

PROBING INTO JUSTICE GOGOI'S APPOINTMENT TO RAJYA SABHA: THE CONSTITUTIONAL WAY

**K.RAMAKANTH REDDY,
ADVOCATE TELANGANA HIGH COURT.**

The Former 46th Chief Justice of India, Ranjan Gogoi had served the Hon'ble Supreme Court of India from 3 October, 2018, to 17 November, 2019. The recent controversy of his nomination to the Rajya Sabha is making the rounds for all the misconceived reasons. It is pertinent to mention that nomination of Gogoi has been made in order to fill the vacancy which arose when senior advocate of Hon'ble Supreme Court of India, K.T.S. Tulsi's term of six-year ended on 24 February 2020. The tenure of other members, in which seven of the members will be expiring in 2022 and the remaining four members in 2024.

Before addressing the controversial issue here, it is pertinent to understand the purpose of constituting the Rajya Sabha under the Constitution of India. The role of Rajya Sabha and its need was a point of discussion before the Constituent Assembly. In this respect, in the Constituent Assembly Debates held on 28 July, 1947 Shri Gopaldaswami Ayyangar observed:

"...The most that we expect the Second Chamber to do is perhaps to hold dignified debates on important issues and to delay legislation which might be the outcome of passions of the moment until the passions have subsided and calm consideration could be bestowed on the measures which will be before the Legislature.... we also give an opportunity, perhaps to seasoned people who may not be in the thickest of political fray, but who might be willing to participate in the debate with an amount of learning and importance which we do not ordinarily associate with a House of the People...¹"

The need of the Rajya Sabha was emphasised to be comprised with eminent and distinguished personalities who are excellent in their fields to provide best well informed opinions for any issues at hand. In this respect, we can appreciate the observations of Dr. S. Radhakrishnan's in this words-

"Parliament is not only a legislative but also a deliberative body. So far as its deliberative functions are concerned, it will be open to us to make very valuable contributions, and it will depend on our work whether we justify this two Chamber system, which is now an integral part of our Constitution. So, it is a test to which we are submitted²."

¹Constitutional Assembly Debate- Volume IV, 28.07.1947 available at <https://indiankanoon.org/doc/188058/>

²Second Chamber in Indian Parliament : Role and Status of Rajya Sabha issued by Rajya Sabha Secretariat New Delhi August 2009 available at https://rajyasabha.nic.in/rsnew/publication_electronic/2nd_cham_ip_rol_sta_2009.pdf

Council of States or Rajya Sabha is termed as the Upper House under the Constitution of India. Constitution framers while proposing the composition of Rajya Sabha has not only included the representation of states but included representation of 12 persons for a tenure of six years based on their extraordinary and outstanding contribution in their respective field or profession. Since, then the President has nominated these 12 persons as members of the Rajya Sabha who have been known for their magnificent contribution in culture, arts, science, journalism, academics, sports and medicine. We should equally not forget that renowned and exceptional people from legal fraternity have also been nominated now and then by then President in the Rajya Sabha.

As per the Hon'ble Supreme Court's decision in *Kesavananda Bharati v Union of India*³, separation of powers between bodies of the government and the judicial independence with the other two bodies are basic feature of the Constitution. We have completely forgot that former Chief Justice of India, Rajya Sabha was nominated by the President with the consent of the present government well within its constitutional powers. The President has nominated Ranjan Gogoi by exercising Article 80 (1) of the Constitution which prescribes that Rajya Sabha shall consist of 12 members who shall be nominated by President by complying with the clause (3) of Article 80⁴. Article 80(3) stipulates the qualification of member to be nominated by President in Rajya Sabha which shall consist of persons or members having special knowledge or practical experience in respect of such matters as the following, namely, literature, science, art and social service⁵.

The controversy created in the appointment of the former 46th Chief Justice of India, Ranjan Gogoi making it to the Parliament of India questioning his political appointment and the procedure adopted by the current government is completely uncalled for by virtue of the Constitutional principles and in the interest of India at large. Since, 1960 the acceptance of government post by the former chief justices and judges has happened in the past. The controversial question framed against this appointment is frivolous and without checking the fact that it's not the first instance that nomination of former judges are made to the Rajya Sabha. The claim of opposition that the appointment has contributed to disturbance in the separation of power and the judicial independence is far from reality when the similar appointment has been made during their tenure of government. For instance, former Chief Justice of India Justice Ranganath Misra was also nominated in the Rajya Sabha who infact entered the Lok Sabha with Congress ticket. It is also wrong to claim that cooling period has been provided to Justice Ranganath Misra and he was not appointed in Rajya Sabha right after his appointment. Justice Misra who retired in 1990 became chairman of the National Human Rights Commission of India in 1993. He was nominated in Rajya Sabha in 1998 and

³1973 4 SCC 225

⁴Article 80 (1) of the Constitution of India, 1950.

⁵Article 80 (3) of the Constitution of India, 1950.

further after end of his tenure in 2004, also became the chairman of the National Commission for Religious and Linguistic Minorities. Therefore, the current appointment of Justice Ranjan Gogoi is not an exceptional phenomenon happened in the history of appointment in Rajya Sabha which can be contested with.

Further, Justice Baharul Islam who was then member of Rajya Sabha was made to resign by the congress government and then appointed as the judge of the then High Court of Assam and Nagaland in 1972. Infact, he became Chief Justice of Gauhati High Court and after the retirement appointed as judge in the Hon'ble Supreme Court. Justice Islam after resigning from the Supreme Court again elected to the Rajya Sabha on the congress ticket.

Also, it is not just Congress has brought the former judges into the Rajya Sabha but has also provided entry to MS Gill, former Chief Election Commissioner (CEC) into the Upper House. In addition to MS Gill, former CEC Ram Krishna Trivedi was also appointed Governor of Gujarat. Infact, Former CEC TN Seshan with the support of Congress contested for the post of the President of India. We must not forget that eminent Justice Krishna Iyer who is a pioneer of starting judicial activism in India was a minister in Kerala's Communist Party in 1957 who after his defeat in 1965 elections was appointed as judge in Kerala High Court in 1968. He was further appointed as Supreme Court judge in 1973.

Contrary to these instances, former CJI, Ranjan Gogoi has not entered Rajya Sabha as a member with a party ticket of the current government but fairly nominated in accordance with Article 80 (1) by the President of India. It is completely frivolous and wrong to question the judicial competence of the former CJI for the reason of his decision to enter the Parliament and serve the nation. It is beyond any dispute that former Chief Justice of India who has vast practical experience of almost two decades fits the eligibility of persons nominated under Article of the Constitution by the President. His appointment after end of his tenure as Chief Justice of India should be challenged by keeping in mind that there are several instances where right after the end of tenure of the judges has taken political position in the government.

For instance, Justice K.G. Balakrishnan who was the 37th Chief Justice of India, has his retirement on 12 May 2010 was immediately appointed on 7 June, 2010, chairman of the National Human Rights Commission. Similarly, the 42nd Chief Justice of India, Justice H L Dattu retired on 2 December 2015 was immediately appointed as the chairman of the National Human Rights Commission in February 2016. Koka Subba Rao resigned from the Supreme Court to be the opposition candidate for the President. Justice Fazal Ali was appointed Governor of Orissa by Pandit Jawaharlal Nehru Government though he gave judgements against the Government of the day. He is remembered for his noted dissent in

*A.K.Gopalan vs state of Madras*⁶ which later became law by a majority judgement in *Menaka Gandhi vs Union of India*⁷ Justice. Hans Raj Khanna the dissenting judge in ADM Jabalpur case⁸ and propounded the doctrine of basic structure in Keshavananda Bharati case accepted the offer from the then Prime Minister Chaudary Charan Singh in 1979 to become the Union law Minister. But, resigned after three days. Justice Kowdoor Sadananda Hegde retired judge of the Supreme court joined Janata Party and was elected in 1977 to Lok-Sabha from Bangalore North constituency defeating congress stalwart K.Hanumanthiah and served as Speaker of Lok-Sabha. Later his son a well known lawyer Sri. Santosh Hegde was appointed as a Judge of the Supreme Court directly from the Supreme Court bar. Justice Palaniswamy Sathasivam, the 40th Chief Justice of India between 2013-2014, served as the 21st Governor of Kerala from 5th September 2014 to 4th September 2019. Mohammed Hidayatulla who became the eleventh Chief Justice of India. A day before his retirement on December 17th 1970 he wrote the majority opinion and quashed the Presidential order abolishing titles, privileges and privy purses of former Princes in *Madhavrao Scindia vs Union of India*⁹. He thrice declined request to contest the Presidential Election, However, he agreed to become the President of India for a brief period when the then president Zakir Hussain went to US for heart Surgery and died suddenly in harness. After his retirement, Justice Hidayatulla was elected as Vice-President of India by a consensus among different political parties and served from 1979 to August 1984.

These kind of appointments has been in vogue since the independence of India and still continuing. Unfortunately, Justice Gogoi has come on the receiving end of these controversies and criticism. It is not wrong to say that these criticisms are more towards the current government of Bharatiya Janata Party rather than leading to any healthy debate of judges accepting positions in the politics. Our country has seen exemplary contribution by judges after their retirement and served the nation with their knowledge in the best possible manner. The very first instance is of Justice M.C Chagla who was the first chief justice of High Court in Bombay. He served as an ambassador to United States and later as the high Commissioner to the United Kingdom and later in 1963 became the member in the union cabinet. Even in that position he took an independent stand with his judicial mind against the emergency imposed by Indira Gandhi during her tenure.

The same has been followed in major democracy of the world since 18th Century. For instance, John Marshall became the fourth Chief Justice of the US Supreme Court in 1801 and died in harness during his 34th year of service as Chief Justice. Prior to joining the Supreme Court (and for a month simultaneously to his tenure as Chief justice) Marshall served as the United States Secretary of State under President John Adams. One of John

⁶ 1950 AIR 27 453

⁷(1978 AIR 597, 1978 SCR (2) 621).

⁸ ADM Jabalpur v S.S Shukla and others , 1976 AIR 1207

⁹1971 (3) SCR 9

Marshall's landmark case was *Marbury vs Madison*¹⁰, which established the basis for Judicial Review. Towards the end of John Adams's term (while John Marshall was serving as Secretary of State) Adams had made William Marbury Justice of peace for the District of Columbia. Instead of handing over the commission to Marbury himself Marshall left the document for his successor as Secretary of state, James Madison, to deliver. However, once Thomas Jefferson, Adams Political Adversary, took office as President Jefferson forbade Madison to deliver the Commission because it has been drawn up by Adams's supporters. Marbury challenged the same by filing a suit in the Supreme Court seeking a direction to Madison to give Commission to Marbury. The case landed before Chief Justice John Marshall during whose tenure as Secretary of State the Commission for appointment of Marbury was drawn. In this celebrated case John Marshall for the first time held that writs can be issued to Government and Laws in conflict with the Constitution can be declared null and void and thus started the process of judicial review. In U.K. judges retire at the age of 70 years and even in U.K. there is no constitutional bar barring judges from accepting post retirement appointments/Nominations. In United States of America Supreme court judge is appointed for life. In India the judges retire early at the age of 65 (Supreme Court Judge) and 62 (High Court Judge) and have indispensable knowledge, Skill and experience gathered over the years as distinguished practicing lawyers and as Judge.

Therefore, for reasons more than one appointment of learned judges should not be looked with suspicion. This undermines the judiciary and causes disturbance in the minds of the general public. In fact, there are several laws in India which provide appointment to many positions providing eligibility of former judge of Higher Court for holding the position.

The Parliament of India and State Legislatures in its wisdom has made provisions under various Central and State enactments to utilize their invaluable services in heading Tribunals and Commissions etc constituted mainly to lessen the burden on the Constitutional Courts and to aid the Government of the day in discharging its duties and obligations. If we look at the Consumer Protection Act, 1986 provides for appointment of retired Supreme Court judge as chairman of National Consumer disputes Redressal commission¹¹. Human Rights Act, 1993 provides for appointment of retired Chief Justice of Supreme Court as the Chairman of National Human Rights Commission¹². In the Armed Forces Tribunal Act, 2007, provides for appointment of a retired judge of a Supreme Court or a retired Chief justice of a High Court as its Chairman¹³. Law Commission of India also provides for appointment of a retired Supreme Court judge as its Chairman. Lok Pal Act, 2003 also provides for appointment of a former Chief justice of India or the former Judge of Supreme Court or an

¹⁰5 U.S. 137

¹¹Section 20 of the Consumer Protection Act, 1986

¹²Section 3 of Human Rights Act, 1993

¹³Section 6 of Armed Forces Tribunal Act, 2007

eminent person as Lok Pal¹⁴. Lokayukta can only be a retired High Court Chief justice or a retired High Court Judge in the State of Telangana and former Supreme Court Judge or former Chief Justice of High Court is a standard requirement in various states for appointment as Lokayukta.

Judiciary led Corporate Governance can also be noticed in National Company Law Appellate Tribunal (NCLAT) constituted to hear appeals against the orders passed by National Company Law Tribunal (NCLTs) under section 61 of the Insolvency and Bankruptcy code, 2016 (IBC), orders passed by Insolvency and Bankruptcy Board of India under section 202 and section 211 of the IBC against any decision or order passed by the Competition Commission of India (CCI). There is a procedure contemplated for appointment of the President of the tribunal and the Chairperson and Judicial Members of the National Company Law Appellate Tribunal in consultation with the Chief Justice of India and the Chairman shall be a former judge of the Supreme Court of India. The Hon'ble Supreme court in case of *Board Of Control For Cricket vs Cricket Association Of Bihar & Ors*¹⁵ in Civil Appeal No. 4236 of 2014 and Civil Appeal 1155 of 2015 set up a Committee comprising Justice R.M. Lodha, former Chief Justice of India as Chairman with Justice Ashok Bhan and Justice R.V. Raveendran, former Judges of the Supreme Court to suggest amendments to BCCI and state cricket association rules and regulations in order to clean up the Cricket Administration in the country. Among other the committee recommended appointment of an Ombudsman to BCCI and each of the state cricket associations to deal with various complaints against administrators etc. The Supreme Court accepted the suggestion and now rules provide for appointment of an Ombudsman by the BCCI and each of the state cricket associations, who shall be a former Judge of the Supreme Court or former Chief Justice of High Court. One of the reasons prompting the Supreme Court to approve the rule providing for appointment of an Ombudsman was to ensure speedy disposal of cases and reduce case congestion in the normal courts and Constitutional courts. Appointments to tribunals, Commissions or nominations to Rajya Sabha under the Constitution of India are devised to serve special purpose as can be deciphered from the Constituent assembly debates.

Further, if we look into the 14th Law Commission report of 1958, in paragraph 28 Jawahar Lal Nehru stated that-

"we have noticed the only bar imposed on a Judge of the Supreme Court who has retired is that he shall not thereafter plead or act in any Court or before any authority. In the result some Supreme Court Judges have, after retirement, set up chamber practice while some others have found employment in important positions under the Government. We have grave doubts whether starting chamber practice after retirement is consistent with the

¹⁴Section 3 of the Lok Pal Act, 2003

¹⁵ (2015) 3 SCC 251].

dignity of these retired judges and consonant with the high traditions which retired judges observe in other countries¹⁶."

Further in Paragraph 29 emphasised-

"But there can be no doubt that it is clearly undesirable that Supreme Court Judges should look forward to other Government employment after their retirement¹⁷."

Therefore, mere acceptance of position right after retirement position by the former judges is not an intrusion to the separation of power or independence of judiciary within the framework of the Constitution of India. The only restriction is stipulated in Article 124 (7) read with Article 220 of the Constitution for the retired judges and the permanent judges respectively.

Chapter IV Article 124 (7) of the Constitution of India provides that "No person who has held the office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India and Article 220 of the Constitution of India bars High Court Judges from pleading before "any authority in India except the Supreme Court and the other High Courts. However, there is a total constitutional bar under Article 148 of the Constitution of India in respect of Auditor and Comptroller General of India and under Article 319 of the Constitution of India in respect of Chairman of Public Service Commission.

These provisions incorporated and moved by Prof.K.T. Shah on 07-06-1949 to prohibit Supreme Court or High Courts who had served for five consecutive years on the bench from being appointed to any executive office, including the office of an ambassador, Minister, Plenipotentiary, or High Commissioner as well as of a Minister in the Government of India or under the Government of any state was turned down by Dr.B.R.Ambedkar and the constituent assembly debates demonstrate that the reasoning by Dr.B.R.Ambedkar was totally justified.

Likewise, in the nomination of Ranjan Gogoi the Article 80 of the Indian Constitution has not been exercised as an exception but as Constitutional way of using the expertise and magnificent talent/work of the former Chief Justice of India which can be brought to the table in our Parliament for efficient and sound working of Rajya Sabha in the field of law. Not to forget Rajya Sabha plays a vital role in studying the legislations which are passed by Lok Sabha. Very recently, important legislation like OBC Commission Bill, Surrogacy Bill, Enemy Property Bill are under the scrutiny of selected committees of Rajya Sabha and the same has been returned to the Lok Sabha with revised and amended suggestions for its

¹⁶ Reform of Judicial Administration- Law Commission Report, 1958 dated 26.09.1958

¹⁷ Reform of Judicial Administration- Law Commission Report, 1958 dated 26.09.1958

incorporation. In such scenarios, it is very much sensible and fair to appoint a person of high stature and experience from the legal fraternity who can provide the theoretical as well as practical insights into the proposed legislations. There the role and importance of the person like our judges, lawyers and eminent jurists starts.

There have no dispute pertaining to these appointments when they are holding the same positions with respect to Justice Gogoi. The same moot question should have been asked in these instances, whether the independence of judiciary was compromised in those occasions. Clearly no, as men of merit has hold a position of serious affairs to serve the nation.

There is absolutely no bar on such appointment of Justice Gogoi under law and Constitution of India. Hence, any criticism doesn't hold water against appointment of Justice Gogoi. In his tenure of 13 months serving as Chief Justice of India, he has passed various landmark judgements which has changed the face of the nation, be it the long pending Ayodhya land dispute or the historic verdict of allowing entry of women in the Sabrimala Temple. He has also passed a remarkable judgement in changing the conditions of appointment and service for members of tribunals specified under Section 184 of the Finance Act, 2017. A unanimous judgment of a 5-judge Constitution bench of the Supreme Court, which struck down the rules formulated by the Centre regarding the appointment and service conditions for members of various tribunals under Section 184 of the Finance Act, 2017. These judgements are nothing but outcome of heavy reliance on evidences, legal reasoning, logic and judicial precedents. Moreover, these judgements are passed in majority by the other sitting judges and not just the CJI. Therefore, there shouldn't be any iota of doubt over biasness shown to a specific political party. Thus, any allegation solely against the CJI Ranjan Gogoi is completely illogical and unreasonable.

If we address to the issue here of the post-retirement benefits provided to members from legal fraternity. It should be noted that these benefits come doesn't only come from jobs provided by the legislature or executive. It also comes from appointments in tribunals, highly remunerative arbitration matters, serving as directors to various public service units. It is completely false to say that judicial independence is compromised only when a judge of the apex court is appointed in Rajya Sabha as a member.

Justice Gogoi had various options of lucrative jobs such as in arbitration assignments etc ahead of him where he can engage in greatest remunerative matters however he has chosen to provide his skills and knowledge in serving the nation by providing insights into the legislation drafting. Therefore, contesting or singling out one particular appointment is a target against the government decision and not leading anywhere to a healthy debate.

These facts and instances clearly depicts that it is always desired by the then and current government to appoint a talented and exemplary personality in the politics/legislature who can contribute with his experience and serve the nation. Instead of contesting and raising questions over the appointment of such dignitaries, the moot consideration should be provided to that person's talents and contributions over which they have been nominated for the position of this kind. Further, how their experience and talent can be used in making the legislature efficient.

These renowned persons from the legal fraternity can have similar contributions as the renowned layers like, Ram Jethmalani, Fali Nariman, K Parasaran and Arun Jaitley had being members of Rajya Sabha contributed towards making important laws. It is beyond doubt that with the vast experience possessed by Justice Gogoi will play a vital role in maintaining the highest standard of Rajya Sabha. It is needless to say that the current controversy should be stopped over the appointment of Justice Gogoi whereas more focus on the work and contributions made by him by using his legal expertise in the drafting of statutes and legislations.

K.Ramakanth Reddy,
Advocate Telangana High Court,
Senior Standing Counsel for Maulana Azad National Urdu University,
Standing Counsel for NCTE, Sun Network.
Mobile: 9849029276