

## PARADIGM SHIFT IN COLLEGIUM- ANOTHER BLACK DAY, ANOTHER SUPERSESSION

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Last year on 12th January 2018, the four senior-most judges after the then Chief Justice of India Dipak Misra - Justices Chelameswar, Ranjan Gogoi, Madan Lokur and Kurian Joseph, in a first of its kind press conference had said that "unless the Supreme Court is preserved, democracy will not survive"<sup>1</sup>. Justice Gogoi had said "It is a discharge of a debt to the nation that has brought us here. And we think that we have discharged our debt to the nation by telling you what is what."<sup>2</sup> Irony of ironies is that one year since the 'historic' press conference, Justice Gogoi (who now is the Chief Justice of India) led collegium on 10th January, 2019 took certain decisions which were appalling, arbitrary and raised lots of eyebrows across the bar and the bench. The collegium resolved to elevate Justices Sanjiv Khanna and Dinesh Maheshwari to the Supreme Court. The shattering fact and one that raises apprehensions not only on the Chief Justice and the whole collegium but also questions the integrity, opaqueness and arbitrary working style of the collegium system. The fact of the matter is that Justice Sanjiv Khanna stands at number 33 in the combined seniority of High Court Judges on an all-India basis, which therefore leads to supersession of 32 other judges. Another huge irony of the present matter is that Justice Sanjiv Khanna's uncle is none other than the great Justice H.R. Khanna. Justice H.R.Khanna was the lone dissenting judge in the infamously famous *habeas corpus* case i.e. *ADM Jabalpur v. Shivkant Shukla*<sup>3</sup>. As a result of his dissent and the act of upholding the democratic principles, he became the second judge in Indian judiciary to be superceded. And today his nephew is being elevated as a means of supersession which he fell victim of.

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<sup>1</sup> INDIA SUPREME COURT JUDGES: DEMOCRACY IS IN DANGER, <https://www.bbc.com/news/world-asia-india-42660391> (last visited Jan. 17, 2019).

<sup>2</sup> SUPREME COURT JUDGES' PRESS CONFERENCE, <https://timesofindia.indiatimes.com/india/shock-sc-judges-press-conference-let-nation-decide-about-cjis-impeachment/articleshow/62471142.cms> (last visited Jan. 17, 2019).

<sup>3</sup> (1976) 2 SCC 521

Moreover, Justice Sanjiv Khanna is being directly elevated from his parent High Court, i.e. Delhi High Court to the Supreme Court. Since December 1997, mere 6 Judges have been elevated from their parent High Court to the Supreme Court. It is also worth noting the fact that three senior judges whose parent High Court is Delhi High Court, Justices Pradeep Nandrajog, Gita Mittal, and Ravindra Bhat have been superseded without any reasoning. Not questioning the competency and integrity of Sanjiv Khanna J. in any manner whatsoever, this unusual supersession shatters the system as questions are posed on the merit, intellect and integrity of the superseded judges.

The collegium met on December 12, 2018 and took certain decisions. This fact is confirmed by the January 10, 2019 resolution which mentions; "The then Collegium on 12th December, 2018 took certain decisions."<sup>4</sup> According to the leaked news reports<sup>5</sup>, among the decisions taken and resolved were the elevation of Rajasthan High court Chief Justice Pradeep Nandrajog and Delhi High court Chief Justice Rajendra Menon to the Supreme Court. The 10th January, 2019 resolution overturned this decision putting the collegium system back into the mainstream debate. The practice which prevails is that the collegium resolution is uploaded on the Supreme Court website. Can the Chief Justice of India suo motu resist publication of a resolution of the collegium? Under what authority is he empowered to act in such an arbitrary manner? The January 10, 2019 resolution states that when the collegium changed after Justice Lokur retired on December 31, 2018 the decision taken on December 12, 2018 was not put in the public domain as "the required consultation could not be undertaken and completed as the winter vacation of the Court intervened."<sup>6</sup> Contrastingly, three judges in the collegium at that time had worked with Chief Justice Nandrajog and one had worked with Chief Justice Menon, while three others were aware of his functioning having been judges in the Delhi high court. Thus it was suffice enough to ascertain the views of consultee judges within the collegium itself. A decision taken by the collegium does not require any ratification by another collegium and thus it was unnecessary for the Chief Justice to have 'extensive deliberations' on January 5-6 with the new collegium to have a *paradigm shift*. If a procedure like this is followed, it can have

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<sup>4</sup> Collegium resolution, <https://barandbench.com/wp-content/uploads/2019/01/Collegium-Resolution-Jan-10-2019.pdf> (last visited Jan. 17, 2019).

<sup>5</sup> <https://barandbench.com/collegium-rajendra-menon-pradeep-nandrajog-supreme-court/>

<sup>6</sup> Collegium resolution, <https://barandbench.com/wp-content/uploads/2019/01/Collegium-Resolution-Jan-10-2019.pdf> (last visited Jan. 17, 2019).

disastrous repercussions as it empowers the Chief Justice to withhold communication to everyone else including the Government until a new collegium is constituted. This gives the Chief Justice unchecked and erratic power. It is also worth noting the sudden appearance of 'Additional material'. Collegium resolution of January 10, 2019 states that "After extensive deliberations on January 5-6, 2019, the newly-constituted Collegium deemed it appropriate to have a fresh look at the matter and also to consider the proposals in the light of the additional material that became available."<sup>7</sup> The timing of this additional material shall be questioned in order to understand the whole mishap. It was definitely NOT during the winter vacation of Supreme Court when this 'material' came up, as if it were so, the Chief Justice could have conveyed the same to the Judges of the then collegium. (Obvious assumption being that the Chief Justice did not want the 'material' to be 'his-eyes-only' for the time being) This proves that the 'additional material' must have come up only post January 2, 2019 when the Supreme Court reopened post-vacation. The 'extensive deliberation' of this material in a totally unofficial way on January 5-6, 2019 led to two consequences. An informal supersession of the December 12, 2018 collegium decision in a highly arguable manner and a formal supersession of numerous judges of various High Courts across India. Under any circumstances does this informal decision style past muster the test of judicial integrity at the pedestal of independence of judiciary and accountability of collegium? Can a decision of the Collegium be superseded? If yes, is there any formal judicial procedure to be followed? Are the judicial appointments based on the whims and fancies of the Chief Justice? Is not there any rule of law to be followed in appointing the scrutinizers of law itself? The chain of events from December 12, 2018 till January 10, 2019 makes me conclude that the 'collegium' system is procedurally flawed, opaque, unaccountable and shreds the very independence of Indian Judiciary. In the *Supreme Court Advocates-on-Record Association Vs. Union of India*<sup>8</sup>, Supreme Court uphold this very system, quashing the NJAC Act citing that it violates the basic structure of Constitution *inter alia* the independence of Judiciary. Today, this very system is affecting the previously reasoned independence of judiciary and raises a very apt question- who will hold a press conference now? Has the Master of Roster, the first amongst equals flown in the tyrannical splash of unaccountability. It reminds me of the words of U.S. Supreme Court judge Justice Benjamin

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<sup>7</sup> Collegium resolution, <https://barandbench.com/wp-content/uploads/2019/01/Collegium-Resolution-Jan-10-2019.pdf> (last visited Jan. 17, 2019).

<sup>8</sup> (2016) 5 SCC 1

Cardozo, “The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”<sup>9</sup> The following were the words of Justice Gogoi last year while delivering *The Third Ramnath Goenka Lecture*, “The freedom to say that two plus two makes four. And that is how I remember him as. Someone who could call a spade a spade; someone who could speak truth to power, even if it came at a cost. To be ready to break, but not bend could be called obstinacy by some, and determination by others. Is it a matter of perspective? I do not know. And, I cannot say for others but as far as I am concerned, I only feel that we need to ask ourselves some questions: Where is the Goenka in us, his ideals, his values? Is that extraordinary phenomenon losing its relevance today, after all these years?”<sup>10</sup> After about seven months post the delivery of that speech the Ideals of that constitutional morality which Gogoi CJI envisioned and the hope that he rekindled in the legal fraternity, that the Indian Supreme Court would be different under him than it was under his predecessor, are some of the things worth recollecting right now. James Madison writes in Federalist paper no. 47, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>11</sup> On 16 January, 2019 the collegium resolution of 10 January, 2019 elevating Justices Khanna and Maheshwari was approved by the Government and the aforementioned judges were appointed to the Supreme Court by Presidential Notification making another supersession a reality and another day a *Black Day* in Indian Judiciary.

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<sup>9</sup> Cardozo Benjamin N. *The Nature of the Judicial Process*. New Haven, CT: Yale University Press, 1921.

<sup>10</sup> <https://indianexpress.com/article/india/justice-ranjan-gogoi-at-rng-lecture-independent-judges-and-noisy-journalists-are-democracys-first-line-of-defence-5257119/>

<sup>11</sup> [http://avalon.law.yale.edu/18th\\_century/fed47.asp](http://avalon.law.yale.edu/18th_century/fed47.asp)