

E A S Sarma

Former Secretary to Government of India

To

Smt Droupadi Murmu

Rashtrapatiiji

Respected Rashtrapati Ji,

The Constitution clearly defines the roles of the Parliament, the judiciary and the executive and they are expected to play their respective roles, subject to the provisions of the Constitution. The independence of the judiciary, in so far as its role in interpreting the Constitution and the laws made thereunder, cannot be questioned.

Of late, there have been attempts on the part of the executive to undermine the judiciary's independence in several ways.

For example, the executive inordinately delaying and, sometimes introducing changes on its own, in the appointment of members of the higher judiciary, statements made by some senior Ministers on how the apex court should conduct its business (<https://www.livelaw.in/top-stories/hearing-bail-applications-frivolous-pils-will-cause-extra-burden-on-supreme-court-law-minister-kiren-rijiju-216828>) and temptations offered to members of the judiciary by way of selective post-retirement assignments, amount to such attempts on the part of the executive, which do not augur well for the well being of our democracy.

While no one can doubt the credentials of individual retiring judges, who have accepted post-retirement assignments offered by the political executive, it is the public perception that matters, as it tends to erode the public trust.

During discussions in 1949 in the Constituent Assembly on the role of the judiciary, the drafting committee Chairman, Dr B R Ambedkar said, *“there is no doubt that the House in general, has agreed that the independence of the Judiciary from the Executive should be made as clear and definite as we could make it by law. At the same time, there is the fear that in the name of the independence of the Judiciary, we might be creating, ... anImperium in Imperio. We do not want to create an Imperium in Imperio, and at the same time we want to give the Judiciary ample independence so that it can act without fear or favour of the Executive”*

On a specific proposal put forward by one of the members in the Constituent Assembly, to protect judicial independence and maintain the separation of powers, that a provision be made in the Constitution that should bar former Supreme Court and High Court Judges from being appointed to any executive office under the Union or the State, Dr Ambedkar chose not to accept it, saying *"the judiciary to a very large extent is not concerned with the executive: it is concerned with the adjudication of the right of the people and to some extent of the rights of the Government of India and the Units as such...the opportunity for the executive to influence the judiciary is very small and it seems to me that purely for a theoretical reason to disqualify people from holding other offices is to carry the thing too far...unlike in the United Kingdom, where Judges retire at 70, and in the United States where Judges hold office until death, Indian Judges are made to retire at a relatively early age of 60 with a low pension. Therefore, barring opportunities for retired judges to hold office would not be ideal and placed too many burdens on the members who accept a post in the judiciary"*

Since then, the circumstances prevailing in the country and the culture of the political parties have undergone a sea change.

Irrespective of whichever be the political party that is in power at the Centre at a given point of time, contrary to the high expectations of the members of the then Constituent Assembly in 1949, since then, there has been an unhealthy tendency on the part of the political parties to cling to power at any cost, if necessary, even by weakening institutions that exist to protect the Constitution, intruding into areas that legitimately belong to the States, encroaching on the citizen's fundamental rights and curtailing the freedom of press, in the name of *"public interest"* and *"national security"*, necessitating the apex court's intervention on a much larger scale than ever. The judges of the Supreme Court retire today at 65 years and the benefits that accrue to them in terms of their salaries, perquisites and pensionary benefits are far more than what they received seven decades ago. Therefore, to say that *"barring opportunities for retired judges to hold office would not be ideal and placed too many burdens on the members who accept a post in the judiciary"* does not hold good today.

From what one sees today, offers of assignments to retiring judges such as a nominated membership of the Rajya Sabha or that of a Governor of a State, or any other similar position, are no more than the political executive's display of its patronage, not based on any rule-based system of selection. Such offers of post-retirement benefits tend to send an inappropriate message to those yet to retire, unless they are subject to a formal set of norms stipulated by the apex court itself, in consultation with the executive, which are to be strictly complied with by both the executive and the retiring

judges.

In the interest of safeguarding the integrity of governance and ensuring independence of the judiciary, as a concerned senior citizen, I take the liberty of suggesting to you to invoke your authority under Article 143 to refer this matter to the Supreme Court to obtain their considered opinion. The apex court may choose to evolve a self-regulatory code to be complied with by all retiring judges, when the executive makes them offers of post-retirement assignments. Another alternative is that the court may propose that the executive formally consults the Chief Justice of India before making such offers, so as to minimise the possibility of political patronage. As in the case of several other public functionaries, the apex court may also prescribe a "cooling-off" period of at least two years, before a retired judge can accept an appointment of the kind referred above.

Referring the proposal contained in this letter only to the executive, not the apex court, may not serve the purpose, as the executive has a conflict of interest in the matter.

I earnestly believe that you will give due consideration to the line of action proposed above, keeping in view the urgency and importance of protecting the independence of the judiciary,

Respectfully,

E A S Sarma

Visakhapatnam

13-2-2023