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LawPublicus The Legal Portal

Independence **of** **Judiciary**

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Independence of Judiciary

By: Vimal Mahajan

ABSTRACT

Ninety-ninth constitutional amendment was declared unconstitutional by Supreme Court on the pretext that it violate the basic structure doctrine. National Judicial Appointment Commission (NJAC) was rejected in majority judgment and Collegium system was restored to ensure impartial appointment and elevation of the judges. NJAC compromised the judicial independence and it made subservient to executive. Collegium may not be the best method for selection but it ensure the integrity and independence of judiciary to sustain. The basic objective of the research is to analyse the constitutional validity of 99th constitutional amendments as well as to critically examine the judgment delivered by the Supreme Court¹. Moreover examining the independence of judiciary ensured by collegium system.

¹ Supreme court advocates-on-record association and others v union of India AIR 2016

INTRODUCTION

Judiciary is considered as the ultimate repository of legal wisdom and popularly known as the guardian of constitution. It plays a crucial role of arbiter not just between people but state as well for resolution of disputes as well as upholding constitutional values. The conflicts and disputes are part and parcel of the society earlier it was dealt by people themselves, in later ages there was king which after rational era and in modern times the role is acquired by the judiciary. In a society where rule of law prevails, judiciary have to play an essential role along with the legislature and executive. The existence of justice and equity completely rely on the independent and accountable judiciary, both the factors are mutually exclusive, missing of any factor will negate the effect of judiciary and merely reduce its existence to the role of stamping authority. The very concept of independence of judiciary is very vague and highly misunderstood, it doesn't necessarily means impartial judges but a fearless as well although a single word but it requires lots of condition to fulfil to achieve it. the real test of this trait come in handy in times of difficulty and where one organ tries to overpower and manipulate other organs, it help to re-establish the existing principles which could lead to a just and democratic society. Accountability is a natural consequence of independence. Without any accountability, the concept and claim of independence becomes merely a hollow concept.

An independent judiciary is important to uphold the rule of law in a democracy. The judicial intervention curbs the arbitrariness of the executive and the legislatures. When all the organs of the government are in disarray, judiciary play a key role in aligning them back. But there have been many issues related to the problems faced by judiciary which have resulted in failure of the weakening of independence of the judiciary, either giving too much involvement to executive or negating the role of any other organ giving rise to the concept popularly known as judicial activism. Absence of quality appointments coupled with the lack of effective machinery to check the aberrant judges from deviating the straight and narrow path of judicial integrity and honesty has led to the growth of all these problems. The four landmarks judgments of supreme court which have not just given rise the conflict between judiciary and executive but as well have tarnished the upright image, this have led to 99th constitutional amendment which have introduced the institute the body of National Judicial Appointment Commission (NJAC) and later supreme court itself declared the amendment unconstitutional.

Today the Indian judiciary has become an enigma. It has become an institution on which generates hope and despair at the same. This study aims at the discussing the amendment which

created the institution of NJAC to succeed collegium system and analyse the judgment critically to understand the 99th amendment was unconstitutional and somehow compromised the judicial independence.

NATIONAL JUDICIAL APPOINTMENT COMMISSION

The constitutional framers were very well aware of the situation that there need to be a firm and harmonious balance between three organs of government especially judiciary have to be specially focused. Independence of judiciary is the cornerstone of our Constitution and it has been held as basic feature as well.

The power of appointment and transfer and discipline was given to upper judiciary. Power of appointment in superior judiciary was vested in president but not entirely as it was given with a condition that is to be in consultation of judiciary .

The appointment of Judges of the Supreme Court and their removal are governed by Art. 124 of the Constitution of India. Arts.125 to 129 provide for certain incidental matters. The appointment and removal of the Judges of the High Courts are governed by Art.217. Arts.218 to 221 and 223 to 224A provide for certain matters incidental thereto. Art.222 provides for transfer of Judges from one High Court to another. Arts.233 to 237 contain provision related to sub-ordinate judiciary.

After series of tussle between executive and judiciary resulting in formation of collegium system and dominance of judiciary over the power of appointment or critically a monopoly over it. this have resulted in government to devise a mechanism which would not just be neutral but would be comprising of the contribution of executive and judiciary to ensure checks and balances mechanism in turn maintaining separation of powers as well. NJAC come into existence for this reason only through 99th constitutional amendment although later on it was declared unconstitutional by constitutional bench restoring the original collegium system to ensure the independence of judiciary.

Art.50 of the Constitution provides that the State shall take steps to separate the judiciary from the executive in the public services of the State.

As Justice Bhagwati would say, a right appointment “would go a long way towards securing the right kind of judges who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity”.²

A person to be qualified for appointment as a Judge of the Supreme Court must be a citizen of India: and (1) have been Judge of a High Court at least for five years. (2) Has been for at least ten years an advocate of a High Court, (3) is in the opinion of the President a distinguished jurist. Thus a non-practicing or an academic lawyer may also be appointed as Judge of the Supreme Court if he is, in the opinion of the President a distinguished jurist.

Earlier the executive have power as well in appointment of judges of superior courts but after first judges case the consent of chief justice of India become mandatory but after second judges case this consent was weakened whereas in third judges case collegium system was developed, which was replaced by National judicial appointment commission which was introduced through 99th constitutional amendment.

In 2014 parliament enacted the constitution (ninety ninth amendment) act as well as national judicial appointment commission act. It amended articles 124 and 217 as well which earlier provides that there was need of president to consult the chief justice of India before appointment of the judges of supreme court whereas in case of high court consultation with chief justice of India, chief justice of high court and governor of the state have to be consulted before appointing the judges of high court respectively. As of which was changed after the amendment now which was to be regulated by national judicial appointment commission and consultation was replaced by recommendation³.

The recommendations of the national judicial appointment commission was binding on the president, that is power of president turned into rubber stamp which was earlier made by judicial interpretations but now constitution itself have reduced the authority of president. Article 124 A and B was added which gave the framework of national judicial appointment commission, comprising of the chief justice of India, next two senior judges of supreme court union minister of law and justice and two eminent person who would be chosen by a committee

² SP Gupta v. Union of India AIR 1981

³ The constitution (ninety ninth amendment) act 2014

comprising of prime minister, leader of opposition and chief justice of India. The function of NJAC will be to recommend the persons to be appointed as judged to Supreme Court as well as high courts and their transfer as well while ensuring the integrity and dignity of individual chosen ⁴.

Although seems very fair but there was a trickery hidden in the act⁵ which made a provision that any two person if disagree in the committee then the motion will not be passed this given eminent person a veto that can be manipulated easily with resources state have. This gave an unnecessary advantage to the executive which could have deep impact on the independence of the judiciary.

A petition was filed in the court against the aforesaid amendment which alleged that the amendment was unconstitutional as it violates the basic structure of the constitution that is independence of judiciary⁶. Constitutional bench of five judges decided the case, justices-khehar, lokur, goel, joseph gave the majority whereas justice chelamaleswar were in dissenting opinion. Major opinions which were formed:

1. Constitution mandated that there shall be primacy of judiciary in judicial appointments in order to ensure independence of judiciary.
2. Primacy of judiciary is one of the essential feature of basic structure.
3. NJAC was considered unconstitutional and it blatantly compromise the independence of judiciary.

The most disputed provision was with respect to the use of veto power by those eminent person which have made every aspect relating the National Judicial Commission very vague and it could be easily exploited to end the primacy of judiciary hampering the overall process of independence of judiciary. Other dispute was with regard to presence of law minister as most of the cases in Supreme Court was by the union government so it would create an interest which could lead to favouritism.

Hence the amendment was declared unconstitutional being violated basic structure of the constitution.

⁴ Ibid.

⁵ National Judicial Appointment Commission act,2014

⁶ See Mohit Singh, NJAC Act and 99th Constitutional Amendment Faces Challenge at Supreme Court

INDEPEDENCE OF JUDICIARY

The judgment basically focused on the meaning of the consultation as provided in the article 124, meaning thereby the opinion of the judiciary is binding on president establishing judicial supremacy.

Dr. B.R. Ambedkar gave a solution to the question of executive role in appointment of in judiciary, he suggested that although independence of judiciary should be maintained but it shall be free from influence of executive yet competitive in a sense as well. He was against the using the methodology of western countries as it give lots of power in the hand of executive rather he recommended as middle course which come as the provision of the article 124 of constitution⁷. He was against the use of word concurrence rather than consultation as he firmly believed the veto power should not be exercised by the judiciary in order to follow the principle of checks and balances.

Kesavananda Bharati made clear that the superiority of fundamental rights vis-a-vis directive principles was a feature of the basic structure. However, it did not clearly establish what other features might also be included. Chief Justice Sikri's opinion in the case suggested five essential features. Secularism, democracy, rule of law, federalism, and the independence of the judiciary-along with two possible additions: socialism and equality⁸. After there were controversial appointment of chief justices where justice A.N ray and justice Beg were giver chief position despite not having the seniority for consideration. This kick started the tussle between judiciary and executive which culminated in, popularly known as transfer of judge's case, where executive wanted to establish dominance over the judiciary.

The S P Gupta case (December 30, 1981) is called the "First Judges Case". It declared that the "primacy" of the CJI's recommendation to the President can be refused for "cogent reasons". This brought a paradigm shift in favour of the executive having primacy over the judiciary in judicial appointments. On October 6, 1993, came a nine-judge bench decision in the *Supreme Court Advocates-on Record Association vs Union of India* case known as the "Second Judges Case". This introduced the collegium system. Justice J S Verma said "justifiability" and "primacy" required that the CJI be given the "primal" role in such appointments. It overturned

⁷ CONSTITUENT ASSEMBLY DEBATES Vol. VIII, at 258.

⁸ Sudhir Krishnaswamy, democracy and constitutionalism in India : a study of basic structure doctrine (2009)

the S P Gupta judgment, saying "the role of the CJI is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter. Justice Ahmadi had dissented and Justice Punchhi took the view that the CJI need not restrict himself to just two judges (as mentioned in the ruling) and can consult any number of judges if he wants to, or none at all⁹.

For the next five years, there was confusion on the roles of the CJI and the two judges in judicial appointments and transfers. In many cases, CJIs took unilateral decisions without consulting two colleagues. Besides, the President became only an approver. In 1998, President K R Narayanan issued a presidential reference to the Supreme Court as to what the term "consultation" really means in Articles 124, 217 and 222 (transfer of HC judges) of the Constitution. Supreme Court laid down nine guidelines for the functioning of the quorum for appointments and transfers; this came to be the present form of the collegium¹⁰.

CONCLUSION

The tussle between the judiciary and executive have been since the inception of the constitution, earlier judiciary act somehow sub-ordinate to the executive. As the very initial executive were the part of constitutional assembly respectively judiciary was brainchild of their ideologies only. Earlier decades saw the combine efforts of government and judiciary in order to bring reforms in the society, many socio-economic regulations were implemented. It was later in the 60s when the stronghold of the executive loosens and after the death of India's first Prime Minister Jawahar Lal Nehru the elected government no longer was dominant. There were hustle in the democracy and during that chaos judiciary acquired the power and dissent came to known which earlier was never made. There were variety of dissenting judgments were delivered beginning from shankari Prasad to golak nath, this infuriated the legislature and executive, as the judicial stamp which was nothing but rubber stamp have started using its authority and there were series of dissenting judgments and many legislations were nullified and amendments were declared unconstitutional. This deepen the crack into the gap that just exaggerated after executive tried to subdue the authority of judiciary by nullifying its decision by bringing the amendments. Introduction of ninth schedule to exclude the jurisdiction of

⁹ Retrieved from

<http://www.upsciasexams.com/article-details/199/Three%20Judge%20Case%20and%20Collegium%20System>

¹⁰ Ibid 10

supreme court was an evident proof that show how desperate executive have become to stay in the power. This tussle have resulted in the famous basic structure case , where there were certain character which were considered the basic structure of Indian constitution and no amendment can change that. Later on there was series of incidents including superseding of justice A.N ray and Justice Beg to become chief justice of India respectively. It is not very difficult to understand there was a malicious nexus between judiciary and executive, mutual favours were expected and can be seen evidently in judgments as well.

It was first judge's case which proved to be significant as for the first time Supreme Court got opportunity to correct the problem which have been haunting the independence of judiciary. The primacy was given to executive decision on the appointment of judges in higher judiciary. Although after ten years there was another nine judge bench given the primacy to chief justice of India. In the third judges case which gave birth to the collegium in which five senior most judges formed it and they decided the appointment and transfer of judges. Although it ensure independence of judiciary but it give rise to further problem that was judges appointing judges. This problem was even recognized by judiciary in following years, they have also asked legislature to come up with the independent authority or mechanism which can impartially appoint or promote the judges.

This gave rise to the evolution of the National judicial Appointment commission which was brought into life after ratification made by majority of states as per the constitutional mandate. Although primacy was given to the judiciary as there were more than 70 per cent judicial member but executive still have veto which can negate any suggestion of judiciary. As per the fourth judges case this was not practical and they considered it to curtail the freedom of judiciary and quashed the ninety ninth constitutional amendment 2014 and National Judicial Commission act 2014 were declared unconstitutional. It can be very naturally understood the present system is not free from corruption and there have been many instances which proved collegium a complete failure as it somehow promoted nepotism somehow. However although the commission with few amendments can be useful and act as independent and impartial body. Researcher is of the view that the though Supreme Court have declared it unconstitutional but it could have a better option and independent mechanism which could ensure a fair and transparent procedure of the appointment. No doubt independence of judiciary is an necessity but it should not act as sole arbitrator, separation of powers principle works best in the mechanism of checks and balances. May be it was the history of the Indian politics and

judiciary which have made Supreme Court very sceptical of every act and intent of the executive.

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