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FOREWORD BY EDITOR-IN CHIEF

Prof. (Dr.) Yubaraj Sangroula

FEATURE ARTICLE

Cultural Dimension of Rule of Law and Social Episteme

Prof. (Dr.) Yubaraj Sangroula

ARTICLES

Belt and Road Initiative and Nepal's Economic Perspective: Regionality and Specificity

Ashish Adhikari

Unwholesome Tendencies in the Judicial Appointment - A Nepali Perspective

Bishal Khanal

Tax Regime in Nepal - Implications on Human Rights

Dagan Omwesiga

Assessing Social Impacts of Slum Displacement on Women's Lives: A Case Study of Three Resettlement Colonies in Delhi, India.

Dr. Deeksha Bajpai and Dr. Upma Gautam

Analyzing Hindu Women's Right to Property in Bangladesh: Absolute Interest versus Limited Interest

Ferdousi Begum

Making WTO Dispute Settlement System Useful for LDCs

Prof. (Dr.) Kumar Ingnam

Religion and State: Revisions Needed in Sri Lankan Constitutional Implications

Nishandey Ratnam

Personal Law and Property Rights of Hindu Woman in India - the Need for Codification

Sindhu Thulaseedharan

LEGISLATIVE COMMENT

Assessing Impacts of Banks and Financial Institutions Act in the Development of Financial Sector

Ram Sharan Pokharel

STUDENT ARTICLES

Sexual Orientation and Gender Identities: An Analysis of the Contemporary Laws and Literature

Dhruba Yonzon

Rohingya's Genocide: Human Rights and Politics

Prachi Tomar and Aditya Pandey

Comparative Study on Anumana and Inference of Hindu and Western Philosophy

Nikhil Dongol

CASE COMMENT

An Analysis of Principle of Erga Omnes Partes with Special Reference to the Case of Belgium v. Senegal, 2012

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Unwholesome Tendencies in the Judicial Appointment - A Nepali Perspective

Bishal Khanal*

Abstract

Although judges are often examined and inspected on various court affairs and subsequent efficiency or deficiency, judge-making systems, especially supersession, is largely unchecked. Nonetheless, it comprises a huge ground for worrying domain of diminishing values and esteem of courts. Unfair practices in appointment and the way they are responded to, hugely embody devastating present and damaging future for expected strength in judiciary. This paper, besides citing various scholars' views on how a judge should be, critically examines the tendency of Supersession (one of the wrong norms in judicature) and its impacts in eroding the efficacy of judiciary.

1. General Perspective

The judge-maker is the one who can put the judicature upon ivory stature or throw it into hell. The judge-makers can give entry either to the virtuous characters or to tedious brains into judicature. Giving entry to any of them begins with belief, conviction and intent of the judge-makers. The judge making entity, if believes in righteous contribution in the judiciary, cares on creativity and nobility of potential appointees as the first choices for candidates. If the entity is guided with the evil intent of personal gain or undue influence or interest such as *nearness* and *dearness*, the choice goes to the tedious one. Unless the judge making entity is able to overcome this predicament, judicial integrity remains in great uncertainty giving long-term impacts. Therefore, judiciary can no longer remain free from thorny questions trying to seek fairness upon the noble undertaking of making judges. Judicial appointment must be indispensably fair in all democratic systems. Richard Nixon therefore observed that the American 'Chief justices have probably had more profound and lasting influence on their times and on the direction of the nation than most American presidents have had'.

Over the history, the role of judges and judge-makers has been observed in different perspectives. The proverb 'a judge and a stomach do their asking in silence' was well popular in Russian empire.² In view of Socrates, 'to hear courteously, to answer wisely,

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¹ David Shrager & Elizabeth Frost, *the Quotable Lawyer*, Aditya Books, New Delhi, 1992, p. 148.

² H.L. Mencken, *A New Dictionary of Quotations on Historical Principles from Ancient and Modern Sources*, Alfred A. Knopf, 1942.

to consider soberly, and to decide impartially' are the good rules for the judges. In 370 (BC), Plato in his book the Republic wrote that 'a judge should not be youth but old (matured)'. Charles Brown observed that 'judge like Caesar's wife, should be above suspicion'.³ A Latin proverb reads that 'the best law leaves the least discretion to the judges'.⁴ Former ABA president Bernard Segal views that 'when we put our judges in an ivory tower, we put justice in ivory tower'.

Judges are viewed with harsh eyes as well. George Savile (1633-1695) observed that 'a popular judge is deformed thing, and praises are fitter for players than the judges and magistrates'. In view of Tacitus, 'judges are best in the beginning but they deteriorate as time passes'. Over two millennia ago, Roman lawyer Cicero observed that 'judges giving judgment by law ought to be obedient to the law'. John Ciardi once wrote that 'the judge who does not worry before passing a sentence is a criminal'.

Francis Bacon said, in 1623, that 'when a judge departs from the letter of law, s/he becomes a law breaker'. In view of Philip Kurland 'for the most part, judges are narrow minded, lawyers with little background for making social judgments'. Talmud had a view that 'disaster comes because the kinds of judges we have.' He goes on saying that 'a judge is disqualified for a case involving one s/he loves or hates'. Canadian judge Dana Porter once observed that 'a judge who is stupid and industrious is an unqualified disaster without question'.⁵ At the extreme, V. I. Lenin reacts by saying that 'there are no more reactionary people in the world than judges'.⁶ Many more observations on judges and judicature have been made in different ages.

2. Overcoming Political Tides - Standoff with the Judges

In India, Justice Bijan Kumar Mukherjia declined the then Prime Minister Jawaharlal Nehru's offer to become Chief Justice of India before his time by superseding the senior most judge Mehar Chand Mahajan in 1950, following the retirement of Chief Justice Patanjali Sastri. He replied to the Premier, 'I would rather resign than accept your offer'. Justice H.R. Khanna, the senior most judge of the Supreme Court of India was superseded to the position of Chief Justice as an outcome of him delivering the judgment against the intent of the Government in commonly known *Habeas Corpus Cases* of 1977. In this case, he ordered the release of political detainees during emergency period of 1975. In 1973, the Indian Government appointed 'fourth senior most' judge to the position of the Chief Justice superseding three senior judges namely Justice Hedge, Justice Salahat and Justice Grover. All three superseded judges instantly resigned from their posts in protest, and brought the issue in wider public with a view to ensure that same mistakes are not repeated again.

In June 2015, former solicitor general Gopal Subramaniam withdrew his consent

³ *Leeson v General Council of Medical Education* [1889] 43 Ch D 366.

⁴ Mencken (n 2).

⁵ Shrager & Frost (n 1), pp. 141-149.

⁶ V.I. Lenin, *Political Parties and the Proletariat*, 1917; Ibid.

to be appointed as the judge of the Supreme Court of India once he saw that the environment could tarnish the high image and stature of justice system. Once the issue of him having worked as a legal counsel for a client who was involved in certain scam came to light, he soon met the Chief Justice of India and withdrew his consent for the appointment in order to serve the larger 'interest of justice'⁷.

John Adams after his defeat in the presidential election appointed his Secretary of State John Marshal to the Chief justice of US in 1801. His ill intent behind the appointment was to grasp judicial power in his party's hand, and create trouble to the incoming government via judiciary and the Chief Justice. On the contrary, John Marshal as the Chief Justice showed his statesmanship, worked with integrity and settled all important impending disputes in the interest of country. Indeed, he improved the stature of American judicature. Consequently, the doctrine entitled *Marshal's nationalism* has been widely recognized in the US judicial history.

3. Supersession- Squeezing Judicial Self Esteem

The supersession is an exceptional rule in the judicial appointments. That can be done either as per the provision of law or at the permission of the person to be superseded or only at unavoidable circumstances. The supersession may irrecoverably damage the judicial institution for long period ahead. The supersession requires transparent, credible, convincing and compelling rules. The supersession must not be considered as a rule of reward and punishment. The supersession leads to disturbing and damaging the system.⁸ After all, termination is better than supersession, if any particular judge has to be punished by way of being superseded.

After the decision in *Keshavananda Bharati v State of Kerala* case in 1973, the Indian government appointed fourth senior most Judge A. N. Roy to the vacant post of the Chief Justice superseding Justice Shaleat, Justice Grover and Justice Hedge by ignoring all earlier practices and conventions.⁹ This led to a great outcry in the legal community. Hundreds of violent and non-violent demonstrations were held in various parts of India against supersession of the three judges.

In the Nepalese context, a few appointees resigned because they found the supersession unfair and were left feeling embarrassed due to unreasonable and arbitrary decision. The appointing authorities by giving no reasons elevated some juniors due to underlying ill intent and ulterior motive. Lately, Chief Judge of the Court of Appeal Ek Raj Acharya resigned, once he was superseded on the appointment to the Supreme

⁷ Bharath Joshi, 'Please Step Down Justice Y Bhaskar Rao Bengaluru Voices its Demand', *The Economic Times*, New Delhi, 30 June 2015.

⁸ Kuldip Nayar (ed), *Supersession of Judges*, Indian Book Company, New Delhi, 1973, pp. 9-41. In the book the issue of supersession of judges has been brilliantly analyzed by other 11 outstanding brains including three judges who were arbitrarily superseded during appointment of the of the 13th Chief Justice of India, so resigned then and there. Some observes that it was the darkest day of Indian judiciary in Independent India. By then supersession of judges was largely ignored in India.

⁹ Fali S. Nariman, 'Judicial Independence in India', in Venkat Iyer (ed), *Democracy, Rule of Law and Human Rights: Essays in Honour of Nani Palkhivala*, Butterworths India, New Delhi, 2000, pp. 24-25.

Court's judge in 2015. In 1996, Joint Secretary Mohan Mani Dahal did not accept his appointment to the judge of the Court of Appeal once he found out that he was superseded by many juniors. The appointment process has faced harsh and thorny public criticisms time and again. Despite the few notable examples, several dozens of others, who were superseded at different times, gave continuity to their jobs regardless.

In the Nepalese context, some candidates use their utmost influence by creating groups based on ideology, geographical affinity, ethnicity, and nepotistic design and so on to convince the appointing authorities to supersede their colleagues. They would hardly hesitate to ignore potential loss and erosion in the faith and values of the court and judicial system. Their efforts bring them instant personal gain but so at the expense of having caused irrecoverable harm to the institution and the public. There are instances where official was given appointment to the High Court superseding the one who started the career 15 years ago.

The above occurrences frequently throw thorny questions to the appointing authorities. Elevating by means of supersession may bring peril than expected changes and results. Repeatedly, the heads of appointing and apex judicial body are made from among those elevated via earlier supersession. The idea on which the system is working is faulty, self-centric, and lusty. It has very less dedication to the prestige of the institution and entirely guided by a need to serve self interest. To address these glaring deficiencies, focus should be paid to make perfectly functional system with consolidated efforts. Still there is a question as to whether the leadership has correct approach, honest desire, strong conviction and undoubting courage to build this system. Over the years, the public have increasingly been losing faith from the court leaders. If the system is put in place, no one needs to be unduly superseded, criticized or blamed. If not, the leadership and his/her team deserve to shoulder the blame. However, the reality remains that instead of correcting earlier mistakes, such incidents have occurred repeatedly.

4. Appointment Scrutiny- International Perspective

In cases of appointment, some countries look into the profile, leadership quality, earlier achievements and their values followed by ethical and other requirements needed to lead the judiciary. In UK, judges are appointed based on merit and earlier achievements. As regards the Chief Justice in USA, age is given consideration with person above 65 not being eligible to be the Chief Justice, but can work as a judge for life long. The SAARC countries have their own traditions of appointing Chief Justice from among senior most judges of the Supreme Court, though the law is open to appoint other judges with certain experience as well.

Harriet Miers, a presidential nominee for the US Supreme Court in 2005, withdrew her nomination after she was criticized on the ground that she possesses inadequate knowledge, has had very close tie with American President of the day, personally met couple of Republican senators, and Senate Committee chair to solicit support for her appointment. Based on those facts, Senate Judiciary Committee chair observed that she possessed less than required knowledge and efficiency to serve the Supreme

Court. In 1987, presidential nominee to the Supreme Court of US, Douglas Howard Ginsberg, a sitting judge of the Federal Court of Appeal, withdrew his nomination once he was found using marijuana during his student life in 1960s and later while working as an Assistant Professor at Harvard Law School in 1970s.

As stated above, in June 2015, former solicitor general of India Gopal Subramaniam withdrew his consent given to be appointed as the judge of the Supreme Court of India once he realized the environment could tarnish the high image and stature of justice system. He met the Chief Justice of India and withdrew his consent for his appointment in order to serve the larger 'interest of justice'. He observed as is said in Bhagavad Gita 'knowing or judging other is knowledge and knowing or judging self is the wisdom'.

In Nepal, exceptionally one or two candidates did not accept the appointment. In 2003 and in 2005, Senior Advocate Bipulendra Chakravarti did not take oath of office twice on his appointment to the judge of the Supreme Court. In 2003, he rejected the offer showing health ground, and in 2005 voluntarily, amidst criticism. In late 1991, out of several appointees from the Bar, advocate duo namely, Vijaya Kumar Gupta and Sthaneswor Bhatta withdrew their appointments at various Courts of Appeal soon after criticisms surfaced in media on the appointment.

As Justice Bijan Kumar Mukherjia and Gopal Subramnium did among others, knowing and judging self is indeed a greater quality of the judges. In case of judge, that quality has greater value. At times, people may get high rewards but self-judgment of not accepting the reward may contain higher values, much above all benefits.

5. Undue Political Influence

The Political influence appears frequent in the judicial appointments in many countries. The Appointment of 'midnight judges' followed by the Chief Justice John Marshall in 1801 over two centuries ago and appointment of former American President William Taft to the Chief Justice of the US in 1921, around a century ago among others, are some examples to this end¹⁰. The motive behind appointing John Marshall as the Chief Justice of US by defeated President John Jay in 1801 was to create problems for the victorious President and the Congress. In US, similar events happened in subsequent periods as well, although not really with ill-gutted motives. In addition, the judges of the State Courts are appointed via election in which political color obviously appears.

As mentioned above, Premier Nehru offered Justice Bijan Kumar Mukherjia the position of the Chief justice of India by superseding Justice Mehar Chand Mahajan in 1950. Justice Mukherjia declined the Premier's offer by saying that he would resign if he appointed superseding his senior, Justice Mahajan. The Supreme Court's three senior most judges, who gave the verdict against government's interest in *Keshavananda Bharati v State of Kerala* case in 1973, were superseded. The one who opined in favor

¹⁰ Gerald W. Johnson, *The Supreme Court*, Morrow, 1962 pp. 40, 48.

of government's interest was given the appointment who subsequently accepted the position as the Chief Justice of India. The appointment of V. R. Krishna Iyer, a minister of the Kerala Government, to the judge of the High Court and Supreme Court respectively also faced criticism¹¹.

Nepal is not free from political influence in appointing judges and that has become a hot issue of criticism. The lawyers, state officials and even judges have begun to attach, either directly or indirectly, to the political figures or parties. The space widened in favor of politically nearer and dearer ones has been realized on several occasions. Since the restoration of multi-party democracy in 1990, frequent criticisms have been churned and some of them have surfaced in the form of threats to judicial independence.

6. Critical Review of Judicial Appointment- Nepali Perspective

In 1991, appointments were criticized on the issue of politicization, personal favor, compromise on qualification and denial of reappointment of some superior judges. In appointments of 1997, issue of qualification and personal favor were seriously raised, again. The appointment process to the Court of Appeal in 2012 appeared even serious once media reported that some appointees visited particular political party office to extend thanks to those who favored the appointment. The criticism was made to the extent that appointment was given to the family relatives of appointing official by ignoring the principles of natural justice.

The appointment of eleven judges at the Supreme Court in 2015 also faced harsh criticisms. The appointment recommendation was made by a three-member majority (with two members in absentia) of Judicial Council comprising Chief Justice, Law Minister and Senior Judge of the Supreme Court weeks before the retirement of the Chief Justice in early 2016. The Nepal Bar and larger numbers of its members expressed antipathy over recommendation. Unfortunately, it became a topic of informal discussion in the Parliament as well. The Parliamentary Committee, an authorized scrutiny body, raised serious concerns in its meetings about some appointees. The Speaker of the House returned the file to Judicial Council for reconsideration. During criticism, media probably crossed modesty of its professional limits of expression. The civil society and legal fraternity perhaps crossed their limits of decency on healthy debates and advocacy.

In view of an expert in human rights, the recommendation on appointment of eleven judges was serious of all earlier appointments. The incident hammered upon the essence of constitution at a time of fragility of State in the ongoing transitional phase of democracy. The appointment process violated various provisions of the Constitution, Supreme Court's precedents, national and international practices. Additionally the process ignored the principles of natural justice, conflict of interest.

¹¹ Nayar (n 8).

It was drenched in mala-fide intention.¹²

More criticisms appeared on the appointment of the district judges in 2015. Against this appointment, the staff under the Attorney General made symbolic protest through pen down for days against unfair process adopted in the appointment. The Attorney General himself criticized the appointment process and stood in line with the protesting public prosecutors. The grievance surfaced heavily once numbers of junior candidates were given appointment denying efficient, senior and experienced others.

7. Indicated Main Flaws

Over the years, the grounds for criticism have categorically been defined by the media and the intellectuals. The criticisms may include the supersession of senior judges having no question of integrity and efficiency; appointment of candidates informally approved by the political powers; appointment of a former legislator representing particular political party; appointment made favoring those with undue proximity and appointment based on collegial, kinship and family lineage in clear violation of the principles of natural justice. The others include appointment of NGO based activists with whom appointing officials have informally solicited consultancy before and presumably are sympathetic to the cause put forward by them; appointment of long-term law firm partner of the sitting or incumbent law Minister and indifference towards the inclusion policy stated in the law and constitution. Additionally, the criticisms include appointment recommendation made against the precedent propounded by the bench of the recommending chief justice and judge. Precedent legally requires the presence of all the members of recommending Council for the appointment recommendation. Likewise, favoring and nominating some relatively junior lawyers and judges giving no convincing and credible reasons and ignoring *subjudice* issue with the mala-fide intention are reasons behind other criticisms.¹³

8. Unpleasant Anomalies

The intellectuals, lawyers and media have frequently demonstrated different anomalies in judicial appointments. The incoming appointing officials repeatedly change or ignore the convention and practices set by predecessors in the next process of appointment without giving credible reasons. There have been times when Judicial Council recommended beyond the notion and spirit of the apex court precedent. As an example in April 2010, a meeting of the Constitutional Council was called by its chair, the Prime Minister. Then opposition party leader Pushpakamal Dahal denied

¹² Dhruvalal Shrestha, 'Nyayadhis Sipharisma Bhagbanda (Allocation of Seats for Appointment of Supreme Court Judges based on Representation of Different Political Parties)', *Annapurna Post*, Kathmandu, 10 April 2016.

¹³ Binod Karki, 'Nyayik Rajniti Niyatranka Upaya (Ways for Controlling Politics in Judicial Appointment)', *Kantipur*, Kathmandu, 15 April 2016; Madhav Kumar Basnet, 'Byabasthit Nyayapalikako Abhyas (Effort for the Practice of Judiciary Already Managed)', *Nagarik*, Kathmandu, 4 April 2016; *Ibid*.

attendance because he should have been informed at least 48 hours earlier to the meeting as per the law. Despite this, the Commission made recommendation in his absence. Dahal filed a writ petition at the Supreme Court claiming the decision of the Council is unlawful. The Court held that the procedure set under the law should be strictly followed and therefore presence of all its members is a legal requirement for any decision of the Council. The decision taken in the absence of Mr. Dahal (a member) therefore was held unlawful. The Court considered the matter as an issue of collective responsibility¹⁴.

The Judicial Council is bound to follow the apex court precedent propounded in the above case under Article 116 (1) and (2) of the Interim Constitution, 2007 (Article 128 (4) of the present constitution) as it was constituted within the same constitutional parameter. The Judicial Council therefore seems ineligible to recommend for judicial appointments in the absence of any of its members. In addition, a very serious moral issue also prevailed before the recommending Chief Justice and the judge who was involved in propounding the above precedents. Hence recommendation for the appointment of eleven judges to the apex court by three members (two in absentia) stating the *doctrine of necessity* of the situation was therefore prejudiced and unfair.¹⁵ In addition, the Law Minister's (an ex-officio member) recommendation to his long-term partner of the law firm was against the principle of natural justice. Likewise, junior among recommended lawyers was enlisted as senior in chronological order with a covert, clandestine and *mala fide* intent of giving access to making future Chief Justice.

In *Madhav Kumar Basnet v Judicial Council and others, 2014*, the petitioner filed a writ petition with the plea to disqualify for judgeship to those who are either member of political party or contestant or party nominee for the election. The petition was under consideration of the apex court for many years. One of the candidates recommended for the apex court judge was the member of the Constituent Assembly representing a political party. The case was clearly *subjudice*. Despite this, the issue was ignored which violated Article 1 and 3 of Bangalore Principles of Judicial Conduct.¹⁶

The Speaker of the House *prima facie* found the recommendation unconstitutional and sent it back to the Judicial Council. She did not refer the recommendation to the concerned committee for the parliamentary hearing. Within few days, a single judge bench of the Supreme Court issued an order directing the Speaker to initiate the process of parliamentary hearing. The Speaker was bound to follow the Supreme Court's order under Art 116 (1) and (2) of the Interim constitution. In the meantime, the issue of violation of separation powers (of the parliament and judiciary) was raised, as well.

The appointment of judges was done employing judicial strength and by ignoring due respect to the principle of separation of powers. As a result, the integrity, neutrality and

¹⁴ Shrestha (n 12).

¹⁵ Ibid.

¹⁶ Ibid.

independence of the judiciary were exposed to trial of public. The issue of appointing eleven judges of the apex court became an indecent, unexpected and extraordinary agenda for public debate.¹⁷ The dialogues and debates endeavored to open the veil of appointment process, by going beyond the moral and civic decency of the society. Probably fore sighting this situation, former Chief Justice late Biswanath Upadhyaya once observed that reform in judicial appointment is essential to save the judiciary from political influence.¹⁸

In view of an advocate and intellectual, the phrase ‘managed judiciary’ would give the meaning against independent judiciary. The managed judiciary is an effort of the executive or other institutions to control the judiciary or direct it to perform action in line with their interests.¹⁹ In order to strengthen the Nepalese judiciary, the work should be started by abolishing the Judicial Council. Upadhyaya adds that the Judicial Council is responsible to create judicial malpractices. It usually recommends from among the mediocre lawyers and denies appointment to the efficient and experienced judges of subordinate court. Hence it is neither credible among the judges nor the people.²⁰

In view of a scholar, judges used to travel abroad under the canopy of NGOs. These NGOs, in turn, influence the judges to get favor in the judgment delivery processes. In the recent appointments, NGOs influence extended even to the appointment of apex court judges. If NGOs influence continues in tandem with the self-interest of the chairperson and members of Judicial Council, judicial independence, integrity and impartial justice will be a nightmare.²¹ The Judicial Council has apparent maladies such as rotten politics, misdeed, sycophancy, non-transparency, nepotism and so on.

In the same issue, the Chairperson with the power of calling meeting did not call the council meeting even when all the members of the council were functioning. He called the meeting only when the tenure of some additional judges of the apex court and appellate court was over. He called the meeting at the time when the Council was incomplete (only three members attended out of five), probably by creating a situation in which his interest could be served.²²

On the issue of the appointment of the 11 or 55% judges, the then Chief Justice Kalyan Shrestha clarified that ‘it was done because of the constitutional compulsion’. He opined that according to the constitution and law, the Council can make the decision in attendance of majority members (presence of all members may not be required) ignoring the established practice and convention. A person in politics yesterday may not be in politics today. They should be impartial after they are appointed to the

¹⁷ Editorial, *Annapurna Post*, Kathmandu, 10 April 2016.

¹⁸ Basnet (n 13).

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

position of judges. The political background of particular person and becoming politician are different matters.²³

In January 2017, eighty judges were recommended for appointment at various High Courts. Against the recommendation, advocate Surendra Prasad Yadav along with other three advocates filed a writ petition demanding to nullify the wrongful appointment process. They raised the issue that the recommendation was unlawful because decision was made in the absence of two sitting members of the Judicial Council (the senior most judge of the Supreme Court and lawyer representing the Bar). Additionally the recommendation was made by ignoring inclusive policy envisioned by the Constitution of 2015, and therefore requested for the annulment.²⁴ The writ petition was not given priority for hearing and remained pending at the Supreme Court.

9. Doctrine of Necessity and Appointment of Judges

The doctrine of necessity is derived from the Latin maxim '*necessitas non habet legum*'. The '*jus necessitates*' (law of necessity) means 'unavoidable necessity knows no law'. This rule is of rare application so as applicable to the act done in no choice of good or evil situation mainly in the absence of self-control. The rule may be applied in order to avoid serious miscarriage of justice. Really compelling situations allows breaking the law at the time of extreme necessity where no law works, and no better option exists. The English law exemplifies that the 'shipwrecked sailors have to choose themselves whether starved to death or accept cannibalism (by killing other human); self defense against illegal threat to death or grave bodily harm including rape (Hobbes theory); entering into prohibited premises and location to save life; person carrying another person released him in the river once running water dragged the carrier downwards' and so on may be the situations in order to apply the rule.

The rule is seldom applied to avoid or respond the situation of imminent danger or irrecoverable loss that may cause large scale damage or adversity for a long time. The rule is applied at a situation of unfortunate necessities or compelling necessities, otherwise the loss would be irrecoverable. The act done under that situation is excused applying the rule. As stated above, the rule allows a person to kill another to save the self (self defense). But the doctrine does not apply for, say, killing of felon²⁵ who is waiting for execution because that can be done later in an appropriate time.

The doctrine is not supposed to be applied on the regular appointment issues including of the judges. No extremely adverse situation had appeared as a compelling ground to fulfill apex court's vacancy under this doctrine. The doctrine applied for the appointment of judges in the absence of two members (out of five) of Judicial Council needs tight and serious scrutiny in order to direct right course for functioning

²³ Kalyan Shrestha, *Kantipur*, Kathmandu, 12 April 2016.

²⁴ *Surendra Prasad Yadav v Chief Justice Sushila Karki and members of Judicial Council*, 2073 (2017).

²⁵ Henry Campbell Black, *Black's Law Dictionary*, 6th edition, West Publishing Co., St. Paul, 1990, p. 1030.

of the organization in future.

The principal function of the Chief Justice as the head of Judiciary and Judicial Council is to make fair rules, standards and strategies for the appointment, functioning and transfer of judges. That is for developing fair criteria and standards with a view to ensure quality, competence, integrity and moral as well as ethical standards among incumbent judges. Any Chief Justice is not at all expected to justify the need of applying rarely applicable and strict rule of ‘*doctrine of necessity*’ in the appointment of above fifty-percentage strength of judges at the apex court in a single event.

It is self-evident that the doctrine was not developed ‘to avoid self-created situation of non-appointment of the judges for long period while all the Councils had all five members. In addition, the doctrine is not for making a wait until preparing favorable situation to recommend liked and favored ones from among the aspirants’. As defended by the Chief Justice, the recommendation for appointment to the judges of apex court by an incomplete Judicial Council, was if not illegal, that is *prima facie* unethical, immoral, unsound, indecent and dishonest. That could have been easily avoided if the Chief Justice had intended to do so.

10. Criticisms and Learning Great Lessons

The criticisms are part of most of the activities. The criticisms based on reasonable and fair observation after careful evaluation of the issue deserves worth, so they must be valued. By rectifying in line with the constructive criticisms, many agencies and individuals have improved themselves. The fair and healthy criticisms are great lessons in the lives of every person and agency. This opens opportunities to make them greater. The fair criticisms indeed help to continually enrich the organization. Patience has been a great value and power of the great leaders. They utilize it at the time the organization requires. At the same time, counter criticism may be fatal as that can block the flow of nutrients that assists in enriching the organization. Ignoring criticism is a sin, bluffing against criticism is a paradox, which can drag anyone into hail. ‘To resist upon criticism against indisputable issues such as the judicial appointment the responsible persons require incontestable moral and ethical strength’.

The appointment of CJ and judges is a critical issue around the world. In such situation, basis of criticism plays larger significance. In the developed countries, criticisms are largely based on personal ideology of the judges, aptitude, specific knowledge on the issue and level of understanding of various laws in order to protect and preserve values of society. Additionally the judges are appointed from among those who can stand above any form of suspicion. Unfortunately, this rule is frequently on trial in developing countries like Nepal. The criticisms about the judges and judiciary largely fall into overall issues of ‘capacity of standing above all forms of suspicion’. In the recent past, unprecedented criticisms have appeared against the appointment. The recommending agency endeavors to clarify on some issues. Samples are as below.

The question of integrity and efficiency among the judges has been an ever raised issue. This issue can be resolved by developing and applying the strategic parameters and benchmarks for selecting candidates. A menace has been invited by appointing the judges from among the candidates of political favor, professional partnership, undue proximity, collegial, kinship and family liking and lineage. Additionally, disrespect to the decision of the apex court and inclusion policy are equally serious. Those dreadful practices may not be acceptable anywhere and anytime. This can devastate core values of justice. The Judicial Council must be vigilant and alert on those issues.

Even the Chief Justice endeavored to defend it by saying ‘political influence in judicial appointment appears around the world’. Reference was given as John Marshal, the Foreign Secretary of John Adam’s government about 272 years ago and William Taft the former US president among others, around a century ago. Likewise VR Krishna Iyer, the former Law Minister of Kerala State and member of the Communist Party of India, was appointed as the judge of the Indian Supreme Court in 1973. The examples were right to the wrong deeds. All their appointments were widely criticized in their respective countries. This led to the appointing agencies taking valuable lessons for future appointments.

During last several decades, hardly any member of political party has been given appointment in the apex court of the US, UK, Australia, India and so on. After VR Krishna Iyer, hundreds of judges were appointed in the Indian Supreme Court but none of them were from among those who held political office or accepted the membership of the political party before. Criticism upon VR Krishna Iyer’s appointment was a great lesson to correct the mistake. As a result, they set a practice of denying appointment to members of the political parties and those who held political office before.

The supersession of judges has been common in Nepal. Many judges are superseded giving no reasons and grounds. If judges are subject to supersession, even the Chief Justice is not immune to supersession. There is no credible and convincing reason to this, so the Indian analogy is referred frequently. ‘The supersession badly embarrasses the judges. It can frustrate them, make them less productive, may create health problems and can increase the chance of eroding individual independence and integrity’. The appointment of the fourth senior most judge as the Chief Justice of India in 1973 was proven to be a blunder. In response to it, three senior most judges namely justice Shaleat, Grover and Hedge brought the issue in wider public and instantly resigned from the Supreme Court’s judgeship in protest. The mistake of supersession became a great lesson for appointing authorities in future. Since then, except once in 1977²⁶, no judge of the Supreme Court is superseded in India.

Did we learn from the above criticisms of political influence in judicial appointments abroad? Did we endeavor to learn from many of our earlier mistakes or criticisms of political influence in judicial appointments? Is not the appointing authority relying

²⁶ Justice Beg superseded H.R. Khanna in 1977 and became the Chief Justice of India.

on examples of exceptional and outdated errors to create confusion and validate their own mistakes? We did have abundant opportunities to learn from abroad and from our own practices. But we did not do it, rather started to justify the issue that is hardly justifiable. An erroneous act cannot be an example for better. An erroneous precedent may not be pursuable for future. An indefensible error hardly occurs unless there is ill intent in the doers. Generalizing the exception is an effort to declare victory of the losers. The bluff responses may give instant self-satisfaction, but it does not give any result for the better.

11 Unwillingness to Rectify

The judges hold the public offices. Their appointment, transfer, service conditions, efficiency and conducts are the issues of public concern. 'The judiciary in all democratic countries is expected to be comprised with best available brains, persons with best conduct, integrity, efficiency and uprightness'. Their appointment therefore requires highest degree of scrutiny to avoid all probable flaws. The observation made by former Law Minister of India L. K. Bharadhwaj, responding to the criticism of opposition leaders in keeping Supreme Court's vacancies for years, is unforgettable. Whatever the reasons behind the minister, however he requested the opposition leaders 'to propose the best brains with required conduct and integrity that befits to be the judge of the Supreme Court of India'.

The decade old controversy on the appointment of judges is becoming more critical in the consequent days in Nepal. Unless clear, transparent and fair standards for judicial appointment, transfer, performance and so on are set, the controversy may continue for unknown future as well. A number of dialogues were held among the members, and in the Council's meeting. The need was realized though not from the core of the heart. Hardly any Chief Justice and Council seriously took up the issue. Probably the Chief Justice and Judicial Council did not intend to stay in the legal parameter of the required norms and standards.

Earlier, poor scrutiny of Judicial Council during the process of judicial appointment could be due to lack of human resources, lack of experience, honesty among the members of the team and hasty accomplishment of the work. In the beginning, Judicial Council might not have been able to develop the system on such a crucial issue of judicial appointments. Additionally some of the members could have their own interest that played significant role in taking decision which appeared very controversial. However, even today, after 25 years, the clear systemic standards have not been built to rectify the errors.

The performance based indicators and benchmarks, followed by personality based indicators as integrity, independence, decision making and catalytic quality have not been developed and applied in regard to soliciting the potential candidates of the judges. Judges may be required to have both inborn and built qualities. By exploring those qualities, society can get the best judges who are able to protect and preserve the values of society and rights and interest of the people. Therefore, a relatively rigid

but functional system ought to be instilled in order to establish credible system of judicial appointment and management. This need is equally pertinent today as it was there over two decades ago.

In order to consider the situation, a policy document was prepared and submitted to the Judicial Council's meetings some time in 1996-97. Informal discussions were held but the Council neither adopted nor rejected the proposed document. The draft policy proposed the number of probable judges from different constituencies such as judges, court officers, prosecutors, legal officers, etc. Broadly, there are five constituencies for the selection of judges namely subordinate court's judges/court officers, attorneys, prosecutors, law ministry officials and law school teachers/researchers. The basic qualifications, efficiency, relevance, gender, demography and so on were set as the criteria for probable candidates. In addition, the draft policy proposed to adopt performance based seniority, merit, and inclusiveness.

The Judicial Council hesitated to adopt those policies with unseen reasons. The subsequent Chief Justices and Judicial Council did not consider them either. Adoption of those policies would have helped to increase certainty, credibility, transparency and public confidence by discouraging maneuvering and manipulation in the appointment of the judges. Whatever the reasons behind, the Council deemed reluctant to set standards on the appointment of the judges.

As a result, the controversies were raised one after other. Some controversies like supersession, manipulation, maneuvering, qualification and experience were not baseless. The qualified ones are left junior while less qualified ones are conferred seniority. Additionally, the procedures adopted for the appointment of judges lack uniformity, transparency, reasonability, certainty and credibility among others. Sometimes the Council makes public advertisement for the purpose and sometimes it does it in confidential way. The political influence is experienced on different occasions. Those all are the outcomes of not developing fair, transparent, clear and certain standards.

12. Conclusion

The judge-makers would be measured on the basis of their contribution to Judiciary and not on the basis of appointing with hidden intent. Judicial appointments adopting uncertain and undue process is one of the unwholesome signs for national progress. The Judicial Council therefore has been in question in terms of maintaining self-esteem and values of this practice. Headed by the Chief justice, the Council has to deserve its stature by acting with fairness, wisdom and integrity in judge making process.

Judicial appointment has become the topic of frequent criticism in Nepal. The tendency of criticism appears increasing to the larger extent, and is becoming sophisticated. It is the urgent need of the day to save it from befalling in the eyes of people. As example, in 1991, criticisms were widely hurled on the issue of politicization, personal favor

and appointment of less qualified lawyers to the Court of Appeal and the Supreme Court. Additional criticisms were made in respect of denial of reappointment to some of the Supreme Court and Regional Court judges. The issues of qualification and personal favor were raised on the appointment at the Supreme Court and Court of Appeal in 1997. As mentioned, ignoring of criticism is unfair as criticisms were not baseless. However, the earlier criticisms were largely exaggerated and biased. Some criticisms only hurt the norm, values and standards of judicial appointments, even crossing the limit of modesty and decorum of media, attorneys and civil society.

The political issue was seriously raised in the second case regarding the dissolution of Parliament once it appeared different than that of the verdict of the first one, right after the restoration of multiparty system in 1990. The macro study shows that there was difference mainly as regards the formation of alternative government, which was possible in the second case. However, the opinion in favor of prime ministerial prerogative for the dissolution of Parliament in Westminster system of governance was tenable and therefore cannot be ignored.

Thus, any delays in developing the system would further damage the judiciary and entire justice system. The time is to act now than waiting further on. Otherwise, the harm will be difficult to mend. Healing the country from this wound might get very tough.