4/20/13/06/17

Findings of Thesis in Abstract

Name of the Ph.D. Candidate: Ashutosh Hajela

Name of the Supervisor: Prof. (Dr.) Manjula Batra

Title of the Thesis: Independence, Transparency and Accountability of the Higher Judiciary in India: Problems and Prospects

Department: Law

The higherJudiciary in India has been entrusted with multifaceted responsibilities under the constitutional scheme of governance owing to which it needs to be sufficiently insulated to withstand any threat and pressure directed towards it so as to enable it to impart justice without any fear or favour. It has, however, been witnessed that in the effort to keep the judicial institution independent and functionally autonomous, the system has turned to appear quite opaque as well as virtually non-accountable to the onlookers.

The 'secretive' style of the functioning of the Collegium to appoint the judges has been objected to by various stakeholders in the issue. The Parliament did enact provisions to establish the National Judicial Appointments Commission for replacing the Collegium.The attempts, however, failed to guard the imperative of maintenance of the independence of the Higher Judiciary as a consequence of which the twin legislations were quashed by the Supreme Court after testing them on the touchstone of the 'basic structure' doctrine.The Appointments Commission has been rightfully scrapped by the apex court in *Supreme Court Advocates on Record Association* v. *Union of India* (II) owing to multiple lacunas. Firstly, the Commission, consisting of three judicial members and three non-judicial members had failed to maintain the primacy of judicial opinion in the selection process. Secondly, the power of veto given to any two members of the Commission was bound to have created deadlock in the appointment process. Thirdly, the inclusion of two eminent persons in the Commission and the method of their appointment was without any rationality and was bound to tinker with judicial independence.Fourthly, the Commission had also kept to itself the power of determining the 'suitability' and 'fitness' of the person to be appointed as the Chief Justice of India, which was substantive enough to cause injury to the functional autonomy of the Institution. Lastly, the power given to the Parliament and further to the Commission to frame rules and regulations to run the process of appointments and transfers was offensive to judicial independence. The apex court has to be appreciated for its acceptance of the shortcomings in the current style of functioning of the Collegium.Several suggestions are put forward for the functioning of the revived Collegium at this juncture. It is imperative firstly that the Collegium now works on the basis of prescribed and published criteria for the process of nominating candidates. Secondly, the Collegium needs to ensure that the screening of the candidates is done in a widely consultative manner, involving the opinions of senior advocates and judges, both serving and retired. Thirdly, it is pertinently important that the entire process undertaken gets adequately documented to reflect a transparent process of recommendations and rejections for the purpose of making appointments. Fourthly, it is important that the vacancies for inducting the judges is duly notified and the candidature,

thereof be invited for. Fifthly, it is imperative to have a mechanism for the 'performance appraisal' of the functioning of the judges for recommending names for movement from the High Courts to the apex court. Finally, there needs to be a strong and effective grievance redressal mechanism for attending and resolving disputes and contestations in the matters connected with appointments, non-appointments, transfers and promotions.

Another off-shoot of the extended judicial independence is the poor accountability mechanism for the judges owing to the solitary provision of removal of the judges on the grounds of proved misbehaviour or incapacity under the Constitution of India. The inefficacy of the same is reflected in the fact of none of the Judges having been removed so far despite there being admitted motions of removal against some of the Judges.The institutional mechanism adopted by the Chief Justice of India in the matters of judicial delinquency has also failed to deliver the dividends due to absence of statutory backing to the same. The Parliament has proposed the Judicial Standards and Accountability Bill, 2010 to tame the situation. However, the same needs to have a re-look to face judicial scrutiny lest it be quashed on the basis of failing to draw balance between judicial independence and accountability.The competence of the Union Parliament to draft a formula prescribing judicial standards as well as penalties is substantively debateable being opposed to the vision of the founding fathers of the Constitution to keep the judges remotely distant from the normal disciplinary reach of the executive. It also goes way beyond the scope of Article 124(5) of the Constitution.The legislative proposal, anyhow, suffers from several lacuna. Firstly, the attempt of the Parliament to prescribe the range of acceptable behaviour and standards to be adhered to by the Judges is bound to open a pandora box of contestations at the hands of disgruntled litigants as well as the lawyers. Secondly, the proposal of imposing different sets of penalties on the Judges shall get struck in judicial scrutiny since it violates the basic structure of the Constitution mandating judicial independence. Thirdly, the *locus standii* of 'any' person to file complaints against the Judges shall run counter to the mandate of judicial independence. Fourthly, the inclusion of the Attorney General in the proposed Oversight Committee is objectionable based on the conflict of his interest and duty in that role. Additionally, the inclusion of an eminent person in the Committee is again without any rationality and shall impinge upon judicial independence. Lastly the powers given to the Committee to dispose off the complaints received by it is bound to cause substantive hardships to the Judges in their functioning. It is humbly submitted at this juncture firstly that the legislation, as proposed, needs to be enacted only post a constitutional amendment to withstand judicial scrutiny.Secondly, it is submitted that the delinquent behaviour of the judges needs to be tried only by a 'peer body' so as to maintain independence and functional autonomy of the Judges. Thirdly, the law needs to create a body to cause an appraisal over the performance of the judges as well as to cause vigilance over the conduct of the judges. Fourthly, an office of the nature of a Judicial Ombudsman needs to be set up to look into the judicial delinquency and to recommend stringent actions. Lastly it is suggested that through suitable amendments, compulsory voting by the parliamentarians needs to be ensured in cases of removal of the judges through the parliamentary process.A cautious approach towards judicial reforms is the need of hour, striking a right balance between judicial independence and accountability in the best interests of the maintenance and sustenance of the rule of law.