The Clarion Volume 5 Number 1 (2016) PP 105-107
The Clarion
International Multidisciplinary Journal
ISSN : 2277-1697

Independence of judiciary in India: a non-negotiable issue.

Jarna Kalita
J B Law College, Guwahati, India

Abstract

The independent and impartial judiciary is said to be the first condition of liberty. It is custodian of the rights of the citizen. There are three organs of the Government Executive, Legislature and Judiciary. The Constitution of India has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts of the branches have been sufficiently differentiated. The Supreme Court has declared separation of power as basic to the Constitution of India. The judges of the higher judiciary are oath bound to uphold the constitution. Accordingly, the supreme court of India acts as a supreme interpreter, protestor and guardian to the constitution of India by keeping all authorities within legal bounds. Only an independent judiciary can protect the rights of the citizen. To prevail the rule of law Independence of judiciary is of prime necessity.

Keywords: Independence, judiciary, separation of power, constitutionalism, rule of law.

1. Introduction

India is a democratic country. For a Democratic Government having a written constitution the rule of law is a basic requirement and for maintenance of it, there must be an independent and impartial judiciary for redressal of the grievances of the citizens in administering justice in and impartial manner free from all interferences without fear or favour. The term independence of judiciary in this sense means that it is free to bring its own sense of values and does not Government. Hence only an independent judiciary can protect the rights of the Individual and afford even handed justice without fear or favour. So an independent judiciary is considered as the sine qua non of a vibrant democratic system. In *State of Bihar Vs Bal Mukhund Sah*, the Apex Court heal that the concept of separation of powers between the Legislature, the Executive and the Judiciary and the independence of judiciary is a fundamental concept and have now been elevated to the level of the basic structure of the constitutional sceme". As the separation of power is required in a country to maintain Constitutionalism, for rule of law is to prevail, judicial independence is of prime necessity. In England, the judicial independence was secured by the Act of Settlement 1701, which declared the judicial tenure to be good behaviour, and that upon the address of both houses of Parliament it would be lawful to remove a judge. Before 1701, the judges held their office during the crown's pleasure and like and any other crown servant; he could be dismissed by the king at will.

The members of the Constituent Assembly were very much concerned with question of independence of judiciary and accordingly, made several provisions to ensure this end. The constitution makes detailed provisions as regards the basic pattern of the court, its composition, powers jurisdiction etc. which cannot be touched by ordinary legislative process.

2. Analysis

Following are the provision under the constitution of India which ensures the Independence of Judiciary.

2.1 Separation of judiciary from executive

Article 50 provides for separation of judiciary from the executive. The Article reads as the "state shall take steps to separate the judiciary from the executive in the public service of the state". The separation of the judiciary from the executive is regarded as a very necessary element for proper administration of justice in the country. *The Supreme Court in Supreme Court advocates on records association Vs union of India* has

Corresponding author : jarnakalita@gmail.com
DOI number: 10.5958/2277-937X.2016.00015.0

held that Article 50 is based on the bedrock of the principle of Independent of judiciary.

2.2 Security of tenure

The judges of the Supreme and High court cannot be removed from the office except by an order of the president that is also ground of proved misbehaviour or incapacity, supported by a resolution adopted by a majority of total of its House and also by a majority not less than 2/3 of the members of the house present and voting.

2.3 Salaries and Allowances of the judges

The salaries and Allowances are determined by the parliament by law. Once a judge appointed his salary and allowances determined by the parliament, these cannot be varied to his disadvantage during his tenure of his office.

2.4 Recruit their staff

The constitution empowers the chief of Supreme Court and chief justice of High court to recruit their staff and regulate the condition and service and officers and servants appointed in their courts.

2.5 Expenditure of the court

The administrative expenses of the supreme court as well the High court have been declared to be charged upon the consolidate fund of India and states respectively, therefore not subjects to vote of legislature.

2.6 Prohibition of practice after retirement

The Constitution of India debars the judges of the Supreme court form pleading or appearing before the court or tribunal or judicial authority in India after retirement. A retired judge of a High Court is also prohibited from practicing before a court he had been a judge. A High Court judge, however, can after retirement, practice in the Supreme Court or in a High court in which had not been a judge.

2.7 Restriction on discussion in parliament/ legislative assembly

Neither in parliament nor in a state Legislature a discussion on can take place with respect the conduct of a judge of the Supreme Court in discharge of his duties.

2.8 Appoinment of judges

The judges of Supreme Court as well as the High courts are appointed by the president. However, the president, in this matter, is required to hold consultation with the judges of the Supreme Court and the High Courts. The constitution, in this matter, does not give a free hand to the executive. In 1982, the matter regarding appointment of the High Court judges as well as of the Supreme Court judges came before the Supreme Court by way of public interest litigation in the famous case of *S. P Gupta VS. Union of India* (AIR 1982 SC 149). The main question considered by the court was regarding the process of appointment of a High Court judge whose opinion amongst the various participants should have primary in the process of the selection? The majority took the view, in substance, that the opinions of the chief justice of India and the chief justice of the High Court were merely consultative and that the power of appointment resides solely and the exclusively in the central government could override that opinions given by the constitution function arises (vig, the chief justice of India and the chief justice of the concerned High Court). This meant that the view of the Chief Justice of India did not have primacy in the matter of the appointment of the judges in the higher judiciary. The majority thus took and extremely literal and positivistic view of Articles 124 (2) and 217 (1) of the Constitution of India.

3. Discussion

In *Supreme Court advocates on record association Vs. Union of India*, in this case the majority view give up literal interpretation and adopted a wider meaning of the constitutional provisions concerning the judiciary the word consultation. In Article 217 (1) was given a board meaning. The majority now insisted that the main concern of the constitution is the selection of the most suitable person for the superior judiciary. Thus the majority view expressed in *S. P Gupta Vs. Union of India* that the last word in appointment of high court judges rests with Government and that the chief justice of India has no place of primacy in selection of High Court judges were now overrules. Accordingly the court has rules that "in the choice of a candidate suitable for appointment the opinion of the chief justice of India should have the greatest weight as he is the best suited to know the worth of the appointee, the selection should be made as a result of a participatory consultation process in which the executive has the power to act as a mere check on the exercise of power by the chief justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is elemeted.

The ruling of the *Supreme Court in the Supreme Court Advocates on Record Association Vs Union of India* regarding appointment of the High court judges has been elaborated and articulated further by another judge Bench in *Re presidential reference* (AIR 199 SC 1) The court has now clarified that although the opinion of the chief justice of India has "primacy in the matter of appointment of the high court judge, it is not solely the opinion of the chief justice of India alone but is "reflective of the rule opinion of the judiciary which means that it must necessarily have the element of plurality in its formation". Therefore the Chief Justice of India should form his opinion in regard to person to be recommended for appointment as a High Court judge in consultation with his two, senior most puisne judges. So, the collegiums system was introduced in this case. They would in making their decision take into account the opinion of the chief justice of the High court, which would be entitled to greatest weight", the views of other High Court judges who may have been consulted and the views of the supreme court judges "who are conversant with affair of the concerned high court". All these views should be expressed in writing and conveyed to the government of India along with the recommendation.

But in 2014 the government passed the National Judicial Appointment Commission Act(NJAC), replace the 20 year old collegiums system for the appointment of judges of the Supreme Court and the High Courts. On, Oct 16, 2015 In Supreme court advocates on Record Association Vs Union of India had declared the National judicial Appointment Commission Act as unconstitutional. The five judge Bench ruled with a 4:1 majority that judges appointment shall continue to be made by the collegium system in which the collegium system i.e. a penal comprising five senior most judges of the Supreme court and High courts, with power to confirm appointments resistance, if any from the Government as per the amended provisions of the constitution, the National Judicial Appointment Commission would have consisted of the following six persons:

- Chief justice of India (chairperson ex officio)
- Two other senior judges of the Supreme Court next the chief justice of India, ex officio.
- Law minister of India
- Two eminent persons would have nominated by a committee consisting of the (chief justice of India, prime minister of India and leader of opposition, if there is no leader of the opposition them the leader of single largest opposition party in Lok sabha) provided that the two eminent persons, one person would be from the Scheduled Castes or Schedule Tribes or OBC or minority communities or a woman. The eminent persons shall be nominated for a period of three years and shall not be eligible for the nomination.

4. Conclusion

However, Independence of judiciary in not just a product of appointment and transfer process. It is basically a product of professional training and personal integrity which no Government can give and take away in India where communal lunacy and insidious corruption in action are increasing in public life, the selection to the higher judiciary must rule out all suspicion. The court must be impeccable n integrity, intelligence and constitutional wisdom.

Thus, the positions of the higher judiciaries are very strong and its independence is adequately guaranteed. However, there are certain disturbing trends the independence of judiciary at present, one of the factors which affected the independence of judiciary is the prevailing practice of the government to re-employ retired Supreme Court judges in various capacities. The only ban imposed by the constitution on a supreme court judge is that he should not plead or act in any court or before by authority after retirement.

References

M.P. Jain, *Indian Constitutional Law.*

V.N. Shukla, *Constitution of India.*

V.R. Krishna Iyer: *"of justice, justices and justicing"*.

S.P. Gupta vs Union of India (1982 sc 149)

S.C. Advocates on Record Association vs Union of India.

Re Presidential reference case. (Air 1999Sc1)

Constituent Assembly Debates Vol. viii, p258.