008 on the Sabarmati Express fire in which 59 people, mostly kar sevaks returning from Ayodhya, were killed; and another in 2014 on the riots that followed the incident. Nanavati gave a clean chit to then Gujarat Chief Minister Narendra Modi and his Council of Ministers. The National Human Rights Commission, headed by J S Verma, the retired CJI, filed a different report. That report of May 2002 stated that "there is no doubt, in the opinion of this commission, that there was a comprehensive failure on the part of the state government to control the persistent violation of the rights to life, liberty, equality and dignity of the people of the state." In view of the contradictory findings of the commissions, some retired Supreme Court judges launched an inquiry along with a group of conscientious citizens calling itself the Indian People's Tribunal. The members were Krishna Iyer and P B Sawant, both retired judges, and Hosbet Suresh, retired Bombay high court judge. Their report contradicted the findings of the Nanavati Commission and put forth incriminating testimony against the state government.

# Chapter 16

## Vying for supremacy

JUDICIARY and the executive are often seen in contest for power. One persisting question is whether the ultimate power belongs to the elected representatives or the unelected judges. Jawaharlal Nehru and Indira Gandhi wanted Parliament to have the last word but failed. The tension over primacy manifested again in recent times. We have seen earlier the tussle over appointment of judges of constitutional courts. Another persisting thorn in the flesh of the executive is the 13-judge Constitution bench judgment in the *Kesavananda Bharati* case. As explained before, the judgment limited the power of Parliament by propounding the Basic Structure theory in 1973. It continues to be a bee in the bonnet of the governments.

Vice President Jagdeep Dhankhar was the main proponent of parliamentary sovereignty and autonomy in recent times. He has spoken vehemently against the Basic Structure doctrine inside the Rajya Sabha, and public forums. Addressing the 83rd All-India Presiding Officers Conference in Jaipur, the Vice President stated that the judgment set a bad precedent. It sought to establish judicial supremacy. "No institution can wield power or authority to neutralise the mandate of the people," he said. Questioning the Basic Structure judgment, he said if any authority questioned Parliament's power to amend the Constitution, it would be "difficult to say we are a democratic nation". Lok Sabha Speaker Om Birla also argued that "the constitutional bodies

should refrain from activism and stick to their responsibilities." Judiciary, he said, should respect the sanctity of the legislative bodies. The Jaipur conference passed a resolution which echoed these sentiments in a more formal language. It reaffirmed its "complete faith in the primacy of the people of India in law-making through legislative bodies."

Commenting on the attacks on the Basic Structure doctrine, D Y Chandrachud while being the CJI, described it as the 'North Star' providing invaluable guidance for the interpretation of the Constitution when the path ahead is convoluted. Delivering the 18th Nani Palkhivala memorial lecture in Mumbai, he insisted that the doctrine was premised on the supremacy of the Constitution. Soon after that Dhankar retorted that Parliament is the North Star of democracy. He reiterated in the Rajya Sabha that "Parliament is the essence of democracy. Parliament is the North Star of democracy."

Another CJI, Justice B R Gavai, called the judgment the "greatest milestone in the constitutional journey of the country" and appreciated the immense labour and intellectual effort that culminated in the landmark judgement. Speaking in 2023 at a memorial lecture in Ranchi he said the decision continued to be a cornerstone of Indian constitutional law.

Jurists pointed out that the Dhankar view was against the established view that the Basic Structure doctrine is a guardrail against threat to democracy. It saves the Constitution from being undermined by authoritarian regimes. Even Dhankar's predecessor, Venkata Naidu, was quoted as saying at the 2020 conference of presiding officers

that the Constitution alone is supreme. The former Union Law Minister, Shanti Bhushan, asserted that every constitution has some basic features which make it unique and give it identity. He wrote: "If some amendment changed the democratic Constitution into a dictatorial one, naming the dictator and giving the dictator power to name a successor, it cannot be perceived as an amended Constitution of India."

The opponents of the Dhankar theory asserted that the *Kesavananda* judgment was a bulwark against authoritarian tendencies by parliamentary majorities. The Constitution was supreme and elected representatives are not the people. The Constitution created Parliament, the executive, judiciary and other organs of state. The majority in Parliament is transient and therefore it cannot change, for instance, the parliamentary system into a republican system, repeal the powers of the state legislature or take away the right to life and liberty. A popular majority is not a defence for arbitrary action taken by the government. The assertion of the "primacy of the people" received strong reaction from judges and jurists. They recalled similar views articulated by Indira Gandhi before and during the 1975 Emergency. She even tried to strip the judiciary of its powers by passing amendments to the Constitution, changing the architecture of the Constitution.

There is another serious flaw in the claim that the majority in Parliament reflected the will of the people. India follows the system of 'first past the poll' in electing representatives. A party or alliance can get a minority of popular votes and still get majority of members in legislative bodies. Such majority cannot claim to speak for all the people. If the

national votes are taken into account, a minority government can come to power. In the *Kesavananda* judgment, the majority judges pointed out that even two-thirds of the members of Parliament cannot claim to represent the majority of the people. A minority of voters can elect more than two-third MPs. The 2019 general election was an example. Though BJP won only about one-third votes, it could form a strong government.

There are other factors too. Many MPs have criminal records and all of them are not well-educated. Recent analyses conducted by the Association for Democratic Reforms have shown that an undesirable number of people's representatives in Parliament and state assemblies across India have declared criminal cases pending against themselves. Moreover, the country has seen for decades how the loyalty of the "people's representatives" could be bought by offering loads of black money or ministerial berths by a strong party. Governments have been toppled and new ones formed by these tactics.

On the other hand, judges pass tough law exams and occupy the seat after several years of practice at the bar. They are not elected so as to keep them away from political influence. They are also given secured tenure (in US Supreme Court it is life time) to protect their independence. They are accountable to the litigants, lawyers, the legislature and jurists.

Ex-CJI Sanjiv Khanna shot some barbs against those criticising judges for not being elected unlike the parliamentarians. He said such alternative was even more frightening. Speaking at the Constitution Day function in November 2024, Khanna quipped: "Imagine a world where

judges campaign for votes, solicit views and decisions from the public and make promises about future judgments..." Appointment of judges, and not voting them to power, was a way to ensure their decisions were unbiased and free from "external pressures". Their conduct was guided solely by the Constitution and the law, the judge told a distinguished audience with Prime Minister Modi among them.

The Vice President, however, renewed his attack on judiciary in 2025 when the court set a timeline for Governors to assent to Bills passed by state Assemblies. Addressing Rajya Sabha interns, Dhankar insisted that the court was acting like a "super parliament". He reiterated that judges have "absolutely no accountability because the law of the land doesn't apply to them." The judgment had invoked Article 142 of the Constitution which empowered the court to pass any order to do "complete justice". Commenting on this special power, the Vice President, who is also a senior lawyer, said that it was "a nuclear missile against all democratic forces, available to the judiciary 24x7."

On the other hand, senior lawyers pointed out that the founding fathers knowingly inserted Article 142 to let the court grant relief where the Constitution has left gaps. In their language, there are "unoccupied" fields in the statute and Article 142 fills up the "interstices". In plain language, laws have undefined areas and can never be complete in all respects. In such instances, judges have the power to adapt the law to specific circumstances. Otherwise citizens will be left without remedy.

The lofty vision of power entertained by the rulers was caricatured in the BBC television serial, *Yes Minister*, where the inebriated minister railed at judges: "Politicians are the

ones who make the laws; and pass the laws. If it wasn't for the politicians, judges wouldn't be able to do any judging; they wouldn't have any laws to judge. They'd all be out of work. Queues of unemployed judges. In silly wigs."

## *Chapter 17*

# Pressure on judiciary

THE majestic building of the Supreme Court is generally enigmatic to the common people. But their destiny is often decided in the 14 courtrooms there. After the court started live-steaming the proceedings, there is less mystery about it. Still few would understand the legalese and intricacies of the procedure and laws. Even more difficult to understand is the administrative decisions taken by the Chief Justice or the court registry, as the people have no access to them. So the bar and the public often complain of arbitrariness, bias and political interference in administrative decisions, like the formation of benches and listing of cases. But the truth is hard to come by as evidence is scarce. Added to these is the image of an ideal judge who is supposed to be a recluse, avoiding society and limelight. Traditionally they do not socialise with politicians, businessmen or even arguing counsel. The judges do not meet the media to meet adverse criticism. They speak only through their judgments. That is the norm.

The mainly opaque nature of the system makes the public wonder how independent is judiciary in its working. Judges would swear that they look at facts and law with objective minds. Once they put on their robes, they forget their ideology, prejudices and faith. No outside force can sway them from the path of truth. They vow political insularity.

This claim has been firmly put forward by D Y Chandrachud, former CJI, on several occasions. He was best

suited to assure the public about judicial independence because he was one of the most criticised CJIs in recent history ("most trolled CJI", in his own words). He was liberal in accepting invitations for delivering speeches at various forums. He fielded sensitive questions deftly in various public forums. Towards the end of his judicial career in September 2024 he insisted that the judiciary was totally independent. His reassurance came at a time when the apex judiciary was being criticised for its alleged tilt in favour of the government. It was necessary to restore confidence of the public about judicial independence. Chandrachud asserted that the judges across the Supreme Court and high courts exercised their functions with "fiercest sense of independence" on the judicial side but the judiciary stood together with the government for issues related to court infrastructure and budgeting as such products help citizens.

Answering a question at the *India Today* Conclave in New Delhi, the judge declared that there was "no question of any pressure" on the Supreme Court from the executive and there was a wealth of evidence to show that the courts were "speaking truth to power" and "constantly holding government to account." In his career as the chief justice of high courts and the Supreme Court, "no one has told me to decide a case in a particular way. No one. We are so clear in the principles which we follow. I wouldn't even talk to a colleague who is presiding over a case and ask them what is going on in that particular case. We have a cup of coffee every morning but there are some lines which we draw for ourselves."

At a function organised by the *Indian Express* newspaper group, Chandrachud took the battle to the critics' camp. He

said the independence of judiciary did not mean always delivering verdicts against the government. There are pressure groups trying to get favourable verdicts by putting pressure on the courts by using electronic media. A lot of them term the judiciary independent if judges decide in their favour. "Our society has changed. Particularly with the advent of social media, you see interest groups, pressure groups and groups which are trying to use electronic media to put pressure on the courts to get favourable decisions," he said.

Chandrachud must be rather fortunate to claim that he had never felt pressure from any quarters. Several other judges had openly stated and written about their experiences to the contrary. Justice K S Radhakrishnan, in his farewell speech when retiring from the Supreme Court in 2014, talked about the immense pressure exerted on him as well as Justice J S Khehar (who later became CJI) and families in the Sahara India case. Ranjan Gogoi, ex-CJI, while hearing the sexual abuse allegation against him by a staffer, also talked about vested interests seriously threatening the independence of the judiciary. “It’s pathetic. Judges are to work under these conditions,” he observed and warned: “That is why I said good people (lawyers) are not coming to this side (judicial). Who will come?”

A few judges have written autobiographies in which they had revealed the backroom ferment. They have revealed attempts by political actors to influence the outcomes in sensitive cases. Justice P Jaganmohan Reddy, who served in the Supreme Court (1969-75), has given a peep into what happened during the hearing of the famous *Kesavananda Bharati* case. The decision of the constitution bench was

crucial to Prime Minister Indira Gandhi as the primacy of Parliament was in question.

In his autobiography, Reddy wrote: "One of the most significant pieces of information about how one of the ministers of the Indira Gandhi's cabinet tried to influence one of the colleagues in the 13-judge bench has been narrated by his wife. It appears that the cabinet minister and his wife who were well known to my colleague and his wife invited themselves on one or two Saturdays for lunch to persuade him to take the view which the government wanted the court to take so that the judgment would be that of a majority which without him would be a minority. In fact, the colleague was told that if he didn't agree he would be losing a great opportunity for a higher post. I was proud to know of his forthright refusal and also when he told them that such a job may be offered to another colleague who will really welcome it." (*The Judiciary I Served)*

There are more writings to fuel these suspicions. Bishan Narayan Tandon, who was joint secretary in the Prime Minister's Secretariat, has given his version in his autobiography, *PMO Diary-I: Prelude to the Emergency.* According to him, P N Haksar, Indira Gandhi's confidante, met judges of the Supreme Court to turn the outcome of certain sensitive cases in government's favour. A G Noorani, constitutional lawyer and writer, confirmed it from his personal knowledge in his column in the *Frontline* magazine in 2003.

In *State of Rajasthan vs Union of India (1977)*, a seven-judge constitution bench was dealing with the dismissal of several Congress-ruled state governments when the Janata government came to power after the Emergency. Justice P K

Goswami wrote a separate but concurring judgment while dismissing the petition, which concluded with a revelation: "I part with the records with a cold shudder. The Chief Justice (M H Beg) was good enough to tell us that the acting President (B D Jatti) saw him during the time we were considering the judgment after having already announced the order and there was mention of this pending matter during the conversation. I have given this revelation the most anxious thought and even the strongest judicial restraint which a judge would prefer to exercise, leaves me no option but to place this on record hoping that the majesty of the High Office of the President, who should be beyond the high watermark of any controversy, suffers not in future." It was Jatti who signed the proclamations imposing President's Rule in the Congress-ruled states.

Meetings between judges and ministers are looked at with suspicion. Only two prime ministers have visited the Supreme Court in its long history. Nehru attended the inaugural of the present building in August 1958. Modi visited the court on the invitation of CJI Ranjan Gogoi in 2018 during an international conference of judges. When Prime Minister Modi visited the official of residence of CJI Chandrachud on 11 September 2024 and performed Aarti on Ganesh Chaturthi there was intense criticism against it. Though it was a private event, the videographed event went viral, provoking debate on the propriety of the PM visiting the official residence of the CJI and the publicity given to it. It was not the shared religious devotion that caused the fuss, but the proximity between the two arms of the state. The timing was also thought to be inappropriate. The CJI was about to retire, the elections in Maharashtra, his home state, was due and the case involving defections of legislators there

was getting adjourned for three years. Several organisations, former judges and senior lawyers criticised the event and the publicity given to it. Former Chief Justice R M Lodha told the *Indian Express* that "this is the first time in my memory that the Prime Minister has visited a Chief Justice of India's official residence." He said there is a constitutional separation of power and "normally, a certain distance is to be maintained" between the judiciary and the executive. By such a meeting, public perception of the judiciary gets impacted but judicial decision-making in a way is not impacted, he clarified.

The PM was the first to reply to the critics of the meeting. Addressing a rally in Bhubaneswar, he accused the Congress of having a problem with Ganesh Utsav and said the party and its "ecosystem" were angry because he participated in the puja. "The hate-filled thinking and mindset to infuse poison in society will prove dangerous for our country. We should not let these hate groups move ahead. We have to achieve many goals by staying together," he said. However, the critics pointed out that they were not against the puja, but were disapproving the proximity of the two heads of institutions and the publicity given to the private event.

After a few weeks, Chandrachud himself hit back at his critics describing their criticism as "unnecessary, unwarranted and illogical." He said the heads of political executive visit judges' homes for social occasions but independence of judiciary is so deeply entrenched that judicial matters are "never, ever discussed," he told *Times of India*. Too much has been made on an "elementary courtesy," he told BBC, adding that what was being circulated in social media was incorrect and one could not go by it. Defending meetings between the heads of judiciary

and the governments, he said that "in the work which we do as judges, we are completely independent." The judge told Chief Editor of *Loksatta* Girish Kuber in Mumbai: "We must have maturity to understand that such meeting had no bearing on judicial work."

**Threat from within**

Evidence of executive pressure came out in a bizarre manner when four senior-most judges of the Supreme Court held an unprecedented press conference on 12 January 2018. They sent word for the media in the morning, finished the hearings in their courts unusually fast and came out and gathered at the official residence of one of them, Jasti Chelameswar. The foursome admittedly violated their code of conduct. In 1997, Supreme Court judges had jointly issued a "Restatement of value of judicial life" in which they had pledged not to give interviews to the media. The justification of the four judges was that extraordinary situations demanded extraordinary action. According to them, democracy and independence of judiciary were under threat. The three other judges were Ranjan Gogoi, who later became the CJI and then nominated to the Rajya Sabha, Madan Lokur and Kurian Joseph.

They told news persons that they had met CJI Dipak Misra that morning and submitted a detailed memorandum about their grievances. They said they were not satisfied with his response and therefore took the extraordinary step of telling their version to the media and through them the public. Copies of their memorandum were distributed to the news persons.

According to the judges, "for some time, the administration of the Supreme Court is not in order. Many things which are

less than desirable have happened in the last few months. We collectively tried to persuade the Chief Justice (Dipak Misra) that he should take remedial measures. Unfortunately, our efforts failed." Their main concern was that cases with high political stakes were allocated to certain benches. The CJI, who is the Master of the Roster, has the power to allot cases to any bench. This prerogative is undefined and is perceived as a roving power. Since the CJI knows all judges in person and understands their views, his discretionary allotment of thorny cases to "preferred benches" was suspect as it may yield "preferred results".

The judges' letter went on to state that there have been instances where cases having far-reaching consequences for the nation and the institution had been assigned by the CJI selectively to chosen benches without any rational basis. They asserted that the CJI is only first among equals and he should have acted following conventions. But the CJI placed cases without regard to the accepted norms. It was alleged that even cases which were being heard by one bench was inexplicably shifted to another bench, consisting of junior judges. This midstream switch confounded lawyers and litigants alike. The four judges had pointed out this pattern when they met the CJI, but Misra did not heed them. This was the trigger for the agitated judges to come out and tell the nation of the perceived danger to the independence of judiciary and democracy. In answer to a query, Gogoi said that a specific instance involved the death of Special Court Judge B H Loya under mysterious circumstances in December 2014. The court later rejected all misgivings about the death in its judgment, *Tehseen Poonawalla vs Union of India (2018).* The judgment written by Chandrachud said the conduct of the petitioners lacked bona fides and revealed misuse of judicial process.

The doubts about the roster continued to persist even after six years of the press conference while Chandrachud was the Chief Justice. His brother judge, Sanjay Kaul, had something to say about his own experience about transferring cases half way by the CJI. In the court, while dealing with the case of delay in appointments caused by the government, he had observed that "there are some things that should be left unsaid because I didn't think that should happen." After retirement, Justice Kaul opened up a little more in an interview to the *Indian Express.* He revealed that the matter of delay in appointment of judges recommended by the Collegium twice was "pulled out from my court. It was to be listed; there was no reason to pull out the matter from me. And it was my last week."

Suspicions persisted among the legal fraternity that sensitive political cases went to the bench of certain judges. Lawyers watch the conduct of the judges carefully and advise their clients accordingly. Thus some accused persons seeking bail withdrew their petitions when they were placed before certain benches. Lawyers even turned into factions over this issue and indulged in a war of words in 2024. Both sides swore by the need to protect independence of judiciary. Groups of them wrote long letters to the CJI, the Prime Minister and the President. Also joining the fray were 21 retired judges, four of the Supreme Court and 17 of the high courts, who wrote to the Chief Justice urging him to take action against the attempts to "undermine the judiciary". The battle turned into a political slugfest before the general election and then subsided.

## *Chapter 18*

# Swaying in political winds

WHILE writing about the history of the Supreme Court one sensitive but frequent question raised is whether it has swayed to the political winds of the day. Though the court has enormous powers, legal pundits never stop discussing whether it has used that at critical times. The record of the court in the early days would show that it did so fearlessly. We have seen earlier that in the first year of the Republic the court surprised Prime Minister Jawaharlal Nehru by striking down land reform laws and other socialist measures dear to him. He reacted by steamrolling constitutional amendments and abridging fundamental rights enshrined in the Constitution which he had helped to compose.

The court continued to stand firm in the beginning of the Indira Gandhi regime. Constitution benches passed judgements one after the other infuriating her. The Golak Nath judgment of 1967 by a constitution bench of 11 judges clipped the power of Parliament to amend the fundamental rights guaranteed by the Constitution. Other constitution benches struck down her populist measures like nationalisation of 14 private banks (1970) and abolition of privy purses and privileges of erstwhile princes (1971). Indira Gandhi's attempt to overturn the Golak Nath ruling failed as the larger constitution bench of 13 judges in the *Kesavananda Bharati* (1973) ruled that amendments should not affect the "Basic Structure" of the Constitution. Such

judgments stung Indira Gandhi severely, especially as she was enjoying massive majority in the Lok Sabha.

On top of all those decisions from the Supreme Court came the judgment of the Allahabad high court in 1975 which quashed her election from Rae Bareli constituency in 1970. She filed an appeal in the Supreme Court. She sought an absolute stay of the high court judgment. Justice Krishna Iyer heard her counsel N A Palkhivala the entire day on June 23. He emphasised that the "nation was solidly behind her as PM". He threw a warning also: "There were momentous consequences, disastrous to the country, if anything less than the total suspension of the order under appeal were made." But the judge showed exceptional courage and judicial independence. He dictated the order of conditional stay the next day in the court giving reasons for his order. This triggered the declaration of Emergency on June 26.

The extraordinary situation led to a drastic change in the attitude of the court for over the next two years. There was an unhealthy harmony between the government and judiciary instead of a healthy tension. The court began to hand down decisions which disappointed the nation, especially on fundamental rights. Thousands of Opposition leaders and political activists were in jail, held under the preventive detention law. Some high courts allowed their habeas corpus petitions. Appeals were moved by the government against those orders in the Supreme Court. It set aside nine high court judgments and ruled that the detenus have no fundamental rights during Emergency (*ADM Jabalpur* judgment). In a reprisal, Indira Gandhi ordered a mass transfer of high court judges who upheld the right to life of the detenus.

The Constitution bench of the Supreme Court ruled that the state can take away the right to life of the citizens during Emergency and they have no remedy against the authorities. Responding to the argument that it might empower the government to arbitrarily shoot any person, Justice Y.V. Chandrachud, who was part of the five-judge bench, wrote: "Counsel after counsel expressed the fear that during the Emergency, the executive may whip and strip and starve the detenu and if this be our judgment, even shoot him down. Such misdeeds have not tarnished the record of free India and I have a diamond-bright, diamond-hard hope that such things will never come to pass." Justice Beg, another judge on the bench, went even further: "We understand that the care and concern bestowed by the state authorities upon the welfare of detenus who are well housed, well fed and well treated is almost maternal. Even parents have to take appropriate preventive action against those children who may threaten to burn down the house they live in."

That Supreme Court decision, also called the Habeas Corpus judgment, remained in law journals for four decades, though some later judgments impliedly overruled it. It was only in 2017, in comparatively freer times, that a nine-judge bench declared that it was wrong. Interestingly, the main judgment overruling the Habeas Corpus judgement was written by the son of Y V Chandrachud. In *Puttaswamy vs Union of India*, D Y Chandrachud stated that Khanna, the sole dissenter in the Habeas Corpus judgment, was right. The judgment rendered by D Y Chandrachud stated: "The judgments rendered by all the four judges constituting the majority in *ADM Jabalpur* are seriously flawed. Life and personal liberty are inalienable to human existence...The human element in the life of the individual is integrally

founded on the sanctity of life...No civilized state can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the state nor does the Constitution create these rights..."

**Change of opinion**

The *ADM Jabalpur* decision also showed how judicial minds could change after they delivered wrong judgments. Years after the Emergency was lifted, two judges in the majority regretted their view which strangled fundamental rights. One of them was Y V Chandrachud. A large section of the legal fraternity had opposed his elevation as CJI because of the judgment. The Janata Party government however stuck to the convention and sworn him in. Two months later he said in a1978 speech: "I regret that I did not have the courage to lay down my office and tell the people, well, this is the law." P N Bhagwati was even more remorseful. In 2011, after retirement as CJI, he told an interviewer: "The Supreme Court should be ashamed about the *ADM Jabalpur* judgment. I plead guilty. I don't know why I yielded..." It may be recalled that Indira Gandhi had also apologised for imposing Emergency which started it all.

After the Emergency was lifted, the coalition government of Janata Party set up an inquiry commission headed by retired Supreme Court judge J C Shah to probe the atrocities and corruption during the Emergency. He submitted a three-volume report to the government. As we have seen, the government set up more commissions arising from the Shah Commission report. The government also passed the Special Courts Bill in 1979 to follow up the commission reports. Two special courts were established.

Meanwhile, the Janata coalition was moving on to a slow-motion wreck and everyone knew it would not last long. Indira Gandhi was waiting for her triumphant return to power. The presiding judges of the commissions were struck by self-doubts midway. Within six months of Indira Gandhi returning to power in 1980 one judge ruled that his special court was not set up according to the Constitution. The other judge also had his epiphany and found that he lacked jurisdiction under the Act. Thus they wound up their mission. The Shah Commission report was not acted upon and its copies were withdrawn from circulation after Mrs Gandhi returned to power in 1980.

**Kissa Kursi Ka**

The instances of change of hearts during and after the Emergency would not be complete without recounting the whodunit over a political movie produced by Amrit Nahata, a Congress MP who later joined Janata Party. Nahata produced *Kissa Kursi Ka* ("Story of the Throne") and sought certification from the censor board in April 1975, a few months before the Emergency was declared. Certain characters in the satirical movie are reported to have resembled Indira Gandhi and her favourite son Sanjay Gandhi. The government banned the film and ordered seizure of all the prints. Nahata moved the Supreme Court on June 11, 1975, just before the Emergency was imposed, to prevent the move. The court asked the government to keep the prints in safe custody with the censor board. It directed the government to screen the film before five judges of the court on November 17. It did not happen because the prints were reported "missing". (Later it was reported that they were burned at the Maruti factory). Ultimately, on

March 26, 1976 the government admitted that it could not recover the prints.

After the Emergency was lifted in1977, Broadcasting Minister Vidya Charan Shukla in the Indira Gandhi ministry and Sanjay Gandhi were prosecuted on charges of conspiracy, destruction of the prints of the film and on several other counts. The complex legal saga took another turn when Indira Gandhi returned to power in 1980. The Supreme Court set aside the conviction of Sanjay and Shukla *(V C Shukla vs Delhi Administration, 1980).* The court said: "The film and all the material relating to it no doubt appear to have vanished into thin air but then neither A-1 nor A-2 (Shukla and Sanjay) can be held responsible therefor, in the absence of proof in that behalf – proof which would exclude all reasonable doubt."

There was a contempt case against Sanjay and others pending since the Janata regime. Long after the death of Indira Gandhi and Sanjay, that was also withdrawn at the request of the Congress government in 1985 *(Amrit Nahata vs Union of India, 1986).* The court said it did not want to "attempt at flogging a carcass" nor delve deep into "an unsavoury past not very conducive to judicial and judicious approach." In view of the drastic changes in the political atmosphere, the judges clarified that "we are keen to emphasise the fact that the change in climate has no relevance."

The Supreme Court was saved from testing the constitutionality of several autocratic laws pushed through by Indira Gandhi during the Emergency. The coalition government which came to power after her election defeat in 1977 repealed most of them.

It was evident from the history of that period that the Supreme Court appeared to be weak when the executive was strong; and it became bold when the government was weak. During the decades of coalition governments, roughly from 1977 till 2013, the court expanded the rights of the citizens with long judgments, as if to repair the damage it had done to the Constitution and the fundamental rights of citizens during the Emergency. It devised PIL and drove it full steam ahead, as we have seen earlier. However, when the government enjoyed big majority in later years, allegations began to crop up that judiciary had again wilted in the shadow of a strong executive. Most of the chief justices of that era retired with poor marks in the eye of the public.

**Winners or losers?**

The record of the court in the later period appears to be a mixed bag. Commentators are on different sides about some pivotal judgments. Some see an unhealthy pattern while others give the court the benefit of doubt. When the BJP came to power in 2014 observers suspected a trend in favour of the government. However, the first major law passed by it was struck down by a constitution bench of the Supreme Court. The National Judicial Appointment Commission (NJAC) was introduced as the 99th constitutional amendment, proposing to set up a commission for selecting judges of the higher judiciary. The BJP government received another setback when the Supreme Court struck down Section 66A of the Information Technology Act 2000 and directed that no one should be prosecuted under it. The court declared the Electoral Bonds scheme unconstitutional just before the 2024 Lok Sabha election. It issued guidelines to curb 'bulldozer justice'; granted bail to jailed Opposition

leaders; restricted the vast powers of Enforcement Directorate to arrest. A judgment relating to the selection of the Election Commissioners went against the government, though it passed a law to avoid it.

Despite delivering such significant judgments against the powerful executive, the court had to face incessant flak from sceptics. They accused the court of a subtle tilt in favour of the executive. When it could not give a definite decision in politically sensitive matters it was accused of judicial evasion or freezing the issues by not hearing them. In 2023, 14 political parties jointly moved the court alleging that the government was selectively targeting Opposition leaders and subjecting them to raids by ED, CBI, Income Tax authorities and other investigating agencies. According to the petition such targeting had a "chilling effect" as their democratic rights were suppressed. But the court remarked that the leaders did not have immunity from ordinary laws and they could not claim a status above that of ordinary citizens. The petition was dismissed as withdrawn. The Supreme Court judgment in 2022 upholding the amendment to the Foreign Contributions (Regulation) Amendment (FCRA) in 2020 also had chilling effect on NGOs as the government was increasingly tightening control over the flow of money from abroad. Licences of many organisations doing humanitarian work at the grassroots were cancelled or not renewed.

The BJP triumphantly pointed out a series of Supreme Court judgments in its favour as vindication of its policies. At the party convention in January 2023, it passed a political resolution which read: "Be it the Pegasus case, loss in Rafale deal to the exchequer, ED money laundering case, the Central Vista case, reservation case on economic basis, or

demonetisation – every time the Opposition was shown the door by the Supreme Court." The court dismissed petitions that challenged the abrogation of the special status given to Jammu and Kashmir. Reservation for the economically weaker sections (EWS) was upheld. The court also rejected a batch of petitions alleging government's inaction in share market manipulations by the Adani group of companies, alleged by foreign entities. A divided and scattered Opposition felt that those judgments in fact tested the judges' own independence.

While the debate raged between the ruling party and the Opposition, the then Chief Justice D Y Chandrachud himself intervened and tried to remove suspicions about the court's role. Sitting judges normally do not reply to all the questions raised by the critics. It is axiomatic that they speak only through their judgments and do not defend their decisions once they deliver them. But when the comments grew shrill, Chandrachud responded strongly in defence of the court. He shed the traditional judicial reticence and answered loaded questions at public conclaves.

For instance, addressing a conference in South Goa in November 2024 organised by the Supreme Court Advocates-on Record Association, Chandrachud said the role of the Supreme Court is that of the "people's court", but that did not mean that it has to fulfil the role of the Opposition in Parliament. "I think there is, particularly in today's time, this great divide between everybody who thinks that the Supreme Court is a wonderful institution when you decide in their favour. It is an institution which must be denigrated when you decide against them. I think that's a dangerous proposition, because you cannot look at the role of the

Supreme Court from the perspective of the outcomes. Outcomes of individual cases may be in your favour, or may be against you. And judges are entitled to decide with a sense of independence on a case-by-case basis, which side of the balance the die must be cast," he said.

The ex-CJI also said people are entitled to criticise the courts for the ultimate outcome or for inconsistency of legal doctrine or an error. "... and I am sure the judges have no difficulty about it, but the problem lies when the very same people, who see that the court is, say going towards a particular direction, are all willing to criticise it merely because an outcome has gone against you. I think we as a legal profession must have a sense of robust common sense to understand that judges are entitled and must decide on a case-by-case basis, depending on how they assess the legal doctrine has to be applied to the fact in that particular situation."

**Delays benefit government**

The debate continued as the opponents saw successive victory for the government on issues that mattered most to it. The reasoning in those judgments was also stripped and discredited. It is not only the contents of judgments that affect political trajectory; even the timing of their delivery counts. It was alleged that judgments have been delayed or speeded up in relation to the political mood outside. The appeal in the Ayodhya case was lying dormant for ten years in the Supreme Court. On the eve of the 2019 general election it was dusted and taken up by CJI Ranjan Gogoi. The verdict was in favour of the BJP, which had promised a temple there in its election manifesto. That was a major factor in the party winning the 2019 general election.

Similarly, the judgment quashing the Electoral Bonds scheme was delivered just before the 2024 poll. It only pricked BJP which had pledged corruption-free governance. The case was before the court for five years and the delayed judgment came too late and did not make any difference to any party. There was no stay of the scheme all the while and therefore money had already been paid to favoured political parties. There was no order of restoration to the old status either. The delay reminded one of the proverbial shutting of the stable door after the horse has bolted.

The common justification offered by the CJIs for skewed listing, or not listing, is that there are several other cases also waiting in the queue. They are the Masters of the Roster who decide which case is to be taken up for hearing, when and before which of the judges. According to them, all cases are equally important and they are even-handed in their decision. Each one will be taken up in 'due course'. But the critics point out that this claim of fair-mindedness is not quite obvious. There are quarter-century old appeals pending before constitution benches which are virtually forgotten. The court has handpicked cases without any perceptible criteria. If it goes chronologically, it cannot clear the backlog in one's lifetime. (A voice from the cloud says, "Not in My lifetime either.")

## *Chapter 19*

# Upholding strong arms of law

PARLIAMENT has passed several laws over the decades which are on the brink of human rights jurisprudence. These legislations are prompted mainly by terrorism and insurgency. The court has upheld these harsh laws and not even diluted their impact. Though some of the laws have since been repealed, their new avatars are still in the statute book. Moreover, the precedents set while upholding the illiberal laws have guided the judges in deciding stringent laws passed later. It invited strident criticism from human rights watchers and legal academics who quoted Lord Atkin (1941) that courts could be "more executive-minded than the executive".

The Terrorists and Disruptive Activities Act 1985, generally known as TADA, was a forerunner among the laws which tested the contours of human rights. It was passed following the assassination of Indira Gandhi in October 1984. There were hostilities and sporadic armed conflicts in Punjab, Kashmir, Andhra Pradesh and the North-east. This was perceived as a national security problem for the whole country. The Supreme Court rejected all challenges to the constitutionality of the law. Though the Act was repealed in 1995 amid allegations of rampant misuse, its spirit is still wandering in constitutional courts, casting a shadow over civil liberties.

The Act was so harsh that it made several basic principles of the criminal law stand on their head. It reversed the burden

of proof in certain cases on to the accused person. Confessions to senior police officers were made admissible, thus ignoring custodian torture which is routine. Those who faced impending arrest were not given the right to move court for 'anticipatory bail'. Even bail after arrest was made difficult. Appeals from the special courts set up to try TADA cases could be filed only in the Supreme Court, eliminating the role of the high courts. The tedious legal procedure itself became the punishment and the accused persons spent years in prison. Most of them were acquitted in the trial. The conviction rate was reported to be one to four per cent.

The law was rampantly misused by the police as reported in the media. When tens of thousands of persons were charged with offences under TADA, writ petitions began to be filed in the Supreme Court challenging the law. By one account, the court had a thousand of them by 1991. The constitution bench upheld the law in *Kartar Singh vs State of Punjab (1994)*. The judgment justified it by citing the dangers of terrorism which threatened the security and integrity of the country. The judgment was eloquent on the constitutional power of the government to pass such a law and pointed out "the countless serious and horrendous events engulfing many cities with blood-bath, firing, looting, mad killing even without sparing women and children and reducing those areas into a graveyard." It then lamented the use of torture habitually adopted by the police to collect evidence and condemned such inhuman and barbaric practice which led even to custodial deaths. Instead of striking down the obnoxious provisions, it issued a series of guidelines, which had little mandatory value. In the face of strong criticism TADA was repealed in 1995, after a decade of dangerous existence.

Another law which continues to be a live subject is the Armed Forces Special Powers Act (AFSPA) which was enacted in 1958 to curb Naga and Mizo insurgency in the North-east. The short Act, with only seven sections, conferred special powers upon members of the armed forces in "disturbed areas" as declared by the government. After the declaration, the military got almost unlimited powers to deal with rebellion. It had licence to search, arrest, kill or destroy. It was stated that it ran a parallel administration. Prosecution against them is not possible without the consent of the Central Government.

After suffering for years, people took the legal route from 1980 and challenged the law. After many years the Supreme Court upheld the law in *Naga Peoples Movement vs Union of India (1998).* The court reiterated the 'national security' refrain as in the *Kartar Singh* judgment. The judges maintained that there were inbuilt safeguards against misuse of power by the military personnel. The Supreme Court had occasion to examine the working of the Act in a later case, *Extra Judicial Execution vs Union of India (2017).* But that also sank in the quicksand of legal technicalities.

Another harsh law intended to rein in terrorism but prone to gross misuse by the authorities was the Prevention of Terrorism Act, 2002 (POTA). It was in force for almost three years, from 2001 to 2004. Under this law, people could be arrested on mere suspicion and detained without charge or trial for six months. The law also allowed for special investigation, special courts and trial procedures. It was alleged that the law had been used to target political opponents, minorities and marginalised sections of society.

The Supreme Court upheld that law also in *PUCL vs Union of India (2003).*

Another law, Maintenance of Internal Security Act (MISA) 1971, was passed during the Indira Gandhi regime. It was actively enforced during the Emergency to suppress political dissent. Top political leaders like Morarji Desai, Jayaprakash Narayan and A B Vajpayee were arrested under it. The court declared one section dealing with preventive detention as unconstitutional as it did not provide procedural safeguards *(Sambu Nath v State, 1973).* The Constitution was amended in 1975 to include the law in the Ninth Schedule making it immune from judicial review. The draconian law was repealed after Indira Gandhi's defeat in the elections in 1977.

One law which became the bugbear of Opposition leaders and dissenters was the Unlawful Activities (Prevention) Act (UAPA), as amended in 2019. Enormous power was conferred on the officers of the Enforcement Directorate (ED) and other investigating authorities. ED is a financial investigation agency and is empowered to enforce the provisions of the Prevention of Money Laundering Act 2002 (PMLA), which was equally strict. ED has the power to conduct investigations, issue summons, search and seize property, among other things.

The Supreme Court has upheld PMLA along with the wide powers of ED. In *Vijay Madanlal vs Union of India (2022),* the court accepted the government's arguments on virtually every aspect that was challenged in the PIL. It upheld the reversing of the presumption of innocence and passing the amendments as a Money Bill under the Finance Act. The misuse of the law was indicated by the data which showed

that conviction under the law was less than 1 per cent. Several politicians were caught in the web of PMLA. Opposition leaders and protesters were jailed and many critics and journalists preferred caution as the better part of valour.

**Curbs on donations to NGOs**

A law which stifled the working of NGOs in the social sector also received the approval of the Supreme Court. The judgment, *Noel Harper vs Union of India* (2022), was seen as affirmation of the trend of upholding restrictions on freedoms. The government was suspicious of foreign contributions for NGOs as it thought that such donations were used to subvert society. In 2020, the government enacted the Foreign Contributions (Regulation) Amendment (FCRA) Act, further controlling the manner in which foreign funds could be received and used. According to the judgment, the influence foreign money might manifest in different ways, "including in destabilising the social order within the country." NGOs were severely affected by the new regulations and moved the Supreme Court. They argued that the rules were vague, arbitrary and violated their fundamental rights, especially the freedom of association.

In the unanimous judgment, the Supreme Court endorsed the amendment, saying that accepting foreign donations is not an absolute or even a vested right. The rules amounted to reasonable restrictions on fundamental rights. The judgment said: "The theory of possibility of national polity being influenced by foreign contribution is globally recognised. For, foreign contribution can have material impact in the matter of socio-economic structure and polity

of the country. The foreign aid can create presence of a foreign contributor and influence the policies of the country. It may tend to influence or impose political ideology. Such being the expanse of the effect of foreign contribution coupled with the tenet of constitutional morality of the nation, the presence/inflow of foreign contribution in the country ought to be at the minimum level, if not completely eschewed. The influence may manifest in different ways, including in destabilising the social order within the country. The charitable associations may instead focus on donors within the country, to obviate influence of foreign country owing to foreign contribution. There is no dearth of donors within our country." Following this judgment, more than 20,000 NGOs lost their licences or made dysfunctional, impeding aid to those who are in dire need.

When the use of UAPA increased, five eminent persons moved the Supreme Court alleging that the law was being misused by the authorities. The petition, seeking an inquiry by a special investigative team (SIT) was filed in the context of the violence in Maharashtra during the 200th anniversary of the Battle of Bhima Koregaon in 2018. Several activists were jailed for long periods. The court accepted the police version stating that there was prima facie case against the accused persons. It asserted that the police was not influenced politically and there was no violation of equality before law, freedom of speech and expression *(Romila Thapar vs Union of India, 2018).*

A large number of leading politicians faced criminal charges under UAPA and PMLA since 2014. Some ministers and party leaders were in jail or on bail. Some of them succumbed to political pressure but the defiant ones moved

courts for bail. Though the criminal courts deal with scores of bail applications every day, the proceedings were watched with intense concern as political leaders were being prosecuted and some of them were in prisons for months together without trial, especially in elections years. They had to move up and down the ladder of judicial hierarchy to seek bail. District judges are hesitant to grant bail as they are under the superintendence of the state government and the high court. As a result, the appellate courts, even the Supreme Court, are weighed down with bail appeals. Since they are overburdened, the legal proceedings themselves make the long stay in prison a punishment by itself.

**Bail rule revived**

The Supreme Court had declared long ago in *State of Rajasthan vs Balchand* (1977) that "the basic rule may perhaps be tersely put as 'bail, not jail'." But this rule has been made to stand on its head by the criminal courts for decades. It was jail which was the rule and bail the exception. Laws also have been made to make bail very difficult. Criminal courts have great discretionary power in bail matters and the laws have been made stricter. The accused person has to prove his innocence, contrary to the basic principle that an accused is presumed to be innocent until proved guilty by the prosecution. Charges are not framed for years; so the trial does not start. Politicians and protesters suffered greatly because they were charged in cases involving money laundering and unlawful activities.

The stand of the Supreme Court exacerbated the situation. In *National Investigation Agency vs Zahoor Watali* (2019), it held that "no elaborate examination or dissection" of the material was needed to reach a prima facie decision by the

designated court. Scrutiny of the material before it is the minimum. In a UAPA case, the court ruled that mere delay in trial in a grave offence could not be used as ground for bail *(Gurwinder Singh vs State of Punjab, 2024)*. The judges stated that the "conventional idea" that bail is the rule, jail is the exception had no place while dealing with bail applications under UAPA. The courts below followed the signal from the top. Opposition leaders, their relatives and associates feared the midnight knock. It was only in 2024, there was a breath of freedom.

The nation was pleasantly surprised when the Supreme Court began to change its view on the question of bail under UAPA and PMLA. The liberal trend began in 2023-2024. In *Pankaj Bansal vs Union of India (2023)*, it held that furnishing a written copy of the grounds for arrest was mandatory under the PMLA. The arrested persons were till then not given the ground of arrest. In *Ram Kishor vs Union of India (2023)*, the court ruled that the accused need not be informed of the grounds of arrest in writing at the time of the arrest; it could be furnished in writing within 24 hours. Further, the accused must be orally informed of the grounds at the time of the arrest.

The liberal trend was sustained in 2024. The court incrementally revived the 1977 principle of bail as the rule. Aam Aadmi Party leaders facing money laundering charges from ED and CBI walked out of jail one by one. In April 2024 the court granted bail to Sanjay Singh in the liquor licence case. Later, Manish Sisodia, Delhi Chief Minister Arvind Kejriwal and Satyender Jain were released one after the other. Jharkhand ex-CM Hemant Soren and Tamil Nadu

cabinet minister V Senthilbalaji were some other leaders who were released.

Bail orders are generally short. But in view of the human rights involved, the judgments of the Supreme Court started getting longer, discussing law and laying down guidelines. In *Parvinder Singh vs Directorate (2024)*, the court relaxed the hold of ED in bail proceedings. It set stringent guidelines for staying bail orders already given, emphasising that such stay orders cannot be issued "casually" or "mechanically" because of their serious implications for human liberty. It stressed that high courts and sessions courts should be "very slow" in granting stay of the bail orders granted by a court below. "The undertrial is not a convict," the court pointed out.

The judgment in *Manish Sisodia vs Directorate (2024)* by a bench of Justices Justices B.R. Gavai and KV Viswanathan, was notable for the law it laid down. It reversed the principles earlier set by the court in the PMLA matters. Describing the extraordinary delay in procedure in this case, the court said the "commencement of the trial is yet to see the light of the day." The documents involved were in thousands of pages and trial would take years. "It is clear that there is not even the remotest possibility of the trial being concluding in the near future," the court said. That deprived him of his right to speedy trial. Then the court delivered the fresh rule: "In case of delay coupled with incarceration for a long period and depending on the nature of the allegations, the right to bail will have to be read into Section 45 of PMLA." The right to speedy trial and the right to liberty are sacrosanct. Every day counted. The court also asked the courts below to follow these principles.

Rejecting the argument of the ED and CBI that Sisodia should approach the trial court or the high court for bail, the judgment stated that "relegating the appellant to again approach the trial court and thereafter the high court and only thereafter this court, in our view, would be making him play a game of 'Snakes and Ladders'...A citizen cannot be made to run from pillar to post." The apex court asked judges below to follow the new principles. It said: "On account of non-grant of bail even in straightforward, open and shut cases, this court is flooded with huge number of bail petitions, thereby adding to the huge pendency. It is high time that the trial courts and the high courts should recognise the principle that 'bail is the rule and jail is an exception'."

The court reasserted the liberal principle of bail even more forcefully while granting interim bail to Delhi Chief Minister Arvind Kejriwal to campaign for the general election. The bail application was opposed by ED on the ground that election campaigning was not a constitutional right. It also argued that a chief minister had no higher right than that of an ordinary citizen. Moreover, if the chief minister was granted bail because of his position, other politicians would also claim the same right during elections. As a result, criminals in jail would tend to turn politicians to claim the benefit, setting a bad precedent. The court rejected these arguments and granted bail to Kejriwal with certain conditions. The order was unique as it granted a politician the right to campaign during elections. Kejriwal returned to the Tihar jail after the campaigning and continued to govern the state from there. After the election, he was granted regular bail.

Soon after the Sisodia order, a woman politician was also released after five months in jail. K Kavitha, a senior leader of the Bharat Rashtra Samithi (BRS) party and daughter of former Telangana Chief Minister K Chandrashekar Rao, was also caught in the Delhi liquor case. The Delhi high court rejected her bail application in July 2024 on the ground that bail under PMLA could be given only to vulnerable women, but Kavitha was "a highly qualified and well accomplished person having made significant contributions to politics and social work." So Section 45(1) of PMLA for leniency towards vulnerable sections and women did not apply to her. The Supreme Court noted that there were 493 witnesses to be examined and 50,000 documents to be considered. The likelihood of the trial being concluded in the near future was bleak. So "undertrial custody should not turn into a punishment". During the same period, Tamil Nadu cabinet minister V Senthilbalaji was granted bail by the Supreme Court. The order reiterated that "the stringent and higher threshold for bail and delays in prosecution cannot coexist." Following these judgments and orders, the number of politicians in jail has come down drastically.

## *Chapter 20*

# Heed the noise of democracy

THE right to protest peacefully is guaranteed as a fundamental right in the Constitution, subject to reasonable restrictions. When governments deny citizen's legitimate demands or try to suppress their voice, people take to the streets. Protests take different forms. Mahatma Gandhi invented satyagraha (civil disobedience) and non-cooperation to fight against the colonial powers. Later, work-to-rule, sit-ins, strikes, pickets, hartals and bandhs were developed by trade unions and political parties. Protests have a tendency to turn violent, but they are said to be the hallmark of democracy. There are also times when the people have a duty to protest against injustice. Bystanders are often arrayed among those on the side of perpetrators of injustice. Nothing irritates the rulers as strident protests. Governments impose prohibitory orders, use lathis, water cannons and guns to crush the agitators. These confrontations ultimately have to be sorted out by courts.

Whether court fiats can contain street protests is problematic. People's anger is likely to burst out spontaneously despite what the courts say. It was demonstrated in a case from Kerala, where the Communist Party (Marxist) is a master of protests. A full bench of the Kerala high court in 1997 ruled that peaceful "strikes" are legitimate and not unconstitutional, whereas "Bandh" is unconstitutional, being a gross infringement of the fundamental rights of others. "Bandh" is an elastic term but

can be explained as a general shut-down whereby all establishments are closed down, usually by intimidation or force. The court seemed to quibble on "Bandh", "a call for general strike" and "hartal". The CPM was quick to appeal to the Supreme Court against the high court judgment. But it was dismissed and the high court view was affirmed in *CPM vs Bharat Kumar (1997).* The issue has returned to the Supreme Court several times but the court orders are generally ignored by organisers of Bandhs. Other high courts have also passed orders in vain. The Gauhati high court, for instance, in *Aniruddha Das vs State of Assam (2019)* had barred road and rail blockades. Despite these orders, Bandhs and its mutations have continued to disrupt life.

The Supreme Court has asserted the people's right to protest in several judgments, but with caveats. The cases arose mostly from Delhi as it is the capital of the country and the favourite venues for resistance are situated there. Boat Club near the Parliament House was the preferred site for a long time. It has seen farmers' agitations and Nirbhaya anti-rape rallies among others. In its face-off with the Centre, newly-elected Delhi Chief Minister Arvind Kejriwal and his ministers created history of sorts by holding Dharna near Parliament in January 2014. They beat the winter night by bringing mattresses and blankets to sleep on the pavement for the night.

In 1993 Boat Club was totally barred for demonstrations. The alternative place provided is the cramped Jantar Mantar, the 18th century monument a kilometre away from the Parliament House. This change did not go down well with the agitators. The Supreme Court, on a petition by the farmers' body, Mazdoor Kisan Sakti Sanghatan (MKSS),

temporarily opened Boat Club lawns in 2018. The judges asserted that "there cannot be a complete or absolute ban on holding protests at places like Jantar Mantar and Boat Club". They directed the Centre to frame guidelines for according sanction to protest events. But the judgment had little effect. In 2017, the National Green Tribunal banned protesters at Jantar Mantar area also on the ground that the nearby offices in central Delhi were disturbed by the sloganeering protesters. The affected parties moved the Delhi high court, where the police gave some vague assurances. MKSS was not given permission to hold rallies. Later, agitating wrestlers who alleged sexual harassment by sports authorities were also dragged away from the site. In October 2024 a Ladakh group led by Sonam Wangchuk came walking from Leh demanding statehood but was denied permission to sit in Dharna at Jantar Mantar.

A sensational incident of 2011 provoked the Supreme Court to interfere *suo motu*, asserting the right to peaceful protest and reprimanding the police for misuse of its powers to suppress dissent. Baba Ramdev, the famous Yoga guru and business magnate, organised a campaign against graft during the UPA regime headed by Manmohan Singh. He wanted black money to be unearthed, including that stashed in foreign banks. When hundreds of his followers gathered at Ram Lila Maidan, another favourite spot for demonstrations in the capital, and were sleeping at night, the police raided the place to arrest Baba Ramdev. This created a huge commotion during the summer night in which there was brick-batting resulting in the death of one person. The Supreme Court took note of the media reports of the incident the following day and issued notice to the authorities. A year later the court passed its judgment

describing the violent crackdown on the sleeping crowd as a "tyrannical approach". The following remark tickled the media: "Sleep is a fundamental and basic requirement without which the existence of life itself would be in peril. To disturb sleep, therefore, would amount to torture which is now a violation of human right."

**Commuter' complaint**

On certain occasions, the court was seen to be acting to balance the interests of the public and the right of the protesters. In the PIL *Rakesh Vaishnav vs Union of India (2020)* the complaint was that the protests against the three farm laws passed by the central government were seriously inhibiting the supply of essential goods to the capital and causing inconvenience to commuters. The court formed a committee "to create a congenial atmosphere", but nothing came out of it. The protesters dispersed when the laws were repealed. Another case with similar complaints led to a judgment by the Supreme Court *(Amit Sahni vs Commissioner of Police, 2020).* The issue arose in 2019 when thousands of people resorted to sit-in in certain parts of Delhi and used roads for protesting against the Citizenship (Amendment) Act 2019 and the National Register of Citizenship. The judgment was slammed by civil society. The main objection was against the court ruling that protests should be held in "designated places".

The judgment said: "While appreciating the existence of the right to peaceful protest against a legislation we have to make it unequivocally clear that public ways and public spaces cannot be occupied in such a manner and that too indefinitely. Democracy and dissent go hand in hand, but then the demonstrations expressing dissent have to be in

designated places alone. The present case was not even one of protests taking place in an undesignated area, but was a blockage of a public way which caused grave inconvenience to commuters." The court held that though the right to protest was a fundamental right it had to be subjected to reasonable restrictions.

The judgment was assailed on several counts as it widened the power of the police to grant or deny permission and regulate rallies. The vague term 'designated areas' was a critical issue. Since the court did not elaborate it, the authorities could allot areas in far-off places, diffusing the effect of protest. Demonstrations happen on a range of issues, in many places. They cannot be confined to designated areas chosen by the authorities. The locality and the cause of protest have a close connection. Rail-Roko happened on railway lines, the Chipko movement was steered by Garwal women by hugging trees to protect environment, women picketed liquor shops in several parts of the country, plantains were planted in potholes on roads in Kerala. Workers strike work and shout slogans at factory gates. Students in universities vent their anger in the campus. Activists like Medha Patkar and Arundhati Roy have demonstrated in the Supreme Court premises against its judgments and have been hauled up for contempt of court.

**Damage to property**

During agitations, angry protesters are prone to damage public property like city buses and railways. Criminal laws are applied to them and they are punished by courts. The Prevention of Damage to Public Property Act 1984 deals only with punishment of rioters. But they do not deal with

recompensing the damage caused to private or public property. The Supreme Court had taken up the issue *suo motu* in *Re: Destruction vs State Of AP* on 16 April, 2009. It had prescribed guidelines for recovery of damage done to property after discussing reports of two committees which had gone into this aspect. The court empowered high courts to initiate action by appointing a judicial officer as claims commissioner. Kerala passed a law in 2019 to recover losses caused by damage to public property during the agitations. The high court used it to impose Rs 5.2 crore on those who went on a flash strike in September 2022 when a ban was imposed on Popular Front of India (PFI). Uttar Pradesh passed a similar law in 2020. However, the states have found their laws tedious to implement. Some of them have found extralegal methods more practical.

**Bulldozers roll out**

One method of retribution which became common in 2020s was nicknamed 'bulldozer justice'. It started during the agitation against CAA and NRC. Demolishing machines were rolled out by the authorities ignoring due process in several north Indian states. They razed houses, shops and properties that belonged to protesters, alleged rioters and rapists waiting to be charge-sheeted. Families were rendered homeless and without income in this collective punishment. The administration and police acted as judges, jury and executioner. Bulldozer politics received support from a section of society and became common in Uttar Pradesh, Madhya Pradesh, Assam and Rajasthan. The common defence of the governments was that the buildings and houses were unauthorised or the land was required under zonal regulations. It appeared to be a coincidence that the

violation of the rules was discovered immediately following an agitation and the buildings belonged to a particular community.

The demolition drive in Delhi caught the attention of the Supreme Court. It took three years to pass two significant judgments in November 2024. Though the orders were hailed as salutary, events reported after the orders showed they did not have the intended effect. The orders were continually defied in various parts of the country. *In Re Manoj Tibrewal Akash*, a senior journalist had written to the court as early as in 2019 complaining that his ancestral house and shop were demolished purportedly for widening roads. The court took up the issue *suo motu* and asked the UP government to pay punitive compensation of Rs 25 lakh to the victim, investigate the role of the concerned officers and take punitive action against those found guilty.

The court later passed a comprehensive order on all sorts of illegal demolitions in the country. In the order *In Re: Directions in the matter of demolition of structures (2024)*, the court called the bulldozer justice "totally unconstitutional". It laid down the procedure for demolition of illegal structures. Before taking action, a 15-day notice should be served on the owner. Errant officers should be asked to rebuild the properties at their cost. Even after that, there have been several instances of demolitions.

Some governments which find the rule of due process inconvenient and cumbersome have taken short cuts to eliminate political irritants. One such method originated in Mumbai in 1990s. The police used 'encounters' to cut down the underworld. It was used to suppress Khalistani terrorism. Ironically, such short cuts to "justice" get public support and

the ruler's image goes up each time an alleged criminal is eliminated. In September 2024, the Shiv Sena factions vied with each other in celebrating the encounter death of a person accused of sexual assault on two four-year olds at a Badlapur school. Both sides offered rewards to the policemen involved in the incident. Sweets were distributed at various towns and firecrackers were burst. When such suspicious deaths became too common, the Supreme Court took notice of the trend and intervened. In *PUCL vs State of Maharashtra (2014)* it passed elaborate directions to tackle the extrajudicial killings. As usual, they had little impact on the ground.

Another invention to tame protesters originated when agitation against CAA was at its peak in 2020. The method was to display the photographs of violent protesters on hoardings and walls of Lucknow streets, along with their personal details. The photographs were gathered from CCTV. The Allahabad High Court took suo motu cognizance of these issues and asked the Lucknow administration to remove the hoardings of those booked in cases of alleged vandalism, calling it interference in their privacy. The UP government moved the Supreme Court against the order. However, the trend trailed of after court intervention.

# Chapter 21

## Court as religious battleground

RELIGIOUS disputes have provoked conflicts all over the world resulting in local riots and prolonged wars. People of India have been found extremely religious in several international surveys. There are four major religions and hundreds of sects, sub-sects and denominations existing in different parts of the country. There are many gods, their local avatars and folk deities. Religious practices and customs vary. This melting pot of religions is rich ground for politicians to exploit popular sentiments.

Efforts to separate religion from the state are continuing despite the wall separating them in the Constitution. Freedom of religion is a fundamental right. But the problems arising from the intersections of religion and politics have frequently reached the Supreme Court. Though clothed in interpretation of doctrines and sacred traditions, they may really be the outcome of power struggles among religious leaders or rival claims for management of huge funds. Thus the feuding spills over to politics. The rulers quietly pass on hot-potato issues to the courts. Therefore there are scores of judgments focusing on various aspects of religion.

Deities and idols have been parties in litigation. Since the British days, the civil courts had considered a deity a "juristic person" or a legal entity. As far back as 1887, the Bombay high court had accepted the concept of an "artificial juridical person" under Hindu law in the Dakor Temple case. A

Hindu idol can own property and sue like a living person. In January 1975, a Nataraja idol stolen from India became a plaintiff in a $ 5.5 m suit in a Los Angeles court. However, gods have not been accorded the privilege given to idols. The constitution bench of the Supreme Court had granted juristic rights to minor Ram Lalla in the Ram Janmabhoomi-Babri Masjid title dispute. Lord Ram was represented by a "next friend". The Supreme Court has held in 2000 that the Guru Granth Sahib of the Sikh religion is a juristic person. The court noted that according to the tenets of Sikhism, it is the Guru.

**Matters of faith**

Claims based on religion and tradition that have been brought before courts would astonish rational minds. A dispute over charging Darshan fees to enter Nij Mandir started in the district court of Ahmedabad in 1880, travelled to the Privy Council and back to the Bombay high court in 1925. In February 2025, a petition was moved in the Supreme Court challenging 'VIP darshan' in certain temples, arguing that this favoured those who had power or deep pockets and was discriminatory. The court left it to the states to take appropriate decision. In recent times, the Supreme Court has been called upon to decide whether the restriction on women of menstrual age going to Sabarimala temple in Kerala is constitutionally valid. It is argued by the temple management that the deity is a Brahmachari who would not like the presence of adult women. Yet another question on which judges are divided is the practice of *angapradakshanam* (circumambulation) in certain south Indian temples. The practice involves rolling over the banana leaves on which other devotees had partaken food.

There are other issues like wearing Hijab and keeping a beard.

**Essential religious practices**

Judges have struggled to define words like religion, denominations and sects without much success. Since customs and practices abound, they have strived to sort out what are the essential practices of a particular religion. There are judgments on disputes like the right to enter places of worship, their ownership and management, acquisition and demolition, disputes between religious sects, excommunication, propagation of religion, cows and animal sacrifices, religious processions and noise pollution, books and films that hurt religious sentiments.

A seven-judge constitution bench had long ago tried to settle the issue of what are the essential practices of a religion in the case, *Commissioner, Religious Endowments vs Shirur Mutt*, usually referred to as the 'Shirur Mutt' case, (1954). In *Durgah Committee, Ajmer vs Syed Hussain Ali* (1961) a five-judge bench held that the state may interfere even in those practices that are not 'essential' and integral to a religion. Superstitious practices that are accretions and secondary to a religion are not 'essential' to it. Later judgments have added more uncertainty. The question of what is essential and what is ancillary pops up frequently in various forms. Examples: the right to carry kirpan by the Sikhs, injunction against women being photographed for identity cards, permission to marry a second Hindu wife in the hope of getting a son to attain salvation, practice of Jain monks who should not use any conveyance but must only walk. The decisions of the courts varied according to the mind-set of the judges and the tenor of the times.

The 'essential practice' test is raised in the Supreme Court on several issues. In *Gramsabha of Village Battis Shirala* (2014), a sect lost its claim to catch a live cobra to worship during Nagpanchami festival. Tandava dance of Ananda Margis, with skulls and tridents carried in procession in Kolkata, was held to be a non-essential part of their faith in *Acharya Jagdishwarananda Avadhuta* (2004). The court was called upon to decide whether the use of elephants at festivals like the centuries-old Thrissur Pooram is an "essential religious practice". Though these appear to be questions of customs and religious practices, they are highly emotive and easily wear political mantle. The problem is further muddied as court verdicts are often fuzzy and never satisfy all parties. The governments are caught in a Catch-22 situation as they fear losing elections if they choose either position.

**Conversions and 'love jihad'**

One constant allegation against religious minorities in the country is that they try to convert Hindus, lower castes and tribals through inducements, by force or even exploiting love as in the undefined 'love jihad'. The main judgement by the Supreme Court on religious conversions so far is *Rev Stainslaus vs State of MP (1977).* The Christian priest was prosecuted for conversion under the Freedom of Religion Act in that state. His appeals were rejected in the state. So he moved the Supreme Court. Meanwhile, the Orissa high court had struck down a similar law in that state. Appeals from both states were heard by a five-judge constitution bench. The main question involved was whether the right to "propagate" religion under Article 25 of the Constitution included the right to convert. The Constitution says, all

persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. The unanimous judgment ruled that there was no right to convert. It stated that "what the Article grants is not the right to convert another person to one's own religion but to transmit or spread one's religion by an exposition of its tenets."

Meanwhile, more states have passed anti-conversion laws in recent times, with stringent provisions to prevent inter-religious and inter-caste marriages. Some of these laws demand that the bride and groom must seek prior permission for marriage from the district magistrate. In the event of any complaint of "coercive conversion", the burden of proof is on the groom's party. They have to disprove the charges of coercion to the authorities. In July 2024 the UP Assembly amended its law of 2021 raising the punishment up to life imprisonment, securing bail made more arduous, and the scope of illegal conversion widened to include promise of marriage.

**Cow vigilantism**

The rise of cow vigilantism started in 2014 in north India. Muslims who transported cattle were thrashed or killed alleging that they were taking cows for slaughter. Several petitions were moved in the Supreme Court against the violence and related hate speeches from different platforms and media. In 2018, the court passed a judgment directing the state governments where the problem was virulent to act against it (*Tehseen Poonawalla v Union of India)*. But Gauraksha Samitis have proliferated in several north Indian states which continued to take law into their own hands.

They assume that they have the support of the authorities and religious leaders.

**Ram temple in Ayodhya**

There has hardly been a litigation so mired in politics, religion, mythology, history, archaeology and communal strife as the dispute over the Babri Masjid-Ramjanmabhoomi site in Ayodhya. Events relating to it have been meticulously recorded and books have been written about it. According to a section of the Hindus, the mosque stood at the birthplace of Lord Ram of the Ramayana epic. According to their faith, the Mughal dynasty founder Babur demolished a temple standing there and built the mosque in its place in 16th century.

The discontent and communal disturbances over the masjid started in the 19th century. Litigation meandered through multiple levels of judiciary in Uttar Pradesh for some seven decades. The questions overlapped law, religion and politics. On 6 December 1992, Hindu kar sevaks (volunteers) demolished the disputed structure. This generated more litigation in various courts. A constitution bench of the Supreme Court tried to put an end to all the controversies by its unanimous judgment on 9 November 2019 (*M. Siddiq vs Mahant Suresh Das*). It enabled the building of a magnificent temple to Lord Ram where the masjid stood earlier.

The judgment running over 1,000 pages had some unique aspects to it. It was read out in the court by CJI Ranjan Gogoi. It was unanimous. The author of the judgment was not identified, breaking the tradition of the court. In May 2020, Gogoi, then Rajya Sabha MP, when asked about the authorship of the Ayodhya verdict, asked: "Why does a

judgment need to have an author?" It created speculations but it is now believed to be the work of Justice D Y Chandrachud, who later became the CJI. In an interview to PTI four years later, he disclosed that all five judges on the bench had unanimously decided that there will be no authorship ascribed to the judgement – it will be a "judgement of the court".

The judgment has been analysed scrupulously by experts of all disciplines and need not be recounted here. The main thrust of those critical of the decision is that while acknowledging that the demolition of the masjid was an egregious violation of the rule of law, the judges condoned it and allowed the disputed land be given to the Hindus for building a Ram Mandir. The judgment, they contended, was based on faith and not on law. The court exercised its extraordinary powers under Article 142 to do "complete justice", and assigned the entire 2.77 acres to construct the Ram temple. The court also ordered the government to give five acres in another place to the Sunni Waqf Board to build a mosque as a replacement for the Babri Masjid. The UP government later allotted a site 25 km away from the temple in Dhannipur village.

# Chapter 22

# Social reforms through court

INDEPENDENCE has brought India political reforms, but a social revolution seems to be a far cry. B R Ambedkar said that political freedom without social freedom is meaningless.Much like the complications arising from the multiplicity of religions and customs, social questions before the courts are also formidable. According to one wild estimate, there are 3,000 castes and 25,000 sub-castes, 22 official languages, 121 other languages and 270 mother tongues. Law-making and judicial interventions in such a scenario have limitations. Well-meaning legislation often meets resistance from orthodox groups. They move constitutional courts to stall reforms. Litigation over reservations for SC/ST/OBC/EWS, women's rights, polygamy, personal laws, right to basic education are still contentious subjects. Decisions of the Supreme Court are sought to be reviewed by interested groups. Decided issues are given new garbs and presented anew. Even primitive customs like Sati have found defenders in the court till a few decades ago. Some of the salient reforms are noted here.

Going by chronology, the ban on Sati is the oldest social reform. Sati is the ritualistic practice of burning alive of a Hindu widow on her husband's funeral pyre. The issue came to a boil in 1987 when an 18-year-old Rajput woman, Roop Kanwar, died in Deorala village of Rajasthan. Parliament passed the Commission of Sati (Prevention) Act in 1987. The ultra conservatives immediately moved the Supreme

Court seeking various reliefs. The petitions were heard after 14 years by a five-bench constitution bench. It upheld the law. *(Ch. Khemi Shakti Mandir Trust vs Union of India, 2001).*

**Triple Talaq declared invalid**

A five-judge Constitution bench of the Supreme Court on 22 August 2017 declared that the practice of Triple Talaq allowed for Muslims was unconstitutional. Triple Talaq or Talaq-e-Biddat is a practice that allowed a Muslim man to instantaneously and irrevocably divorce his wife by saying the word 'talaq' three times successively. Shayara Bano, who was divorced by her husband before witnesses following the Shariat Act 1937, filed a petition challenging the practice arguing that it violated Muslim women's right to equality. The court passed the judgment in her favour by a 3:2 majority. The majority stated that the practice was arbitrary, illegal and void. One judge added separately that the practice was not sanctioned by the Koran. The minority judges held that the personal law was protected by Article 25 of the Constitution. The court further asked Parliament to take legislative measures in tune with the judgment.

The BJP government promptly followed the directive. It passed the Muslim Women (Protection of Rights on Marriage) Act, 2019. According to it, Triple Talaq in any form – spoken, written, or by electronic means such as email or SMS – is illegal and void. The husband was also slapped with criminal liability. The man could be sentenced up to three years in jail for violating the law. On the other hand, an aggrieved woman is entitled to demand maintenance for her dependent children. Another judgment of the Supreme Court referring to the right to maintenance of divorced Muslim women is discussed later. That decision in the Shah

Bano case practically denied the right, leading to intense political debate. The Rajiv Gandhi government then passed a law to circumvent the judgment. In 2001 the court passed another judgment to dilute that law, *Daniel Latifi vs Union of India.*

The Supreme Court has refused to grant legal recognition to same-sex marriages in *Supriyo vs Union of India (2023).* A five-judge constitution bench unanimously held that there was "no unqualified right" to marriage, and same-sex couple could not claim it as a fundamental right. The court cannot enter into the legislative field and it was for Parliament to make a gender-neutral law. However, the court ruled that live-in relationship is part of the right to life. It is therefore not illegal. The five judges wrote four separate judgments where they agreed on some points and disagreed on others. The judgment accepted the promise of the government that it would set up a committee chaired by the Union Cabinet Secretary to define the scope of the entitlements of queer couples living together. The court directed the government to implement its recommendations. It also asked the government to ensure that the LGBTQ community is not discriminated against and there is no discrimination in access to goods and services.

**Atrocities against low-castes**

Untouchability was abolished by Articles 15 and 17 of the Constitution but it still prevails in many parts of the country. There are several laws to protect lower caste persons like the Untouchability (Offences) Act, 1955, the Protection of Civil Rights Act, 1955 and the SC/ST (Prevention of Atrocities) Act 1989. But convictions under them are very few. Complaints are registered late, police investigation is

tardy, witnesses against upper class offenders are hard to find, legal technicalities are too complex and the victims have little resources to fight prolonged legal battles. The Supreme Court has said that mere insult to a SC/ST member is not an offence under the Act unless the intent was to humiliate him or her based on caste identity. The court has also ruled in *Swaran Singh vs State (2008)* that the insult coupled with humiliation is to be made in a place within public view. An insult in a private place does not fall under the Act. In *Dashrath Sahu vs State of Chhattisgarh (2024),* the court added a new condition that "the offence of outraging the modesty should be committed with the intention that the victim belonged to the SC category." The man who outraged the modesty of his maid was acquitted on this ground.

Caste discrimination penetrates the high walls of jails too. It is given tacit recognition in jail manuals of several states. The governments have looked askance at these provisions for decades. As a result, supposedly menial jobs or "polluting" occupations are allocated to low caste prisoners. They are expected to carry out their "hereditary trades". On the other hand, the caste privileges of a few placed high in the hierarchy are reflected in the allotment of work. Highlighting the situation, journalist Sukanya Shanta moved a PIL in the Supreme Court based on an article she had published titled "From Segregation to Labour, Manu's Caste Law Governs the Indian Prison System." She stated that caste-based discrimination was prevalent in jails in a range of areas — from division of manual labour like cleaning toilet, cooking food and segregation in barracks. For example, food shall be cooked by a 'suitable caste', which reflected notions of untouchability. There was a caste column in prisoners'

registers. On 3 October 2024, the Supreme Court directed the Union and state governments to ensure the end of this discrimination by amending the prison manuals *(Sukanya Shantha vs Union of India).* The Supreme Court had earlier also tried to update the prison rules several times, like in 2003. In 2016, it formed an expert committee to draft a model prison manual, taking up the issue in a *suo motu* petition. Such a model was published. In January 2025, the Home Ministry updated the rules prohibiting classification of prisoners on the basis of caste. The implementation remains to be monitored.

**Hate speeches and crimes**

In recent times some new social issues have cropped up in the country, one of them being hate speeches by religious and political leaders. They are mostly aimed at minority communities. The law is vague and enforcing authorities are selective in taking action. Prevalence of social prejudices makes the problem extremely complex. According to the National Crime Records Bureau (NCRB) report of 2022, there has been an increase of 45 per cent of such offences registered under Section 153A of Indian Penal Code in the two previous years. Some states going to the polls had 100 per cent rise. Even in the Lok Sabha, some members used repulsive words against minorities without any consequences. According to the Association for Democratic Reforms (ADR) and National Election Watch, which analysed the affidavits of law-makers, 107 MPs and MLAs had hate speech cases against them in 2023. Moreover, 480 candidates with such charges had contested elections in the five previous years.

Hate speeches continue nevertheless in many parts of the country, often triggering riots. Even top leaders and judges have pushed boundaries for communal speeches. Social media played an important role in spreading communal venom. There have been television serials, prime time debates, fake news promoting hatred and violence against minorities. The court in August 2023 pointed out the weaknesses in the self-regulatory mechanism of the television industry.

The definition of hate speech itself has posed problems for the court and the Law Commission. The court, in 2014, had asked the Law Commission to define the term as it could not "confine the prohibition to some manageable standard". The Law Commission, in its 267th Report, had recommended amendments to the criminal laws for inserting new provisions prohibiting incitement to hatred and causing fear, alarm, or hate speech. But it has not been done.

In *Amish Devgan vs Union of India (2020),* the court expressed its difficulty in defining the term hate speech in the background of freedom of speech. It said: "It remains difficult in law to draw the utmost bounds of freedom of speech and expression, the limit beyond which the right would fall foul and can be subordinated to other democratic values and public law considerations, to constitute a criminal offence."

During election campaigns, and often even after the polls, ministers in the government are prone to make hate speeches. The political bug in them makes them forget that they are now holding responsible government positions. If the minister belongs to the ruling party, the authorities look

the other way. A five-judge constitution bench considered this issue in a large batch of writ petitions. The verdict was that such hate speeches of ministers would not make the government vicariously responsible for them *(Kaushal Kishore vs State of UP, 2023)*. The judgment said: "A statement made by a minister, even if traceable to any affairs of state or protecting the government, cannot be attributed vicariously to the government invoking the principle of collective responsibility." The Prime Minister or the Chief Minister does not have disciplinary control over all members, the judgment said. The concept of collective responsibility cannot be extended to any and every oral statement made by a minister outside the legislature.

There was, however, a caveat: "If as a consequence of such statement any act of omission or commission is done by the officers resulting in harm or loss to a person, the same may be actionable as a constitutional tort." The judges hastened to add that they were not "suggesting for a moment that any public official including a minister can make a statement which is irresponsible or in bad taste or bordering on hate speech and get away with it. We are only on the question of collective responsibility and vicarious liability of the government."

Hate speeches naturally lead to outbreaks of hate crimes. Lynching of persons who were in the cattle trade became a common menace. Several Muslims were killed by mobs in north Indian states on suspicion that they slaughtered cows worshipped by a section of the Hindus. The cow lynching issue was also dealt with by the court in the Tehseen Poonawalla case. In a unanimous judgment, CJI Dipak Misra wrote that "no individual in his own capacity or as a

part of the group can take law into his or their hands and deal with a person treating him as guilty." The court asserted that mob justice in any form is opposed to the principles of legal system and inconceivable in a civilised society. It warned that if unchecked, lynching may become "the new normal".

The court issued several interim orders like appointment of nodal officers and highway patrolling. The court recommended to Parliament to constitute a separate offence for lynching with adequate punishment. Section 103(2) of Bharatiya Nyaya Sanhita (BNS) provides that when a group of five or more persons acting in concert commits murder on the ground of race, caste or community, sex, place of birth, language, personal belief or any other ground each member of such group shall be punished with death or with imprisonment for life. However, cow vigilantes have posed problems in the implementation of the law.

**Honour killings**

The Poonawalla judgment also passed directions against another practice prevalent in northern states in which a few male elders of the village sitting as panchayat acted as a kangaroo court and punished men and women for disobeying customary practices. They did so to protect the honour of their families and community. Most of the victims were youths. The so-called offences included inter-caste marriage, pre-marital pregnancy, infidelity, having unapproved relationships, refusing an arranged marriage, asking for divorce, leaving the family or marital home without permission and falling victim to rape.

A PIL was filed in 2010, *Shakti Vahini vs Union of India*, seeking steps to stop "honour killings". The Supreme Court

judgment came in 2018 in which a number of directions were given though they were hardly followed by the authorities. The state governments were told to set up special cells with 24x7 helpline to deal with the problem. The police was ordered to file FIR against erring Khap Panchayats and provide protection to the victims and their families. One of the punitive measures: "Any failure by either the police or district officer/officials to comply with the aforesaid directions shall be considered as an act of deliberate negligence and/or misconduct for which departmental action must be taken under the service rules. The departmental action shall be initiated and taken to its logical end, preferably not exceeding six months." Even in 2024 the federation of panchayats in Rajasthan was demanding a law to curb love marriages and love-in relationships.

**Reservation for backward classes**

The most prominent social issue handled by the Supreme Court undoubtedly is reservation for backward communities in government jobs and educational institutions. This is a contentious politico-legal question which refuses to subside.

Reservation was introduced originally for ten years, assuming that it would uplift the lower rung of the caste ladder and they would recover from the age-old inequities by then. However, even decades of reservations have not achieved the result. In fact, the situation continues to simmer, especially during election seasons. Reservation policies of different governments have intensified social divisions and antagonism. The Supreme Court also swung back and forth, without any clear guidance. Caste inequality continues to be the mother of all other inequalities.

Reservation was prevalent even before Independence and some enlightened princes had introduced it to uplift backward classes. The current problems started soon after the Constitution came into force. In the *Champakam Dorairaj vs State of Madras (1951)* the Supreme Court ruled that reservation for backward communities violated the equality provisions in the Constitution. This irritated Prime Minister Jawaharlal Nehru so much that he bulldozed constitutional amendments to overcome the judicial hurdles against his affirmative programmes. However, the problems did not die down.

Social conflicts on this subject peaked in 1990 when the V P Singh government introduced reservation according to the recommendations of the Mandal Commission which was put away by previous governments for a long time. It resulted in social tremors leading to political turmoil in several parts of north India. Some youths immolated themselves against the move. Then the issue was tossed to the Supreme Court. A nine-judge bench passed a judgment on 16 November 1992 upholding the reservation policy but with a cap of 50 per cent *(Indra Sawhney vs Union of India).* The limit was arbitrarily set by the judges. They also held that the "creamy layer" of the backward communities should be kept out of the benefit. These last points in the judgment, 50 per cent cap and creamy layer, are still under attack from various political leaders. The creamy layer was defined in various ways by the state governments. The Centre set the income limit at Rs 1 lakh per family in 1993, and raised it periodically. The last one was Rs 8 lakh in 2017.

The problems have been returning to the court in different contexts and in varied cloaks. Marathas in Maharashtra,

Vanniyars in Tamil Nadu and other castes and classes in different states fought for the economic pie. State governments are under pressure from influential groups and they had to politically meet the challenge of unemployment and social tension. Violence broke out frequently over short-sighted policies. Courts were a convenient outlet for releasing the steam. So there were review petitions, clarificatory applications, appeals and more writ petitions. The judgments of the court, written by different benches at different periods and in different contexts, merely added to the confusion. New sub-categories popped up, like Extremely Backward Communities. The court has taken so many turns that some commentators think that it has become difficult to find the highway. The Supreme Court had to write judgments clarifying its clarification of clarifications.

## Chapter 23

# Pride, prejudice and contempt

POLITICAL orators, legal commentators, satirists, stand-up comedians and others of similar stripe face the ire of the ruling class when they are criticised. The famous cartoonist, R K Laxman, has described an incident in his autobiography, *The Tunnel of Time*. Morarji Desai, chief minister of erstwhile Bombay State in 1952, had imposed prohibition, and also banned horse racing and crossword puzzles. "A cartoon I drew on this theme annoyed him so much that he held a full cabinet meeting to muzzle me, and ban making the government, politicians and ministers objects of ridicule in the name of humour. He was told there was no way of stopping the cartoons since our Constitution fully protected the freedom of expression."

Some enlightened statesmen delight in being cartooned. Nehru famously told the doyen of cartoonists, "Don't spare me Shankar!" Shankar went on drawing Nehru and published a collection of 400 of them out of over 1,500. Indira Gandhi also relished cartoons. She selected Laxman for Padma Bhushan award in 1973. "I was stunned," he wrote, "here I was attacking and making fun of her in my cartoons, and she had seen fit to confer this honour on me".

Ordinary persons who are hurt by defamatory remarks or lampooning can take up arms under ordinary civil and criminal laws. Judges of the Supreme Court and high courts have a short cut. They can invoke the Contempt of Court Act 1971. If a person disobeys a court order it is civil

contempt. A criminal contempt is elaborately defined in the Act and casts a wide net. It is a punishable offence if an act "(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner." The punishment is a maximum of six months simple imprisonment or a fine of Rs 2,000 or both. In 2025, it was reported that 1.45 lakh contempt cases were pending in the high courts and the Supreme Court. The government told Lok Sabha on 28 March 2025 that 1,852 contempt cases were pending before the Supreme Court alone.

Ordinary persons can also move the court if they feel the institution has been scandalised. But they have to get approval from the Attorney General or the Solicitor General to move the Supreme Court. Judges, on the other hand, can move a contempt case on their own motion. The Constitution confers this prerogative on the Supreme Court and high courts which are called "courts of record" (Articles 129 and 215).

However, the exercise of this power has been quite controversial. Supreme Court judgments against politicians and social activists using the power of contempt have been uneven and open to question. It is decried as a roving jurisdiction without clear borders. The general impression is that when high dignitaries use harsh words against the judiciary the judges ignore the assault or it is pardoned in the name of free and fair speech. But the same yardstick is not used if the criticism is made by ordinary persons.

Moreover, in this jurisdiction, the court is the victim, prosecutor, judge and the executioner.

Judiciary in England, from where this law takes inspiration, have been very liberal in their approach while dealing with criticism of judges. According to them, exposure to criticism only strengthens judiciary, far from weakening it. Lord Atkin is often quoted who said that "justice is not a cloistered virtue. She must suffer the scrutiny and outspoken comments of ordinary men." Lord Denning, Master of Rolls, said: "Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. ..We must rely on our own conduct itself to be its own vindication." True to his words, when Denning was called an "ass" for a judgement by Labour party leader Michael Foot, no action was taken against him. *Daily Mirror*, a tabloid, in 1987 called a set of three judges of the House of Lords "You Old Fools" in banner headlines on the front page and printed their portraits upside down. The case involved the publication of the book *Spycatcher*. Another tabloid *Daily Mail* on 4 November 2016 published an article by its political editor headlined "Enemies of the People" criticising the three judges who had written a judgment on Brexit. The judges did not take action against the newspaper. In 2013, England abolished the offence of contempt of court on the recommendation of the Law Commission which stated that the law was vague and not compatible with freedom of speech.

But the colonial law is still live in India. The offence is still a "vague and wandering" jurisdiction. The Supreme Court has claimed that the power to punish for contempt is a

constitutional power; therefore it cannot be abridged or taken away even by legislative enactment. The first major judgment in contempt jurisdiction was in 1970 when the Supreme Court held that E M S Namboodiripad, the first communist chief minister in India, guilty of contempt of court. He had said at a press conference, as reported in the *Indian Express*, that judiciary was an "instrument of oppression", judges were "guided and dominated by class hatred, class interests and class prejudices." Illustrating his point, he continued: "Where the evidence is balanced between a well-dressed pot-bellied rich man and a poor ill-dressed and illiterate person the judge instinctively favours the former." The Chief Minister said that election of judges would be a better arrangement. Chief Justice M Hidayatullah sentenced him to pay a fine of Rs 50 *(E M S Namboodiripad vs T N Nambiar, 1970).*

Two important judgments involving the media delivered in 1978 relaxed the rigour of the law. The first one involved the editor of *Indian Express* newspaper regarding the publication of an article by noted jurist A G Noorani. It assailed the ill-reputed judgment in the Fundamental Rights case during the 1975 Emergency. In the second case, the *Times of India* was hauled up by Chief Justice M H Beg. The newspaper had published a memorandum submitted by 52 intellectuals assailing the same judgment for taking away the fundamental rights of citizens. Both were published after the lifting of the Emergency.

The memorandum quoted a few passages from the judgment. While hundreds of opposition leaders were whisked away at midnight and lodged in objectionable conditions, Beg had written: "We understand that the care

and concern bestowed by the State authorities upon the welfare of detenues who are well housed, well fed and well treated, is almost maternal." Another majority judge, Y V Chandrachud wrote: "Counsel after counsel expressed the fear that during the Emergency, the executive may whip and strip and starve the detenue and if this be our judgment, even shoot him down. Such misdeeds have not tarnished the record of Free India and I have a diamond bright, diamond hard hope that such things will never come to pass".

There was no conviction in these cases but in *S Mulgaokar* judgment *(1978)*, various guidelines were laid down diluting the rigour of the law. They are: free expression of ideas, fair criticism in good faith when it is in the public interest, the surrounding circumstances, the person who is making the comments, his knowledge in the field regarding which the comments are made and the intended purpose.

How discriminatory could the views of the court be was revealed in 1988 when the then Union Law Minister Shiv Shankar made a public statement much stronger than that made by EMS. "The Supreme Court, composed of elements from the elite class had their unconcealed sympathy for the haves; i.e. the Zamindars and anti-social elements, i.e. FERA violators, bride burners and a whole horde of reactionaries have found their haven in the Supreme Court." But he was let off after a long discussion on contempt jurisprudence, citing the Mulgaonkar case. That judgment in *P N Duda vs P Shiv Shanker (1988)* said: "Bearing in mind the (liberal) trend in the law of contempt established by the judgment of Justice Krishna Iyer in the Mulgaokar case, the speech of the Minister has to be read in its proper perspective, and when so read it did not bring the administration of justice into

disrepute or impair the administration of justice. The Minister is not guilty of contempt of the Court." EMS was held guilty earlier for similar views but the Shiv Shankar judgment superseded the EMS decision. Even sitting judges have made controversial remarks in public. Justice D A Desai of the Supreme Court once proclaimed that he had joined the bench to overturn the system from within.

A Congress heavyweight, Mohammed Yunus, assailed Justice O Chinnappa Reddy for his judgment in the National Anthem case. The judge had written that a student belonging to the Jehovah's Witness need not sing the anthem which was against his faith. Yunus said Reddy "had no right to be called either an Indian or a judge". Though an association had moved the Supreme Court against him, the case could not be taken forward because the necessary sanction from the Attorney General or the Solicitor General was not available. Therefore his case was not decided on merit *(Conscientious Group vs Mohammed Yunus, 1987).*

H M Seervai, eminent jurist, wrote in his classic book *Constitutional Law:* "If a humble citizen had said of the Supreme Court what Shiv Shankar and Mohammed Yunus had said, the public familiar with the recent functioning of the Supreme Court would have had little doubt that the humble citizen would have been found guilty of contempt and punished after the Supreme Court gave an eloquent lecture on its duty to uphold the dignity of the Supreme Court and its judges in high esteem."

Some persons with no political clout have suffered on account of the spectre of contempt. In May 2017, a seven-judge bench ~~of SC~~ sentenced a sitting judge of the Calcutta high court, C S Karnan, to six months jail for committing

contempt of court. The bench headed by Chief Justice J S Khehar, in a *suo motu* petition, ordered that he should be taken into custody "forthwith". Karnan had written to the Prime Minister making serious allegations against judges of the Supreme Court and high courts. He had also passed several orders in his capacity as a judge against Supreme Court judges.

Some prominent persons facing conviction for contempt of court have apologised to avoid punishment. Former chief minister of Karnataka, S M Krishna, offered unconditional apology in 2002 for disobeying a court order related to the release of water to Tamil Nadu. Another dignitary who apologised before the court was former Supreme Court judge, Markandey Katju. The court moved *suo motu* for his blog flailing an order commuting death sentence on a rapist. Katju appeared in the court of Justice Ranjan Gogoi and tendered apology.

Several persons facing punishment have refused to apologise. Noted author and social activist Arundhati Roy, who had several brush with the top judiciary, did not apologise in 2002 when the Supreme Court hauled her up for contempt of court. Arundhati Roy and Medha Patkar had participated in a dharna organised by the Narmada Bachao Andolan outside the Supreme Court on December 13, 2000. Arundhati Roy refused to apologise and was convicted and underwent one day's "symbolic" imprisonment in Delhi's Tihar central jail. She also paid Rs 2,000 as fine (*In Re Arundhati Roy).* She had been writing a series of articles criticising the court. She had been found guilty earlier also *(Narmada Bachao Andolan vs Union of India, 1999).* So the judges wrote that she had not shown "any repentance or

remorse." Their order imposed the punishment for "scandalising the court's authority with mala fide intentions". Before she was taken to jail, she said: "I stand by what I said and I am prepared to suffer the consequences. The dignity of the court will be upheld by the quality of their judgments; the quality of their judgments will be assessed by the people of this country."

Prashant Bhushan, a public interest lawyer of repute, also refused to apologise despite the judges giving ample opportunities. Bhushan was hauled up for his two tweets. In one he criticised the then CJI for riding a Rs 50 lakh bike without mask or helmet during the Covid lockdown (*In re Prashant Bhushan).* In another tweet, he is reported to have remarked that four ex-CJIs had damaged democracy in the six previous years of undeclared Emergency. As he stood by his statement, the bench presided over by Justice Arun Misra sentenced him to pay Re one as fine. Arun Shourie, who himself had faced a number of contempt cases as editor of *Indian Express*, told the paper that the contempt order showed how "this central pillar of the largest democracy in the world (Supreme Court) is now so hollowed out, that it is so fragile, that a mere puff of two tweets can put it in jeopardy."

**Applause for Netas**

Contempt action against those who are blamed for scandalising the court is covered by law and judgments. On the other hand, there is no law dealing with judges who shower unsolicited praise on politicians in power even if the admiration is well-deserved. Such judges stand only before the bar of public opinion. Judiciary is supposed to be a watchdog over the executive and some tension between them

is in fact good for the health of democracy. But there are several instances when this norm was overlooked by judges.

When Jawaharlal Nehru was the undisputed leader of the country, high court judges made adulatory remarks about him. Nehru was a freedom fighter, an architect of the Constitution and highly educated lawyer. Justice M Anantanarayanan of the Madras High Court reportedly described Nehru as a "greatly esteemed national leader". A bench of Chief Justice M Hidayatullah and Justice G Bhutt of the Madhya Pradesh high court had termed Nehru as the "the most beloved leader of the people". On July 3, 1953, Chief Justice of the Bombay high court, M C Chagla, wrote to Nehru that he was proud of the Prime Minister as he had given the country international status. Such flattery was largely ignored by the public, presuming that Nehru deserved it.

During the 1975 Emergency, some "bandwagon judges" recommended the "20-Point Programme", a mere slogan devised by Prime Minister Indira Gandhi to bolster her highhanded measure. She lost the election in 1977 but returned to power in 1980 with a whopping majority. Soon after that, Justice P N Bhagwati, future CJI, wrote a 1,200 word fawning letter to her: "You have become the symbol of the hopes and aspirations of the poor, hungry millions of India, who had so far nothing to hope for and nothing to live for. I am sure with your iron will and firm determination, uncanny insight and dynamic vision, great administrative capacity and vast experience, overwhelming love and affection of the people, and above all, a heart which is identified with the misery of the poor and the weak, you will be able to steer the ship of the nation." When this letter

was leaked to the press there was vehement protest from the legal community. His brother judge, Justice V D Tulzapurkar, commented: "If judges start sending bouquets or congratulatory letters to a political leader on his political victory, eulogising him on assumption of high office in adulatory terms, the people's confidence in the judiciary will be shaken." In more recent times, some judges of the Supreme Court also invited criticism for making remarks with sycophantic tenor.

## Chapter 24

# Perils of oral observations

JUDGES normally listen quietly to the arguments presented by counsel on each side. They ask questions on doubtful points and often needle them to get at the truth of the matter. Some judges speak rarely, which is frustrating to the lawyers and litigants as they do not get a clue as to what is going in the judicial mind. Some others are talkative and try to impress those in the court room.

In one of his books, noted jurist and lawyer F S Nariman, narrates an anecdote gathered during the hearing of the celebrated Kesavananda Bharati case. It was before a 13-judge bench of the Supreme Court, and lasted six months, the longest in the court history. All judges put some question or other to the arguing counsel – except Justice G K Mitter. The lawyers waited for days and weeks to hear his voice. They started betting in the bar library if and when he would open his mouth. At last the D-day came, when he asked a counsel who referred to a document: Which page?

There is a converse disposition. J S Verma, former CJI, used to launch into long monologues during proceedings. After a lengthy exposition of law once, he was going to dictate the order in the usual format: "After hearing counsel.." His brother judge, B N Kirpal (later CJI) interrupted him and light-heartedly corrected: "Counsel having heard the judge.."

Oral remarks made by judges during the proceedings have little legal force. It is their reasoning written in judgments

and orders that are binding on the parties. The provisional opinions and off the cuff comments made by judges, often reported in the media, tickle the mind of audiences. It is often "breaking news" aimed at the viewers in the drawing rooms munching fried chips. TV firms use them to increase the TRP ratings. However, these bytes can influence public opinion and yield dividends during elections. They are capable of disturbing political beehives and even cause civic unrest.

One of the most prominent examples in recent times was the repercussions following the observations of former CJI DY Chandrachud on the Places of Worship Act, 1991. The law says that the religious character of any place of worship must be maintained as it was on 15 August 1947. While this issue was being argued in May 2022 with reference to Gyanvapi mosque in Uttar Pradesh, he said that a non-invasive survey of the structure would not violate the Act. While sitting along with two other judges, he said that Sections 3 and 4 of the Act did not prohibit the "ascertainment of religious character" of any place of worship.

This observation had a cascading effect. A number of district courts in UP and Rajasthan began admitting petitions seeking to "ascertain the religious character" of mosques and Darghas of the medieval period. State officials began surveys of mosques and Darghas to find out what was underneath them. Amid renewed tension, Chandrachud defended his observations after his retirement. Responding to a question on the *Times Network* India Economic Conclave, Chandrachud said that "any discussion in the court has to be understood in the context of a dialogue. Questions are posed to lawyers to elicit the truth. Sometimes, judges play

devil's advocate to tell the lawyer a contradictory position…To say that an observation or a dialogue in the court is reflective of the position of the court would be doing a disservice to the nature of dialogue in the court." Unless the last word of the judgment is printed, whatever is said by a judge remains an observation only. It has no precedential value. "If you prevent judges from engaging in a free-flowing conversation, you are preventing the truth from coming out," he clarified.

Another retired Chief Justice, Ranjan Gogoi, gave an ingenious explanation for making odd remarks during the proceedings. He cracked an ill-timed joke in the court which attracted flak when picked up by the media. Iltija, daughter of ex-Chief Minister of Jammu and Kashmir Mehbooba Mufti, moved a writ petition in 2019 after Article 370 of the Constitution was abrogated and tough conditions were imposed on local leaders' movements. She wanted to travel from Chennai and meet her mother in Srinagar and move around the city. During the hearing, Gogoi remarked in a lighter note why she wanted to move around freely in the city when the weather would be cold. This observation was not taken kindly in some quarters. The judge explained in his autobiography: "Judges need to lighten matters at times in view of the strenuous and serious nature of the work they undertake."

Talking judges have invited unexpected reaction in the past also when they unwittingly ruffled the vanity of parliamentarians. In 1980s, half a dozen lawyers on each side were shouting at each other before a Supreme Court bench. The presiding judge tried to stop them by admonishing them: "Don't turn the court into parliament!" This remark,

reported in the press, hurt the sentiments of some MPs, who brought a privilege motion against the judge. It was hotly debated in the Lok Sabha but the issue was subtly diffused. Now the judges tell the combative lawyers: "Don't turn this into a TV debate!"

Observations made by high court judges also could make waves in the national mainstream. Sometimes the Supreme Court had to sort out crises created by remarks of high court judges. In *Chief Election Commissioner vs M R Vijaybhaskar (2021)* the apex court dealt with the problem of mixing oral observations with final judgments. In 2021, while campaigning for the Tamil Nadu state elections was in full swing amid Covid epidemic, the bench of Chief Justice Sanjib Banerjee of the Madras high court made some scathing observations against ECI. The bench was hearing a petition filed by a candidate seeking directions to the EC to implement strict health measures. The remarks of the court were extensively reported in the national media. Some bits: ~~22~~"ECI has been the most irresponsible over the last few months in not stopping political parties from wanton abuse of the Covid-19 protocol…You should be put up on murder charges probably." "Your institution is singularly responsible for the second wave of Covid-19". "Were you on another planet when election rallies were being held?" "Your officers should be booked…"

The Election Commission was aggrieved by the outburst and moved the high court requesting it to restrain the media from reporting judges' oral remarks and stick to what is on record. The high court did not oblige. So ECI approached the Supreme Court with the same request. It complained that its reputation has been seriously damaged and a

dangerous trend had started with the "uncalled for, blatantly disparaging and derogatory remarks". However, the judges advised ECI to take the high court remarks “in the right spirit and as a bitter pill.”

In the judgment, the Supreme Court stated that a balance should be struck between “the authority of a judge to conduct judicial proceedings and to engage in a dialogue during the course of a hearing and the freedom of the media to report not just judgments but judicial proceedings.” The court also emphasised the need for judges to exercise caution in off-the-cuff remarks in open court, which may be susceptible to misinterpretation. Asserting the freedom of the media, the judgment said: “We find no substance in the prayer of the ECI for restraining the media from reporting on court proceedings. This court stands as a staunch proponent of the freedom of the media to report court proceedings. This we believe is integral to the freedom of speech and expression of those who speak, of those who wish to hear and to be heard and above all, in holding the judiciary accountable to the values which justify its existence as a constitutional institution.”

The Supreme Court diffused a tense situation created by the remarks of a judge of the Karnataka high court in July 2022. His searing observations were against the Anti-Corruption Bureau (ACB) and an officer. While hearing a bail application one judge remarked that the ACB had become a “centre of corruption” and a "collection centre". The ACB approached the Supreme Court seeking expunction of the remarks. The bench presided over by Chief Justice N V Ramana acceded to the request and stayed all controversial observations of the high court judge.

In September 2024, another Karnataka high court judge breached more boundaries prompting a five-judge Bench of the Supreme Court headed by Chief Justice Chandrachud to take *suo motu* cognisance in the matter. One remark was politically sensitive and another offending the dignity of women. The day after the Supreme Court took notice of it, the judge expressed 'regret' in the open court. He said his remarks were reported out of context by the media. The apex court closed the case since the judge had apologised for the remarks. The CJI pointed out that the court proceedings are now live-streamed and reached the public. "The reach of the proceedings does not extend to merely those who are physically present but also to audiences well beyond the physical precincts of the court," he said. Video-conferencing and live-streaming of proceedings have emerged as an important outreach facility of courts to promote access to justice.

Laying down guidelines for the judges, the court said: "As judges, we are conscious of the fact that each individual has a certain degree of accumulated predispositions based on our experiences of life...At the same time, it's important that every judge should be aware of their own predispositions...Casual observations may well reflect a certain degree of individual bias, particularly when they are likely to be perceived as being directed to a particular gender or community...Courts, therefore, have to be careful not to make comments in the course of judicial proceedings, which may be construed as being misogynistic or for that matter, prejudicial to any segment of our society."

# Chapter 25

## Dealing with adverse judgments

POLITICIANS fear mainly two things: people's verdict in elections and court judgments. They can churn society to skim votes. Tackling judiciary is more difficult, but not impossible. When an unfavourable judgment is handed down, honest rulers bow to it. Parliament can enact a fresh law to cure the deficiency in the overruled law. An adamant government will search for ways to evade inconvenient orders. Often it succeeds because the government can tweak the old law and dress it up as new. Moreover, it controls the executive which has to implement court orders. Non-compliance with a court order can take many different forms. The following are some common stratagems adopted by governments which want to sidestep or nullify unfavourable judgments. Methods vary according to the situation in the Supreme Court and the strength of the ruling party in Parliament.

The Supreme Court Rules provide for a review of judgments. But the chances of winning a review petition are low. The petition is usually heard in chambers by the same judges who decided the original judgment. Moreover, they examine only whether there was "error apparent on the record". A peeved government would tend to move Review Petitions to reargue the case or sooth itself or placate the public. After all, the tax payers finance the legal adventure. If the government loses a second time, there is another way to revive the pleas. It is called Curative Petition. It is a little

more complex and the chances of winning are again narrow. If the government wants to persist, it can move a "clarification" petition, feigning that certain parts of the judgment and orders need further clarification before implementation. After all, judgments like those on reservation for backward classes are tortuous both in logic and language. Sometimes such pleas have resulted in a full-fledged hearing.

**Amend the Constitution**

We have seen earlier how Prime Ministers Jawaharlal Nehru and Indira Gandhi made drastic amendments to the Constitution when unpalatable judgments came from the Supreme Court one after the other. The Indian Constitution was amended more than hundred times in 75 years. Many amendments were pushed through by governments with large majorities to overcome court decisions. In contrast, the US constitution, the oldest written constitution, was amended only 27 times since 1789. According to a research paper by the University of Chicago that analysed life spans of constitutions around the world 50 per cent of them are likely to be dead by age 80 and only 19 per cent survive until age 50. Seven per cent do not even make it to their second birthday.

**Ordinances as quick fix**

One method to outfox court judgments is to issue an ordinance immediately to overcome their impact. The Constitution has retained this anti-democratic power found in the Government of India Act of 1935. An ordinance has the weight of a law but it is meant to be issued in emergency situations, when the legislature is not in session. The ordinance making powers are used by the central and state

governments to overcome the impact of judgments. They are sometimes promulgated repeatedly without placing them before the legislature. As early as in 1986, the Supreme Court had declared this practice as a fraud on the Constitution in *D C Wadhwa vs State of Bihar.* Wadhwa, a professor of political science, challenged the power of the Governor to repromulgate various ordinances in Bihar, after 256 were repromulgated between 1967 and 1981. Out of them, 69 were repromulgated several times and kept alive with the permission of the President. A constitution bench of the Supreme held that "an ordinance promulgated by the Governor to meet an emergency situation shall cease to be in operation at the expiration of six weeks from the reassembly of the Legislature." The governments continued to flout the judgment. In 2017, a seven-judge constitution bench reiterated the law in *Krishna Kumar Singh vs State of Bihar.* It held that repromulgation of ordinances is a fraud on the Constitution and a subversion of legislative processes. Despite these definitive judgments, governments have taken the ordinance route to overcome judgments.

**New law to defuse tension**

A government with an eye on vote banks would not hesitate to pass a new law if court judgements stand in its way. The most infamous instance from the past is the government's reaction after the *Shah Bano* judgment in 1985. A constitution bench had held that divorced Muslim women are entitled to maintenance under Section 125 of the secular Criminal Procedure Code. This ruling had hurt a conservative section of the Muslim community which insisted that the secular law was not applicable to them. Soon after the judgment, Parliament passed the Muslim

Women (Protection of Rights on Divorce) Act, 1986, which nullified the Supreme Court's decision. The amended law stated that maintenance could be paid only during the iddat period. The Supreme Court has since changed the position in favour of women in *Daniel Latifi vs UOI (2001).*

**Ignore the judgments**

Aadhaar card was originally limited to claim state subsidies and benefits. The Supreme Court had passed orders to that effect. A nine-judge bench of the Supreme Court delivered an elaborate judgment in *Puttaswamy vs Union of India* in 2017, emphasising the right to privacy in various contexts. It held that it is an intrinsic part of the right to life and liberty. However, the erudite judgment has been rendered practically ineffective because the governments have disregarded the principle and also failed to cope with the advances in cyber science. Aadhaar has run out of control and now pervades every aspect of life and death.

One more example: Delays in deciding petitions for disqualification of defecting legislators have saved several state ministries. In 2020, the Supreme Court had called for an impartial tribunal to decide disputes over disqualifications as the anti-defection law had several loopholes. "Parliament may seriously consider amending the Constitution to substitute the Speaker of the Lok Sabha and Legislative Assemblies as arbiter of disputes concerning disqualification," the court said while hearing an appeal related to the disqualification of a Manipur minister. This call has been repeated in other judgments, with no effect.

### Playing hide and seek

Another way to outmanoeuvre the court is to play hide and seek with the judgments and orders. This game was played, for instance, when tribunals were being set up to lighten the burden of regular courts. The war of attrition started when administrative tribunals were set up in the early 1990s. Appointment to the tribunals, some forty at one time, was the field of contest between the bureaucrats and the judges. The draftsmen in the ministry tended to fill the tribunal benches with their own retired brethren. Judicial members were absent in many. The court insisted that the tribunals must have a judicial member. The law was tweaked several times, but ultimately the judges had their way after the passage of the Tribunal Reforms Act, 2021.

### Fait accompli ploy

There is a time lag between the delivery of a court order and the time it takes to reach the place where it has to be enforced. So authorities who anticipate an adverse order swing into action before the order is served on them. Municipal authorities use this strategy effectively to defeat justice when properties have to be demolished. By the time the victims move the court, the damage is already done and the court is presented with a fait accompli. The judges can do little to reverse the destruction already done.

### Reluctant implementation

There are several judgments which were meant to protect the basic rights of accused persons. The enforcing authorities have ignored them. The judgment on police reforms, celebrated at one time, is one stark instance. Prakash Singh, a top police officer, moved a petition in the Supreme Court

in 1996 to implement reforms suggested by the National Police Commission in 1981. The judgment, *Prakash Singh vs Union of India*, was delivered after ten long years, in 2006. The court passed a series of well-intentioned directions. The central and state governments did not take any substantive action, despite contempt petitions. The judgment would have checked the politicisation of the police. But politicians want the forces to remain under their thumb. As a result, phenomena like 'encounter deaths' have become par for the course. A survey conducted by Common Cause-Lokniti-CDS in 2025 found that 22 per cent of the policemen thought encounter killings were better than waiting for trials and almost a third justified torture.

**Cloak and dagger moves**

So far the discussion was about government manoeuvres after the judgment adverse to it has been delivered and the order had become final. Sometimes the manipulations begin even before the case comes up before the judges or during the hearing. A telling example was the behind-the-curtain moves in the Kesavananda Bharati case, described by persons who should know. Kesavananda Bharati was a young monk from Kerala, who took sanyas at 19 and was a Carnatic and Hindusthani vocalist. He was the head of a Mutt. In 1970, he filed a case challenging the Kerala Government's attempts to acquire the Mutt's property through the Kerala Land Reforms Act. Since the case involved seminal constitutional questions, the case was argued by the famous lawyer Nani Palkhivala. Though the name of the pontiff echoes in Parliament and constitutional courts even today, he had little role in the legal spectacle enacted in the court and was much less aware of the intense political battle fought behind

the scenes. He was surprised that his case was getting such great coverage in the press. He was more concerned about the legal fees due to the eminent counsel whom he had never met or engaged. But the counsel was arguing almost free to save the Constitution. Palkhivala argued that the law violated Bharati's fundamental rights, particularly his right to religion (Article 25). The case was heard by the largest Constitution bench ever held, with 13 judges. It was also the longest hearing as it lasted some 68 working days.

A number of unsavoury episodes marred the proceedings, according to T R Andhyarujina's book, *Kesavananda Bharati case: The untold story of struggle for supremacy by Supreme Court and Parliament*. During the hearing, the petitioners' side believed that the proceedings were leaked to the government by one judge. It is stated in the book that the draft judgment came into the hands of the government even before it was delivered.

There were many more unpleasant episodes during the hearing. Jaganmohan Reddy, a member of the bench, has written that during the arguments, Attorney General Niren De was most arrogant and rude, and suggested, not in so many words, that the court's future would be at stake. Palkhivala, in his book *Our Constitution Defaced and Defiled* wrote that during the hearing De "expressly referred in open court, both orally and in writing to the alternative of 'political action' if the Supreme Court's rulings did not find favour with the government." This was a warning of the impending supersession of judges.

The health of Justice M H Beg, one of the judges on the bench who was a favourite of the establishment, was also a talking point at that time. He fell ill three times and was

hospitalised even in the last days of the hearing. It gave rise to rumours that the illness was feigned to delay the completion of the hearing as the trend was against the government. CJI Sikri visited AIIMS to check whether Beg was seriously ill and asked for a medical certificate. He had high blood pressure.

Sikri was to retire on 25 April 1973. If the marathon hearing did not complete before that, a new bench would have to hear the case all over again. Ultimately, the hearing closed on 23 March 1973 and the rest of the arguments were allowed to be submitted to the court in writing. The judgment was delivered on the last working day of Sikri. The doctrine of Basic Structure was firmly entrenched in the Constitution.

The whole story revealed that the government would try to get a favourable decision even before the hearing and at the summit level. The Supreme Court Rules or conventions do not provide adequate guidance in listing of cases, leaving scope for 'forum shopping' and 'bench hunting'. Moreover, the CJI as Master of the Roster could decide the bench and the timing of the hearing, which was the subject of the historic press conference of the four senior-most Supreme Court judges.