

## INDEPENDENCE OF JUDICIARY IN INDIA

MS. SHIVANJALI BHOITE

Assistant Professor

P.e.s. Modern Law College

### Introduction

Every democratic country puts a great store on the independence of the judiciary as a guarantee of individual freedom. Independence of the judiciary means that the judiciary as an organ of the government should be free from influence and control of the other two organs i.e. the executive and the legislature of government. Freedom from the influence and control of the executive is of crucial importance. It is important for individual freedom, that the judges give their verdict without fear or favor. It refers to an environment where the judge can pass impartial judgments.

Every democratic country adopts various means to ensure freedom of the judiciary and thereby to ensure individual freedom. The U.S.A. has adopted system of separation of powers to ensure independence of the judiciary. But in constitutional systems based on the concept of Parliamentary sovereignty, the adoption of separation of powers is ruled out. This is the case in England. This is also partly the case in India, for in India, the doctrines of Parliamentary and constitutional sovereignty are blended together<sup>1</sup>.

The constitution of India<sup>2</sup> adopts diverse devices to ensure the independence of the judiciary in keeping with both the doctrines of constitutional and Parliamentary sovereignty.

- Firstly, the judges of the Supreme Court and the High Courts have to take an oath before entering office that they will faithfully defend the constitution of India and the laws. Recognition of the doctrine of constitutional sovereignty is implicit in this oath.
- Secondly, the judges of the Supreme Court and the High Courts are appointed by the President. The President makes the appointments in consultation with the highest judicial authorities. He of course takes advice of the Cabinet. The constitution also prescribes necessary qualifications for such appointments. The constitution tries to make the appointments unbiased by political considerations.
- Thirdly, the judges of the Supreme Court and the High Court's serve "during good behavior" and not during the pleasure of the President, as is the case with other high Government officials. They may be removed from office only through impeachment. Their salaries and allowances once fixed cannot be varied adversely during their tenure, except during a financial emergency under Article 360 of the constitution.
- Fourthly, the judges serve up to the 65th year of age and after retirement cannot engage in legal practice.

The hierarchy of judicial system in India plays an important role in maintaining the independence of judiciary. Supreme Court is the highest court for justice. Then, there are High Court and District Courts in every state. Then, there are People's courts known as Lok Adalats. If no decision is reached at these Lok Adalats, again the cases move to courts.

### Meaning – The Independence of the Judiciary

The meaning of the independence of the judiciary is still not clear after years of its existence.

Our constitution by the way of the provisions just talks of the independence of the judiciary but it is nowhere defined what actually the independence of the judiciary is.

The primary talk on the independence of the judiciary is based on the doctrine of separation of powers which holds its existence from several years. The doctrine of separation of powers talks of the independence of the judiciary as an institution from the executive and the legislature<sup>3</sup>.

The other meaning of the judicial independence can be found out by looking at the writings of the scholars who have researched on the topic. Scholars have followed the “constituent mechanism” (i.e. what constitutes the judiciary) to define the independence of the judiciary. Scholars try to define judiciary by talking about the independence of the judges which constitutes judiciary. Therefore the independence of the judiciary is the independence of the exercise of the functions by the judges in an unbiased manner i.e. free from any external factor.<sup>4</sup>

So the independence of the judiciary can be understood as the independence of the institution of the judiciary and also the independence of the judges which forms a part of the judiciary.

The independence of the judiciary as an institution and the independence of the individual judges both have to go hand in hand as the independence of the judiciary as an institution is not possible without the independence of the individual judges and if the institution of the judiciary is not independent, there is no question of the independence of the individual judges.

#### **Objective of Having Independent Judiciary:**

Independence of Judiciary is sine qua non of democracy. In a democratic polity, the supreme power of state is shared among the three principle organs constitutional functionaries namely the constitutional task assigned to the Judiciary is no way less than that of other functionaries legislature and executive. Indeed it is the role of the Judiciary to carry out the constitutional message and it is its responsibility to keep a vigilant watch over the functioning of democracy in accordance with the dictates, directives, and imperative commands of the constitution by checking excessive authority of other constitutional functionaries beyond the ken of constitution. So the Judiciary has to act as the sentinel sine qua vive<sup>5</sup>. Our Constitution does not strictly adhere to the doctrine of separation of powers but it does provide for distribution of power to ensure that one organ of the govt. does not trench on the constitutional powers of other organs. The distribution of powers concept assumes the existence of judicial system free from external as well as internal pressures. Under our constitution the Judiciary has been assigned the onerous task of safeguarding the fundamental rights of our citizens and upholding the Rule of Law. Since the courts are entrusted the duty to uphold the constitution and the laws, it very often comes in conflict with the state when it tries to enforce orders by exacting obedience. Therefore, the need for an independent and impartial Judiciary manned by persons of sterling quality and character, underling courage and determination and resolution impartiality and independence who would dispense justice without fear, ill will or affection. Justice without fear or fervor, ill will or affection, is the cordial creed of our constitution and a solemn assurance of every Judge to the people of this great country<sup>6</sup>.

Secondly, the Judiciary, which is a repartee but equal branch of the state, to transform the status quo into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The Judiciary has therefore a socio- economic distinction and creative function. The Judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to

use law in the service of social justice through a pro-active goal oriented approach. But this cannot be achieved unless we have judicial cadres who share the fighting faith of the constitution and are imbued with constitutional values.

### **Need For the Independence of the Judiciary**

The basic need for the independence of the judiciary rests upon the following points:

- 1) **To check the functioning of the organs:** Judiciary acts as a watchdog by ensuring that all the organs of the state function within their respective areas and according to the provisions of the constitution. Judiciary acts as a guardian of the constitution and also aids in securing the doctrine of separation of powers.
- 2) **Interpreting the provisions of the constitution:** It was well known to the framers of the constitution that in future the ambiguity will arise with the provisions of the constitution so they ensured that the judiciary must be independent and self-competent to interpret the provision of the constitution in such a way to clear the ambiguity but such an interpretation must be unbiased i.e. free from any pressure from any organs like executive. If the judiciary is not independent, the other organs may pressurize the judiciary to interpret the provision of the constitution according to them. Judiciary is given the job to interpret the constitution according to the constitutional philosophy and the constitutional norms.
- 3) **Disputes referred to the judiciary:** It is expected of the Judiciary to deliver judicial justice and not partial or committed justice. By committed justice we mean to say that when a judge emphasizes on a particular aspect while giving justice and not considering all the aspects involved in a particular situation. Similarly judiciary must act in an unbiased manner.

### **Composition of the Independence of Judiciary**

The independence of judiciary and the protection of its constitutional provisions are not achieved by a single act but rather over a period of time by a continuous struggle that takes place within the framework of the ongoing and the dynamic process. Therefore it may not be possible to lay down all the conditions in advance either in the constitution or otherwise which will ensure and secure perpetual independence of the judiciary. Such conditions will have to be checked and revised from time to time. A few conditions are, however, so basic to the independence of the judiciary that without them the judicial independence will not exist. Some of them may be assigned to the collective independence of the Judiciary as an institution, while others may be assigned to the independence of the independence of the individual judges.<sup>7</sup>

The most important aspect in the independence of the judiciary is its constitutional position. Just as the constitution provides the composition and powers of the legislature and, the executive, it should also provide for the judiciary. If the constitution vests the judicial powers with the Judiciary, then it is much better. Otherwise the constitution may provide for the composition of the courts and their jurisdiction, and for the appointment, the term of office, and the tenure of the judges. The constitution must ensure a constitutional position of dignity to the judiciary. The constitution must also ensure administrative independence of the Judiciary, such as supervision and control over the administrative staff, preparation of its budget and maintenance of the court buildings. It must not prohibit ad hoc tribunals and diversion of the cases from the ordinary courts, ensure the natural judge

principle, ordain respect for and provide for separation of judge from the civil services, and prohibit diminution of judges' service conditions. Some of these matters may be entrusted to legislation; however there must be enough assurance in the constitution to the effect so that the judiciary is able to command respect in the eyes of the people and is able to attract the ablest persons as the judges.<sup>8</sup>

### **INDEPENDENCE OF SUPREME COURT**

The Independence of judiciary in particular with reference to the supremacy and Independence of Supreme Court is implicit in a number of Articles 124 to Articles 127 in Chapter IV of Part V of the Constitution. In fact as discussed above the objective of all this conflict provision is made explicit in the Art. 50.

#### **Appointment of Supreme Court Judges: - Art 124 (2)**

The independence of Judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the higher Judiciary. To expect an independent Judiciary when executive has the power to do so is illogical. This is because centre and state governments are parties before the courts in large number of cases where Judiciary acts as adjudicator. So it cannot be accepted that framers of the constitution could have left the power to appoint the Judges of the Supreme Court and High Courts in the hands of the executive. I have an independent Judiciary to meet all challenges, unbending before all authorities and to uphold the imperatives of the constitution at all times, thereby preserving the judicial integrity, the person to be elevated to the Judiciary must be possessed with the highest reputation for independence uncommitted to any prior interest, loyalty and obligation and prepared to pay any price, bear any burden and to always wedded only to the principles of constitution and 'Rule of Law'<sup>9</sup>. If the selected bears a particular stamp for the purpose of changing the cause of decisions bowing to the distal of his appointing authority, then the independence of Judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights and privileges, safeguards conditions of service and immunity. In this context mandate of Article 50 becomes significant which, creates an obligation on the Government to refrain from any interference in judicial appointments.

In -the matter of appointments of Judges of the Superior Judiciary, the interaction and harmonization of Art. 74(1) with Art. 124(2) and 217(1) has to be home in mind to serve the constitutional purpose.<sup>10</sup> In the case of Appointment of Supreme Court Judges, the Constitutional requirement is that President is to act in accordance with advice of the Council of Ministers as provided in Art 74(1). And the advice of the Council of Ministers is to be given in accordance with Article 124(2) so Art.74 (1) is circumscribed by the requirements of Articles 124 (2) and 217(1).

#### **Impartiality of Judges**

A judge is under a duty not to adjudicate on cases in which he has either an interest personal or financial- or where he may be influenced by biases. A fundamental doctrine of judicial impartiality is '*nemo iudex in sua causa*' - no one should be the judge in his own case.

#### **Financial Interest**

In Dr. Bonham's case<sup>11</sup>, Lord Coke held that the members of a board, which determined the physician's fine couldn't impose or receive the fine thus giving early judicial expressions to the requirement of the freedom from bias. More recently, in the Dimes v. Grand Junction Canal Proprietor<sup>12</sup>, the propriety of Lord Cottonham, LC adjudicating was challenged on the basis that the Lord Chancellor held shares in the canal company involved in the litigation. The House of Lords set

aside the decision of the court despite the fact that: No one can suppose that Lord Cottonham could be in the remotest degree influenced by the interest... it is of the last importance that the maxim that no man is to be the judge in his own cause should be held sacred. Thus, the mere existence of a financial interest, even where it does not in fact result in actual bias but at present the appearance of bias may be sufficient to disqualify a judge from adjudication. The same position prevails in U.S.A. where law expressly covers the issue of financial interest of federal judge. The Ethics in Government Act, 1978 requires that the Supreme Court and the federal judges must make a public declaration of income, gifts, shares, liability and transactions in security and real estate.

Financial interest in a case, which does not go beyond the financial interest of any other citizen, does not disqualify them from sitting. Thus in *Bromley London Borough Council v. Greater London Council*,<sup>13</sup> the fact that the judges were taxpayers and users of public transport did not disqualify them from hearing the case.

### **Other Bias**

Judges exhibit bias by the virtue of race, sex, politics, background, associations and opinions. When adjudicating they must, however, be demonstrably impartial. This involves that the judge listens to each side with equal attention and comes to the decision on the arguments, irrespective of his personal views about the litigation; and further that whatever his personal belief, the judge should seek to give effect to the common values of the community, rather than any sectional system of values to which he may adhere. There has however been uncertainty and inconsistency in the interpretation of 'bias'. In *R v. Gough*<sup>14</sup>, Opposing Counsel presented two different tests of bias. The first suggested criterion was whether a reasonable and fair-minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that fair trial of the defendant was not possible. This test is known as 'reasonable suspicion' test. The second suggested test was whether there was a likelihood of bias. The question to be asked is whether there was a 'real danger' that a trial may not have been fair as a result of bias - 'the real likelihood' test. The House of Lords declared that the actual test was the real likelihood test where the judge himself feels that he has been biased against one party; he may disqualify himself from hearing the case, as did Lord Denning in *Ex Parte Church Scientology of California*<sup>15</sup>. There the council for the church requested that he disqualify himself as a result of eight previous cases involving the Church on which he had adjudicated and in which in the eyes of Church, he displayed against them.

### **Judicial Immunities**

Judicial independence requires that the judges should be protected against the attacks on their conduct in court. This is secured from two branches of law. Firstly, judges are immune from personal action for damages in respect of their personal action. Anything said by the judge in the court by judges, advocates or witnesses is absolutely privileged against an action of libel and slander and to this extent is similar to parliamentary privilege.

Enforcing the independence of judges, convention dictate that there should be no criticism leveled at them from the members of the executive- but not of the legislature. Parliamentary practice prohibits the criticism of the judges other than the motion expressing criticism or leading to impeachment of the judge.

The judges are also immune from suits if they have acted within their jurisdiction or their powers. The situation here remains unclear. If a superior court acts beyond its jurisdiction, it remains

immune to suit till it does not come to know about the violation of jurisdiction. On the contrary, if the magistrate acts beyond his authority whether innocently or knowingly, he is not immune from a suit.

Part of the immunity enjoyed by the judiciary is extended to other participants of the judicial proceedings. This relates to the law of defamation so that everything said in the court is absolutely privileged. They also enjoy certain protection. They are not required to give reasons for their verdict nor they will be punished for not giving a verdict.

## CONCLUSION

The constitution provides for a judiciary, which is independent. Independence of judiciary is important for the purpose of fair justice. There should be no interference by the legislature or the executive, in the proceedings of the judiciary so that it may take a judgment that seems reasonably fair. In case of intervention, there may be an element of bias on the part of the judges in taking a fair decision. It is difficult to suggest any other way to make the Indian courts more self-reliant and keep them away from the influence of the other two organs. In spite of the foresaid, a growing unease is also being felt and expressed about the accountability of the judiciary and its extensive and frequent intrusion into the supposedly executive and the legislative domains. Although accountability of judiciary should scrutinize the act of legislation and executive are delicate controversial issues, the judiciary should not be left totally unchecked. The judiciary should not get attracted or tempted towards correcting every wrong in the society, a role that society has never assigned to it and it is not expected to perform the same. At all times the judiciary must be getting popular approbation of its intrusion into the domain of the legislature and the executive, but in the long run it may erode the very basis and justification of its own independence and endanger it.

### (Endnotes)

- 1 Independence of Judiciary in India; Vishnu Parshad and Vishnu Prasad *The Indian Journal of Political Science* Vol. 25, No. 3/4, CONFERENCE NUMBER FOR XXVI INDIAN POLITICAL SCIENCE CONFERENCE 1964: ANNAMALAINAGAR (JULY—SEPTEMBER—DECEMBER, 1964), pp. 307-312
- 2 Basu D D; *the Constitution of India* Vol. 9. 2011.
- 3 JUDICIARY AND CONSTITUTIONAL EVOLUTION IN INDIA: A SELECT BIBLIOGRAPHY, Pritam Singh; *The Indian Journal of Political Science*; Vol. 34, No. 3 (JULY-SEPTEMBER 1973), pp. 362-374
- 4 Available at, <http://mulnivasiorganiser.bamcef.org/?p=482>, accessed on 30<sup>th</sup> August 2015
- 5 UOI v. Sankalchand Himatlal Sheth (1997) 4 SCC 193 at 212.
- 6 Independence of the Judiciary ; Arun Prokas Chatterjee; *Social Scientist* Vol. 2, No. 4 (Nov., 1973), pp. 65-69
- 7 Available at, [http://www.academia.edu/11577347/NJCL\\_V2\\_S1\\_JAN\\_2015\\_National\\_Journal\\_of\\_Comparative\\_Law\\_NJCL\\_Issn\\_2393-9338](http://www.academia.edu/11577347/NJCL_V2_S1_JAN_2015_National_Journal_of_Comparative_Law_NJCL_Issn_2393-9338), accessed on 31<sup>st</sup> August 2015
- 8 Available at, [www.ijlp.in/ijlp/imageS/Volume-1,Issue-4,December-2014.pdf](http://www.ijlp.in/ijlp/imageS/Volume-1,Issue-4,December-2014.pdf), accessed on 30<sup>th</sup> August 2015
- 9 UOI v. Jyoti Prakash (I 971) 1 SCC 396.
- 10 Available at, <http://bharatiyas.in/cjarold/files/S.C%20Advocates%20Vs%20UOI.pdf>, accessed on 30<sup>th</sup> August 2015
- 11 (1609) 77 All ER 646.
- 12 (1852) 3 HL Cas 759.
- 13 [1982] CA & HL
- 14 [1993] 2 All ER 724.
- 15 The Times, 21 Feb. 1978.