THE INDEPENDENCE OF THE JUDICIARY IN INDIA IN LIGHT OF RECENT EVENTS : "A CRITICAL ANALYSIS"

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Ever since, 1979, judiciary started playing a more assertive role in the national arena, perhaps not even envisaged by the architects' of the Constitution. It has become an active participant in providing social justice by issuing strictures and corrective actions in respect of policies of government, public bodies and authorities. It all began in 1979, when the Supreme Court ruled that the under trails at a Bihar jail had already served more period of pre-trail detention as they would have served if convicted. Similar, rulings thereafter were passed in respect of various human rights violations taking place, e.g. stone quarry bonded labourers in Agra, plight of jail inmates, etc. However, in recent times, rather than only enforcing the rights for the disadvantaged or poor sections of the society, the rulings of the apex courts has started correcting the actions or omissions of the executive or public officials or departments of government or public bodies. Some examples of these are: Supreme Court ordered control over automobile emissions, air and noise and traffic pollution, gave orders for parking charges, wearing of helmets in cities, cleanliness in housing colonies, disposal of garbage, control of traffic in New Delhi, made compulsory the wearing of seat belts, ordered action plans to control and prevent the monkey menace in cities and towns, ordered measures to prevent accidents at unmanned railway level crossings, prevent ragging of college fresher's, for control of loudspeakers, banning of fire crackers, etc. The court has issued such orders based on its authority to protect and enforce the Fundamental Rights of the citizens of the country under Article 32 of the Constitution. However, in light of recent events, it has been an awakening time to get a fast track check on the system of appointment of Judges, without hampering the independence of the judiciary.[2]

It is a well known fact that the independence of the judiciary is the basic requisite for ensuring a free and fair society under the rule of law. The framers of the Indian Constitution too were in doubt with the matter concerning the independence of the Judiciary. All through the era of British rule, the judiciary progressed to a great extent, so the big question that remained after independence was one relating to 'the extent of the independence of the Judiciary.' However, this concern too came to an end when Dr. B.R. Ambedkar responded saying "There can be no difference of opinion in the House that our judiciary must be independent of the executive and must also be competent in itself."

Under the scheme of the Constitution, the final interpreter of the law is the court, not the legislature or the executive. Judicial independence is, therefore, central to democracy because it is the judiciary which helps the realisation of the Rule of Law and protection of human rights. But the concept of independence is a complex one which subsumes in it concepts like impartiality, accountability, efficiency and respect for other institutions of governance. In this regard, one has to distinguish individual independence from institutional independence, adjudicative independence from administrative independence, as well as actual independence from perceived independence. These relationships have to be factored in while appointing judges to the higher judiciary. Admittedly, a judge's personal independence is incomplete unless it is accompanied by the institutional independence of the judicial branch. The idea of a separation of powers is related to the latter aspect of independence.[3]

The meaning of the independence of the judiciary is still not clear after years of its existence. Our constitution by the way of the provisions just talks of the independence of the judiciary but the term as such has not been defined anywhere. The primary context relates to the separation of power

between the executive and the judiciary which has been in place for a long time. The independence of the judiciary is also understood as the independence of the exercise of duties and functions by the judges in an unbiased manner i.e. free from any external factor. So the independence of the judiciary can be understood as the independence of the institution of the judiciary and also the independence of the judges which indirectly forms a part of the judiciary.[4]

The need for such independence has risen as a result of the multiple functions performed by the judiciary including the interpretation of the constitution, solving disputes, and acting as a watchdog over the functioning of the other institutions and pillars of the Government. This independence has been made available to the judiciary through various provisions of the Constitution. These include : the security of their tenure, the security of their salaries, no right to discuss the conduct of a Judge in the Parliament, the power to punish for contempt of court as suggested by Art. 129 of the Indian Constitution. Moreover Art. 50 contains one of the Directive Principles of State Policy which lays down that the state shall take steps to separate the judiciary from the executive in the public services of the state. Such steps are necessary for the proper functioning of all the three pillars of the Government.

In recent times, around a year back the NJAC i.e. the National Judicial Appointments Commission Act[5] brought in by the 99th Amendment of the Indian Constitution,[6] passed on 31st December 2014 had been a hot topic for debate on all media, whether it be the newspaper or the television. The National Judicial Appointments Commission Act and Amendment Bill amends Article 124 of the Indian Constitution by adding Article 124A, which provides for the creation of the National Judicial Appointments Commission in place of the current collegium system. The new National Judicial Appointments Commission dramatically limits the primacy of the judiciary and increases the government's power in appointments. The National Judicial Appointments Commission is to be comprised of the chief justice of India and two senior-most Supreme Court judges, the union law minister and two "eminent people," one of whom would be drawn from the scheduled castes, tribes, minorities and other backward classes or women. At present, the chief justice is H.L. Dattu, and the two senior justices are Justice T.S. Thakur and Justice Anil Dave. Under this new system, the two eminent persons would be selected from a panel consisting of the chief justice, the prime minister and the leader of the opposition in the Lok Sabha. Significantly each of the six members of the National Judicial Appointments Commission would have a vote, and two members would be able to veto an appointment to the court. In addition, the National Judicial Appointments Commission would have the power to promulgate new regulations governing criteria for selection and procedures for appointment of Indian Supreme Court and high court judges.In a letter to PM Modi, Chief Justice of India, H.L. Dattu stated that he would refuse to participate in the three-person committee charged with selecting the two eminent persons to the National Judicial Appointments Commission until its constitutionality had been decided by the Supreme Court. The National Judicial Appointments Commission Act was passed enthusiastically not just by the centre but also by 20 state assemblies, but the response amongst members of the judiciary has been divided, with many judges accusing the National Judicial Appointments Commission system of diminishing the role of the judiciary while allowing politicians to have a say. However, the Supreme Court then declared the recent National Judicial Appointments Commission amendment as unconstitutional because it violated the basic structure of the constitution. Independent Judiciary is one of the components of this doctrine. The judiciary might have suggested some changes in the National Judicial Appointments Commission to make it work better like selection of eminent persons who belonged to law or bar. Or it could have asked for making new All India

Judicial Services which are already mentioned in article 312. However along with the above said, the past cannot be ignored. Breach of independence of judiciary during 1970s shows that judiciary cannot take a risk of involving executive in the appointment process. The judgment came with the recognition of weaknesses of the collegium system which shows that Supreme Court only wants to maintain the sanctity of the judiciary. In case of the executive taking part in the appointment process creates a never-ending doubt over the character of judges appointed by such process. This doubt is antithetical to the work of judiciary which is based on the foundation of trust. It is not a game of controlling the appointment process or maintaining superiority over the other pillars of constitution because the Supreme Court knows very well that "the Constitution abhors absolutism" therefore it needs some reforms in the process developed by the judiciary itself, i.e, collegium system.[7]

If as per the National Judicial Appointments Commission Act, the Executive were to be allowed to be part of the Judicial Appointments Commission, the main aim of separation of the judiciary would go down the drain. The three pillars of the Constitution popularly known as the legislature, executive and the judiciary are independent but interrelated and co-dependent on one another. The legislature makes laws and the executive execute the same, so the two have been provided with satiable checks on one another's execution in real time. However, the judiciary plays the role of adjudicating the laws. It is the only institution which can interpret the constitution. Furthermore, it is the only institution which checks the validity of a certain Act passed in the Parliament. If the concerned Act is found against any Constitutional provisions then the Higher Courts in the Indian Court Hierarchy can declare that Act as null and void. This in turn secures the citizens of India from being part of any result of party focused politics. If the Executive were to be part of such an Appointments Commission, the Judges so appointed may feel that they owe this credit to the Commission. In future if such member of that Commission was to make abused use of the power vested in him, it would be rather difficult to mend the damage done. Rather we could follow the popular phrase "Prevention is better than cure," and find better ways in solving the issue of a collegium.

The crucial issue to be examined is how far the appointment procedure secures the personal independence of judges. The search for a proper system of appointment will have to address this fundamental question if the public is to be persuaded to accept the appointment system in the name of protecting the "independence of judiciary". If judicial independence is about freedom from all pressures in the exercise of the adjudicative function, how can the appointment process secure it? Are matters of impartiality, integrity, propriety, equality, competence, etc. on which personal independence is dependent better assessed in a transparent, participatory commission system with pre-defined norms and procedures than in an opaque system managed by judges alone? This was the larger issue contested in the Supreme Court, for which the judgment did not provide clear answers. The court is now trying to figure out how the collegium can be retained and still secure independence and accountability on which it failed to prove its superiority to the earlier model. For this purpose the Supreme Court has started accepting recommendations.[8]

The pool of eligible candidates for judicial selection is partly determined by the Constitution. The Constitution does not speak about standards of integrity, propriety, competence, independence, etc. as qualifications essential for judicial selection. The system of examination and interview employed in the selection to the lower judiciary is perhaps not acceptable either to judges or to advocates. In the circumstances, a transparent procedure is to prescribe the norms and standards expected of candidates seeking to be appointed as judges and invite applications from them. Alternatively, they

can be nominated by retired judges, senior advocates, bar councils or bar associations, etc., testifying to their possession of qualifications prescribed. On receipt of applications, a system of short listing based on comparative merit, again according to pre-determined norms and procedures, can follow to identify those who are meritorious. Both the original list of applicants/nominees and those shortlisted along with their details can be posted on the website of the court for a reasonable period to elicit objections, if any, from the government as well as the public. There can be a technical committee of retired judges to shortlist the applications and to respond to objections/grievances in the initial stage of selection. This part of the procedure should be open to Right to Information Act queries as well.

The independence of the judiciary as is clear from the above discussion holds a prominent position as far as the institution of judiciary is concerned. It is clear from the historical overview that judicial independence has faced many obstacles in the past specially in relation to the appointment and the transfer of judges. Courts have always tried to uphold the independence of judiciary and have always said that the independence of the judiciary is a basic feature of the Constitution. Courts have said so because the independence of judiciary is the pre-requisite for the smooth functioning of the Constitution and for a realization of a democratic society based on the rule of law. The interpretation in the Judges Case giving primacy to the executive, as we have discussed has led to the appointment of at least some Judges against the opinion of the Chief Justice of India. The decision of the Judges Case was could never have been intended by the framers of the Constitution as they always set the task of keeping judiciary free from executive and making it self-competent. The decision of the Second Judges Case and the Third Judges Case is a praiseworthy step by the Court in this regard.

As the saying by Lord Acton goes "Power tends to corrupt, and absolute power corrupts absolutely" we need to make sure that the Supreme Court is not concentrated with powers in all matters. Several changes need to be made in the system for appointment of Judges and suggestions can be sought after by the Supreme Court. The executive and legislative branches have to bring in immediate reforms that are essential to supplement efforts at strengthening the collegium system. In addition, the time for an All India Judicial Service has come and the government should legislate for the purpose. Let the window of opportunity provided by the Supreme Court in looking at suitable procedures for selecting judges be utilised to push for other structural changes necessary in order to give the country a judicial system which will decide disputes competently, and in reasonable time and expense.

(Endnotes)

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2 Available at, http://www.olivegreens.co.in/blog/contemporary-issues-pertaining-to-indian-judicial-system, accessed on 19th July 2016

3 Available at, http://www.thehindu.com/opinion/lead/a-way-to-judicial-independence/article7896653.ece, accessed on 20th July 2016

4 Available at, http://mulnivasiorganiser.bamcef.org/?p=482, accessed on 20th July 2016

5 For details see, www.indiacode.nic.in/**acts**2014/40_of_2014.pdf, Accessed on 21st July 2016

6 For details see, **india**code.nic.in/coiweb/**amend**/**99th**.pdf, accessed on 21st July 2016

7 For details see, *"Supreme Court Advocates-on-Record - Association & Anr. v/s Union of India (WRIT PETITION (CIVIL) NO. 13 OF 2015)"*

8 Supra note 2