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INDEPENDENCE OF JUDICIARY AND POST RETIREMENT JOBS

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“We, the people of India, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC…”

The Preamble to the Constitution of India has envisaged, India to be a Democratic Nation, consisting of the three most important functionaries of the Government – The legislature, the Executive and the Judiciary. The three organs should work independently and at the same time continue to maintain checks and balances over one another as per our Constitution and the constitutionalism that exists. These three pillars are similar to the American Constitution; i.e. Article 1 Section 1. Article II Section 1 and Article III Section 1, each of these articles envisages and lay down different roles for these three pillars of the democracy in the Federal Constitution of the United States of America. The Judiciary considered to be the Interpreter of the Constitution plays a significant role while safeguarding the valuable rights of the citizens and adjudicating disputes between the state and non-state actors and private individuals. In a country like India, having the world’s lengthiest and one of the most rigid

Constitution, the role of the Judiciary becomes important as they have to interpret the Constitution and resolve any ambiguity that might stem from the wordings of the Constitution or any other law framed therein.

In the words of Glanville Austin, “The members of the Constituent Assembly envisaged the judiciary as a bastion of rights and justice.” The Assembly was been careful to keep judiciary out of politics.

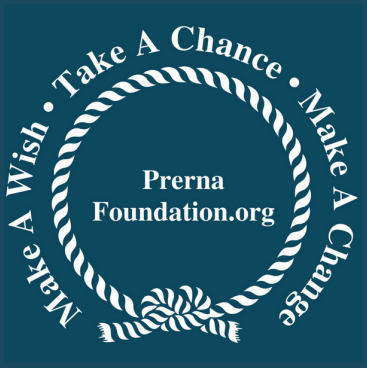
The Indian judicial system is a ladder of justice. The Constitution has entrusted the Supreme Court and the High Courts with the important duty of exercising Judicial Review. Any legislation or executive action held to be arbitrary or unreasonable can be rendered void. The Constitution of India envisages an Independent judicial System, free from intervention from the other functionaries. This makes it imperative to maintain an Independent Judicial System in the Country. It is important to keep it free from all possible interventions to uphold the sovereign belief of people in the great institution.

Even before the Constitution of India came into place, the Members of the Constituent Assembly advocated for an Independent Judiciary. Sir B.P. Sahib Bahadur, one of the members had stated that the Judiciary should be above all Political Parties and above all Political Considerations and it is necessary to establish and maintain an Independent Judiciary in respect to the Executive [1]. The doctrine of separation of powers and judicial independence are two key facets of the basic structure of the Constitution which is beyond

the scope of the amending power of Parliament [2]. The need for an Independent Judiciary is extremely important from the standpoint of the Public; any overlap/interference in this regard may cause the general public to lose faith in the Judicial System of our Nation. An Impartial and Independent Judiciary is extremely necessary for protecting the rights of the individuals while upholding equality and drawing a distinction between individual liberty and social control. Independence of Judiciary shall be construed to mean, not only the independence of the Judges in terms of dispensing justice but also independence of the institution as a whole with the absence of any kind of interference from the Legislature and the Executive. The Rule of Law can prevail, only if the Judiciary is Independent. The Independence of the Judiciary can be assessed by considering factors such as Mode and Mannerism of Appointment and Removal of Judges; their Tenure; the remuneration, immunities, and privileges granted to them by their post and other varied aspects.

Considering the importance of an Independent Judiciary, the Supreme Court has time and again emphasized the need to establish and maintain its Independence.

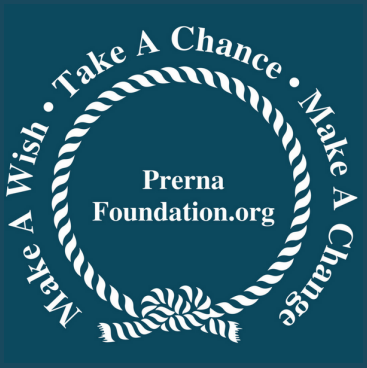
In the case of **SP Gupta v. Union of India (1981)** [3], the manner of appointment of Judges of the Supreme Court and High Court were being considered. It is in this case that Article 124 (2) about the appointment of a Supreme Court Judge and Article 217 (1) concerning that of a High Court Judge



was brought under the Judicial Lens.

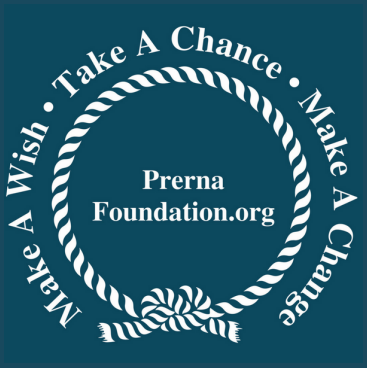
The Hon'ble Supreme Court dealt with the role of the Chief Justice of India in matters relating to the appointment of Judges to the Supreme Court and High Court and held that Independence of Judiciary is one of the basic features of the Constitution and the same was to be confined within the four corners of the Constitution and cannot at any circumstance go beyond that. It observed that the term "consultation" used in Article 124(2) and Article 217(1) didn't correspond to concurrence and that the Power of the Executive concerning matters relating to Appointment and Transfer of Judges of the Supreme Court and High Court is permissible and within the limits of the Judicial independence. This case is considered to be a landmark Judgement on the subject of Independence of Judiciary as it lay down that despite the power relating to Appointment of Judges is vested with the Executive; the Independence of the Judiciary is a basic feature of the Constitution.

This decision was soon followed by the **Supreme Court's Advocates on Record Association v. Union of India (1993) (commonly known as the Second Judges Case)**, [4] where the Supreme Court after considering the evils of favouritism and political influence that the Executive might exert on matters associated with Appointment of Judges overruled the decision of 7-Judge Bench in the case of SP Gupta v. Union of India.



By, a 9-Judge Bench, the Supreme Court asserted that the opinion of Chief Justice of India in matters relating to the appointment of Judges of High Court and Supreme Court should be given utmost importance to prevent the Executive from exerting their influence on such decision. This, however, did not restrict the scope of the Executive in giving suggestions on matters relating to appointments and in keeping checks and balances over one another. The Supreme Court envisaged that such a manner of appointment of Judges would reinstate the Independence of Judiciary from the Executive as provided in Article 50 of the Constitution of India.

After a period of 6 years, the then of President of India- Mr.KR Narayanan under Article 143 of the Constitution, sought for an opinion from the Supreme Court on matters relating to the appointment of Judges. This came to be referred to as the **Third Judges Case (1999)** [5]. The Supreme Court deliberated on the questions that were put forth to them by the President of India and gave a concurring decision as that of the Second Judges Case. They upheld the primacy of the Chief Justice of India in matters ascertaining to the appointment of Judges and further suggested that the Chief Justice of India had to mandatorily consult a collegium consisting of four senior-most judges of the Supreme Court and based on such opinion, appointments were to be made. This was done to keep a check on the Chief Justice of India while making appointments and to ensure he doesn't act arbitrarily and unreasonably.



In the year 2014, when the BJP government came into power, they introduced a National Judicial Appointments Commission Bill of 2014 which advocated for the establishment of a National Judicial Appointments Commission (NJAC). As the name suggests, this Commission was formed for making appointments to the post of High Court and Supreme Court Judges. This Commission led to the 99th Amendment being passed related to Articles 124(2), 127 & 128 and also inserted Article 124 A, B & C.

The Commission would consist of –

1. The Chief Justice of India (Chairperson ex-officio)
2. 2 senior-most Judges of the Supreme Court (ex-officio members)
3. The Union Minister of Law & Justice, and
4. Two eminent personalities (nominated by a committee consisting of Prime Minister, Leader of Opposition and Chief Justice of India).

The role of the NJAC in matters associated to the appointment of Judges was considered to be against the concept of Judicial Independence as it included deep-rooted involvement of the Executive in matters concerning the Appointment of the Judges and this was looked upon as a hindrance in the path of maintaining the Independence of Judiciary in India. It was further considered to be against the age-old Collegium system which was involved in matters associated with the appointment of Judges and was considered to be essential to ensure the proper functioning of the Judicial System.

The constitutionality of the 99th Amendment as being violative of the Basic Structure of the Constitution (Independence of Judiciary being a part of the basic structure) was challenged in the case of **Supreme Court Advocates-On- Record Association & Anr v. Union Of India (2016) (the NJAC case)** [6]. It is in this case that the Supreme Court (4:1) ruled that, the domination of the Executive in matters relating to the appointment of Judges affects the independence of the Judiciary by compromising on the merit of the Judges and weakens the principle of checks and balances and the separation of Judiciary from the Executive. The Court reasoned that the primacy of the Chief Justice in matters relating to Appointment is essential to prevent the Legislature and the Executive from exerting political pressure on matters of Appointment and secure loyalty from the ones appointed even after they are appointed a quid pro quo service. The Involvement of the Executive in such allied matters would attack the very fibre of civil society and act as an obstacle on the way to a democratic nation. Therefore it was decided that, while the primacy of the Judiciary on matters relating to initiation and finalization of the proposal for appointments is indisputable; the role of Executive could extend only to suggestions and feedback on the character of the candidates, relating to the appointment of Judges. The judgment, in this case, was based on the important axiom that the Independence of the Judiciary is a key element in the entire functioning of the Constitution and such independence is integrally linked to the appointment of Judges in a manner which is free from interference by the Executive. This Judgement not only upheld the importance of an Independent Judiciary in a Democratic

Society with Rule of Law as the order of the Society but also nullified the 99th Constitutional Amendment that tried to introduce a Commission in the appointment of Judges. The involvement of the Law Minister in the Commission was considered to be an attack on the principle of Separation of Powers and an attempt to defeat the Independence of Judiciary in our Nation.

Thus, over time, significant attempts have been made by the Supreme Court in maintaining and preserving the Independence of Judiciary as elucidated in our Constitution. The Constitution of India under Article 124(7) and Article 220 has attempted to ensure the Independence of Judiciary and the Judges by prohibiting the Judges of the Supreme Court and High Court from practice in any Court or, in the respective High Courts, as the case may be, post their retirement. This is done to ensure the sanctity of the institution and promote Judicial Independence.

In this regard, it is pertinent to take a view of the report laid out by the first law commission. The **First Law Commission in its Fourteenth Report (1958)** [7], had while considering the scope of Post-retirement jobs undertaken by the Judges of the Supreme Court, unanimously expressed that the practice of Judges looking forward to or accepting employment under the Government after their retirement was undesirable as it could affect the independence of the Judiciary and hence a Constitutional bar should be imposed on the same. However this hasn't been taken into account at all and Judges of the Supreme Court and the High Courts have time and again

accepted employments post their retirements and the instance of Mr. Ranjan Gogoi being nominated to the Rajya Sabha, four months post his retirement isn't the very first instance in India.

INSTANCES OF JUDGES TAKING UP POSTS AFTER RETIRMENT WHICH ARE POLITICAL IN NATURE

One can trace such a practice back to the year 1950s, when the Jawaharlal Nehru Government appointed Justice Fazal Ali, who is known for his dissenting opinion in the landmark judgment of AK Gopalan v. State of Madras(1950) as the Governor of the State of Orissa, post his retirement.

This was further followed by the appointment of **Justice KS Hedge**, as the Speaker of Lok Sabha from the year 1977 to 1980, within a time period of 4 years after his resignation as Judge of Supreme Court in 1973 as he was superseded by junior as the Chief Justice of India.

The year 1979, witnessed the appointment of **Justice M Hidyatullah** as the Vice President of India and the ex-officio Chairman of the Rajya Sabha, within a period of 9 years post his tenure as the Chief Justice of India. He had also served as the Acting President of India twice. Once, when VV Giri had resigned and the then President of United States, Richard Nixon was to visit India and the second time was, when the then President, Sardar Zail Singh went for his medical treatment to the United States from 6th October 1982 to 31st October, 1982

Justice Baharul Islam who retired in January 1983 from Supreme Court was nominated to the Rajya Sabha within a few months post his retirement in 1983 itself. His nomination to Rajya Sabha was criticized as a quid pro quo for rendering clean chit the then Bihar chief minister, **Mr. Jagannath Mishra** in the Patna Urban Cooperative Bank scam case.

In 1998, the nomination of the then **Chief Justice Ranganath Misra** to the Rajya Sabha soon after his retirement was highly talked about and was looked upon as a reward in return of his loyalty to the Congress party in giving a clean chit to them in the 1984 anti-Sikh massacre.

Again in the year 2014, the evil of Post-Retirement Job had made its resurgence when **former Chief Justice of India, Mr. Palaniswamy Sathasivam** was appointed as the new Governor of Kerala post his retirement. His appointment was questioned by the opposition.

Late Mr. Arun Jaitley, in 2013, when he was the Leader of the Opposition in Rajya Sabha, had commented on Post-retirement appointments of the Judges by stating that the post-retirement jobs were obstacles in the path of establishing an Independent Judiciary. He further went on to say that the pre-retirement Judgements were influenced by the desire to seek for a post-retirement job and the Independence of the Judiciary amidst such situations can be maintained by providing a cooling period of 2 years post the retirement of the Judge before any such appointments are made by the Government.

In the case of **Rojer Mathew v South Indian Bank & Ors Ltd. (2019)** [8], Mr. Arvind Datar, a Senior Advocate in the Supreme Court had raised an issue regarding the post-retirement jobs stating that tribunals should not become a haven for retired persons. He believed that it is important to make an effort such that the number of retired persons being reappointed is brought down and more persons from within the tribunal services are appointed up to the highest level in the tribunal. He further contended that if the administration is involved in making appointments and judges, serving or newly retired judges, are under consideration for such posts then the independence of the judiciary is likely to be compromised and the faith of the Public in the Judicial System be eroded.

ANALYSIS OF ARTICLE 80

Article 80 of the Constitution of India provides for the Composition of the Council of State also known as the Rajya Sabha. The President under this Article has the power to nominate 12 persons to the Rajya Sabha who are proficient in the field of Art, Science and Literature and Social Service on the aid and advice of the Council of Ministers headed by the Prime Minister. Besides the 12 persons nominated by the President under Article 80(3) of the Constitution, the Rajya Sabha consists of 238 members who are the representatives of their respective States and Union Territories. These Representatives are elected by the Members of the Legislative assembly of that particular State. The Rajya Sabha is a permanent body and 1/3rd of its members retire after every 2 years thereby affixing tenure to be 6 years. The history of the Rajya Sabha can be traced back to the British rein in India when the Council of State, the Rajya Sabha was the upper house of the legislature of British India which was established under the Government of India Act of 1919 through the Montague-Chelmsford Reforms, which advocated for diarchy in the governance.

These members can participate in the debates but have no power to vote for or against a motion. The Rajya Sabha even though a permanent body where members retire as stated earlier, is in session for only 65 days per calendar year.

The much-debated nomination of Mr. Ranjan Gogoi to the Rajya Sabha by the President within 4 months of his retirement is governed by Article 80(3) of the Constitution of India as per which the President has the power to nominate persons who have special knowledge in their respective field of Science, Arts, Social Service, etc., to the Rajya Sabha. The rationale behind such a clause was to enable the representation of professionals and utilize their services in the proper functioning of democracy. This mechanism turned out to be of great usage for those who despite having the capabilities avoid the hassles of seeking an election for the purpose of representation.

While one group of people consider that the nomination of Ranjan Gogoi to Rajya Sabha is done to ensure that the knowledge of such a highly learned man who has been a Judge for more than 15 years and had ably held the office of the

Chief Justice of India and had also been instrumental in giving path-breaking and landmark judgments on the decriminalization of homosexuality, the entry of women in Kerala's Sabarimala temple and the Rafale jet deal along with Assam's National Register of Citizens (NRC); is utilized effectively for formulating governmental policies and aiding the Legislature in enacting progressive laws, the Opposition has certainly looked down upon the nomination as an attack on the Independence of the Judiciary and a threat to the integrity and impartiality of the Judiciary and even 'quid pro quo' for his certain judgments for example; the Rafale Deal, the Sabrimala Reference, the deferment of hearing concerning the Constitutional Challenge to Article 370 and of course the Ayodhya judgment.

However, nomination under Article 80 of the Constitution is not within the purview of a job. It is a coveted duty entrusted upon by the President of India. It may be important to note that such nomination takes place on the aid and advice of the Council of Ministers. Hence, the interference of the Executive Government in the decision-making process for such nominations in writ large and plays a major role.

Whether it is a "Quid Pro Quo" or not, is a debatable issue. The other instances cited above are equal to Justice Gogoi's nomination to the Rajya Sabha, which is definitely a cause of concern for the compromise of independence of the judiciary.

The argument that the nomination is nothing compared to a job of heading a Tribunal or a Commission, is fallacious, because, a Rajya Sabha seat may not attract a great retirement package as such much but the powers and the privileges are more than a Chairperson of a Tribunal. However, some statutes such as the National Green Tribunal Act of 2010, which establishes the National Green Tribunal, the Companies Act which led to the establishment of National Company Law Appellate Tribunal (NCLAT), etc. provide for "Chairpersons to be a former Judge of the Supreme Court" or, "the High Courts". The possible argument can be to have a reasonable standard of adjudication in a Statutory Tribunal especially those Tribunals, from where the Appeals directly lie to the Supreme Court. Possibly, it can be to reduce the workload of the Supreme Court and the High Courts. However, the controversy remains that, if we omit the portions of those statutes which provide

for chairpersons to be retired Supreme Court or High Court Judges, and then whom do we appoint? and whether we go ahead for compromising the quality of adjudication expected from these Tribunals? Foremost, the question whether these statutory posts can be termed as “Political Appointments” or “Quid Pro Quo” is a debatable issue with strong views for and against it.

CONCLUSION

Thus time and again, the issue relating to appointments being accepted by the Judges of the Supreme Court post their retirements have arisen and they have been questioned on lines of such appointments being violative of the Independence of Judiciary. However, there hasn’t been any Judicial Precedent pertaining to such an issue and ambiguity still lingers. While one could defend such appointments as being means to utilize the services of learned professionals in their designated fields and cater services to the Public, it cannot be ignored that such appointments tend to influence the pre-retirement decisions of the Judges and erode the faith of Public in the Judicial System of the Nation and are barriers to Independence of Judiciary. In such a situation, the best manner to solve such issues would be to that the Judges keep themselves politically neutral and not indulge in any appeasement policies to seek post-retirement Jobs. The suggestion tendered by Mr. Arun Jaitley in providing a cooling period of two years, post the retirement of the Judge and before the appointment of the Judge may be a useful mechanism in solving the

necessary evil of appointing Judges to utilize their services. However, the question with respect to appointment of judges in posts after their respective retirements of the cooling-off period will continue to raise doubts in the minds of the public unless and until, a neutral policy for such appointment is envisaged which promotes transparency as well.

RESEARCH CREDITS -

Ms. Sneha Dey (4th year Law student, School of Law, Christ University, Bangalore)

FOOTNOTES -

[1] Kesavananda Bharati vs. State of Kerala (1973) Supp.1 SCC 1.

[2] Supra. Note. 1.

[3] SP Gupta v. Union of India 1981 Supp. 1 SCC 87.

[4] Supreme Court's Advocates on Record Association v. Union of India (1993) 4 SCC 441.

[5] In Re Special Reference No.1 (1998) 7 SCC 739.

[6] Supreme Court Advocates-On- Record Association & Anr v. Union Of India (2016) 5 SCC 1.

[7] Law Commission of India, 14th Report on Reform of Judicial Administration(1958) http://lawcommissionofindia.nic.in/1-50/Report14Vol1.pdf .[8] Rojer Mathew v South Indian Bank & Ors Ltd. (2019) SCC OnLine SC 1456.

IMAGE SOURCES -

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