

APPOINTMENTS

Flouted Guidelines

"If the sycophant element amongst the chief justices is not eschewed from consideration, the entire judiciary is doomed."

Justice V.D. Tulzapurkar in the Supreme Court on May 6, 1985

"They (the judges) have also been appointed by someone."

Lok Sabha Speaker Balram Jakhar on May 7, 1985

AFTER a short-lived truce, the simmering confrontation between the judiciary and executive surfaced once again last month. In a scathing attack on what it saw to be arbitrariness in the appointment of chief justices (cj's) to the country's high courts, a three-member bench of the Supreme Court consisting of V.D. Tulzapurkar, D.A. Desai and A.P. Sen accused the Government of packing the judiciary with "sycophant judges" and violating its professed policy which stipulates guidelines for the appointment and transfer of chief justices in the country.

Referring to the Government's policy, Tulzapurkar remarked: "Junior judges in the high courts were being appointed as chief justices under the policy of having chief justices from outside the state." Added Sen: "The policy of appointing chief justices from outside of their own courts seems to be a pernicious principle."

It wasn't the first time that the Supreme Court had pronounced on the

policy of the Government to appoint one-third of the chief justices of high courts from other benches rather than from within the court concerned. In fact, the Supreme Court had in 1982, in a majority judgement, agreed that the Government had the right to transfer judges. But this time round, the court's ire was provoked by arguments that Government was flouting its own guidelines.

The occasion for the salvo from the bench was a writ challenging the transfer of the Chief Justice of the Allahabad High Court, Satish Chandra, in 1983. The writ, filed in the Allahabad High Court in early 1984 by advocate Virendra Singh, alleged that Chandra was shifted in order to benefit some high caste judges who, following Chandra's transfer, were quickly appointed to fill most of the 16 vacancies in the court. The writ questioned this action made on the recommendation of acting chief justice M.N. Shukla.

The high court dismissed the case on the plea that it lay within the powers of the Central Government to transfer any judge to any other high court in the country. Not satisfied, the petitioners took the writ to the Supreme Court in October 1984. Justices D.A. Desai and A.N. Sen admitted the petition and gave the Central Government notice for a reply.

The writ's hearing last month became an opportunity for the three judges to speak their mind. Having criticised the Government for arbitrariness and discrimination in the transfer of chief justices, they also directed the Government to make up its mind once and for all on what policy it intended to follow. Sen specifically asked Attorney General K. Parasaran: "Will you assure us that you don't want judges of a particular kind?" Seen in the context of other remarks from the bench, this was clearly a demand for an assurance that the Government wouldn't resort to manipulation and pack the benches with sycophants.

The bench went on to direct the Government to furnish to the petitioner information detailing:

► the names of acting chief justices and the high courts from which more than one judge had been transferred to another court as chief justice;

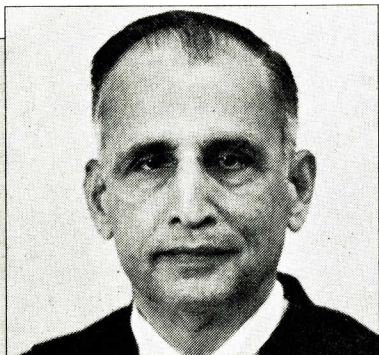
► the names of chief justices who would have been transferred had the Government's stated policy been rigorously followed; and

► the names of judges who have actually been superseded with the appointment of their juniors as chief justices in other high courts.

The order was provoked by arguments made before the bench which, accusing the Central Government of being arbitrary in the appointment of high court chief justices, alleged that in some high courts, senior judges had been moved out to clear the way for a junior to act as chief justice or take over as permanent chief justices of their own high courts. Charged prominent Supreme Court advocate Soli Sorabjee: "It is the Government which has breached its own policy for the sake of accommodating some people as chief justices."

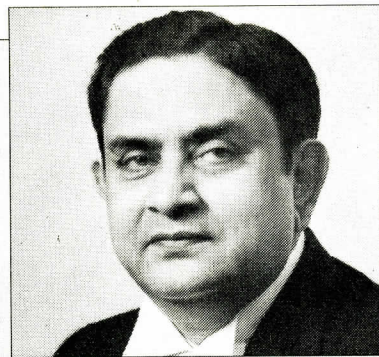
Sorabjee was not off the mark. Hardly one in four transfers and appointments of chief justices of high courts has been in accordance with the guidelines since they were adopted in 1983. The decision to adopt the guidelines, which stipulate that all cj's and one-third of all judges in high courts should be from outside benches, was taken in early 1982 when P. Shiv Shankar was Union law minister.

The policy was, in fact, based on the recommendations of the Law Commis-



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sion. The Centre's hands were strengthened by the Supreme Court's earlier judgement upholding the Government's authority to appoint and transfer judges.

Armed with its new policy, the Centre first used its axe on Chandra and chief justice K.B. Singh of the Patna High Court. Singh was moved to Madras and Chandra to Calcutta. Two months later, in 1983 the Government shifted a relatively junior judge, V. Khalid of the Kerala High Court, to the post of chief justice in Jammu & Kashmir whose incumbent, Baha-ud-din, was sent to Sikkim. Since then, 12 of the 18 chief justices appointed have come from outside courts. Some of them have since retired, and at the moment over half the courts are without outsiders as chief justices.

Ironically, these and other judicial transfers violated the Government's detailed guidelines, including:

- ▶ a judge who is to retire within a year should be appointed chief justice only to his own court if he is eligible for elevation;
- ▶ the all-India seniority of judges must be taken into account while appointing chief justices from outside the states;
- ▶ a judge who is to retire within a year will not be transferred away from his state.

In actual implementation, these guidelines were observed more in the breach. Of 12 chief justices transferred or elevated, only four—Chandra, K.B.N. Singh, S.S. Sandhawalia of Punjab and Haryana and M.M. Ismail of Madras—were according to the guidelines. Of the others, Khalid had less than a year to go when he was moved to Jammu & Kashmir. In Patna, by transferring Sandhawalia, the Centre effectively blocked the possibility of promoting Syed Anwar Ali who was to retire in 10 months and was eligible for elevation.

The Supreme Court bench last month also learned of the elevation of T.S. Mishra as chief justice in Guwahati although he was only 58th in the all-India seniority list. In Kerala, when Khalid and another senior judge, Padmanabhan Subramaniam Poti, were transferred, Kattali Bhaskaran, only 46th in the seniority list on March 31, 1983, was elevated as chief justice.

Among other violations are:

- ▶ In December 1983, Mohan Lall Srimal, a relatively junior judge then 91st in the seniority list, was elevated as chief justice in Sikkim superseding 40 judges.
- ▶ Dambarudhar Pathak, a relatively junior judge, was first elevated as chief justice of his own high court at Guwahati and then moved to head the Orissa High

Court superseding 25 senior judges.

▶ Govardhan Lal Jamnalal Oza of Madhya Pradesh, 11th in the seniority list of all-India judges on May 1, 1983, was first made acting chief justice and then confirmed in the same court, superseding five senior judges.

AS IF these weren't enough, the Government was violating its own guidelines by permitting junior judges to act as chief justices in at least 10 high courts for over a year in 1981-82 and again in 1984-85. Nor did the policy change after Rajiv Gandhi took over as prime minister. The three appointments of chief justices since then—to Allahabad, Madhya Pradesh and Jammu & Kashmir—follow the same pattern in violating the guidelines.

The new Government acted true to form once again last fortnight when it confirmed Adarsh Sein, a 51-year-old judge of the Jammu & Kashmir High Court, as chief justice in his own court even though he was 86th on the all-India seniority list and superseded some 50 judges. Nor has the new Government taken steps to fill the vacancies of chief justices in Sikkim, Guwahati, Andhra Pradesh and Punjab and Haryana, all courts which are being looked after by acting chief justices.

The Supreme Court evidently concurs with the widespread belief that all this has been done in order to pack the judiciary with pro-Congress(I) judges. During the hearing, Sen observed that after the reti-

rement of the chief justice in Madhya Pradesh, the next judge in seniority was "kept as the acting chief justice so that he clears all the 10 names recommended for appointment" to the court by the Government. The message was 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.

There is circumstantial evidence to back this: in the last 15 months, of the 53 high court judges appointed, no fewer than 32 were made by acting high court chief justices, and 25 of these were in two courts, Allahabad and Madhya Pradesh. The remaining seven were made in Kerala and Jammu & Kashmir. Moreover, as Sen observed, the Government had recommended for appointment to the high court the names of lawyers who had "never appeared" in the high court.

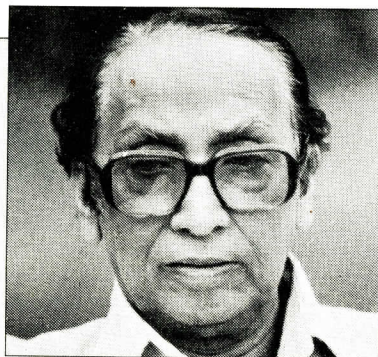
The outburst against the Government has assumed significance with the appointment of P.N. Bhagwati as the next chief justice of the Supreme Court. The outgoing Chief Justice, Y.V. Chandra-chud, was always opposed to the transfer of judges from one court to another without the chief justice's prior approval. It was Bhagwati with three other judges who gave a majority judgement on the right of the Government in this regard, clearing the way for what followed.

The views of the bench headed by Tulzapurkar, who ranks next to Bhagwati in seniority, indicate that the judiciary is likely to remain divided on this issue. But since the Government has already made it clear in Parliament that all high courts in the country will be headed by chief justices from outside benches, the court is unlikely to be able to do much.

Central Government spokesmen deny the charge that it is undermining the judiciary. Says Law Minister Asoke Sen: "A loyal judge is not worth his salt. We cannot let the judiciary degenerate as that will undermine the rule of law."

But judicial circles believe that Sen has not been able to carry the rest of the government with him. Sen's junior minister Hans Raj Bhardwaj has played a key role in many appointments, and he has been touring state capitals to discuss potential candidates for elevation to the high courts. With divisions in the Supreme Court and such differences within the Government, the course of events can hardly be smooth. But eventually it will be the nature of the appointments made which will determine whether the judiciary will flounder or flourish.

—PRABHU CHAWLA



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ASOKE SEN
law minister