Judiciary in India, No longer Independent: A Critical Analysis

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"*The bedrock of our democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing.*"

----Caroline Kennedy

"*All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.*"

----Andrew Jackson

INTRODUCTION

The framers of the constitution at the time of framing our constitution were concerned about the independence and the kind of judiciary this country needed. the concern regarding this among all the members of the constituent assembly, could be seen from the following words of the B. R. Ambedkar:

"There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself. And the question is how these two objects can be secured".

For this very purpose, they made it a point to include a provision in the Constitution which specifically separated the judiciary from the executive. And not only since the inception of the constitution but from the times when India was under British control, the judiciary was still independent more or less. Though the judges were appointed by the crown in many states, but the judges were allowed to act independently without any interference from the crown. This practice was taken care of while framing the constitution too and it was included in the Constitution under Article 50.

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But the meaning of independence is judiciary is still not very clear and that has lead to the inherent tussle between the legislature, executive and judiciary from quite a long time now. In *S.P. Gupta vs. Union of India*[2], this Court has held that:- "The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law thereby making the rule of law meaningful and effective." It is well understood that if the judiciary by their performance and conduct does not meet the expectations for which such Constitutional protection has been provided, the judiciary will be reduced to any other organ of the State which we have come to distrust in recent times.

It is, therefore, of utmost importance that a Court or a Tribunal should be perceived as independent, as well as impartial in the performance of its duties, and the perception of the public in general is as important a test as that of experts. The doctrine propounded by Montesquieu famously known as Separation of powers is also considered and given due weight age is given to this doctrine. This doctrine simply means that the three organs, namely, judiciary, legislative and executive should be separated from one another and one organ should not interfere into the workings of the other. This doctrine also provided judiciary as a watch dog on the working of the other two organs and to ensure that they work within the boundaries specified and not interfering with each other's function. This doctrine has made the judiciary as the third pillar of the democracy. The democracy and independence of the same cannot be ensured if the very judiciary and functioning is not independent and if it is been influenced by the other organs and interference from them. When we talk about the independence of judiciary, we do not about the judiciary as an institution of democracy alone, but it also includes the functions it carries out, the appointment of judges to the higher courts. There are various provisions in the constitution itself which ensures the independence of the judiciary.

[2] 1981 Suppl. 87

Some of the provisions are:

i) Article 50: Separation of judiciary from executive is one direct provision which ensures the independence and no interference from the executive.

ii) Article 211 and Article 121: No discussion on the conduct of any judge from the High Court/Supreme Court in the Parliament or the state legislature with respect to their discharge of the duties or their workings.

iii) Tenure: Judges of the High Courts / Supreme Court cannot be removed from the office except by an order of the President and that too on the ground of proven misbehavior and incapacity. A resolution has also to be accepted to that effect by a majority of total membership of each House of Parliament and also by a majority of no less than two third of the members of the house present and voting.

These are some of the provisions which ensure that the judiciary in the country is independent and that there is no involvement of any other organ, i.e., executive and legislature.

But this independence is now facing some kind of threat in the form of the appointment of the judiciary. The passing of the two important bills regarding the judiciary with undue haste has shaken the institution and has resulted in the conflicts between the two organs. There is an eminent danger and threat to the independence of the judiciary in the form of appointments of the judges. The provisions of the Constitution (120th Amendment) Bill read with the Judicial Appointments Commission Bill, 2013 (JAC Bill), if adopted, will emasculate an independent judiciary and will pose a grave threat to the rule of law.

To understand this bill, let us first focus on the method adopted for last 60 years for the appointment of judges to the High Courts / Supreme Court through their judgements.

BEFORE JUDICIAL APPOINTMENTS COMMISSION BILL

In the case of *SP Gupta vs Union of India*,[3] (also known as Judges Transfer Case I), the court specifically held that while judicial independence did not require the view of the Chief Justice of India in the matter of appointments and transfers to

[3] AIR 1982 SC 149

be determinative, nonetheless consultation with him would have to be full and effective and his opinion should not ordinarily be departed from. The power of the executive in appointing judges was accordingly circumscribed although it continued to have the last word on who would be appointed. This decision led to a lot of discussions from various academicians, lawyers and they argued that this decision has given priority to the executive in the appointment of the judges. This led to the filing of another petition with respect to the same issue which was, *Supreme Court Advocates on record Association vs. Union of India* (Judges Transfer Case II)[4]. This case overruled the first case and established a judicial collegiums consisting of the Chief Justice of India accompanied by the senior most judges of the Supreme Court as the primary body for appointment. This case became the first to establish a collegiums system with respect to appointment of judges and hence ensuring its independence and no interference from the executive, could be achieved from making of this body for the appointment of the judges. Though this case ordered for the formulation of the collegium system for the appointment of judges but it was still unclear on many terms and how this system would work, so there was special reference made by the President and the case was *In Re, Presidential Reference*[5] (Judges Transfer Case III). The court unanimously clarified the previous decision. According to this ruling, the Chief Justice of India would have to consult his four senior most colleagues for Supreme Court appointments and his two senior most colleagues for High Court appointments. Additionally, the senior most judge of the Supreme Court acquainted with the High Court from which the potential candidate hailed (for Supreme Court appointments) and to which High Court the candidate was proposed (for High Court appointments) would have to be consulted. Further, the Chief Justice of the High Court too, in forming his opinion, would have to consult his two senior most colleagues.

The system we followed for past so many years has been taken from the third Judges transfer Case. This was a brief history as to how the appointments of the judges were governed so far. The collegiums system for the appointment of judges has ensured the significance of judiciary in the country for so many years by now.

[4] (1993) 4 SCC 441
[5] (1998) 7 SCC 739

AFTER PASSING OF JUDICIAL APPOINTMENT COMMISSION BILL

The passing of the JAC bill has changed the appointment method for the judges in the Supreme Court and the High Courts.

According to this bill, in its present form, the Judicial Appointments Commission will consist of the Chief Justice, two other judges next to the Chief Justice of India in seniority, and the Union Law Minister as ex-officio members. Only two other persons described as eminent persons are to be nominated by a collegium consisting of the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the House of the People. One very interesting feature of the Judicial Appointment Commission is that it provides that the Central government will appoint the officers and employees of the Commission, making its secretariat a government department. This is the most dangerous provision. The officials and personnel of the Commission should be appointed in the same manner as those of the Supreme Court (Article 146), viz. by the CJI or such other judge or officer of the court as he may direct. If the secretariat or officers and servants of the JAC are treated as government departments, there are a hundred ways of making the JAC dysfunctional. In addition, the confidentiality and secrecy of the JAC deliberations cannot be maintained.

COMPARATIVE AND CRITICAL ANAYLSIS

The above two method adopted prior to the passing of the bill and after passing of the bill has a very significant difference. And that very important difference is that of the involvement of the executive in the bill that prescribes the appointment of the judiciary. This difference in the appointment method has lead us all to the point where we need to analyse if the independence of judiciary is in the danger or if this bill has posed some serious threats for the upcoming judiciary by making an appointment with the consultation of political leaders in the collegium system?

This bill up to a great extent has posed serious threats to the independence. The involvement of members other than members of judiciary in the collegiums system has not only corrupted and tainted the idea of the framers of the constitution but also defeats the provision of the Constitution which separated the judiciary from the executive so that the sanctity of the justice giving institution can be maintained. The passing of the bill in undue haste has also resulted into so many questions so to what made the legislature to pass this bill without any premature discussions. The Bill is a carefully crafted legislation designed to create a bureaucratised and subservient judiciary.

We really need to understand at this point that the government is one of the largest litigant in the country and if the government itself appoints the judges for the Supreme Court, then it would definitely lead to the question of biasness in the judgement given by the Court. This would not only the truthness of the judgement but also of the judge. It would then be difficult to call the judges of the Supreme Court or High Court independent in their workings and discharge of their duties, thus leading us to the another question as to if the bill has been passed, how will it uphold the very principle and basic feature of the Independence of Judiciary. The answers to all this questions are not easy to find. It is now very difficult to call our judiciary an independent one if the executive plays an important role in the appointment of judges. In addition, the ability of two members of the commission to exercise veto powers will cause much consternation. If two members disagree, then the appointment does not take place. The political element in the appointments system would always gravitate towards the spoils system, which continues most unabashedly across party lines. The present Judicial Appointment Commission bill will call for a debate regarding its constitutionality. Not only independence of judiciary but the democracy along the lines of judiciary that we claim as the third pillar of democracy in the country is in danger too.

It is still a very long way to go to adopt a method which involves members of Executive in the appointment of the judges and this bill is not declared unconstitutional, the independence of judiciary is in serious danger and posing an eminent threat to the third pillar of democracy.

CONCLUSION

The independence of the judiciary as is clear from the above discussion hold a prominent position as far as the institution of judiciary is concerned. It is also clear from the historical overview that judicial independence has faced many obstacles in the past especially 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. The various judgements have ensured the independence of judiciary so far and it has been given top most priority. So the question left to us to analyse in the end is that are we ready to give away the independence of judiciary by implementing the collegiums system that our Parliament has passed for the appointment of judges or we need to revisit the bill to remove the lacunaes in order to ensure the independence as our framers of Constitution had in their minds.? Is judicial independence is the significant value to be protected in the matter of appointments? The Judicial Appointments Commission is still suffering from various defeats which we need to overcome so the sanctity of such a great institution can be maintained. The Judicial appointment commission Bill has failed to take in account the most important factor as to involvement of the Executive in the appointment of the Judges where Union itself is one of the parties. This has defeated the very existence of the Judicial Appointments Bill. This Bill has not only affected the judiciary but also the other organs and the pillars of democracy and hence, it again needs to be looked into.

I would like to end this by posing a question to the readers as to what exactly do we mean when we talk about Independence of Judiciary? Before we answer the above raised questions, we need to first answer this question.