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Judicial Independence in India : Some Pitfalls



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Introduction

Independence of the judiciary is the basic principle that the judiciary should be political shield from the legislative and the executive setup. That is courts should not be subjected to reprehensible influence from the other branches of government or from the personal or adherent interests. Nations deal with the idea of judicial independence differently, through different means of judicial assortment, or selection of judges. One way to promote judicial independence is by granting life time tenure or long tenure for judges which ideally free them to decide cases and make ruling according to the Rule of Law and judicial discretion, even if those decisions are politically unpopular or opposed by powerful interests. The official of the judiciary should make scarifies to maintain the independence of the judiciary and sustain the constitution goals.

But in spite of utmost importance given to judicial system, by the makers of our constitution it is not immune from ailments. An attempt has been made in this research paper to high-light some major pitfalls of our judiciary.

Appointment of Chief justice and other judges of the Supreme Court

When making appointments in the judiciary, the Executive has a chance to intervane the judicial system. According to Article 124 of our constitution. The Judges of Supreme Court are appointed by the president. As we have parliamentary democracy, the president has to act

on the advice of his Council of Ministers. So, the Executive have a says in the appointments of judges of the Supreme Court, President may consult the judges of Supreme Court and High Court as he deems necessary for the purpose. The President is not bound to consult the Judges, according to the provision of the constitution. But in case of appointment of the Judge other than the chief Justice the consult president is bound to the chief justice of India.²

1973 to 1983 was a deplorable decade that is of unseemly tussle between the ruling party and the judiciary. In 1973, three senior-most judges of the Supreme Court were superseded. The person appointed as the Chief Justice had held in favor of the Government in three important constitutional cases. Justice H.R. Khanna should have become the Chief Justice. However, he delivered a most courageous judgments during the emergency. The majority had held that a person who had been detained without trial need not approached either the Supreme Court or the High Court. He could be held in preventive custody and would have no remedy at all. Justice H.R. Khanna delivered a brave dissenting judgments. He paid the price and was superseded by a junior judge.¹

During the emergency from 1975 to 1977, 16 High Court judges were transferred; all of them had shown remarkable independence which was not to the liking to Prime Minister of India Mrs. Indira Gandhi and her Government.

In 1980, there was a sinister proposal to transfer judges from one High Court to the other. This was challenged before the Supreme Court *S.P. Gupta Vs Union of India*². The Supreme Court, in a self-inflicted blow, held that the opinion of the Chief Justice of India could be completely ignored in the matter of appointment of Supreme Court and the High Court judges. The views in this deplorable judgement were overruled in the *Supreme Court Advocates-on-Record Association v Union of India*³ by a nine judge bench. Although this judgement is also highly unsatisfactory, it at least brought back some of the dignity that rightly belonged to the judiciary. It is now necessary to consider two important Supreme Court judgements dealing with the appointment to the Supreme Court and High Court.

Appointment of Supreme Court and High Court Judges - two important cases:

The method of appointment of High Court Judges was considered in detail in what is popularly called the Second Judges' case—*Supreme Court Advocates-on-Record Association v. Union of India*.⁴ This was a bench of nine judges and the judgement is extremely lengthy. It has been severely criticized by the eminent Indian Jurist H.M. Seervai. Without going into its merits, it would suffice to summarise the conclusions made by the Supreme Court in this case:-

a. The process of appointment of the High Court must be initiated by the Chief Justice of the respective High Court. b. The Chief Justices must adhere to a time bound schedule so that the posts of judges are not kept vacant for a long period. c. The proposal of the Chief Justice of the High Court must be sent to all other constitutional functionaries. The other functionaries, within 6 weeks from the receipt of the proposal, must convey their views to the Chief Justice of India. (It is not clear as to why the views cannot be conveyed to the Chief Justices of the High Courts). d. If the particular constitutional functionary does not express its opinion within the specified period, it would be considered as a

deemed agreement with the recommendation made by the Chief Justice. e. The Chief Justice of India, after considering the recommendations and the views of the constitutional functionaries, should confirm his final opinion and convey to the President, within four weeks, of the final action taken. f. The Chief Justice of India should take into account the views of his colleagues in Supreme Court who are likely to be conversant with the affairs of the concerned High Court. It should be noted that these requirements do not change the procedures laid down. It must be considered by the collegium consisting of the Chief Justice of India and two senior-most Supreme Court judges. g. The process of appointment to the Supreme Court should be an integrated, participatory and consultative process of all constitutional functionaries who must perform their duty collectively so as to meet the required constitutional objectives. h. It is also open to the Chief Justice of India to recommend the initial appointment of a person to any High Court other than the High Court for which the proposal was initiated, provided the other constitutional requirements are satisfied. 1. If there are any objections for the appointment of a particular person, it should be for good reasons, which must be disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendations on these conditions. J. In exceptional cases, even a candidate recommended by the Chief Justice need not be appointed, if there are valid objections for his appointment. The objections can relate to his character, conduct, health or other factors. Similarly, "if his tenure is likely to be very short, the appointment need not be made. In rare cases, even if the opinion of the Chief Justice of High Court conflicts with that of the Chief Justice of India, the appointment need not be made.

The judgement is highly confusing and it is very difficult to decipher clear propositions. The Supreme Court recommended that a Memorandum of Procedure should be prepared by the Government of India after consulting the

Chief Justice of India, so that it could be followed for all future appointments. This memorandum was never prepared. The second case is the Presidential reference made on 23rd July, 1998. The President of India referred nine questions for consideration by the Supreme Court.

These questions related to three aspects:-

(i) Consultation between the Chief Justice of India and his brothers judges in the matter of appointments of Supreme Court and High Court Judges and transfer of the latter; (ii) judicial review of transfers of Judges; and (iii) the relevance of seniority in making appointments to the Supreme Court. The principles laid down by the Supreme Court can be summarised as follows:-

1. Consultation with the Chief Justice of India does not mean consultation only with the Chief Justice. It requires consultation with a plurality of judges. 2. The Chief Justice of India has to form a collegium of four senior most puisne judges of the Supreme Court. This is necessary for appointments for judges of the Supreme Court or to transfer a High Court Chief Justice or a High Court judge. 3. For appointment of the High Court judges, the Chief Justice has to consult two seniormost judges of the Supreme Court. This collegium can also take into account the views of a Supreme Court judge from the particular High Court to which appointments are to be made. For example, if appointment is to be made to the Madras High Court, collegium of the three judges can consult the senior-most judge of the Supreme Court from the Madras High Court. This will be necessary if he is not a part of the Collegium. They can also take into account the views of other Supreme Court judges or Chief Justices of the High Courts. This is to ensure that the best possible talent is brought to the Supreme Court Bench. 4. Until 1998, the collegium consisted of the Chief Justice of India and two seniormost judges. Thereafter, it was changed to the Chief Justice and four Judges of the Supreme Court. 5. The opinion of the collegium will have primacy in the matter of appointments. It is open to the Executive to inform the collegium of its objections.

However, if the Chief Justice and his companion judges are still of the view that there is no reason to withdraw their recommendation, then that appointment should be made as a matter of healthy convention. However, even if two judges have serious reservations about a particular appointment, then it should not be made. 6. The Supreme Court can also consult other judges of the Supreme Court, judges of the High Court or even the Members of the Bar with regard to a particular appointment. The views of the members of the collegium should be made in writing and should be forwarded to Government of India along with recommendations of the Chief Justice. However, when the Chief Justice consults other Supreme Court Judges or members of the Bar these views should be summarised in a memorandum and forwarded to the Government of India. 7. If some members of the collegium have retired before a particular appointment is made and the Government of India has sent back adverse comments, then the Chief Justice has to constitute a new collegium by adding the requisite new judges to form the collegium. In such an event, there has to be unanimity in the appointment that is” to be made. 8. The Chief Justice may, in his discretion, inform the person of the objections raised by the government of India. The collegium can call for the reply of the prospective appointee and take into account his explanation before either withdrawing the nomination or confirming it. 9. Merit is the predominant consideration for appointment to the Supreme Court but seniority should be kept in mind. The Supreme Court has held that seniority can be overlooked in cases of outstanding merit. 10. The collegium for approving the appointments of High Court judges is the Chief Justice and two senior-most puisne judges of the Supreme Court. 11. The Chief Justice should take into account the views of the Supreme Court Judges who are likely to be conversant or familiar with the affairs of the concerned High Court., They must also taken into account the opinion of the Chief Justice of the particular High Court; this is entitled to the greatest weight.

National Judicial Commission:

The Constitution (67th amendment) Bill, 1990 proposed the formation of a National Judicial Commission for the appointment of Supreme Court and High Court Judges and for the transfer of Judges from the High Court. The object was to prevent any arbitrariness in appointments and, This Judicial Commission was based on the recommendations of in the 121st Law Commission Report. It was to consist of the Chief Justice of India, two Senior Supreme Court Judges, Chief Justice and two Judges of the High Court wherein appointments were to be made. This Bill was never passed.⁵ The composition of the National Judicial Commission is seriously flawed. The Commission does not refer to consultation with the Chief Justices of the High Court or senior High Court Judges in cases where appointment has to be made to the respective Courts. This Bill may also not see the light of the day because of the lack of a majority of the Parliament by the ruling government. It is rumored that the opposition does not accept the Bill in its present form. Therefore, the method of appointments to the Supreme Court and High Courts is likely to continue as per the two decisions referred earlier.

Transfer of High Courts Judges

The independence of another way associated by judiciary, the transfer of the judges of the high Courts from one state to the other state. Transfer are not necessarily harmful for maintaining independence of judiciary. Transfer necessary to make the judiciary transparent and more experienced. Because, when a judge is transferred to another state, it provides him the opportunity to interact with experience bar and Bench of different states. Transfer are also helpful to answer the transparency of the judiciary because if a judge spends whole his carrier in one state he can foster undesirable likes and dislikes with practicing lawyers. But to ensure the transparency, the transfer it self should be transparent. But in the Indian judiciary, the transfer itself were not transparent, and served a particular person or party. There are so many instances of

arbitrary and partism transfers. Mr. Justice M.S. Liberhan was a member of first bench of Madras high Court. Some cases of grave embrace had been heard by this bench. These cases were relating to Tamilanadu Chief Minister Jayalalitha challenging the setting up special Courts to try cases of corruption against her. The matter was heard by the First bench over a period of time and judgments were reserved in these cases. But he was suddenly transferred to Assam High Court, which meant a vacancy of C.J. in Madras High Court and then the cases would have to be heard again which would take a good length of time. The transfer was purely arbitrary without an under lying principle.

Caste Hegemony in Transfers

What really triggered of the policy of transfers was the situation in some southern states. There was a period of time when in Andhra Pradesh and in Karnatka. Most judges in the high Courts, belonged only to a particular caste. It is common knowledge that in Andhra Pradesh, for a long time. Only a Reddy could become the Chief justice, and in the Karnatka only a Lingyat could become the Chief justice. Justice Das Gupta was transferred to Karnataka. So strongly entrenched was the caste domination in some of these states that in relation to Justice Chandra Shekhar of the Karnatka High Court went to the extent of withdrawing the powers of the district Court to appoint peons and reposed his power in the High Court thus ensuring that even peons were appointed from a particular caste alone. In varying degrees, the same previous practice existed in other states such as Uttar Pradesh and Rajsthan. But for the policy of transfers, it is now an established fact that in Andhra Pradesh only Reddy would have been Chief Justice up to the year 1999 and in Karnataka only a Lingyat would have been Chief justice up to the year 2003. It is in this context that the policy of transfers of Chief Justice, was to be viewed.

Salary of Judges

The judicial appointments are not attractive today. The lawyers with good practice are not

interested in becoming judges. Only those lawyers takes interest in judge ship who have other sources of income, or who had made enough money to support the whole life. On other hand, legal profession is fairly good for lawyers. There are hardly a few lawyers in the superior courts, who earn less then a judge. In 2006, in Punjab and Haryana High Court an senior practising lawyer Mr. P.S. Patwalia was elevated as justice of Punjab & Haryana, but Mr. P.S. Patwalia resigned from the judgeship and started practice in Supreme Court. It is harmful development in our judicial system. It prevents the best legal talent from getting attracted to the bench. It also threatens the independence of judiciary by financial anxiety and demoralization of judges another case In July 1966 a Bombay High Court Judge declared publicly that he was resigning his office due to rising cost of living and judge can not live on salves fixed 20 years earlier. In the views of justice Lentin of Bombay High Court “to make justice cheap judges must be expensive”.⁶

If we compare the salaries of judges of India and other countries we can say that judges in India are low paid. For example in United Kingdom Chief Justice of a Court of Appeal is paid £ 60,000 per annum and other judges are paid f 55,000 per annum. Even a small country like Mauritius paid to its chief Justice Rs. 1,19,500 per month while other 24 days are paid Rs. 1,03,920 per a month. The above figures shows that the Indian Judges are greatly being discriminated against their counter parts in foreign countries. The above figure amply demonstrate that Indian judges have been greatly discriminated against their counter parts in some of the foreign counter- parts were must understand that to attract the best legal brains of the country to the bench it is of utmost importance that they become ensured with their status and position. Unless we provide complete economic gravity in the judges independence of judiciary will always remain under shadow.⁷

Assault by Legislature

Apart from executive, the legislature has also tried to intervene to gain political motives. The

framer of constitution did their best to prevent the legislative interference in judiciary. But when the members of the constituent assembly entered in legislature they also started criticizing of the functioning of judiciary. Even the responsible members of the constituent assembly like Nehru and Patel went to the extent of criticising the judiciary in Parliament. The Parliament had tried several times to nullify the decisions of the Supreme Court for benefiting a single individual or a particular section of society. In 1955 the so delivered a historical verdict in Shah Bano’s case that Muslim wife can claim maintenance from her husband after divorce.⁸ But the government brought a legislation in parliament to nullify the effect of the decision. This was all to please the Muslim fundamentalist.

Judicial Accountability

In India, judiciary is a separate and independent system. Legislature and executive are not allowed by the constitution to interfere in the functioning of judiciary. The Courts on the other hand checks the acts of these two bodies. The functions of judiciary is independent but it doesn’t meant that it is not accountable to any one.⁹ In democracy the power lies with people. The judiciary must concern with this fact during their functioning. Considering the judicial system independent and unaccountable by the Courts generally it gives leisure and comfort to the judges that ultimately lead to delay in deciding the matters. High Courts has the power to control over subordinate Courts under Article 235 of constitution of India. Supreme Court has no such power over High Courts. The Chief Justice of High Courts of India has no power to control or make assumable other judges of the Courts Woolf Report 1996 emphasized to make judiciary accountable for their functioning by generating accurate judicial statistic revised on daily basis. It were observed by the report pertaining to the judge functioning and flow of such information ultimately make. Judge more accountable to the judiciary and also it was suggested that it is more important and use full mean to tackle are the pendency of

litigation.

Conclusion and Suggestions

The above said recommendation and suggestions given by various committees, reports and law commissions should be followed by the government for making judiciary Independent. Besides these, there are certain facets should also be considered.

- The process of appointment of judges to the Supreme Court and the High Court is an integrated' participatory consultative process for selecting the best and most suitable person available for appointment, and all the constitutional functioning must perform his duty collectively with a view primarily to reach an agreed decision sub serving the Constitutional purpose, so that the occasion of primacy does not arise.

- No appointment of any judge to Supreme Court or high Court can be made, unless it is in conformity with the opinion of the CJI.

- Any other purpose transfer made on

recommendation of the CJI is not to be deemed to be punitive and such transfer is not justifiable on any ground.

- The judgment should not be allowed to be kept reserved by the judges at various level more two weeks after completion of argument. The provisions should be made which makes judges statutory liable for delay in pronouncing of judgments.

- A provision must be introduced in the code of conduct for judges that if judges hears the case he should deliver the judgment. The judge who hear the arguments, examined the witness in particular case requires to deliver his decision unless otherwise the case falls in specific exceptions such as death of judge or retirement.

It is important to note that the judiciary is a last way to achieve the goal of socio-economic justice which enshrined in our constitution and faith of the people can be restored by application of fair method and healthy appointment and transfer of Judges of Supreme Court and High Courts.

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