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Vital Significance of Procedure of Appointment, Transfer and Removal of Judges in Securing the Independence of Higher Judiciary in India

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ABSTRACT

For a democratic government, the rule of law is a basic requirement, and for the maintenance of the rule of law, there must be an independent and impartial judiciary. It is the first condition to protect and safeguard the sacrosanct constitutional liberties and other rights of the citizens. In a federal Constitution, it plays another important role: it determines the limits of the power of the Centre and State.The nature of judicial process is such that under coercive winds the flame of justice flickers, faints and fades. The true judge is one whose soul is beyond purchase by threat or temptation, popularity and prospects. To float with the tide is easy; to counter the counterfeit current is uneasy. And yet the judge must be ready for it, if needed. Hence, judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says "Be you ever so high, the Law is above you." This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. The present paper makes an earnest endeavor to look into the importance of procedure of appointment, transfer and removal of the judges in securing the independence of Higher Judiciary in India.

Keywords* : *Appointment, Independence, Judiciary, Removal, Transfer

1. INTRODUCTION

The ideal in our mythology is 'Rama' who stood by his "swadharma" even when wooed to return to the palace at Ayodhya after withdrawal of boon given to Kaikeyi on the basis that "Pran Jaye Par Vachan Na Jaye". (Keep the word even at cost of life). Though that path is tough, the judges have to adopt it to bear out the oath or 'Pramana Vachana' (swearing) they have taken when entering the Office. Another instance is: Though Ravana was a king and could covet anything or anybody and get it, went to Sita in the garb of sanyasi and did what a sanyasi should not do. Hence Ravana had to pay a heavy price. So do judges when they wear the robes of Judges, they cannot but be true to it, else they meet with the fate of Ravana. Let judges choose, either the path of Rama which leads to glory or of Ravana ending in destruction. It may be worth recalling, what Dhuryodhana felt when his end was about to come, that his wife Bhanumathi may suffer at the hands of Pandavas as did

Draupadi at his hands. But later, realisation comes to him that so long as Yudhisthir is at the helm there will be no injustice. Similarly, even an enemy or opponent must feel that he would get justice at the hands of a Judge and that, by itself, is a true safeguard.[i]

2. VARIOUS CONSTITUTIONAL ASSURANCES FOR SECURING THE INDEPENDENCE OF HIGHER JUDICIARY IN INDIA

2.1 Constitutional Provisions regarding Appointment and Transfer of Judges in Higher Judiciary

(i) Article 124 of the Indian Constitution, inter alia, deals with the matters of appointment, qualifications etc. of a Judge in the Supreme Court of India. The said Article reads as hereunder:

"124. Establishment and Constitution of Supreme Court- (1) There shall be a Supreme Court of India and, until Parliament by Law prescribes a larger number, of not more than thirty other Judges. (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the State as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted".

(ii) The Article 217 of the Constitution inter alia, deals with the mode of appointment of Judges of High Courts. The said Article reads as hereunder:

"217. Appointment and conditions of the office of a Judge of a High Court- (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years."

(iii) The Article 222 deals with the matter of Transfer of a Judge from one High Court to another. The relevant provision in Article 222 reads as here under:

"222. Transfer of a Judge from one High Court to another- (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court. …..".

2.2 Tenure and Removal of Judges of Higher Judiciary

(i) A Judge of the Supreme Court may be removed from his office in the manner provided in clause (4) of Article 124 of the Constitution which reads as follows: "A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-third of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity". Clause (5) of the Article124 empowers Parliament to regulate by law the procedure for the presentation of an address and for the investigation and proof of the misbehavior or incapacity of a Judge under clause (4). In pursuance of power conferred under clause (5) of

Article 124, the Parliament has enacted the Judges (Inquiry) Act, 1958 and framed Judges (Inquiry) Rules, 1959 there under.

(ii) According to clause (1) of Article 217 of the Constitution a Permanent (Regular) Judge of a High Court shall hold office until he attains the age of 62 years. However, a Judge of the High Court may be removed from his office by the President in the same manner and on the same grounds as a Judge of the Supreme Court under Article 124(4) of the Constitution.

2.3 Restriction on discussion in Legislature on the conduct of the Judges of Higher Judiciary

Article 121 of the Constitution mandates that "no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided". Similarly, Article 211 of the Constitution reiterates that "no discussion shall take place in the Legislature of the State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties".

2.4 Prohibition on Practice after Retirement

The Constitution debars the Judges of the Supreme Court to plead or act in any Court or before any authority with in the territory of India after demitting his office. Similarly, Article 220 of the Constitution declares that "no person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any Court or before any authority in India except the Supreme Court and the other High Court.

2.5 Power to Punish for Contempt

The Supreme Court and the High Courts are vested with power to punish any person for their contempt. This power is very essential for maintaining the impartiality and independence of judiciary.

2.6 Separation of Judiciary in the Constitution

Realizing the significance of the independence of judiciary and in order to give a full life to that concept, felt the need of separation of the judiciary from the executive and designedly inserted Art. 50 in the Constitution after a heated debate; because judiciary under our constitutional scheme has to take up a positive and creative function in securing socio-economic justice to the people. In the Indian Constitution, Article 50 appears in para IV dealing with "Directive Principles of State Policy" under the heading „Separation of Judiciary from Executive" and it reads as follows: "Article 50- The State shall take steps to separate the judiciary from the executive in the public services of the State."

2.7 Salary and Allowances of Judges

Articles 125, 112 (3) (d) (i) and 113 (1) of Indian Constitution governs the matters of salary, privileges and allowance of the Judges of the Supreme Court of India. The Articles 221, 202 (3) (d) and 203 of Indian Constitution governs the matters of salary, privileges and allowance of the Judges of the High Courts in India.

2.8 Expenditure of Courts

Article 146 (2) & (3) incorporates provisions regarding expenses of the Supreme Court of India. Article 229 of the Constitution deals with the matters of expenses of the High Courts in India.

2.9 Appointment of Staff

Article 146 (1) of the Constitution provides for the appointment of officers and servants of the Supreme Court. Article 229 (1) of the Constitution provides for the appointment of officers and servants of a High Court.

2.10 Retirement Age of Judges

A Judge of the Supreme Court holds office until he attains the age of 65 years and a Judge of a High Court holds office until he attains the age of 62 years. [Article 124(2) and Article 217].

3. REFLECTIONS OF THE SUPREME COURT OF THE INDIA ON THE PARAMOUNT IMPORTANCE OF THE PROCEDURE OF APPOINTMENT, TRANSFER AND REMOVAL OF THE JUDGES IN HIGHER JUDICIARY

No doubt true, that the Constitutional assurances, relating to basic service conditions are absolutely necessary to protect the independence of the judiciary but at the same time they are not the be all and end all. More than the above, one other basic and inseparable vital condition is absolutely necessary for timely securing the independence of judiciary; that concerns the methodology, followed in the matter of sponsoring, selecting and appointing a proper and fit candidate to the Supreme Court or High Court) higher judiciary. The holistic condition is a major component that goes along with other constitutionally guaranteed service conditions in securing a complete independence of judiciary. To say differently, a healthy independent judiciary can be said to have been firstly secured by accomplishment of the increasingly important condition in regard to the method of appointment of Judges and, secondly, protected by the fulfillment of the rights, privileges and other service conditions. The resultant inescapable conclusion is that only the consummation or totality of all the requisite conditions beginning with the method and strategy of selection and appointment of Judges will secure and protect the independence of the judiciary. Otherwise, not only will the credibility of the judiciary stagger and decline but also the entire judicial system will explode which in turn may cripple the proper functioning of the democracy and the philosophy of this cherished concept will be only a myth rather than a reality.[ii]

While contemplating and realizing the importance of scheme and procedure of selection and appointment of Judges in Higher Judiciary vis-à-vis Independence of Higher Judiciary, it shall be a manifestation of sagacity and prudence to always bear in mind the immortal words of Sh. Fali S. Nariman:

"No. We don't need Judges who behave like emperors. What we do need is those "whom the lust of office does not kill; /whom the spoils of office can not buy;/who possess opinions and a will;/who can stand before a demagogue./And damn his treacherous flatteries without winking/Tall men (and women), sun-crowned, who live above the fog/ In public duty and private thinking."[iii]

Transfer of some of the upright High Court Judge's during the Emergency and a circular issued by Mr. Shiv Shankar Rao (the then Law Minister of India) on March 18, 1981 to the Governors, Chief Ministers and Chief Justices of all High Courts also brought to fore the inter-relationships between transfer of High Court and Independence of Higher Judiciary.

During the Emergency a list of 56 Judges to be transferred without their consent had been prepared, but in the first instance, 16 judges had been transferred, and names of the other judges on the list were deliberately leaked in order to shake the nerves of the High Court Judiciary.[iv] One of the judges so transferred was Sankal Chand Himatlal Seth J. of the Gujrat High Court and with commendable courage he filed a writ petition before the Gujrat High Court[v] against the Union of India (Justice A.N. Ray) challenging the order of transfer as ultra vires and invalid. Against the Judgement of Hon'ble Gujrat High Court, the Union of India went in appeal in Hon'ble Supreme Court of India.[vi] In the said case N.L. Untwalia J. said:

"But one thing is certain which I would venture to say… that the order of transfer of so many judges at one and the same time created a sense of fear and panic in the minds of the Judges and others throughout the country and led them to suspect strongly that the orders of transfer were made by and large in cases of Judges who had shown exemplary courage and independence even during the period of emergency in delivering judgments which were not to the liking of the Men in authority, including the judgments in many MISA cases… But one thing is certain, and I again take courage to say so with the utmost responsibility, that the panic created had shaken the very foundation and the structure of the independence of the judiciary throughout the country.[vii]

The Justice P.N. Bhagwati loftily intoned that:

"If on a proper construction of Cl. (1) of Art. 222, the power of transfer could be exercised by the executive and the High Court Judge could be transferred without his consent, it would be a highly dangerous power, because then executive will have an unbridled power to inflict injury on a High Court Judge by transferring him from the High Court to which he originally agreed to be appointed to another High Court, if he decides against the Government or delivers judgment which do not meet with the approval of the executive. That would gravely undermine the independence of the judiciary, for the High Court Judge would then be working constantly under a threat that if he does not fall in line with the views of the executive or delivers judgments not to its liking, he would be transferred, may be to a far-off High Court. …."[viii]

The circular issued by Sh. Shiv Shankar, in his capacity as Law Minister, to Governors, Chief Ministers and Chief Justices of the State asking them to obtain the consent of additional judges if sent to any other High Court on confirmation came for considerations before Hon'ble Supreme Court in the case of S.P. Gupta and other v.

President of India.[ix] The Justice P.N. Bhagwati reaffirmed the view he had taken in Sankalchand's case. He observed:

"I have examined the arguments which have been advanced with great ability and learning on both sides, but I am afraid I find it impossible to change the view I took in Sankalchand Seth's Case… I hold for the reasons given by me in Sankalchand Seth's Case that the power to transfer under Art. 222(1) can not be exercised against a Judge without his consent."[x]

Thus, it is clear that provision and policy of transfer of Judges of High Courts cast a direct bearing on the independence of higher judiciary.

The question of removal of a Judge before the age of retirement is an important one as it has a significant bearing on the independence of the judiciary. If a Judge of a Higher Judiciary could be removed by the Executive without much formality, then it can be imagined that the Court would loose its independence and become subject to the control of the Executive.[xi]

4. COLLEGIUM SYSTEM AND ATTEMPTED REPLACEMENT THEREOF BY NJAC REGIME

After the judgment of the Supreme Court in the S.C. Advocate-on-Record Association v. Union Of India[xii] (Second Judges case) was rendered in 1993, and the advisory opinion of the Supreme Court in Re, Presidential Reference Case[xiii] was tendered to the President of India in 1998, the term "consultation" in Articles 124(2) and 217(1), relating to appointment (as well as, transfer) of Judges of the higher judiciary, commenced to be interpreted as vesting primacy in the matter, with the judiciary. The Union of India, then framed a Memorandum of Procedure on 30.6.1999, for the appointment of Judges and Chief Justices to the High Courts and the Supreme Court, in consonance with the above two judgments. And appointments came to be made thereafter, in consonance with the Memorandum of Procedure. A feeling came to be entertained, that a Commission for selection and appointment, as also for transfer, of Judges of the higher judiciary should be constituted, which would replace the prevailing procedure, for appointment of Judges and Chief Justices of the High Courts and the Supreme Court of India, contemplated under Articles 124(2) and 217(1). It was felt, that the proposed Commission should be broad based. In that, the Commission should comprise of members of the judiciary, the executive and eminent/important persons from public life. In the above manner, it was proposed to introduce transparency in the selection process. To achieve the purported objective, Articles 124 and 217 were *inter alia* amended, and Articles 124A, 124B and 124C were inserted in the Constitution, through the Constitution (99th Amendment) Act, by following the procedure contemplated under Article 368(2), more particularly, the proviso there under. The amendment, received the assent of the President on 31.12.2014. It was however given effect to, with effect from 13.4.2015 (consequent upon its notification in the Gazette of India (Extraordinary) Part II, Section 1). Simultaneously therewith, the Parliament enacted the NJAC Act, which also received the assent of the President on 31.12.2014. The same was also brought into force, with effect from 13.4.2015 (by its notification in the Gazette of India (Extraordinary) Part II, Section 1). The above constitutional amendment and the legislative enactment, were put to challenge through a bunch of petitions in the Supreme Court of India. [xiv]

The Hon'ble Supreme Court held that Article 124A constitutes the edifice of the Constitution (99th Amendment) Act, 2014. The striking down of Article 124A would automatically lead to the undoing of the amendments made to Articles 124, 124B, 124C, 127, 128, 217, 222, 224, 224A and 231. This, for the simple reason, that the latter Articles are sustainable only if Article 124A is upheld. Article 124A(1) provides for the constitution and the composition of the National Judicial Appointments Commission (NJAC) that it is composed of the following:

(a) the Chief Justice of India, Chairperson, *ex officio*;

(b) two other senior Judges of Supreme Court, next to the Chief Justice of India – Members, *ex officio*;

(c) the Union Minister in charge of Law and Justice – Member, *ex officio*;

(d) two eminent persons, to be nominated – Members.

The Hon'ble Supreme concluded, that clauses (a) and (b) of Article 124A(1) do not provide anadequate representation, to the judicial component in the NJAC, clauses (a) and (b) of Article 124A(1) are insufficient to preserve the primacy of the judiciary, in the matter of selection and appointment of Judges, to the higher judiciary (as also transfer of Chief Justices and Judges, from one High Court to another). The same was accordingly held, violative of the principle of "independence of the judiciary". It was further concluded, that clause (c) of Article 124A(1) is *ultra vires* the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an *ex officio* Member of the NJAC. Clause (c) of Article 124A(1), impinges upon the principles of "independence of the judiciary", as well as, "separation of powers". It was also concluded, that clause (d) of Article 124A(1) which provides for the inclusion of two "eminent persons" as Members of the NJAC is *ultra vires* the provisions of the Constitution, for a variety of reasons. The same was also held as violative of the "basic structure" of the Constitution. Then the entire Constitution (99th Amendment) Act, 2014 was struck down, as being *ultra vires* the provisions of the Constitution. The Court went on to hold that the National Judicial Appointments Commission Act, 2014 *inter alia* emanates from Article 124C. It has no independent existence in the absence of the NJAC, constituted under Article 124A(1). Since Articles 124A and 124C have been set aside, as a natural corollary, the National Judicial Appointments Commission Act, 2014 was also liable to be set aside, the same was accordingly hereby struck down. In the end, the system of appointment of Judges to the Supreme Court, and Chief Justices and Judges to the High Courts; and transfer of Chief Justices and Judges of High Courts from one High Court, to another, as existing prior to the Constitution (Ninety-ninth Amendment) Act, 2014 (called the "collegium system"), was declared to be operative. However, The Hon'ble Court was alive to shortcomings in the extant Collegium System and thus desired for amendments in Memorandum of Procedure in accordance with law for improved working of the Collegium System. The Supreme Court and the Government of the day are yet to reach a consensus on the finalization of said Memorandum of Procedure and it has become a major bone of contention between them.

5. CONCLUSION

Under our constitutional scheme, the Higher Judiciary has been assigned the onerous task of protection and safeguard of fundamental rights and liberties of the citizens and upholding of rule of law. Only and only an independent and impartial judiciary can accomplish this vital and indispensable task. It shall be trite to say that

concept of Independence of Higher Judiciary (stand elevated to the level of basic structure of the Constitution) is a multifarious, multidimensional and ever evolving concept of momentous, monumental and colossal significance in a Democratic Republic Federal State. The present researcher harbors a conviction that inter alia, the "scheme and procedure of selection and appointment, transfer and removal of Judges in Higher Judiciary" is having an exceedingly transcendental and unexceptionally indispensable role in establishing, asserting and perpetuating the Independence of Higher Judiciary. Only competent, meritorious and qualified persons of great legal caliber, expertise, meticulousness and precision, immaculate honesty and impeccable integrity, sterling qualities and unimpeachable character, undaunting courage and unwavering determination selected through a transparent, merit-oriented, efficacious and holistic methodology having security of tenure and necessary safeguards in place against unregulated and arbitrary transfer and removal, and discharging their duties and functions without fear or favour, and sufficiently protected against Executive's interferences and prejudices can bring home the most cherished constitutional ideal of the "Independence of Higher Judiciary."

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