

Quest for Democratisation of Judicial System

Subodh Kumar

Abstract

The suppression of power was done to check the arbitrariness of the executive legislative and judiciary. The democratization of democracy can only be possible when there is no interference in these processes. Today, there has been a remarkable achievement of equality, liberty, and fraternity through constitutionalism. This was possible only when Judiciary is independent. To enhance the belief in institutions of judiciary, more pragmatic and decentralized approach is needed. This will enhance the faith and trust in judicial institutions. Through democratization of judiciary, constitutional democracy and republic will achieve the aims and objectives of our constitution.

Montesquieu's *Spirit of Laws* advocates separation of powers where political authority of the state is divided into legislative, executive and judicial powers. The separation was done to preserve liberty and, as the institutional requirement of a representative democracy. Hence, Judiciary checks arbitrariness of the Executive and Legislature and is the custodian of the constitution. To ensure its independence elaborate provisions have been made in the constitution under Article 124, 217, 233, 234 and 235. Moreover, the democratisation in actual sense can only be possible when there is no interference in the processes of judiciary, i.e., from appointments of judges to pronouncement of the verdicts. Today there has been a remarkable achievement of liberty, equality and fraternity through constitutionalism. This is possible only when our judiciary is independent. But, to enhance the

belief in the institutions of judiciary, we have to make more transparent approaches towards appointments of judges and pronouncement of verdicts. To make the processes of appointment of judges transparent and "just". Rastriya Lok Samta Party, a member of the ruling National Democratic Alliance has launched a nationwide movement "**Halla Bol Darwaja Khol**" to evolve a consensus on democratisation of the appointment of processes judges in higher judiciary. This is the first time in the history of Independent India, where political party is demanding for more transparent methods for the appointments of judges in higher judiciary, so that principle of equal opportunity should prevail.

When we analyse the political history of *Democratization of democracy* and its three pillars, we find that in 1225, there was a revolt in Britain, which led to establishing the principles of the of "Rule of Law" through *Magna Carta*, The process of democratisation continued with the establishment of constitutional monarchy in 1688 through Glorious Revolution, a year later in 1689, through *Bill of rights*, parliamentary supremacy was established in Britain Democratisation of. Democracy witnessed its first prime minister Robert Walpole in Britain (1714-1742). The irresistible revolution continued and in 1789, French Revolution marked the celebration of liberty, equality and fraternity across the world. Ernest Barker says justice is a tread which passes through liberty, equality and fraternity. These ideas has been enshrined in our constitution, and describe the "Preamble" of the Indian Constitution as one of the finest treatise in social justice.

In order to ensure justice, the framers of the constitution enshrined the idea of liberty, equality, fraternity and justice. We all know that "the Government of India Act 1935" has been accepted as a "model while framing the constitution" for free India. The framers of the Government of India Act 1935, showed their disinclination to Separate Executive from the judiciary. The provincial services commission was given a role in the matter of selection of members of subordinat Civil Judicial Service. Moreover, the Secretary of State's Services, namely, Indian Civil Service and the Indian Police Service were to lapse on the advent of freedom. Till 1947, there was a Quato for members of I.C.S. to be posted as District and Sessions Judges and who in turn got elevated to the High Court. But when, Secretary of State services lapsed and were replaced by I.A.S. & I.P.S. respectively. A policy decision was taken not to post any members of I.A.S. & I.P.S. to judicial posts. This was the starting point in independent India

of separating executive from judiciary.

Constituent Assembly members believed that unity in diversity, spirit of democracy and social revolution must be like seamless web in order to construct modern India. This, led to the incorporation of provisions relating to independence of judiciary in the Constitution. The appointment of judges of Supreme Court and High Court is governed by Article 124(2) and 217(1) of the Constitution respectively. The President appoints the judges of the Supreme Court after the consultation with the Chief Justice of India.

Over the period, the appointment of judges has emerged as a contentious issue, with constant friction between the executive and the judiciary. The Law Commission's recommendations that Chief Justice of India should be chosen not merely on the basis of seniority but should be the most suitable person, whether taken from the court, the bar or the high courts. This recommendation was used for personal benefits by Indira Gandhi in 1973, where she appointed Justice A.N. Ray as Chief Justice of India, superseding three senior most judges. In 1977, Indira Gandhi once again committed same mistake and appointed Justice H.H. Beg as Chief Justice of India superseding Justice H.R Khanna. These two appointments transformed independent judiciary to committed judiciary, which led to unrest in the judicial fraternity in particular and civil society in general. These appointments are the geniuses of collegium system in India, which resulted into three judges case. In the First Judges Case (1981); *S.P. Gupta vs Union of India*, the Supreme Court led by P.N. Bhagwati came down in favour of the executive by pointing to the fact that "to consult" does not mean that the power of appointment is with the Chief Justice. The power of appointment resides solely and exclusively in the central government. A similar judgement was given by the court in *Sankakhand Seth's Case* (1977), while interpreting the words "constitution" the Supreme Court rule that the term never mean "concurrence".

In the second judges case, the Supreme Court Advocate-on-Record Association vs Union of India (1993), the Supreme Court led by Justice J.S. Verma overruled the judgement of the first judges case. Justice Verma held that "constitution" really meant "concurrence" and that the Chief Justice of India views enjoys primacy since he is "best equipped to know and assess the worth" of candidates. The judgment evolved a new system i.e. colligium for appointment and transferring judges in the higher judiciary.

The working of colligium system was clarified in the third judges cases (1998); led by Chief Justice of India S.P. Bharuchia with reference to President K.R. Narayanan's presidential reference to the Supreme Court over the meaning of the term "consultation". The colligium will comprise the Chief Justice of India and his four senior most colleagues. In the case of appointments to High Court, the colligium will be Chief Justice of India and two senior most colleagues. This judgment completely excluded the role of executive in the process of judicial appointment.

When we analyse the appointments of judges in the higher judiciary, we find that collegium system has not been transparent in accommodating or giving representation to the diverse Indian society. There has been a negligible representation of S.C., S.T. and OBC and minorities in the higher judiciary. Gender disparity is also witnessed in the higher judiciary only approximately 10 per cent representation of women is there in the higher judiciary. The appointment process reflects the notion of 'Circulation of Elites'. Due to this, Karia Mundra Committee, recommended reservation in higher judiciary. To, overcome the flaws of appointments in the higher judiciary on All India Judicial Services has been the demand of various commissions. The 1st, 8th, 11th and 116th Law Commission recommended creation of an All India Judicial Services, so that right to equal opportunity should become the guiding force in the appointments of judges in higher judiciary. Similarly, in 1961, 1963, 1965 Chief Justice Conference, they recommended the creation of an "All India Judicial Services". In 1976, 42nd Amendment, All India Judicial Services provisions were amended in Article 312 clause (3)(4). In 1990, V.P. Singh Government introduced 67th Constitutional Amendment for creation of All India Judicial Commission, but his government did not last long. In 1994, All India Judges Association and others vs Union of India, gave a verdict that an All India Judicial Services should be set up and the Union of India should take appropriate steps in this regard. In 1999, National Judiciary Pay Commission recommended creation of an All India Judicial Services. In 2013, Constitutional Amendment (120th Amendment Bill) was introduced in Parliament to establish a Judicial Appointment Commission to appoint judges to the Supreme Court and the High Court.

In 2014, National Democratic Alliance led by Shri Narendra Modi introduced its first Constitutional Amendment Bill (121st) in Parliament for the creation of

National Judicial Appointment Commission (NJAC). Parliament after a long deliberation passed the Bill in 2017, so that transparency and equal opportunity should be provided in the processes of appointments of judges to higher judiciary. The Commission would consist of 6 people – Chief Justice of India, the two senior most judges of Supreme Court, Law Minister and two eminent persons. These eminent persons are to be nominated for a three years term by a Committee consisting of Chief Justice of India, Prime Minister, Leader of Opposition in Lok Sabha and must have at least 1 women/SC/ST/Minority/OBC representation. The five judge bench of Supreme Court rejected NJAC Act by 4:1. Justice J. Chelemswar gave dissent. They were of the view that it infringed on the Independence of the judiciary which is basic structure of the Constitution. But, the court asked the executive to prepare a Memorandum of Procedure (MoP) in consultation with the Chief Justice of India to enable transparency in the appointment of judges. Similarly, on 28th March 2018, Supreme Court bench led by Justice Adarsh Goel and U.U. Lalit accepted the pitfalls of colligium system and it argued for creation of a better system. Moreover, On 11th May 2018, Supreme Court bench accepted that there is a need for creation of national tribunal commission so that appointment of judges should be transparent.

When we analyse the appointment processes in different countries we find that colligium system does not exist anywhere in the world. In all other countries the “WILL OF THE PEOPLE” gets reflected in the appointment processes. In U.S.A., Article III of the United States constitution establish the federal courts as part of the federal government. Judges are appointed by the President, the legislative committee forward the names to Senate, then Senate pass the names and then which later, President appoints judges. In Britain, judges are appointed by five member commission. In Canada, judges are appointed by a panel led by five members of Parliament. In France, judges are appointed by President after the approval of Special Panel.

Conclusion

After 1989, the world saw democratisation of democracy across the world, including India. The democratisation helped the alienated sections of the society in the process of decision making. Almost every institutions in India accepted and celebrated the processes of democratization and the will of the people prevailed. But, judiciary in the only institution where we see the

circulation of elites process for appointments to the higher judiciary. This needs to be transformed. The irresistible revolution of liberty, equality and fraternity will create a democratic pressure from below that will democratize the processes of appointment in higher judiciary. In this way the credibility, trust and faith in judiciary will be upheld. Along with merit and seniority, the diversity in the processes of appointment should be the guiding principle. This will uphold the will of the people and will strengthen constitutional democracy and republic.

Reference

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