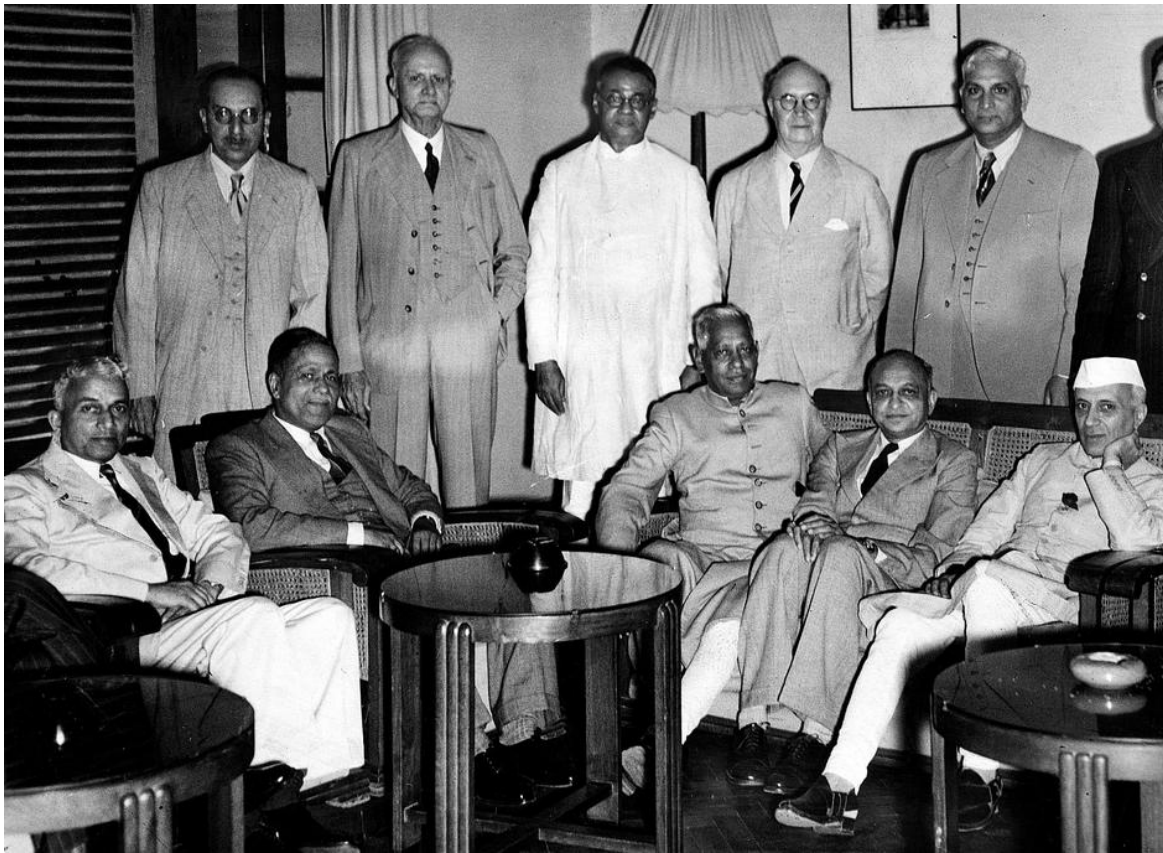


STATE OF INDIA'S JUDICIARY

## Judges & their bogus collegium

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New Delhi, March 27, 1948: When Chief Justices of the High Courts met to discuss the legal implications of the draft Constitution. Nehru was a guest. | Photo Credit: THE HINDU PHOTO ARCHIVES

*The decline of the judiciary started early in the history of independent India.*

Justice P. Jaganmohan Reddy was one of the finest judges the Supreme Court ever had, fiercely independent and devoid of communal bias or any other prejudice. His frank memoir, *The Judiciary I served* (Orient Longman, 1979), is a mine of useful information. He recalled Chief Justice of India Harilal J. Kania's visit to Secunderabad when the judge presided over the Sessions Court. "Towards the end, Chief Justice Kania made one important remark about the judiciary and its structure which made a deep impression on me. He said, 'The British have given us a fine system of judiciary on a platter. No doubt, a little mortar is falling here; a little brick is coming out there. But don't destroy it by trying to interfere with the edifice. You may repair it or add to it or alter it somewhat, without destroying the structure as a whole.' I could never forget the sagacious and salutary injunction."

This passage occupied page 42 of the book. Towards its end one learns of the decline of the judiciary and how it happened. The tallest leaders had little understanding of these matters, and that applies to the judges also. Chief Justice H.J. Kania and Justice M.C. Mahajan, a politician on the Bench, locked horns publicly during the hearings in the A.K. Gopalan case, even as early as 1950.

But you must read Volume 10 of *Sardar Patel's Correspondence* (Navajivan Publishing Housing) to realise how the leaders fared. On January 23, 1950, even before the Constitution had come into force, Prime Minister Jawaharlal Nehru wrote to Vallabhbhai Patel complaining about CJI H.J. Kania over a matter pertaining to a highly respected Judge of the Madras High Court Justice Bashir Ahmed . Nehru wanted Kania to resign. Patel replied the same day. "I am fully conscious of his faults, but, on the whole, I think I have been able to *manage* him. This is the only time when he has pressed his views to this extent, otherwise, in the past he has generally deferred to my views; or, indeed, to your views whenever you had any occasion to discuss matters with him. He is sensitive on certain points. He is even liable to become petty-minded and persist in his attitude; but that, unfortunately, is a trait not uncommon with some heads of the judiciary who feel that they have the sole monopoly of upholding its independence,

integrity and purity.” (Emphasis added, throughout). It is alarming to think of any government minister being able to manage a judge.

The scheme of Supreme Court judges did not begin well from the word go, though the framers of the Constitution had laboured hard to ensure judicial independence.

**Also read: [Indian judiciary needs reforms](#)**

At the very early stages of its deliberations, the Constituent Assembly set up an ad hoc committee on the Supreme Court, consisting of some of the greatest jurists in the country. In its report on May 21, 1947, the committee declared emphatically that “we do not think that it will be expedient to leave the power of appointing judges of the Supreme Court to unfettered discretion of the President of the Union”.

**Highlights**

- **The scheme of Supreme Court judges did not begin well from the word go, though the framers of the Constitution had laboured hard to ensure judicial independence.**
- **The policies of Prime Minister Indira Gandhi and Prime Minister Rajiv Gandhi effectively suborned and undermined the judiciary.**
- **The Supreme Court, as an institution, assisted in the process of the undermining of the judiciary.**

Very relevant are the observations of the Chief Justice of India Justice P.N. Bhagwati in the famous judges’ case. He observed: “There must be checks and controls in the exercise of every power, particularly when it is a power to make important and crucial appointments and it must be exercisable by plurality of hands rather than be vested in a single individual. That is perhaps the reason why the Constitution-makers introduced the requirement in clause (2) of Article 124 that one or more judges out of the judges of the Supreme Court and of the High Courts should be consulted in making appointment of a Supreme Court Judge. But even with this provision, we do not think that the safeguard is adequate because it is left to the Central government to select any one or more of the Judges of the Supreme Court and of the High Courts for the purpose of consultation. We would rather suggest that there must be a collegium to make a recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be more broad-based and there should be consultation with wider interests.”



**Former Union Law Minister A.K. Sen. | Photo Credit: Twitter /@incindia**

Such a collegium will also provide a solution to the problem of the transfer of High Court judges. One had regarded this as one of the excesses of the Emergency. Unfortunately, the practice was revived by the Union Law Minister after Indira Gandhi came back to power in 1980. The law relating to public servants rightly recognises that transfers can be one of the forms of punishment. Accordingly, when the Constitution 15th Amendment Act, 1963, was being debated in Parliament, Union Law Minister A.K. Sen assured the Lok Sabha on April 30, 1963, that the provision for transfer was not “designed to coerce the judges and to keep

them in a state of perpetual fright". He pointed out that the Constitution already contained a provision for transfer of High court judges. What he sought to ensure by the 15th Amendment was payment of compensatory allowance for the transfer. He pointed out that despite the existence of the provision for the transfer, never had a High Court judge been transferred without his consent.

To quote his assurances in the Lok Sabha: "I said that we had accepted it as a principle that so far as High Court judges were concerned, they should not be transferred excepting by consent. This convention has worked without fail during the last twelve years, and all transfers have been made not only with the consent of the transferee, but also in consultation with the Chief Justice of India." He went on to add: "The plenary power of transfer has never been exercised and transfers which have been effected since the Constitution have always been made with the consent of the transferee and in consultation with the Chief Justice of India." Those assurances have been violated.

M. C. Chagla, in his capacity as Chief Justice of Bombay High Court, delivered political speeches.

## Judges and politicians



Former Prime Minister Lal Bahadur Shastri. | Photo Credit: KN CHARI

Nehru's successor, Lal Bahadur Shastri, saw nothing wrong in nourishing a close personal relationship with the Chief Justice of India and misusing his name to secure the resignation of a Cabinet colleague. Chief Justice P.B. Gajendragadkar hugely enjoyed the relationship, volunteered advice on diplomacy, and was by no means resentful that Shastri had lied to the Cabinet colleague, saying that the Chief Justice had found a *prima facie* case which he was prepared to inquire into. That Minister, T.T. Krishnamachari, was also a "friend" of Gajendragadkar with whom "my relationship was very cordial and indeed personal".

Krishnamachari had been indicted only a few years earlier by the Chagla Commission and had been obliged to resign. Ironically, Chagla found his way into the Cabinet, in fulfilment of political ambitions which his memoirs lay bare, and became a colleague of Krishnamachari.

Shastri was Prime Minister for barely a year and a half (June 1964 to January 1966) and material on his policies towards the judiciary is sparse. The same cannot be said of the periods during which Indira Gandhi (1966-77 and 1980-84) and Rajiv Gandhi (1984-89) served as Prime Minister. Their policies effectively suborned and undermined the judiciary; and the Supreme Court, as an institution, assisted in the process. Several of its judges enthusiastically collaborated and secured rewards.

**Also read:** [Slow wheels of justice](#)

There arose the baleful doctrine of "committed judges". A discourteous judge is a public menace. Confident that he knows the law and the facts, conscious of his own exclusive devotion to justice, he disdains the assistance of counsel at the Bar and regards all legal argument as a waste of his precious time. The law irks and irritates him, and it is only because of the compulsion of his oath of office that he listens to these "technicalities".

The judiciary is itself largely to blame for the present condition because it has itself violated some of the laws and conventions of the judicial office. Judges talk too much in public and after retirement some of them do not follow the conventions set for retired judges. We need a code of conduct for judges. And it is a document which they alone can draft.