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POST-RETIREMENT APPOINTMENTS & JUDGES: A Blow to the Independence of Judiciary, Democracy, and the Constitution

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POST-RETIREMENT APPOINTMENTS & JUDGES: A blow to the Independence of Judiciary, Democracy, and the Constitution

Shreshth Srivastava[*]

[***Abstract***: *The ethical and philosophical principle underlying the principle for separating Judiciary from the Executive is an immutable principle recognized, in one form or other, in all countries having democratic legal system. The independence of Judiciary functions as a shield against the possible abuse of power by the Executive and the Legislature. The kind of functions which a Judge has to discharge, requires conducting himself in a manner which aggrandizes the credence of the people in the Judiciary. But the recent practice of appointment of retired judges of the Supreme Court or high courts, to different legislative, political, or other autonomous and quasi-judicial bodies raises serious questions for the working of the political and the judicial institutions in India. The issue is of great Constitutional importance that how these post-retirement engagements are a scar on the independence of the Judiciary. This paper seeks to analyze the practice of appointing the retired Judges to the various commissions and tribunals etc., and how this practice amounts to defilement of the cherished principles of the Constitution and at the end provide a mechanism which should be evolved so that the vacancies of high offices of various commissions, tribunals, and other ad judicial or legislative bodies may be filed in a transparent manner. The deterrent on Judges taking on any lucrative job instantly after their appointment stems from the larger connotation that Judicial independence requires that those who have held such should be seen as above all influences. This principle and the image is a sine qua non for an 'healthy' democratic legal system.*]

I

Introduction

'Whatsoever great man doeth, that other men also do,
the standard they set up, by that the people go'

— The Holy Bhagavad Gita[1]

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[1] THE HOLY BHAGAVAD GITA, *available at*: https://www.holy-bhagavad-gita.org/chapter/3/verse/20-21 (last visited 07 Jun., 2021).

Law and politics have multifarious interactions. It is, however, important how does it exhibit in the actors who are seen as, either, belonging to the law, or maneuvered pre-dominantly by politics? India has witnessed, in recent times, public debate on the relation between Judicial independence and Judicial appointments. There are arguments that we need to revisit our conception of Judges at a societal level. There are several views: such as are judges really 'lawmen'? Judges are very much political thespians in the democratic set-up. The general basic belief is that judges should be beyond political influence to be capable to preserve judicial independence. The latter point extends the debate to post-retirement as judges cannot be expected to adjudicate, in a specific way in lieu of their forage for Post-Retirement benefits.

The Constitutional concept of Judicial independence insinuates two things.[2] Firstly, judges are seen as beings with sagacity, fearlessness, and independence. In simple terms, the best of human beings. Thus, their appointment and actions have to be free from any interference and should also be seen as such. And, secondly, Whatever Judges do it reverberates the perspicacity about Judicial institutions, which is why there are several conventions regulating how a judge should act while holding the Judicial office and when out of it.

Once a judge decides to accept the exalted post of the high court or Supreme Court, he has to abide by certain principles and norms and is also expected to follow self-imposed restrictions in order to maintain the dignity of the high office he holds. He is supposed to enhance the persona of the court and to see that the confidence which the people have in the court is not shaken.[3]

Justice Learned Hand warned against the danger of political or other extraneous considerations influencing Judicial decisions. While stressing the need for Judges to keep away from political battles and assuming the role of Legislators or seeking solatium from their bosom. He observed:

> *'If an independent Judiciary seeks to fill them from its own bosom, in the end it will cease to be independent. And its independence will be well lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs; it must be content to stand aside from these fateful battles'.*[4]

Justice Hand further remarked:

> *'There are two ways in which the Judges may forfeit their independence if they do not abstain. If they are intransigent but honest, they will be curbed; but a worse fate will befall them if they learn to trim their sails to the prevailing winds. A society whose Judges have taught it to expect complaisance under the pretence of interpretation is rottenness'.*[5]

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2 D.D. BASU, COMMENTARY ON THE CONSTITUTION 58 (2015).

3 *Id*, para 40.

4 LEARNED HAND, THE SPIRIT OF LIBERTY 162-165 (Dillard, ed., 1953).

5 *Id*.

Independence of Judiciary can be well described to be the very matrix of the system, it is considered as the one of the indispensable conditions for the survival of liberal democratic institutions and the of rule of law, and without such independence the courts would not enjoy the confidence and faith of the people.[6]

This paper examines a question of great Constitutional importance that how the post-retirement jobs for the Judges are a scar on the independence of Judiciary. The present paper is divided into seven sections. The first section provides a general overview. The section II discusses how post-retirement appointments tends to undermine the principle of 'Separation of Powers'. Section III deals with the subject from the concept of Constitutional morality. An in-depth analysis has been attempted, in section IV, as to how the re-employment of the retired Judges undermines the idea and practice of 'rule of law' and also attempts to provide a comparison of the same issue from the perspective of the Judges of the European Court of Human Rights. Section V the author has tried to show that the acceptance of post-retirement jobs is violative of article 124(7) and 220 of the Constitution of India. The analysis of the existing laws in the UK and Canada regarding the same issue is given under section-VI. The last section is devoted to concluding remarks and certain recommendations have been put forth.

II

Post-Retirement Appointments and 'the Separation of Powers'

The doctrine of 'Separation of Powers' has a variety of meanings. The concept may mean at least three different things: (a) that the same persons should not form part of more than one of the three branches of Government; (b) that one branch of government must not interfere or control with the work of another, for example the executive should not interfere in the functions of the judiciary; (c) that one branch of government should not exercise the functions and powers of another.[7] Montesquieu described separation of powers among a Legislature, an Executive, and a Judiciary. His approach was to present and defend a form of Government that was not excessively centralized in all its powers to a single monarch or similar ruler. In the British Constitutional system, Montesquieu discerned a separation of powers among the Monarch, Parliament, and the Court of Law. Montesquieu did actually specify that 'the independence of judiciary' has to be real, and not illusionary.[8]

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6 Justice H.R. Khanna, *Independence of the Judiciary,* 17(3) SCC J. 15 (1981).

7 A.W. Bradley & K.D. Ewing, CONSTITUTIONAL AND ADMINISTRATIVE LAW 88 (2009).

8 Binod K. Das, *Law and Political Science Exploring Relationship*, 5.1 NLUJ REV. 21 (2012).

Position in the US

In *Northern Pipeline Construction Co* v. *Marathon Pipeline Co*[9] the US Supreme Court while dealing with the question of separation of powers and independence of judiciary, held that 'separation of powers has been described as the centerpiece of the American constitutional plan, and it is basic to the constitutional structure established by the framers. And any type of favour or fear which could sabotage the performance of a judge would undermine the separation of powers, a judge is always expected to discharge his duties without any prejudices. It appears that such post-retirement jobs create certain prejudices in the mind of the Judges which ultimately affects their ruling. The powers vested in the state are not to cause fear or favour or any pressure on the judiciary, lest the sitting judge after retirement be dependent upon the kindness of the executive.[10] This element of arbitrariness or mercy must be eliminated to give judiciary its deserved independence and freedom to work effectively in the public interest and also for the attainment of the constitutional goals.[11] In 2012, in *Baka* v. *Hungary*,[12] the term of office of the Chief Justice of Hungary's Supreme Court was prematurely terminated for expressing his personal political views on the Legislative reforms that would affect the Judiciary. This termination was ultimately termed by the European Court of Human Rights as a 'chilling effect' on the independence of judiciary and separation of powers.

The ethical and philosophical principles underlying the idea of separating the judiciary from the executive is an undeniable fact that has received recognition in one form or other in all countries and among all communities.

Position in India

In *Delhi Laws Act, 1912*,[13] a seven-judge bench of the Supreme Court has considered the doctrine and ruled that strictly speaking, it has no place in the system of governance in India nor at the present day under the Constitution. Unlike the American and Australian Constitutions, the Indian Constitution does not expressly vest the different set of powers in the different organs of the State. Under article 53(1)[14], the Executive power is indeed vested in the President, but there is no similar vesting provision regarding the legislative and the Judicial powers. Few years later,

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9 458 U.S. 50 (1982), para 74.

10 Gerhard Casper, *An Essay on Separation of Powers: Some early versions and Practices* 30 WN & MARRY LAW REV. 211 (1989).

11 Ajepe Taiwo Shehu, *Chief Justice John Marshall and Marbury v. Madison: Revisited,* 6.1 NLUJ REV. 19 (2017).

12 2061/12 (Eur Ct HR, May 27, 2014).

13 AIR 1951 SC 332, para 31.

14 Constitution of India, 1950, article 53(1).

however, in *Ram Jawaya Kapoor* v. *State of Punjab,* the Court held that the essential functions of the three organs of the state have been sufficiently differentiated.[15]

Though the principle of separation of powers is nowhere expressly defined in the Indian Constitution but in *Kesavananda Bharti* v. *State of Kerala*[16] and later in *Indra Nehru Gandhi* v. *Raj Narain,*[17] the Supreme Court has held that 'Separation of Powers is a part of the basic structure of the Indian Constitution'. A question is often arised whether it is possible to follow absolute separation of powers in the modern context? The answer is in negative. Bradley and Ewing[18] argued that a strict separation of powers is possible neither in theory nor in practice.

Thus, though our Constitution, which is Federal in structure, is modelled after the British parliamentary system where strict application of separation of powers is not possible, still this does not give any leverage to the judges to accept post-retirement jobs. There has to be a set of norms that needs to be followed when a judge retires. Judiciary occupies an exalted position in the minds of the people as the savior of democracy, rights, and the constitution it is an institution that can effectively combat corruption and nepotism in high places. It has been rightly observed by Justice VR Krishna Iyer that:[19]

> 'It must be said that the independence of Judiciary which plays the useful role in democratic societies in checking a class-based Government is being undermined in our country, by such devices as making Judges, after retirement, or on the eve of the retirement of Governors, Ambassadors, Vice-Chancellors, etc. These plums have a seductive influence on the superannuating gentlemen, and should be avoided if we are purists regarding the independence of Judiciary'.

It can be very well said that re-employment of the retired judges by the executive violates, in spirit, the doctrine of separation of powers. The whole principle of an independent judiciary is based, essentially, upon the principle of separation of powers *e.g.* the ruling of the Supreme Court, for appointing of judges through the collegium system minimizing the role of the executive is based on the necessity of maintaining the independence of judiciary. This also explains why judicial independence became one of the most important elements of modern Constitutionalism. One of the main objectives of Constitutionalism is 'to limit the arbitrary exercise of power and make it legally accountable, submitting the performance of public functions to the security of an independent body (the

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15 AIR 1955 SC 649.

16 (1973) 4 SCC 225, para 292.

17 (1976) 3 SCC 321, para 12.

18 *Supra* note 7.

19 V.R. Krishna Iyer, LAW AND THE PEOPLE: A COLLECTION OF ESSAYS 24 (1972).

Judiciary)'. It ensures the ascendancy of the law and represents a fundamental step in building a Constitutional State'.[20]

According to article 50[21] it is the duty of the state to separate the judiciary from the executive which with the passage of time, has turned into a Constitutional mandate rather than a mere Constitutional directive. The conditions of service of judiciary have to be reasonable and free of arbitrariness. article 148[22] also enunciates this principle stating 'the Comptroller Auditor General after his retirement shall not be eligible for any office under the Government of India or under the Government of any State." **a**nd article 319[23] which states "The Chairman of the Union Public Service Commission and Chairman of a State Public Service Commission shall be ineligible for any office under the Government of India or under the Government of any State after their retirement.' But unlike in the above-mentioned provisions, the drafters of the Constitution did not make any explicit provisions restricting the post-retirement acceptance of public offices by the judges of the superior judiciary as they were expected to conduct themselves in such a manner even after their retirement so as not to create an adverse impression about the independence of Judiciary.

By offering post-retirement engagements to judges there is a defloration of the separation of the powers because these engagements apparently make judges as the government servants. It only creates a sense of avariciousness in the mind of the judges which directly thwarts the smooth functioning of the administration of the Justice.

The fourteenth Law Commission Report[24] which was led by Mr. Setalvad advocated that judges should not shoulder the post-retirement jobs from the government. Eloquently, several judges of the Apex Court have in past declined taking any Post-Retirement jobs, including Justice Jasti Chelameshwar, Justice JS Khehar, Justice Kurien Joseph, Justice RM Lodha and Justice SH Kapadia.[25]

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[20] *General issues: Judicial Independence as a Fundamental Value of the rule of law and of Constitutionalism,* UNODC, *available at*: https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--general-issues--judicial-independence-as-a-fundamental-value-of-the-rule-of-law-and-of-constitutionalism.html (last visited 17 Aug., 2020).

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] Law commission of India, *14th Report on Reforms of Judicial Administration* (1958) *available at*: https://lawcommissionofindia.nic.in/1-50/Report14Vol2.pdf (last visited 17 Aug., 2020).

[25] Krishnadas Rajagopal, *Will Reject Post-Retirement Jobs, says Justice Kurian Joseph,* THE PRINT (10 Apr., 2018) *available at*: https://www.thehindu.com/news/national/will-reject-post-retirement-jobs-says-justice-kurian-joseph/article23490476.ece.

III

Post-Retirement Jobs and Constitutional Morality

> *"To be faithful to his oath is the test of his integrity as a Judge. Implicit in this is that he must resist any influence or temptation indeed, independence is a vital component of a judge's accountability, since a Judiciary which is not truly independent, competent or possessed of integrity would not be able to give any account of itself"*
>
> — Tun. Mohd. Dzaiddin Abdullah J.[26]

Constitutional morality refers to the respect, reverence, and internalization of the "form" as well as the spirit of the Constitution[27]. In *Indian Young Lawyers Association* v. *UOI,* the Supreme Court held that, 'Constitutional morality is the founding faith upon which the Constitution is based, it must have a value of permanence which is not subject to the fleeting fancies of time and age'. [28]

The term "Constitutional morality" should be accorded according to the interpretation that was envisaged by the framers of the Constitution[29]. It was sparsely used by Dr. B.R. Ambedkar in the Constitutional Assembly Debates. He referred to the term while delivering his speech on the inclusion of administrative details in the Constitution, which has been borrowed from the Government of India Act, 1935:

> 'The diffusion of Constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of a Government at once free and peaceable; since even, any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendency for themselves'.[30]

In another instance, Constitutional morality has been defined as the anticipated behaviour of individual or duties cast on them by the Constitution with the objectives of ensuring that the Constitutional system operates in such a manner that the basic principles and objectives are met.[31] According to Lodha and Bobde JJ., in the case of *Manoj Narula* v. *Union of India,*[32] 'the principle of Constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the Rule of Law or reflective of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in

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[26] JUDGES AND JUDICIAL ACCOUNTABILITY 120 (Cyrus Das ed., 2004).

[27] Latika Vashist, *Re-Thinking Criminalisable Harm in India: Constitutional Morality as a Restraint on Criminalisation*, 55 JILI 73, 71-85 (2013).

[28] (2019) 11 SCC 1, para 215.

[29] Thomas E. Baker, *Constitutional Theory in a Nutshell,* 13 WM. & MARY BILL RTS. J. 57 (2005).

[30] S. Pal, INDIA'S CONSTITUTION- ORIGIN AND EVOLUTION 255 (2005).

[31] *Supra* note 4, para 9.

[32] (2014) 9 SCC 1, para 75.

institution building. The traditions and conventions have to grow to sustain the value of such morality'.

The above-given definitions highlights the sacred norms for an independent judiciary. Though the Indian Constitution does not prohibit post-retirement jobs for the retired Judges, therefore, such appointments are Constitutionally permitted, but whether such post-retirement jobs justify the noble concept of Constitutional morality? The answer is no. According to Ronald Dworkin, 'Judicial independence and Judicial morality are the two wheels of a chariot'.[33]

The post-retirement jobs can be said as a reward to the pre-retirement judgments rendered by the Judges in favour of the Government e.g. Mr. Ranjan Gogoi (former CJI) ruled two landmark judgments Ayodhya Verdict *(M. Siddiq (D) through Lrs* v. *Mahant Suresh Das and Others)*[34] and Rafael Verdict *(Yashwant Sinha and Others* v. *Central Bureau of Investigation)*[35] in the favour of the Central Government.

The above two pre-retirement verdicts which appeared to be ruled in the favour of the Central Government can be said as a major factor leading to the appointment of Mr. Rajan Gogoi as the member of the Rajya Sabha just after four months of his retirement. This particular appointment not only received a backlash from the opposition but also the brother Judges criticized it. Justice Kurian Joseph criticised this particular act by stating, 'Mr. Ranjan Gogoi has compromised the noble principles of the Judiciary'.[36] The most interesting thing about Justice Gogoi's nomination is that during a hearing he himself stated that 'firm viewpoints are there as to how the post-retirement jobs are a scar on the independence of Judiciary'.[37]

When Justice Gogoi was asked whether his nomination was a quid-pro-quo for having judgments rendered in the approbation of the Central government, his answer was that along with him there were other Judges too who delivered the same verdicts. According to him Rajya Sabha membership was not a job but a duty for him, and that once the President nominated him for this honourable post, the call of duty required him to accept it. An uncovered perusing of article 80(3) of the Indian Constitution only envisages the President to nominate 'persons having special knowledge… in the field of literature, science, art and social service' as members to

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[33] Ronald Dworkin, TAKING RIGHTS SERIOUSLY 137-149 (1977).

[34] (2020) 1 SCC 1.

[35] (2020) 2 SCC 338.

[36] Seema Chisthi, *Ranjan Gogoi's RS nomination: Has last bastion fallen, asks Justice Lokur,* THE FINANCIAL EXPRESS (17 Mar., 2020), *available at*: https://indianexpress.com/article/india/ranjan-gogoi-madan-b-lokur-rajya-sabha-6317871/.

[37] *Post- Retirement jobs 'scar on the independence of Judiciary'*, FINANCIAL EXPRESS (09 Mar., 2020) *available at*: https://www.financialexpress.com/opinion/post-retirement-jobs-scar-on-independence-of-judiciary/1902694/.

the Rajya Sabha. It is difficult to envision that the drafters of the Constitution had in mind a retired judge or CJI while framing this particular provision!

Justice Gogoi's case is not the only case where such appointment has met with a lot of criticism not only from the opposition but also from the legal fraternity itself. That such appointment compromises the noble principles of an independent judiciary. Some of the examples are as follows:

1. In order to become the opposition's candidate for the post of President of India, Justice Koka Subha Rao resigned from the judgeship of the Supreme Court.
2. Justice Baharul Islam who retired from Supreme Court in the year 1983 was the first Judge to be appointed as the member of the Rajya Sabha by the then Central Government lead by Mrs. Indira Gandhi (former Prime Minister).
3. Justice Faizal Ali was appointed as the Governor of Orissa in 1952 after retiring from the Supreme Court.
4. In 1958, Chief Justice of Bombay High Courts Mr. M. C. Sagla resigned from his post to become India's Ambassador to the U.S.
5. Justice P Sathasivam was appointed Governor of Kerala by the Narendra Modi government in September 2014. Justice Sathasivam was part of the Supreme Court bench that quashed a second FIR against Amit Shah in the *Tulsiram Prajapathi case*[38] in April 2013.

There are clubs, societies and various influential circles which are always active to vitiate independence of the Judges. Therefore, a judge to be independent must maintain aloofness and isolation. His is a very sacred task in society. A judge should be guided or influenced by nobody but by his own conscience. He should imbibe a habit of independent thinking and uprightness.[39] The Third Schedule of Constitution[40] prescribes the oath or affirmation to be taken by the judges before they assume office. The phrase 'without fear' used in the oath is of great importance. This phrase highlights the performance of duty of the office without any fear or favour and the commitment to this oath even after the retirement according to the author is the biggest facet of the Constitutional morality.

IV

Post-Retirement Appointment and the Rule of Law

Judicial independence is an aspect of the 'rule of law'. This aspect overlaps with but goes beyond the separation of powers. Its condition is considered as a necessary

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[38] *Amithbhai Anilchandra Shah* v. *CBI & Anr.*, (2013) 6 SCC 348.

[39] *A.G. of Australia* v. *Reginman*, [1957] 2 All ER 45, para 15.

[40] Constitution of India, 1950, Third Schedule.

condition for a free society and a constitutional democracy, that the Judiciary must not only be independent but also appears to be independent.[41] There is just one principle which comprises the entire texture of the Constitution, it is the standard of rule of law. It is the judiciary which is constitutionally mandated to keep each organ of the state inside the constraints of the law[42]. The entire fabric of independence of the judiciary is not only limited to the pressure or any interference from the executive, but it is a much wider concept which encapsulates independence from many other pestering and prejudices.

Judges should be of rhadamanthine stuff and tough fiber, inexorable before power, economic or political, and they must endorse the fundamental principle of the rule of law which says, 'Be you ever so high, the law is above you'.[43] The very foundation of the rule of law and judicial service is that there is no master and servant relationship between a judge and the government. A judge cannot be asked by the Government to decide a case in a particular way[44]. The apex court has held that, 'lawyers and litigants cannot be allowed to domineer or overawe judges with a view to secure orders which they want. This is basic and fundamental and no civilized system of administration of Justice can permit it"[45] in simpler terms there can be no rule of law if we don't have an independent and an impartial judiciary.

Reasonable Likelihood of Biasness in the Pre-Retirement Rendered Verdicts

The very foundation of the rule of law and judicial service is that there is no master and servant relationship between a judge and the government. A judge cannot be asked by the government to decide a case in a particular way[46] which has been very well explained by Lord Denning what he said about the independence of the Judges, 'when I speak of Judges, I include also all the Magistrates and others who exercise Judicial functions. No member of the Government, no member of Parliament and no official of any Government department has any right whatever to direct or influence to interfere with the decision of any of the Judges'.[47] However, the post-retirement sinecures tends to influence the judgments of the courts which may be called as a 'biased decision' which goes against the principle of natural justice.

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41 *Supreme Court Advocates on Record Association* v. *UOI*, (1993) 4 SCC 441, para 424; *State of Bihar* v. *Bal Mukund Shah*, (2000) 4 SCC 640, para 76.

42 *Id*.

43 *Id*.

44 *Queen* v. *Grey* [1990] 2 QB 36, at 38 (Eng).

45 *Chetak Construction Ltd* v. *Om Prakash*, AIR 1998 SC 1855, para 16.

46 *Id*.

47 Lord Denning, *Independence of Judiciary-Presidential Address* (Feb. 25, 1950), *in* OX. J.L.S., July 1988, at 227, 222-248.

One of the principles of justice is *'Nemo Judex in re sua'* which literally means that no man should be a Judge in his own cause. It has come to mean that a judge must be impartial and free from bias. In other words, a Judge should be neutral and, in a position, to apply his mind objectively to the dispute before him. The test of bias has been held to be a reasonable suspicion. There need not be actual bias. If a reasonable person would suspect bias, that is sufficient. Bias is after all an attitude of mind leading to a predisposition towards the issue, *e.g.,* the appointment of Justice Sunil Gaur as the chairperson of the Prevention of Money Laundering Appellate shortly after his retirement. This particular appointment *prime facie* does not look like a favoured or biased appointment but the point to ponder here is that two days prior to his retirement he had rejected the former Finance Minister P Chidambaram's plea for interim protection from arrest by the CBI in the INX Media case and how his appointment was cleared, raises a lot of eyebrows because in this particular appointment there appears an element of 'inclination'.

Apparently, it would be credulous to directly assert, based on the above hypothesis, that Justice Gaur's appointment to above-mentioned post is directly or indirectly related to the judgment he gave but at the same time, it would be against the well-established truisms about human nature to also brush off the fact the appointments to such Statutory, Constitutional and Governmental jobs are considered and cleared behind closed doors and it is ludicrous to conclusively bespeaks any act of 'wrongdoing' or 'misconduct' within the meaning of articles 124 and 218 of the Indian Constitution. Impartiality and the appearance of impartiality are central elements in bolstering public confidence in the judicial institution. In considering whether there was a real likelihood of biasness, the Court will always look at the impression which would be given to the ordinary people. Even if a Judge was impartial as he could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. There must be circumstances from which reasonable man would think it likely or probable that the justice, or Chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other.[48]

Judges are, nevertheless, frail people and individual inclination frequently comes which may impact the results of their decisions. In *the Queen* v. *Huggins*[49] it was held that: 'the Court will not inquire whether he did, in fact, favour one side unfairly. Suffice is that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'the Judge was biased'.

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[48] *Union of India* v. *B.N. Jha*, (2003) 4 SCC 531.

[49] [1895] 1 QB 563.

In *T. Fenn Walter* v. *UOI*[50] the Supreme Court considered the question regarding the circumstances under which a sitting Judge of a High Court could be appointed as the Chairman of a Commission or of a Tribunal since such appointment is likely to affect the independence of Judiciary the court held that, 'When a sitting Judge is appointed to another post, which is whole time and if the decision taken in that capacity is subject to Judicial review, it may not be in the best interests of independence of the Judiciary. Sometimes, the additional post held by the Judge may not be of equivalent status or maybe under different situations which may even spell out a master and servant relationship between the Judge and the appointing authority'.

One may say that there exists a considerable difference between a retired judge and a sitting Judge, but the author strongly objects to such point. The position of a sitting judge and a retired Judge is not all different there might exist a difference in terms of power but when it comes to respecting and maintaining the integrity of the judiciary as an institution then there does not exist any difference, *e.g.*, Justice H. R. Khanna refused to lead the Inquiry Commission which was formed to investigate upon the causes which lead to the proclamation of 1975 National Emergency.

Career Incentives: An analysis from the perspective of the Judges of the European Court of Human Rights

While identifying the importance of rule of law in judicial independence, one should recall that the courts do not operate in vacuum. Several exogenous factors will influence the judges' opinions and will have varying impacts on their impartiality and insularity[51] and post-retirement jobs can be called as one such exogenous factor. Judges may exercise caution in making decisions that go against the perceived interests of their national governments out of fear that such choices will harm their careers.

Such career motivations may be an important determinant of judicial behaviour which is widely recognized[52] *e.g.*, studies of American courts have shown that retention prospects may influence the decisions of the judges on when to retire. Incentive effects imply that judges will decide cases in ways that increase their chances of being re-employed. If judges expect to be screened based on their judicial decisions, they may consider this when rendering those decisions. Many studies have demonstrated the effect of re-employment on judicial decision making, *e.g.*,

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50 AIR 2002 SC 2679, para 16.

51 Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996).

52 Erik Voeten, *The impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SC. R. 420 (2008).

Shepherd[53] provides a concise review of this literature. Three hypotheses emerged from Shepherd's study:[54] The first is that judges' decision conforms to the preferences of their appointing agents. The second is that the degree of such conformity depends on various institutional features of the method of re-employment. These two hypotheses do not distinguish between selection and incentive effects. The third hypothesis does. It suggests that the conformity between the preferences of the judge and the appointing agent becomes more pronounced as re-employment approaches and that it becomes less pronounced when judges are serving in their last term in office. The author finds the practice of re-employment of the retired judges by the Executive to be one of the facets of the 'Political Mobbing'. Political impact on justice including the constitutional courts should not be identified with the political mobbing. The former is a natural characteristic intrinsically linked with the nature of constitutional justice. The latter (mobbing) is always at least a kind of deformation of relations between the justice system and the world of politics. The purpose of political mobbing is always motivated by intentions to reach some political goals, *e.g.*, direct and concrete political outcomes (*e.g.*, to ensure in the future the "positive" Constitutional judgments and to eliminate the risk of unsuccessful legislative activity; to limit too large a scope of the Constitutional review, to accelerate the schedule of some cases).[55]

V

Constitutional Provisions Prohibiting Re-Appointment

Primarily, the post-retirement jobs are violative of article 124 (7) and article 220[56] of the Constitution of India. Appointment to various tribunals, Statutory and constitutional posts is directly done by the executive which now gives the executive the authority to do 'cherry-picking'. It has tendency to influence the judgment making policy of the judges. The founding fathers of our Constitution being conscious of such facts, incorporated articles 124 (7) and 220[57] creating a bar for the retired judges of the Supreme Court to become members of the Parliament. It was highlighted by Dr. Ambedkar that, 'in India, judges are intended to be non-political and free from political pressure'. It is submitted that what is intended by article 124

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[53] Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory and Judicial Behavior*', 5 ILLINOIS L. REV. 1761 (2011) *available at*: https://illinoislawreview.org/wp-content/ilr-content/articles/2011/5/Shepherd.pdf.

[54] *Id*.

[55] Marek Saf Jan, *Politics-and Constitutional Courts,* 8 POL. SOC. SCI. L. REV. 4 (2009).

[56] *Id*.

[57] *Id*.

(7) and article 220[58] is to insulate judge against political pressure, political/executive influence, allurement, and temptation and to remain above reproach. It also aims at checking the internal corrosion of Judiciary.

The judgment of Ananga Udaya Singh Deo v. *Ranga Nath Mishra*[59]

The Supreme Court of India once had an opportunity to interpret article 124 (7)[60]. We will argue why this judgment needs to be revisited. In the case of *Ananga Udaya Singh Deo* v. *Ranga Nath Mishra*,[61] the acceptance of the nomination of a retired Judge of the Supreme Court as a member of the Parliament was challenged on the grounds that such nomination or appointment is *ultra vires* to the Constitution under article 124 (7).[62] The Court in this case rejected this contention and held that the, *"plead or act" used in article 124(7) can only be explicated to be a bar for practice before any authority and it does not refer to the functioning or performance of a Member of the House of People or Council of States, i.e. Parliament'*[63]. *The court* further held that the phrase 'plead or act' should be given the same meaning which is given under article 220[64] which states, 'Restriction on practice after being a permanent Judge, the word 'act' or 'plead' must be construed in that context i.e. restriction on practice'. The author does not agree with this particular reasoning of the court because it does not bring out the real intention of the 'Legislature'. The very intention of the legislature was to keep the judges away from any 'temptation', these post-retirement engagements on *prima facie* acts as a temptation.

The word 'authority' under articles 124 (7)[65] and 220[66] has to be given the same effect which is given to the phrase *'other authority'* under article 12 of the Indian Constitution. Article 12 of the Indian Constitution defines 'State' which includes the parliament and other authorities.[67] The ratio of the *Rajasthan State Electricity Board* v. *Mohan Lal*[68], on the point, *quasi*-governmental powers or sharing of governmental function' still hold good'.

Constituent Assembly Debates

During the meeting of the Constituent Assembly, a motion was proposed by Professor K. T. Shah which, if adopted, would have prohibited Judges of the

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58 *Id*.

59 AIR 2001 Ori 24.

60 Constitution of India, 1950, article 124(7).

61 *Supra* note 59.

62 *Supra* note 60.

63 *Supra* note 59, para 19.

64 Constitution of India, 1950, article 220.

65 *Supra* note 60.

66 *Supra* note 64.

67 *Central Inland Water Transport Corporation Ltd.* v. *Brojo Nath*, (1986) 3 SCC 156, para 21

68 AIR 1967 SC 1857, para 5.

Supreme Court or any High Court, who had served for five consecutive years on the bench, to be appointed to any executive office, including the office of an ambassador, a minister, a plenipotentiary or a high commissioner, as well as a minister of India or under the government of the Union or a State. The motion was even backed by Professor Shibban Lal Saksena, who explained the need for such a prohibition thus: '*If the temptation of being appointed to other high positions after retirement is not removed, it will also be liable to be abused by the Executive or by any party in power and they may hold out such temptations which might affect the independence of the Judiciary. I personally feel that the amendment is very salutary and healthy … I hope that somewhere in our Constitution the principle enunciated here will be embodied so that the Judiciary may be above temptation and nobody may be able to influence it'.*[69] Therefore, it is very difficult to envision that the drafters of the Constitution had in mind that retired judges can be re-employed. The entire fabric of independence of judiciary is not only limited to the pressure or any interference from the executive, but it is a much wider concept which encapsulates independence from many other pestering and prejudices.

VI

Analysis of Laws Governing Post-Retirement Jobs for Judges in The UK & Canada

Though the Indian Constitution does not expressly prohibit the retired judges to accept a post-retirement appointment but the situation is completely different in the UK and CANADA. An analysis of the same may provide valuable insights.

Position in the UK

In the United Kingdom, a Supreme Court Judge retires at the age of 70, and there is an express bar for the judges to become the member of the House of Commons. Under Part 1, Schedule One of the House of Commons Disqualification Act, 1975, the judges of the superior as well as the lower Judiciary are disqualified from becoming the members of the House of Commons and this express bar highlights the supremacy of the principle of independence of judiciary.

Though there is an express bar for the retired Judges to become the member of the House of Commons but there does not exists any express bar for them to accept any other job after their retirement. However, till date, no Judge has accepted any such post-retirement engagement and the reason is obvious that judges are keen to uphold the *'integrity'* of the judiciary as an *'institution'* and this is what is called a

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[69] Parliament of India, Constituent Assembly Debates (Proceedings), Vol VIII, 24 May, 1949 *available at*: http://loksabhaph.nic.in/Debates/cadebatefiles/C24051949.html.

'self- restraint' which has been lucidly explained by Lord Hewat's, as 'society is entitled to expect that a judge must be a man of high integrity, honesty and required to have moral vigour, ethical fairness and impervious to corrupt or venial influences. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of the Judicial process'.

It is, therefore, a basic requirement that judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standards of propriety and probity. The standard of conduct is higher than that expected of a layman and also higher than expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others.

Position in Canada

The retirement age of the federally appointed judges in Canada is 75 years and after their retirement, they can return to legal practice. However, in the past few years concerns, about the judges returning to the legal practice after their retirement, have been raised in a variety of quarters. Owing to these concerns, the Standing Committee on the Model Code of Professional Conduct, a committee established by the Federation of Law and Societies of Canada, undertook to review the provisions of the Model Code of Professional Conduct which deals with the return of the judges to the Legal practice after their retirement.

In 2019, a review of Ethical Principle for Judges was conducted by the Canadian Judicial Council in which they invited the public opinions on the question whether the Canadian judges should be allowed to return to the legal practice after their retirement? And this review revealed that nearly 75% of the population opined that the judges must refrain themselves from accepting any post-retirement job. As a result of this the revised Ethical Principles Document for Federally Appointed Judges is scheduled to be released by the end of this year.

Though the Federation of Law and Societies of Canada strongly opines that the judges are enriched with experience and this experience can be very well used in the legal field, but they also believe that it is desirable for a judge to keep himself distant from all those activities which could hamper the faith of the people in the judiciary.

If one analyses the laws of the above two nations then it can be very well said that the moral code of conduct does not allow the judges to seek or accept any post-retirement sinecures and this is what defines the 'appearance of an independent

Judiciary' which in India seems to be '*like bats of law flitting in the twilight, but disappearing in the sunshine of actual facts*'.[70]

VII

Conclusion

The credibility of a judiciary as an institution rests on the fairness and impartiality of its Judges. This credibility, however, cannot be achieved if judges accepts post-retirement jobs. We are aware that a judge is a personality whose experience cannot be outmatched[71] and it can be said that these experienced judges are the most suitable person to fill up the vacancies of various commissions and tribunals but yes there has to be a proper mechanism which should be evolved to fill up these vacancies. We shall put forth certain recommendations which can be implemented in order to fill up the vacancies of these commissions and tribunals in a transparent and fair manner until the practice of re-employing the retired Judges is totally done away with it.

The retired Supreme Court and High Court's judges are not required to face competitions like UPSC or any other State Public Service Commission but these offices can be filled up by a committee comprising of a representative of the Government, leaders/representative of the opposition, and an expert of the subject and a renowned social worker that too after examining the various important pronouncement given by the judge during his tenure. Although this process may not be an efficacious process, chances of sabotage or influencing the judiciary will be remote.

Some posts may require retired judges to be appointed, such as, Lokpal, Lokayukta, Chairpersons of the Human Rights Commission, Chairman of the Law Commission of India, etc. but such practice should not become a routine matter especially when the appointments are being made by the executive.[72]

Judicial independence requires that our Constitution's construct of 'Separation of Powers' is extended to judges' conduct even post-retirement and is balanced by the tool of 'cooling off' period to inspire people's faith in the independence of judiciary *e.g.*, ex- CJI Mohd. Hidayatullah, who denied rumors of taking up the offer of being appointed to the Lok Pal, when he was hearing the Privy Purse Case.[73] He was appointed as the Vice-President of India only after nine years of retiring from his

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[70] *Mackowik* v. *Kansas City*, (1906) 94 S.W. 256.

[71] *Supra* note 2, at 46.

[72] *Rojer Mathew* v. *South Indian Bank Ltd. and Others*, 2019 SCC OnLine 1456, para 451.

[73] *Madhav Rao Jivajirao Scindia* v. *UOI*, AIR 1970 SC 530.

post as a Supreme Court Judge. If the serving or newly retired judges of the high courts and Supreme Court, are under consideration for such posts then the independence of the judiciary is likely to be threatened.

Posts of the lower tribunals can be filled by the lawyers and this can be possibly achieved by an objective criterion, like the written test directed for the post of the District Judges. The people chosen for the lower tribunals can be promoted to the appellate tribunals. In fact, a common service can also be established to man more than one or more tribunals[74] *e.g.*, there can be a common service for all the tax tribunals. There can also be a common service for the State administrative tribunals, the central administrative tribunal and for the judicial members of the armed force tribunal. The issue as to whether it would be better to have a tribunal service rather than appointing retired judges must be looked by the committee carrying out the judicial impact assessment. If members of the bar or from the state judiciary are appointed at the lowest rung of the tribunal and then they would have a tenure of about 15 or 20 years, and this would help in to attract better talent which will be committed to their work and this long tenure would help in ensuring Judicial independence.

Reinstatement of Judicial Values Charter, 1997: A Need to be Revisited

The author, in this context, finds it relevant to refer to a Charter called *'Restatement of Values of Judicial Life'*, which was adopted by the Supreme Court on May 7, 1997. It is a code of judicial morals and fills in as a guide for an independent and fair judiciary. The code comprises sixteen points. Some of them which are pertinent for the discussion are as follows:

1) Justice must not only be done but it must also be seen to be done. The conduct of the members from the higher Judiciary must reaffirm the individuals' confidence in the impartiality of the Judiciary. Appropriately, any demonstration of a judge of the Supreme Court or a High Court, regardless of whether in the official or individual limit, which disintegrates the validity of this discernment, must be evaded.
2) A Judge ought not to contest the election to any office of a club, society or other affiliation; further, he will not hold such elective office except in a society or affiliation associated with the law.
3) A Judge will not acknowledge gifts or neighborliness with the exception of from his family, close relations and companions.
4) A Judge will not hear and choose an issue wherein an organization where he holds shares is concerned except if he has revealed his advantage and no issue with his hearing and choosing the issue is raised.

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[74] *Id.*

5) A Judge ought not to look for any financial advantage as a prerequisite or privileges joined to his office except if it is accessible. Any uncertainty for this benefit must be got settled and explained through the Chief Justice.

An ingrained reading of these principles highlights the noble principles of an independent judiciary. While the drafters wrote into the Constitution that Judges must not 'act' or 'plead' before any court or 'authority' in India, there isn't anything in the Indian Constitution that prevents the Government from offering and, Judges from accepting, post-retirement jobs. The question is not whether a pre-retirement ruling leads to securing a post-retirement government work, but whether a sitting judge who is presented to the draw of potential future career prospects could be openly seen as acting fairly? Therefore, we are of the firm viewpoint there is a dire need to revisit the whole Charter to provide a much-detailed principles and guidance which a judge must follow, including a resolution that it would be highly iniquitous and nefarious for the judges to accept any post-retirement job.

Though the above-mentioned recommendations to a large extent can eradicate the presence of 'biasness', 'insecurity', 'fear' or 'favour' in the judiciary, time has come that the Constitution should be amended to provide for a total restriction on the judges to accept any post-retirement job. If our Constitution visualizes that the judiciary should be kept out of politics, then it must be ensured that politics is also kept out of the judiciary. Indeed, if there is one branch of the state which must steer clear of political controversies and not get involved in or aligned with any of the political personages and parties in their disputes and struggles, it is the judiciary. The citizens of this country reposes great faith in the judiciary. This faith will be shaken in case it is felt that the appointments are made for tangential reasons. Most of the judges live up to the surmise of high standards of probity and refinement one cannot expect justice from those who, on the verge of the retirement, throng the corridors of power looking for post retiral sinecures.