[**Appointing judges**](https://www.dawn.com/news/1604448/appointing-judges)

[A.G. Noorani](https://www.dawn.com/authors/1277/a-g-noorani)Published January 30, 2021

The writer is an author and a lawyer based in Mumbai.

INDIA’s supreme court is in a sad state today. The flaw lay at the very inception — the process by which its judges are appointed. It is an object lesson in how the best conceived schemes can be perverted if the men in power are left with unfettered discretion to abuse power.

The constitution empowered the president to appoint judges to the supreme court and the high courts, to transfer a high court judge from one high court to another. Underlying them were assumptions as unwarranted as they were flawed. In 1949, Jawaharlal Nehru advised the constituent assembly to consider “what rules to frame so that we can get the best material from the bar for the high court or federal court judges”. In 2021, it sounds like a cruel mockery.

The assembly had appointed an ad hoc committee. Its report of May 2, 1947, said, “We do not think that it will be expedient to leave the power of appointing judges of the supreme court to the unfettered discretion of the president of the union. We recommend that either of the following methods may be adopted. One method is that the president should, in, consultation with the chief justice of the supreme court (so far as the appointment of puisne judges is concerned), nominate a person whom he considers fit to be appointed to the supreme court and the nomination should be confirmed by a majority of at least seven out of a panel of 11 composed of some of the chief justices of the high courts of the constituent units, some members of both the houses of the central legislature and some of the law officers of the union. The other method is that the panel of 11 should recommend three names out of which the president, in consultation with the chief justice, may select a judge for the appointment.”

The effects of Indira Gandhi’s action are still felt by India’s top court.

The report was rejected. Blanket powers of appointment were given to the state conferred with inspiring rhetoric.

Dr. B.R. Ambedkar said: “The draft article … does not make the president the supreme and the absolute authority in the matter of making appointments. … The provision in the article is that there should be consultation of persons who are … well qualified to give proper advice in matters of this sort….” In this he erred woefully. The president acts on the advice of the government. He can transfer judges.

Dr Ambedkar, architect of the Indian constitution, also said, “We also took into account the fact that this power of transfer of judges from one high court to another may be abused. …[We] have introduced a provision that such transfers shall take place in consultation with the chief justice of India who can be trusted to advise the government in a manner which is not affected by local or personal prejudices.” The possibility of abuse of power by the central government was remotest in his reckoning.

The trust was misplaced. Chief justices of the supreme court proved themselves unequal to the task. The winds blowing from the government dispirited them. In 1958, the law commission opined: “It is widely felt that communal and regional considerations have prevailed in making the selection of the judges.”

Clearly, by 1958, the constitutional scheme had failed. The slide downwards had begun. The judges accelerated the pace from 1971 to 1978; prime minister Indira Gandhi dissolved the Lok Sabha and emerged all powerful.

On April 24, 1973, the supreme court ruled that “the basic structure” of the constitution is not amendable. The very next day, Mrs Gandhi struck a terrible blow. She violated an unbroken rule of seniority in the appointment of the chief justice of India by nominating to the office a sycophantic favourite. The Indian supreme court has still not quite recovered from that blow. In this train followed the sweeping transfer of 16 high court judges in 1976 during the Emergency. The governments that followed stuck to the seniority rule for the chief justice but exercised the power of transfer of high court judges. Mrs Gandhi’s return to power and Rajiv Gandhi’s regime followed the same traits.

In this clime, two former chief justices of India suggested a collegium to appoint judges to superior courts. The idea was put into action, not by a constitutional amendment, but by an ipse dixit of seven judges with two dissenting. The majority gave the primacy to the chief justice provided he consulted some judges on judicial appointments to the supreme court and the high court. On transfers he had more than primacy. His views were final and beyond. This judgement was delivered on Oct 6, 1993.

The last 28 years do not reveal superior judgement by this ‘collegium’ based not on law but on judicial excess.

A law on a judicial appointments commission was struck down by the court. The court has been criticised for its pro-executive rulings in recent years. Clearly a thorough reform is called for. It is men who work a constitution and build a state.

*The writer is an author and a lawyer based in Mumbai.*

*Published in Dawn, January 30th, 2021*