**How to Cite:**
**Prashant Barthwal and Shashi Kant (Dec 2018).** ***Judging the Judges: Politicization of Indian Judiciary***
*International Journal of Economic Perspectives*,*12*(1), 154-161.
Retrieved from https://ijeponline.org/index.php/journal/article

# *Judging the Judges: Politicization of Indian Judiciary*

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**Abstract:**Judiciary plays a significant role as a wing of democracy which helps in sustaining the regulation of law and order along with executive and legislative institutions. Undoubtedly, Judiciary has a unique stand and plays a crucial role which is considered as lenders last resort (for justice). In a democracy, it is creating conflicts when an institution trespasses over other's jurisdiction.Many political theorist and legal experts believe that is a mechanism which reflects the supremacy of the constitution and universality of rights and laws. This study is not just an analysis of Indian Judicial system rather on the policies, attitudes, and action towards it by the Indian National Congress who holds the power for maximum time in the history of Indian politics and also to analyse the role of Congress in the, though politically influenced, appointments/transfers of the judges, a true sign of '*politicization of judiciary*'.

**Keywords**: Jurisdiction, politicization of judiciary, judicial system, appointments/transfer.

## Introduction

**C**ontemporary Indian judiciary is a continuation of the colonial judicial system the foundation of which was laid down by the Britishers. The Constitution makers were unaware for what to do with the judiciary as how its structure should like-either same as the colonial one or to come up with a rejuvenated structure. The Indian judiciary had assigned an important duty to interpret and enforce the laws and provision of the constitution which the constitution permits the existence. As the legal Constitutionalist proclaims it as the expansion of the power of judges by which judges widened the definition of the rights held to be constitutionally 'justifiable', not only widen the working arena for judges rather it also creates a sort of some resentment over other institutions after courts practicing this licensed permission to intervene. In the words of Judith Shklar, 'politics' is regarded not only as something apart from law, but as inferior to law. While law focus on the level of justice whereas, politics focuses only to the level of expediency by which politics is regarded as the uncontrolled child of contesting interests, on the contrary law is neutral'.


*Corresponding author:* **Prashant Barthwal and Shashi Kant**
Submitted: 27Oct 2018, Revised: 09 Nov 2018, Published : Dec 2018

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Upendra Baxi states that "at this juncture of Indian Political history, the judiciary and especially the Supreme Court, is increasingly seen as the only surviving assurance of fair play and justice", and even as "last resort for the oppressed and the bewildered". [1] In Indian judicial system, Judges are always wonderful targets, for the informed as well as the ignorant, for politicians as well as lawmen. Critics of the court in India have almost forgotten that judging the judges is a very serious business, more so since judges cannot, while in office, reply and in a status-ridden society like India no one hears them whey they answer back from their retirement. Apart from the issues of parliamentary supremacy in the matters of constitutional changes, and the criteria of selection of chief justices, Indian politicians have failed altogether to identify what they mean by a good judge and a good decision; they have had no time, even the party theoreticians and ideologues, to articulate any comprehensive political critique of the court.[2]

Significantly, A. G. Noorani states that in other democracy governed by the rule of law does the higher judiciary present as pathetic a spectacle of itself as does the higher judiciary in India. This is the direct result of the policies, particularly regarding appointments to the judiciary, which successive Prime Ministers have pursued in the last two decades. Not that the ones followed earlier were without flaws or that the Judges themselves did not contribute to the steep decline in the credibility of the institutions over which they presided.[3] H. M. Seervai's aptly remarks that what can only be called a lack of judicial discipline on the part of some judges of the Supreme Court in deciding important questions of constitutional law, by their persistent proneness to subjective opinions in disregard of precedent and, not seldom, of the fundamentals of the constitution itself.[4] As the Indian Court has not merely the power to read down statutes or to hold executive action illegal and void but also to strike down laws. What is more, it has also the power to review and invalidate constitutional amendments.[5] According to the published report in Indian Express, 'with all arms of the republic, including the judiciary, almost prostrating before the ruling party, the media has been an affective instrument of restoring some balance in the system.'[6]

[1] Upendra Baxi, The Indian Supreme Court and Politics, Eastern Book Company, Lucknow, 1979, p. xi.
[2] ibid, p. 5.
[3] A. G. Noorani, '*The Prime Minister and the Judiciary*', in B. D. Dua (ed.) Nehru's to the Nineties: the changing office of Prime Minister in India, OUP, 1990, p. 94.
[4] H. M. Seervai, *Constitutional law of India*, 4th ed., Vol. 1, Bombay, 1991, pp. 224-36.
[5] Upendra Baxi, op. cit., p. 10.
[6] Indian Express, 9th May 1992.



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**Appointments of Judges: *journey begins*.**

In the history of world's most powerful courts, India had, between 1950 to 2009 which includes 37 Chief Justices, 189 Judges who served on the Supreme court of India and High Courts.[7] Gradually, the Indian Constitution formally provides the criteria for the appointments of the individuals to the Supreme Court: - (i) high court judges of five years' standing, (ii) high court lawyers of 10 years' standing, and (iii) distinguished jurists', that is, law professors or others."[8] If the jurisprudence of the first three decades of the Court was defined by a struggle for custody of India's Constitution, the politics of the next three decades were delineated by a tussle for custody of the Court's composition.[9] When the Constitution came into being, it said that appointments to the Supreme Court were to be made by the President of India, and that the Chief Justice of India (CJI, hereafter) only had to be 'consulted' in the process. In 1981, perhaps, the longest set of judicial ideas ever produced by the court, the court upheld that the power to appoint judges laid with the executive- i.e. "the recommendation made by the CJI would not be limited on the executive".[10] In 1990s, the court, once again, upheld the advice of the 'collegium' of different judges that consists of CJI and the other four senior most judges those were binding on the executive and subsequently, Collegium helped in the selection for the court judges". [11]

The Supreme Court, after reframing the legal provisions of Indian Constitution, came into existence on 26th January 1950. Harilal J. Kania, who was the Chief Justiceof India (pre-Independence) resultantly became the CJI of Independent India [12] after William Patrick Spens had resigned from the post of Chief Justice of India. Admittedly, Kania's appointment took place even though Prime Minister Nehru had expressed doubts about whether Kania should become CJI.[13]Confrontation amongst the executive and judiciary, was highlighted, in 1972-73in the case of *Kesavananda Bharati v. State of Kerala*. [14] After this, rumours had started to do the rounds that the government was preparing to 'pack' the Court in order to

[7] S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, New Delhi, OUP, 2002.
[8] Article 124(3), Constitution of India.
[9] Abhinav Chandrachud, *An Empirical Study of the Supreme Court's Composition*, Economic & Political Weekly, 46(1): 2011, pp. 71-77.
[10]*S. P. Gupta v. President of India*, AIR, 1982 SC 149; (1982) 2 SCR 365.
[11]*Supreme Court Advocates on Record Association v. Union of India*, AIR 1994 SC 268; In *re Presidential Reference,* AIR 1999 SC 1.
[12]For more detail, *Second Schedule*, Part D, paragraph 9(3)(a), Constitution of India.
[13] Nehru's letter to Sardar Patel, 23rd January 1950, where Nehru wrote a letter to Patel in against of Kania's dissent voice against his work action. He said, "we should ask Chief Justice Kania to resign. It would be a great risk to make him the permanent Chief Justice of the Supreme Court of India". For more detail, see D. Das (ed.), Sardar Patel's Correspondence 1945-50, Vol. 10, Ahmedabad, 1974, pp. 305-6
[14] *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.



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have the *Golak Nath* decision overruled. The next moment it was announced on All India Radio that the next CJI expected to be, nonetheless, Justice Ajit Nath Ray- the fourth most senior puisne judge on the court at the time, a judge who was not in the line of succession according to the seniority norm. "The three judges who had been superseded- Justices Shelat, Hegde, and Grover- had repeatedly held against the government's position in many of the key confrontational cases".[15] This punitive supersession of "three senior judges created a national outrage".[16] The three superseded judges had clearly been "punished by the government for holding against it". [17] Accordingly, Jayaprakash Narayan wrote to the Prime Minister on 27th June 1973:

*"The simple fact is, as I have said in my statement, that if the appointment of the Chief Justice of India remains entirely in the hands of the Prime Minister of India, as has been the case in the present instance, then the highest judicial institution of this country cannot but become a creature of the Government of the day". [18]*

Unfortunately, the (un)constitutional loyalty comes for a family from two central government ministers, the minister for Law and Justice, H. R. Gokhale, and the Steel, Mines and Power, S. Mohan Kumaramangalam [19], who propounded the doctrine of '*committed judges*' in Parliament while defending the (un)constitutional actions by Smt. Indira Nehru Gandhi. Another instance came into the light after the judgment on *Indira Nehru Gandhi v. Raj Narain*[20] where Supreme Court declared the ouster clause (4) of the new article 329A to be void as violating the 'basic structure' of the Indian Constitution. Thereafter, 42nd amendment act 1976 curbed the democratic characteristics of the Indian polity. The main objective of this amendment is to wipe out all the 'unamendable' features of the constitution or to exempt the constitutional amendments from Judicial (over)reach. On this note, Law Minister of India [21] H. R. Gokhale threatened the Judiciary during the debate on the amendment in the Lok Sabha on 28th October 1976- "if the supreme court were to strike

[15] '*3 Superseded Supreme Court Judges Resign in Protest*', Times of India, April 1973.
[16] Kuldip Nayar, '*Supersession of Judges*', 1973, Indian Book Company, New Delhi.
[17]For more detail, Granville Austin, *Working a Democratic Constitution*, p. 281 and M. Hidayatullah, My Own Bosewell, 1981, Gulab, New Delhi, pp. 218-20.
[18] S. Mohan Kumaramangalam, Judicial appointments: An Analysis of the recent controversy over the appointment of the Chief Justice on India, Gulab, Delhi, 1973, p. 83.
[19] S. Mohan Kumaramangalam in his *Judicial appointments* wrote 'it is entirely within the discretion of Government of the day to appoint the person considered in its eyes as most suitable to occupy the highest judicial office in the country, and to take into consideration his philosophy his outlook on life'.
[20] The Times of India had compared the judgment, Indira Nehru Gandhi v. Raj Narain as '*firing the Prime Minister for a traffic ticket*'.
[21] Gokhale's work during and after 1975 simply makes him 'LAW MINISTER OF INDIRA(INDIA)'. (my emphasis).


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down a Constitution Amendment", hereafter, he said, it would be a "*bad day for the judiciary*".[22] With the disappointment in mind, Jayaprakash Narayan made the perfect comment:

*"I must say that the High Courts have come out with flying colours in the present crisis. But the record of the Supreme Court is unfortunately very disappointing, mainly because Mrs Gandhi has packed it with pliant and submissive judges, except for a few".*[23]

**Post-Emergency reflection on Judicial appointments**

The case of *ADM Jabalpur v. Shivakant Shukla*, or the '*Habeas Corpus case*' as it came to be known, would go down as one of the low points of India's constitutional history. The only dissenting judge, Justice H. R. Khanna, held that "the state did not have the power to deprive a person of his life or liberty without the authority of law. On 18th January, Indira Gandhi decided to call elections, and 11 days later, when A. N. Ray retired on 29th January 1977, Khanna, the next most senior judge on the court, was superseded. Instead of appointing him Chief Justice of India, the government appointed M. H. Beg, next in the line of seniority and later received honour".[24] The two instances of supersession had taken place one after the other- Ray had superseded three judges after Sikri retired, and now Beg was made to supersede Khanna when Ray retired. The government was only continuing its policy of overlooking unfavourable judges for appointment to the post of chief justice, "fully in keeping with the declared policy of the government". [25] On 14th January 1950, her Law minister, P. Shiv Shankar, "*We are going to give a fresh look to the policy and manner of appointment*". [26] In the other case, March 1981, Indira Gandhi hinted at "a large scale (re)shuffling of administrative and judicial services to undo appointments made during 1977-9".[27] Justice O. N. Vohra, had held against Sanjay Gandhi in the *Kissa Kursi Ka*[28] Case

[22]Lok Sabha Debates, 5th Series, LXV, no.4, 28th Oct 1976, Col. 10
[23] Jayaprakash Narayan on Indira Gandhi during his rally against her 'court packing' movements, People (Pune), 15th Sept. 1976, p. 36.
[24]After his retirement, Justice M. H. Beg was appointed as a director of the newspaper, NATIONAL HERALD, that was fully owned by the Indian National Congress Party. Also, in 1980, Beg was appointed as the Chairman of the Minorities Commission after Indira Gandhi's return to power. Hence, this clearly reflects the political sign of intervention by the Indian National Congress Party at regular interval.
[25] Times of India, '*Beg is named Chief Justice*'.
[26] The Statesman, 15th Jan. 1980.
[27] Indira used to say that the 'Janata and Marxist governments had made political appointments to the high courts, and in a speech, publicly asked, 'Can we expect justice from those who are so closely connected with the Janata and Marxist governments? Times of India, 1981, 'Janata Made Partisan Appointments: PM', Times of India, 17th March, p. 7.



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and was perhaps seen as a political enemy. Based on this ill-will political involvement in Judicial system, Justice Bhagwati held that while appointing Judges, one needed to look not merely at the judge's professional competence, but also at his '*social philosophy*'. He wrote: -

> "The appointment of a judge of a High Court or the Supreme Court does not depend merely upon the professional or functional suitability of the person concerned in terms of experience or knowledge of law though this requirement is certainly important and vital and ignoring it might result in impairment of the efficiency of administration of justice..." [29]

CJI Y. V. Chandrachud, after retirement, in his candid interview gave a graphic but brief description of his conversations with Mrs. Indira Gandhi on judicial appointments during her tenure. She told him: "*My Partymen come and tell me that the Chief Justice wants that man to be appointed. I know you have no politics in you. But I am a political leader, I must carry my people with me. I cannot displease my own people. My difficulties are political difficulties."*[30] R. Dayal, the magistrate who had ordered her release in October 1977, superseded thirty District Judges and was made Commissioner for *Sick Mills".*[31] Another instance is of, Justice Baharul Islam, also a former Congress leader, was appointed as a judge of Guwahati High Court. He retired as the Chief Justice of the High Court on 2nd March 1980. The*Second Judges case* would be decided by the Supreme Court of India nearly 12 years after the first case had been decided. Between December 1981 (the *first Judges Case*) and October 1993 (the *second judges'* case), the political landscape of India would drastically change. The All India Radio announced "the prime minister's death at 6 pm, and eight hours later, Rajiv Gandhi, her elder son, was sworn in as the New Prime Minister of India."[32] In May 1985, a bench of three judges of the Supreme Court of India accused the Rajiv Gandhi government of packing the high courts with "*sycophant judges*". [33] Further, Chawla himself wrote, "the message was crystal clear: Keep a judge in an acting position so that he concurs with the Government's recommendations on appointments to the bench in the hope of getting confirmed himself".[34] The judges transfer policy was being applied by the executive in a selective and arbitrary manner. The transfer policy required that a high court chief justice

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[28] V. C. Shukla, former Minister for Information and Broadcasting, and Sanjay Gandhi, Indira Gandhi's son, were involved in destroying a film critical of the Congress Party, *Kissa Kursi Ka* (The Story of the Seat). See also *State Through Delhi V. Sanjay Gandhi*, AIR 1978 SC 961.
[29] S. P. Gupta v. President of India, 1982, p. 546.
[30] The Statesmen, Sunday, 21st July 1985.
[31] Indian Express, 5th December 1980.
[32] Times of India, 1984, '*Nation Mourns Indira*', 1 November, p. 1.
[33] Prabhu Chawla, *Flouted Guidelines*, India Today, 15th June 1985, 10(11), p. 78.
[34] Ibid, p. 78.



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come from the outside, but the policy was selectively applied.[35] The government's judges' transfer policy seemed to be one of 'pick' and 'choose'![36] Chief Justice R. S. Pathak, a senior lawyer, commented that all this pointed to the fact that "*Rajiv Gandhi (believed) in his mother's philosophy of packing the judiciary with favourites and committed judges*" and that state governments had been "*encouraged to tinker with the Judiciary*".[37]

Early in 1989, there were signs of government interfering with judicial appointments at the high courts once more. At the Madhya Pradesh High Court, once again, the acting Chief Justice G. Sohani was not confirmed as permanent Chief Justice by the government for 18 months, to use this potentially as a ploy to coerce him into accepting the government's appointments. [38] An additional judge at that court, Brij Mohan Lal, was not confirmed as a permanent judge for several years, despite having been recommended for confirmation by three high court Chief Justices (Oza, Verma, and Sohani), and three was allegedly done because Lal had struck down the government's liquor policy. [39] In the meantime, the judiciary, in 1990s, was suffering from a crisis of credibility. A day before retirement, CJI E. S. Venkataramiah, told Kuldip Nayar, that the "judiciary in India has deteriorated in its standards because such judges are appointed, as are willing to be 'influenced' by lavish parties and whisky bottles".[40] Allegation of corruption were also beginning to emerge against a sitting Supreme Court judge, something that had not happened since the inception of the court- V. Ramaswami, a sitting Supreme Court judge, was being accused of misusing his office as Chief Justice of the Punjab and Haryana High Court. Soli Sorabjee, a noted Supreme Court senior lawyer, said that "Standard of Judicial integrity had fallen alarmingly".[41] Chief Justice Sabyasachi Mukharji said that the judiciary was facing a "crisis of credibility".[42] As, reported in India Today that he had been appointed Chief Justice of the Punjab and Haryana High Court because he had "promised to be strict in granting bail to

[35] For instance, Yogeshwar Dayal was made Delhi High Court Chief Justice and K. N. Saikia was made Gauhati High Court Chief Justice, and both these judges had served as puisne judges on these courts respectively. Debi Singh Tewatia, Chief Justice of the Punjab and Haryana High Court, was transferred to the Calcutta High Court, was transferred to the Calcutta High Court only a day after he took over as Chief Justice of his own court. Tewatia had made a pro-communist speech during the Emergency, which some felt might have influenced the decision to transfer him. See also, Prabhu Chawla, '*Shuffling the pack*', India Today, 15th November 1987, 12(21), p. 76.
[36] It included the Delhi High court Chief justice T. P. S. Chawla and the Punjab and Haryana High Court Chief Justice, H. N. Seth. See also Chawla, '*Shuffling the Pack*', p. 76.
[37]Chawla, Shuffling the Pack, p. 76.
[38] N. K. Singh, Injudicious Actions, India Today, 30th June 1989, 14(12), p. 52
[39] Ibid, p. 52.
[40] See Vishwanath v. E. S. Venkataramiah, 1990, 92 Bom LR 270.
[41] Chengappa and Rahman, Crisis of Credibility', p. 18.
[42] Raj Chengappa, 'I feel very sorry and perturbed', India Today, 1990, 15(13), p. 22.



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militants".[43] Further, the allegation against him was that he exorbitantly spent state funds, especially to furnish and renovate his residence.[44] Especially Rajiv Gandhi had sent him as Chief Justice to Chandigarh to look after the 'terrorist Cases'.

## Concluding Observations

However, in India, though the judge's appointment is theoretically made by the president, for all practical purposes the collegium appoints judges. Given that no judge in independent India has successfully been removed by the process of impeachment so far, the collegium system illegitimately insulates the Supreme Court and the judiciary from vibrant democratic checks and balances.[45]Congress being as the party who bears the power maxim time in the history of Indian democracy had played significantly with the appointment of judges according to their political interests. It not just violates the Constitutional provision rather it also humiliates the constitutional fathers who, constitutionally, had established the separation of power among the organs of the state, i.e. Legislature, executive and judiciary. Moreover, Dr. Ambedkar never imagined that the power of judicial appointment would rest specifically with either executive or the judiciary. It was intended by the founding fathers to put check and balances amongst the organs of the state, i.e. executive, legislative and judiciary. Henceforth, the discourse of the Indian judicial system as an institution that perhaps may not have a golden historical record specifically in the judicial appointments and transfers, but it always projects certain innovative ideas, out of the political intervention, that will perhaps help to ensure the democratic governance more robust.

[43] Rahul Pathak, 'The Judiciary- Crumbling Citadel', India Today, p. 52. Moreover, Pathak also observed that "the system is growing under its own weight. There are far too many cases, too many unnecessary adjournments and often pointless appeals. Cost of litigation is exorbitant the process tedious and the quality of justice given the appalling lack of talent, is suspect".
[44] Manoj Mitta, 'Move to Impeach Justice Ramaswami', Time of India, 3rd March 1991, p. 24.
[45] Abhinav Chandrachud, The Insulation of India's Constitutional Judiciary', EPW, 2010, 45(3): 38-42.



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