

Judicial Independence and Impartiality: A Sinking Belief

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Abstract

For efficient working of a republican setup rooted totally on Rule of law, an unbiased and impartial judiciary is indispensable. The percept of judicial independence and impartiality has brought greater significance in the countries with written constitutions, where the executive has been conferred with wide authority to sprint the government and the likelihood of abuse of such power is considerably high. In a country like India where judiciary is regarded as the watchdog of democracy, it undoubtedly becomes essential that judges in their individual capacities and the judiciary as a whole are unbiased and neutral of all interior and exterior influences in order to guard and shield the philosophical and conceptual phrases used in the preamble of the Indian Constitution. Besides, an impartial and independent choice mechanism is a sure safeguard for ensuring that persons with dubious integrity do not occupy high judicial offices, thereby enhancing public's have faith and self assurance in justice delivery mechanism of the country. Considering the significance which an unelected judiciary wheels in our system, the screening of judges to man the superior courts cannot be confined to mere technical and professional competence and their approaches and philosophies have to be screened extensively. The paper attempts to reflect the significance adhered to the principle of independent and impartial judiciary and the urgency to defend and hold such standards earlier than its dimensions turn into just indistinct and academic concepts. The continuous government stalling in the appointment of judges to the Superior Courts, nominating judges to political offices and occasionally unscrupulous conduct by some judges in the recent past, where judiciary on most part seemed to side with the executive, has raised questions on independent and impartial identity of judiciary. Should we permit the constitutional democracy to live to tell the tale or the authoritarian rule to be allowed is these days the important query before the masters of the country.

Keywords: *Constitution, Democracy, Independence, Impartiality, State.*

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I. Introduction

“All rights secures to the citizens under the constitution are worth nothing, and a mere bubble, except guarantee to them by an independent and virtuous judiciary”.

Andrew Jackson, 7th U.S. President

In any democratic system of governance, the twofold principles of judicial independence and impartiality are indispensable for upholding the Rule of Law and came to be the central theme of range debates and discussions in nearly all the democratic nations of the world. The independence of judiciary secured lots attention in the global locations with written Constitutions. Under a Written constitution, incorporating welfare philosophy, the government has been vested with huge powers for its acceptable functioning and to make policies for socio-economic development. However a robust democratic society that observes and upholds the rule of law cannot survive by relying solely on the splendid trust of those who govern its political institutions. The top notch protection of society from possible dangers originating from the abuse of power and circumvention of necessary democratic standards rests on, inter alia, the existence of counter balance mechanism. The independence of judiciary and legal profession is a quintessential pedestal of this system.³To maintain a balance of interests within a society and for its proper and smooth functioning, an independent and impartial judicial system was considered a pre-requisite. All the leading democracies of the world have time and again emphasized the need of an impartial and independent judiciary.

The genesis of institutional independence is grounded in the notion of Separation of Powers. Relying on the notion of separation of powers in the State, the independence of justice applies to each and every institution of justice, and to the individual judges who determine on particular matters.⁴Initially, there

³*Independence of Legal Profession: Threats to the bastion of a free and democratic society*, (Apr. 20, 2020, 7:55PM) <http://www.ibanet.org>.

⁴CristiDanilet, *Independence and Impartiality of Justice: International Standards*, (Apr.27, 2020, 5:35 PM),<http://www.medelnet.eu/images/stories/docs/independence%2520and%2520impartiality%2520of%2520justice->

was a call for institutional independence only but currently the drift is towards the independence of individual judges as well. Judges must be competent to discharge their professional obligations except being influenced by means of the executive/legislative branches of the government, by economic stake holders or by interest groups. While the State, one-of-a-kind establishments and private parties have an obligation to desist from coercing or persuading adjudicators to rule in a certain manner, judges too share a correlative responsibility to conduct themselves impartially.

II. Meaning of Judicial Independence

Normally independence is described as the absence of improper influence, coercion or strain from a range of internal or external factors whether or not political, social, and economic or different factors. It signifies some element that it is now not controlled or managed through any other agency or authority. Although the notion of judicial independence is recounted in a real manner and in many instances varies from one jurisdiction to another, but it does no longer detract from its recognition as a keystone of the Rule of law. For British, judicial independence intended that judges have to be free from affect from the king or Parliament. For United States, judicial independence means that judges ought to be free from the influence of the government or legislature.

In legal parlance, independence of judiciary imply the power of upholding besides concern or favour, the rule of law, character freedom and liberty, equality before law and unbiased and effective judicial control over administrative and executive working of the government.⁵ Independence, beneath the affect of fine State law, is commonly coupled with certain institutional guarantees or safeguards that enable adjudicators to free themselves to some extent from exterior pressures when making their decisions. Such safeguards include, amongst others, the neutrality of the appointment approach (i.e., an absence of political intervention), the stability of the position, autonomy from other branches of the government, a reasonable sphere of immunity, and the inviolability of their salary. Substantive independence of the Judges therefore, refers to as:

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⁵ L.M. Singhvi, *Independence of Justice*, 14 INDIAN BAR REVIEW, 515-517 (1987).

- a) Decisional or functional independence where judges are anticipated to appear at settlements without surrendering to any inner or outdoor forces;
- b) Individual independence which implies the judges are no longer subjected to the authorities in any way in which would it possibly affect them in arriving at choice in precise cases;
- c) Collective independence which infers institutional, legit and economic freedom of judiciary as a whole vis-a-vis incredible hands of the government especially the executive and the legislative; and
- d) Innermost independence which implies freedom of judges from the judicial masters and associates. In different words, it pertains to, independence of an adjudicator or judicial officer from any form of order, manifestation or influence from his judicial superiors and associates in figuring out cases.⁶

III. Relationship between Independence and Impartiality of Judiciary

Judicial independence brings forth the accountability to enforce the law impartially. A court that lacks independence cannot be impartial. In according independence to judges, it is extraordinarily necessary that their judicial power be utilized in an independent fashion. To the judiciary as an institution, independence pertains to (freedom from distinctive branches of power, referred to as “institutional independence”) and to the specific judge, it signifies (freedom from exclusive contributors of the judiciary, or “individual independence”). “Independence” demands that neither the judiciary nor the judges who constitute it be subjected to the other state authorities. On the other hand, the attitude a judge or tribunal in the direction of a case and the parties to it is what is typically referred to as “judicial impartiality”. The idea of impartiality is thus related with the objectivity of the opinion or the lack of prejudice regarding one or other of the parties and forms a crucial component of justice. Judges are supposed to act as unbiased arbiters so that law suits are determined in accordance to the law free from the influence of bias or ply, or cronyism. In the context of Article 14.1 of the ICCPR, The Human Rights

⁶Sunil Deshta, *Independence and Accountability of Judiciary in India: Problems and Solutions*, 3 ORIENT JOURNAL OF LAW AND SOCIAL SCIENCE, 49-50 (2009).

Committee has noted that: “impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”.⁷

The principle of judicial impartiality is critical to the due process of law. The percept is dictated with the aid of statutory and common law and is required by using the rules of judicial conduct. The Code of Judicial Conduct requires a judge to be disqualified from presiding over any proceeding in which the judge’s impartiality would possibly and fairly be questioned. This indicates that judges are disqualified from presiding over cases not only when they are in fact partial to one side or the other, however, also when there is an appearance of partiality to the reasonable observer. Hence, judges are expected to keep away from no longer only real partiality, but the appearance of it as well, due to the fact the appearance of a judge who is not impartial diminishes public confidence in the judiciary and degrades the justice system.⁸

IV.Importance of Judicial Independence and Impartiality

In almost all the democratic nations, a place of outstanding significance has been accorded to the judiciary. It is a job of the courts to confirm the rule of law and to guarantee that the government runs in harmony with the law. In countries with written Constitutions, courts possess an extra characteristic of safeguarding the supremacy of the Constitution by decoding and making use of its provisions and maintaining all powers within the Constitutional framework. The Constitutional guarantees, formal legal framework and institutional safeguards are no longer in themselves enough if the values of independence and separation of powers, which structure the basis of such rules, are lacking. Judges need to be independent to fulfill their part with regard to the other authorities of the State, society as a whole, and the parties to any particular dispute upon which judges have to adjudicate.

In order to restrain other powers from committing abuses and to make them answerable for their actions or inactions, independent judiciary acts as a key

⁷ International Covenant on Civil and Political Rights 1966 art 14.1.

⁸ JEFFREY M. SHARMAN, JUDICIAL ETHICS: INDEPENDENCE, IMPARTIALITY, AND INTEGRITY 15 (Inter-American Development Bank 1996).

instrument (“power stops power”). It gives a stability and check upon the authority of the different organs of government and thereby nullifies arbitrary government actions. The call for independent judiciary is not due to the fact of eagerness on part of the people to regard judges as relished representatives of the public services, it is rather fundamental to preserve and uphold the purity of the justice system thus enabling judges to earn public confidence in the administration of justice. The impartiality and independence of judges is hence now not a prerogative or privilege accorded in their own interest, but for the sake of the rule of law and of all those who seek and anticipate justice. By and large, an impartial and independent Judiciary can stand as a bulwark for shielding and safeguarding the rights of the individuals and mete out even handed justice besides worry or favour. To ensure the rule of law and truthful judicial administration, an independent judiciary is therefore of utmost importance.

V. Creation of Independent and Impartial Judiciary

Being an intrinsic aspect of the rule of law, judicial independence is safeguarded by a number of international and regional instruments,⁹ and in many jurisdictions, it is a constitutional guarantee. The doctrine of independence of judiciary calls for ‘separation of powers’, a doctrine that takes its roots in Montesquieu’s book *Spirit of the Law/ De L’esprit des* (1748). Formal guarantee of judicial independence dates back to 1701, when England’s Act of Settlement accorded express safety to the judges from unilateral removal by the Crown in the context of a larger shift of power from the king towards the Parliament and

⁹*United Nations Basic Principles on the Independence of the Judiciary* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (Apr. 22, 2020, 11.25 AM), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>. ; *The Bangalore Principles of Judicial Conduct* UNITED NATIONS OFFICE ON DRUGS AND CRIME (Apr. 22, 2020, 11.30 AM), http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf. ; International Covenant on Civil and Political Rights 1966 art 14. ; European Convention on Human Rights 1953 art 16. ; Universal Declaration of Human Rights 1948 art 10. ; American Convention on Human Rights 1969 art. 8. ; African Charter on Human and Peoples’ Rights 1986 art 7. ; Arab Charter on Human Rights 2004 art 12, 13, 6.

the courts.¹⁰ After United States acquired its independence in 1776, its constitutional record was marked by way of the checks and balances among the three organs of the government and for many western countries, this system of counterbalance has been of tremendous inspiration. The architects of the US Constitution were very much concerned about having judges being immune from any kind of intimidation and thus provided for their appointment through nomination by the President and its confirmation by the US Senate rather than appointment through election. In order to shield them from aggression by the executive or the legislative branch, the US Constitution offers for life tenure of a federal judge.¹¹

The framers of the Indian Constitution were mindful of the very substantial and distinctive position appropriated to the judiciary in the scheme of the Constitution. They took greater efforts to secure that an even better and effective judicial structure was incorporated and voiced that separation of judiciary from executive, which is the life-line of the independent judiciary, is a basic feature of Constitution. Dr. B.R. Ambedkar in his speech in the Constitution Assembly on June 07, 1949 observed that: *“I don’t think there is any dispute that there should be separation between the executive and the judiciary and in fact all the articles relating to the High Court as well as Supreme Court have prominently kept that object in mind”*.

Being the highest court in the land, it is very imperative that the Supreme Court be permitted to work in an atmosphere of independence of action and judgment and is insulated from all sorts of pressure, political or otherwise. To ensure such independence, several provisions were incorporated in the Constitution.¹² There was the focus that Judges, particularly the judges of the superior courts,

¹⁰ This Statute formally recognized the principles of security of judicial tenure by establishing that High Court judges and Lords of justice of Appeal hold office during good behavior. Appropriate and formal mechanism had to be in place before a judge could be removed.

¹¹ First, Article III states that federal judges shall hold their offices during good behavior and can only be removed from office by impeachment for the commission of high crimes or misdemeanors. Secondly, under Article III, the salaries of federal judges may not be lowered while they are in office. So, federal judges have virtual life tenure, so long as they do not misbehave, and their salaries are protected during that tenure.

¹² The entire scheme of judicial system in India is contained in art 124-147, art 214-232 and art 233-237. These Articles deals with Supreme Court, High Court and Subordinate Courts, respectively.

entrusted with the power to evaluate the administrative and legislative actions, discharge their duties without fear or favour and stay totally independent and wholly shielded from internal and external intimidations. The framers of the Indian Constitution therefore, brought a provision in Part-IV of the Constitution expressly directing the State to strive to keep judiciary out of politics.¹³

In India, the Supreme Court is envisaged as the custodian and the final expounder of the Constitution. It is regarded as the last authority to hold back any absolute, capricious and arbitrary exercise of power. Any legislative and executive activity of majority has to meet the scrutiny of legal elite, the judiciary, on the criterion of the constitutional arrangements and relevant statutory provisions so that the tyranny of the majority is contained by judicial vigilance. Besides upholding the constitutional supremacy, the Judiciary was assigned a role to act a guardian of the fundamental rights and civil liberties assured under the Constitution, as mere enumeration of range of fundamental rights in the Constitution without any provision to guard them will no longer serve any practical purpose. For this cause an independent and unbiased judiciary with the power of judicial review has been established.¹⁴ From time and again, the Supreme Court of India itself stressed on the principle of judicial independence. In *Minerva Mills Ltd. V. Union of India*¹⁵, the Court has found that the constitution has brought about an independent judiciary invested with the power of judicial review to decide the legitimacy of administrative actions and the validity of laws. Simultaneously, a solemn obligation is cast upon the judiciary itself under the constitution to keep distinctive organs of the State within the limits of the powers assigned to them by the Constitution by making use of power of judicial review as sentinel on the *qui vive*.

In the notable decision of *S.P Gupta v. Union of India*¹⁶, the Constitutional Bench of the Supreme Court held that, “judges should be of stern stuff and tough fiber, unbending before power, financial or political, and they may additionally moreover uphold the core percept of the rule of law which says: Be

¹³ INDIAN CONST. art 50 reads that the State shall take steps to separate the judiciary from the Executive in the public services of the State.

¹⁴ INDIAN CONST. art 32, Supreme Court of India exercises original jurisdiction for the enforcement of fundamental rights through power of ‘Judicial Review’.

¹⁵ AIR 1980 SC 1787.

¹⁶ AIR 1982 (2) SCC 831.

you ever so high, the law is above you. It is the principle of judicial independence which is indispensable for the foundation of actual inclusive democracy, preservation of the Rule of law as a dynamic notion and for dispensing social equity to the inclined sections of the public. It is this principle of independence of judiciary which we must and hold in concept whilst interpreting the relative provisions of the Constitution.”In 1993, another Constitutional Bench in the *Second Judges Appointment Case*¹⁷, declared that judicial independence is the sine qua non of democracy. While the judiciary certainly remains distant from the legislature as well as the executive, the overall competence of the public can by no means be jeopardized from any quarters. The constitutional scheme desires at guarding an independent Judiciary which is bulwark of democracy.¹⁸

VI. Modes of Securing Independence and Impartiality of Judiciary in Indian Constitution

The founding fathers of the Indian Constitution enshrined numerous provisions to secure judicial independence and impartiality, which are as follow:

- a) Judges are appointed, after consultation with judiciary, by the President.¹⁹
- b) High minimum eligibility for appointment as a judge.²⁰
- c) Oath to work impartially, fearlessly and uphold the Constitution.²¹
- d) The security of tenure is assured to every judge. A judge of Supreme Court or High Court can be removed from his office only on the ground of proved misbehavior or incapacity by the President after an address presented to him by each house of the Parliament.²²

¹⁷ Supreme Court Advocates-on-Record Association &Anr. v. Union of India, Writ Petition (Civil) 1303 of 1987.

¹⁸ A.C. Thalwal v. High Court of Himachal Pradesh, AIR 2000 SC 2732.

¹⁹ Articles 124(2), 127, 217(1) of Constitution of India

²⁰ Articles 124(3), 217(2) of Constitution of India

²¹ Articles 124(6), 219 of Constitution of India

²² Articles 124(4), 128 of Constitution of India

- e) The privileges, rights and allowances conferred on the judges cannot be altered to their disadvantages after their appointment.²³
- f) The Supreme Court and High Courts have power to appoint their staff and frame rules to regulate their procedure. The remuneration and other allowances of judges are not subjected to the vote of legislatures.²⁴ The administrative costs consisting of salary allowances and pensions of the Supreme Court and High court judges are charged to the consolidated fund of India and the States respectively.
- g) The judges of the Supreme Court are debarred from pleading after retirement before any court or judicial authority in India.²⁵
- h) The conduct of the judges of Supreme Court and High Courts in discharge of their duties shall not be discussed in legislature.²⁶

VII. Executive Incursions on Judicial Independence

Although the Constitutional framers made sincere efforts to ensure judicial independence and impartiality, the image of judiciary in its functional aspect is not fully independent and impartial. The establishment of independent judiciary remains a vague and academic concept. If we look by and large, the power of the Indian President to appoint judges is totally formal as the President is bound to act on the aid and advice of the Council of Ministers on this count.²⁷ An apprehension constantly persists that such Ministers may additionally drag politics in the engagement of judges. The truth of such apprehensions may be evident from the past instances where until 1973, the common procedure used to be to appoint the senior most puisne judge of the Supreme Court as the Chief justice of India. But on April 25, 1973, such long standing convention was breached and unexpectedly bidden a good bye by the then Indira Gandhi regime, when Justice A.N. Ray was appointed as Chief Justice of India superseding other senior judges, namely Justices Jaishankar Manilal Shelat, A.N. Grover and K.S. Hegde. The supersession was made a day after Supreme Court's judgment

²³ Article 125, 221, 360

²⁴ Articles 146, 229

²⁵ Articles 124(7), 220

²⁶ Articles 121, 211

²⁷ INDIAN CONST. art 74.

in the Fundamental Rights Case²⁸ and all the three judges resigned in protest as the practice was taken as an assault upon the independence of the judiciary. The government though justified the departure from past convention on two basis, one that the Constitution did not lay down any rule of seniority and secondly citing the recommendations of Law Commissions of India in its 14th report titled *Reforms in Judicial Administration*.

Second supersession could be witnessed all through the Emergency²⁹ when the Union Government in its supreme wisdom appointed Justice M.H. Beg as the Chief Justice of India on January 29, 1977, by superseding Justice H.R. Khanna. Justice Khanna submitted his resignation to the President soon after Justice Beg's appointment as the Chief Justice of India was announced. Khanna's supersession was feared much to the displeasure of the executive, as he was too independent and an ardent believer in the rule of law and sanctity of the Constitution. The plain motive backing Khanna's supersession was once executives desire to cast off any possible obstacles to their subsequent actions. Although in a well-known Fundamental Rights Case, Justice Khanna decided in the favour of government by upholding Parliament's power to alter, abridge or abrogate fundamental rights guaranteed under the Constitution, he had added a rider to it by holding that Parliament is not authorized to alter the "basic structure or framework" of the Constitution. Also Justice Khanna's dissenting opinion in the famous Habeas Corpus Case,³⁰ that even if the fundamental rights are lacking, the State has not been given the power to dispossess an individual of his freedom except with the authority of law. Such and other similar pronouncements made him a bugbear for the executive and the legislature.

In 1993, the Supreme Court in *the Second Judge Case*³¹ confirmed the convention to name the senior-most judge of the Supreme Court as the CJI, subsequent to the retirement of the outgoing CJI. The Court stated that the convention is in keeping with the idea of independence of judiciary as it eliminates any likelihood of the executive intrusion in this business. And now

²⁸Keshvananda Bharti v. State of Kerala, AIR 1973 SC 461.

²⁹ The Proclamation of Emergency on 25 June 1977 by Mrs. Indra Gandhi, referred to as "the emergency".

³⁰ ADM Jabalpur v. Shiv Kant Shukla, AIR (1976) 2 SC 521.

³¹Supreme Court Advocates on Record v. Union of India, AIR (1993) SC.

the senior-most convention has become a synonym for independence of judiciary.

The independence and functioning of the higher judiciary is additionally affected by the mode of their transfer. Although the Constitution offers a specific procedure for transferring a judge from one High Court to another³², there is hardly any efficient safeguard to counter the abuse of such power by the Executive. A list of 56 judges, to be transferred without their consent has been prepared during the emergency, but in the first occasion only 16 judges were transferred and the names of the other State judges on the list have been intentionally looked in order to shake the never of the judges of the High Courts.³³ Justice S.H. Seth, of Gujarat High Court, one of the judges so transferred, displayed a commendable courage by filing a writ petition against the Union of India and the then Chief Justice of India, Justice A.N. Ray, popularly known as *Sankal Chand's Case*³⁴ where Bhagwati and Untawalia JJ., in their dissenting opinion stated that transfer of a judge without his consent impedes the independence of judiciary.

In order to challenge the judicial power and primacy, the government in late 2014, enacted the National Judicial Appointments Act and the 99th Constitutional (Amendment) Act, established a new National Judicial Commission (NJAC). The Amendment inserted Article 124A in the Constitution which provided for the creation of the NJAC in place of current collegium system. The new NJAC would have extensively limited the judicial primacy and increased the governmental say in judicial appointments and was perceived by some in the legal fraternity as an attempt to intervene with the freedom enjoyed by the judiciary. However, the Supreme Court struck down the Government's bid to give the executive a greater say in the selection of judges by upholding the collegiums system.³⁵

The continuous allegations of executive interference in the judiciary, very recently led Justice Chalameswar, the senior most judge of the Supreme Court,

³² INDIAN CONST. art 222.

³³ 2 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 2266 (3 ed. N.M. Trepathi, Bombay, 1984).

³⁴ Union of India v. S.H.Sheth, AIR (1978) 1 SCR 423.

³⁵ Supreme Court Advocates-on-Record Association and Anr. v. Union of India, AIR (2016)5 SCC 1.

to raise certain questions by writing to the Chief Justice of India and thereby asking him to consider convening a full bench to take up the issue of such alleged executive interference. Such questions are fundamental for the preservation of judicial independence and especially the independence of country's highest court. In a letter written on March 21 of 2020, Justice Chalmeshwar cautioned that courts should not do the bidding of the government and "*the bonhomie between the judiciary and the government in any State sounds the death knell to democracy*"³⁶The letter criticized the governmental attitude towards courts, the functioning of the High Courts and the changing relations among the executive and the judiciary. This criticism has been made in the context of the government's stonewalling of the Apex Court's collegiums recommendations for appointment of a judge, its erroneous actions in the matter and the compliance of the Karnataka Chief Justice with these actions.³⁷

VIII. Compromising Judicial Independence and Impartiality

As a result of the convention developed by the government to employ judges in various capacities post retirement, the doctrine of judicial independence seems to have suffered erosion in India. If a judge wishes to get any government office once retired, then normal feeling may arise among public that judge is not wholly detached in a case where the government is a part.

The nomination of Justice Ranjan Gogoi, the ex CJI of India, to the upper house of the Parliament presents a very recent example raising serious doubts concerning the judicial independence and constitutional propriety.³⁸The fact that

³⁶(Apr. 23, 2020, 12:23 PM), http://www.google.co.in/amp/s/m.economictimes.com/news/politics-and-nation/sc-judge-red-flags-centres-interference-asks-cji-to-convene-full-court/amp_article/show/63532757.cms.

³⁷ The unprecedented letter has questioned the probe initiated by Karnataka High Court Chief Justice Dinesh Maheshwari J. against District and Sessions Judge Krishna Bhat at the instance of Union Ministry of Law and justice, despite his name being recommended for elevation twice by the Collegium, (Apr. 28, 2020, 12:45 PM), <http://www.google.co.in/in/amp/s/www.decanherald.com/amp/content/668064/threat-judiciarys-independence.html>.

³⁸ Justice Gogoi headed the Constitutional Bench in *M.Sidiq v. Mahant Suresh Das* (Ayodhya dispute 2019) that ordered the handing over of the disputed land to a trust, paving the way for the construction of the Ram Mandir.

the nomination came soon after the Akhil Bharatiya Karyakari Mandal of RSS applauding the Supreme Court for its 'highly balanced' and 'historic verdict in the Ayodhya dispute has led to accusations of quid pro quo.³⁹ In the recent past, Justice Gogoi presided the benches of the Supreme Court that decided politically volatile issues such as the Rafale deal, Kashmir Habeas Corpus petition, NRC direction in Assam and the Ayodhya title dispute, and the judgments concluded in each case suited the present ruling party at the Centre.

A day after such nomination, former Judges of Supreme Court including Justice Chelameswar, J.A K Patnaik and Kurian Joseph together with Justice Madan B Lokur exhibited grave dismay and voiced against such decision by saying that such a nomination and its acceptance have certainly shaken the confidence of a common man and will raise multiple doubts regarding judicial independence. In the words of Justice Patnaik, "if the government wants real experts, they would have gone for experienced lawyers like K Parasaran, Fali Nariman and K T S Tulsi or academicians like Upendra Baxi. Why would a chief Justice, at the peak of the judicial system, at all take such a nomination and why would government offer this to him?" Justice Kurian Joseph expressed his deep concern over the issue by stating that "*I am surprised as to how Justice Gogoi, who once exhibited such courage of conviction to uphold the independence of judiciary, has compromised the noble principles on the independence and impartiality of the judiciary*".⁴⁰

However when we look around, this is no longer perhaps for the first time when the accusations of constitutional misconduct and quid pro quo have been raised. The practice of appointing and nominating judges to the political offices post retirement has been happening for decades. Few notable parallels can easily be

³⁹ (Apr. 29, 2020, 3:53 PM), <http://www.google.com.in/amp/s/www.theweek.in/news/india/2020/03/17/pre-retirement-judgements-and-post-retirement-posts-and-their-politics.amp.html>.

⁴⁰ Seema Chishti, Liz Mathew, *Ex-SC judges say Gogoi in RS clouds judiciary's independence, he says am for nation-building*, THE INDIAN EXPRESS, March 18, 2020, at On 12 January 2018, justices Ranjan Gogoi, Madan B Lokur, Kurian Joseph and Chelameswar, the most senior judges then in the Supreme Court, in an unprecedented step, called a press conference to question the conduct of then CJI Dipak Misra, especially on the allocation of important cases to particular Benches by stating the independence of judiciary was in peril as that there was an attempt to fix benches and senior judges were being kept out of important cases.

drawn with some such past events with those unfolding now. Take an example of Justice Syed Fazal Ali, who despite his best powerful dissent against the government in *A.K.Goplan v. State of Madras* (1950), was appointed as the Governor of Orissa in 1951. The slashing criticism faced by such appointment virtually portrays the call for constitutional propriety where a judge should never be considered for political offices, nor should they accept such favours or positions.

The criticism in opposition of the nomination of Justice P. Sathasivam as the Governor of Kerala in 2014 not before long his retirement as the Chief justice of India offers an excellent example where such appointment forced some to reassess his judgments to see whether he was rewarded for some of his pre-retirement judgments. Incidentally, he was part of a Bench that decided know Sahabuddin Sheikh's fake encounter case in which present Union Home Minister, received a clean chit.

Among the varied instances of executive-judiciary nexus, Justice Baharul Islam's case stands out. Initially a congress politician, Justice Islam was twice elected to the upper house of the Parliament. After his resignation in 1972, he was once appointed as a judge of the then Assam and Nagaland High Court. He went ahead to become the Chief Justice of Gauhati High Court and retired in March 1980. In an unprecedented move, in December 1980, he was appointed to the Supreme Court. However, he resigned in January 1983 and was again elected to the Rajya Sabha, on a Congress ticket. His Rajya Sabha membership was sharply criticised as a quid pro quo for exonerating a Congress Chief Minister in a corruption case.⁴¹

On 20th August in 2019, Justice Sunil Grover of Delhi High Court brushed aside the petition of former Union Finance Minister P. Chidambaram seeking protection from arrest in a case under Prevention of Money Laundering Act (PMLA), 2002. The ruling led to arrest of Chidambaram. Justice Grover retired from office on August 23 and not less than a week was appointed as the chairman of the Appellate Tribunal for the PMLA.

⁴¹ (Apr. 30, 2020, 8:22 PM), <http://http://www.google.com.in /amp/s/www.theweek.in/news/india/2020/03/17/pre-retirement-judgements-and-post-retirement-posts-and-their-politics.amp.html>.

The list of the instances where judges could be seen favoured via the government of the day is quite long. It offers a grim reminder that the image of judiciary gets tarnished in such appointments besides the commitment of a political party to constitutional values. The Law Commission has long ago conveyed that this practice has a tendency to affect the independence of the judges and should be discontinued.⁴² Such appointments critically undermine judicial independence and impartiality. Such events do not bode well with the image of the judiciary as a guardian of the Constitution and the rights of the people mentioned therein. And somehow gives a genuine colour to the allegations that in India there is surely a nexus among judges and politicians and both are pursuing a policy of give and take.

IX. Conclusion

Executive's incremental encroachment in judicial sphere unveils a gloomy picture in near future of the government directing the courts what orders are to be passed. Democracy will be dander if State agencies continue to meddle in the functioning of one another and strive to command each. Judges of higher judiciary seem more interested to secure their future than their present i.e., Pre-retirement judges influenced by post-retirement jobs. Except a few, there is a competition going on among judges to please the government of the day thereby overlooking an average person. The law is actually simple but is now bound and muddled in the complexities and for some judges such complexities made it too convenient to interpret law according to their conveniences. In defending and promoting the significance of judiciary as an institution charged with the duty to uphold the constitutional values, personal independence of judges is equally adored. The recent scenario of post-retirement nominations and appointments of judges put forth some thoughtful questions concerning the integrity, impartiality and conduct of a judge whilst in the office. If we fall short of judicious adjudicators who can display the courage to hold back from assuming post-retirement political offices, it is high time to bring about a constitutional prohibition calling for a mandatory cooling off period.

⁴² Law Commission of India. (1958). *Reforms of the Judicial Administration* (XIV Report).

There are certain assumptions at play as to why do democratic system vests in judge the power of judicial review. One such assumption is that the judges though not directly elected by the people, consequently continue to be immune to popular influences and are anticipated to go with the aid of the spirit of law, even though not by its letter. There is a presupposition that judges, without the fetters of popular pressure, will turn out to be better at moral reasoning than politicians. Owing to these speculations, the impression that a judge is malleable to political leverages, turn out to be a fatal fault for that judge. The moment such a perception occurs, the authority of the judge as a person competent of superior moral reasoning crashes and with it erodes the institution of the judiciary.