



Independence of judiciary in India

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Abstract

An independent judiciary is the sine qua non of a vibrant democratic system. Only an impartial and independent judiciary can stand as a bulwark for the protection of the rights of the individuals and mete out even handed justice without fear or favour. The judiciary is the protector of the constitution and, as such, it may have to strike down executive, administrative and legislative acts of the centre and the states. For Rule of law to prevail, judicial independence is of prime necessity. The independence of the judiciary is normally assured through the Constitution but it may also be assured through legislations, conventions and other suitable norms and practices. The constitutions or the foundational laws on judiciary are however, only the starting point in the process of securing judicial independence. Ultimately the independence of the judiciary depends on the totality of a favorable environment created and backed by all state organs including the judiciary and the public opinion. The independence of judiciary also needs to be constantly guarded against the unexpected events and the changing social, political, economic conditions; it is too fragile to be left unguarded. In India, the question of independence of the judiciary has been a subject of heated national debate over the last many years. It has exercised the minds of legislators, jurists, politicians and the laymen. Both the supporters and the opponents have cogent arguments in support of their views. This question assumes great importance whenever the Supreme Court holds a particular Act or particular Clause of an Act passed by Parliament ultravires of the Constitution.

Keywords: democratic, judicial independence, political, economic conditions

Introduction

An independent judiciary is the sine qua non of a vibrant democratic system. Only an impartial and independent judiciary can stand as a bulwark for the protection of the rights of the individuals and mete out even handed justice without fear or favour. The judiciary is the protector of the constitution and, as such, it may have to strike down executive, administrative and legislative acts of the centre and the states. For Rule of law to prevail, judicial independence is of prime necessity. The independence of the judiciary is normally assured through the Constitution but it may also be assured through legislations, conventions and other suitable norms and practices. The constitutions or the foundational laws on judiciary are however, only the starting point in the process of securing judicial independence. Ultimately the independence of the judiciary depends on the totality of a favorable environment created and backed by all state organs including the judiciary and the public opinion. The independence of judiciary also needs to be constantly guarded against the unexpected events and the changing social, political, economic conditions; it is too fragile to be left unguarded. In India, the question of independence of the judiciary has been a subject of heated national debate over the last many years. It has exercised the minds of legislators, jurists, politicians and the laymen. Both the supporters and the opponents have cogent arguments in support of their views. This question assumes great importance whenever the Supreme Court holds a particular Act or particular Clause of an Act passed by Parliament ultravires of the Constitution.

Historical Aspect

The first political philosopher, who propounded the idea of an independent judiciary, was Montesquieu, the famous French philosopher. He believed in the theory of separation of powers of the three branches of the Government- Legislature, Executive and Judiciary. The fathers of the American Constitution were very impressed by his theory. They, therefore, established an independent judiciary in their country. The American people have great faith in the independence of the judiciary. They are convinced that if any fetters are placed on the independence of judiciary, the rights and liberties of the people might be endangered.

In U.K., however, the Parliament is supreme. The judiciary, there, has not separated from the legislature. In fact, there the House of Lords acts as the highest Court of appeal. Though in U.K., the judiciary has not been independent or supreme, yet its judges have been giving decisions without fear or favour on matters coming up before them. They have been independent and impartial in their judgements. The U.K. does not have a written Constitution but still its people enjoy no less liberty than the Americans. In the U.K. no major clash between the Parliament and the judiciary has occurred so far. The concept of independence of judiciary took time to grow in England. Before 1701 judges held their office during the pleasure of crown and like any other crown servant he could be dismissed by the king at will. The judges view thus subservient to the executive. This subservience naturally led the judges to favour the royal prerogative. The most typical example of such an attitude is to be found in the Hampden's

Case in which seven out twelve judge gave an award in favour of crown's prerogative to collect money without parliamentary approval. One of the judges even propounded the view that rex is lex. In 1616 Coke was dismissed from the office of the chief justice of the king's bench. The judicial independence was secured by the act of settlement 1701, which declared the judicial tenure to be during good behaviour, and that upon the address of both the houses of parliament it would be lawful to remove a judge. This position regarding security of judicial tenure is now secured by statutes. The judiciary in the U.K. is not competent to declare a law passed by their respective legislatures as unconstitutional. But in the U.S.A. and India, the judiciary has been vested with the power of judicial review. They can hold a law passed by the legislature as unconstitutional and strike it down. In India the Supreme Court strikes down a law only if it violates the basic structure of the Constitution.

Meaning Of Independence of Judiciary

The independence of the judiciary is not a new concept but its meaning is still imprecise. The starting and the central point of the concept is apparently the doctrine of the separation of powers.⁸ Therefore, primarily it means the independence of the judiciary from the executive and the legislature. But that amounts to only the independence of the judiciary as an institution from the other two institutions of the state without regard to the independence of judges in the exercise of their functions as judges. In that case it does not achieve much. The independence of the judiciary does not mean just the creation of an autonomous institution free from the control and influence of the executive and the legislature. The underlying purpose of the independence of the judiciary is that judges must be able to decide a dispute before them according to law, uninfluenced by any other factor. For that reason the independence of the judiciary is the independence of each and every judge. But whether such independence will be ensured to the judge only as a member of an institution or irrespective of it is one of the important considerations in determining and understanding the meaning of the Independence of the judiciary.

Constitutional Provision

The Constitution of India is the fundamental law of the land from which all other laws derive their authority and with which they must conform. All powers of the state and its different organs have their source in it and must be exercised subject to the conditions and limitation laid down in it. The constitution provides for the parliamentary form of government which lacks strict separation between the executive and the legislature but maintains clear separation between them and the judiciary. The Indian Constitution specifically directs the state "to separate the judiciary from the executive in the public services of the State. The Supreme Court has used this provision in support of separation between the judiciary and the other two branches of the state at all levels, from the lowest court to the Supreme Court. Although the nature of the Indian Constitution-whether it is federal or unitary-is doubtful, basically it provides for a federal structure of government consisting of the Union and the States. The Union and the States have their distinct powers and organs of

governance given in the constitution. While the Union and States have separate legislatures and executives, they do not have a separate judiciary." The judiciary has a single pyramidal structure with the lower or subordinate courts at the bottom, the High Courts in the middle, and the Supreme Court at the top. For funding and some administrative purposes, the subordinate courts are subject to regulation by the respective States, but they are basically under the supervision of the High Courts. The High Courts are basically under the regulative powers of the Union, subject to some involvement of the States in the appointment of judges and other staff and in the finances. The Supreme Court is exclusively under the regulative powers of the Union. Subject to territorial limitations, all courts are competent to entertain and decide disputes both under the Union and the State laws. The unitary character of the judiciary is not an accident but rather a conscious and deliberate act of the constitution makers for whom a single integrated judiciary and uniformity of law were essential for the maintenance of the unity of the country and of uniform standards of judicial behavior and independence. The member of the constituent assembly were very much concerned with the question of independence of judiciary and accordingly made several provision to ensure this end. The supreme court has itself laid emphasis on the independence of judiciary from time to time. As the court has observed in *A.C. Thalwal Vs High Court Of Himachal Pradesh* - The constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy.

Objective of independence of judiciary

Independence of Judiciary is sine qua non of democracy. In a democratic polity, the supreme power of state is shared among the three principal 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. 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 dries 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 dispose justice without fear fervor, 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.

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 quality of status and opportunity for all. The Judiciary has therefore a socio- economic distinction and creative function. It has, to use the words of Granville Austin to become an arm of the Socio-economic revolution and perform an active role calculated to bring social justice within the reach of common man. Approach to judicial function is entirely different for a society pulsating with needs and urges of gender justice, worker justice minorities justice and equal justice between chronic unequal. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a passive and creative approach. 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 proactive 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.

Constitutional Provision about Independence of Judiciary in India: The constitution of India adopts diverse devices to ensure the independence of the judiciary in keeping with both the doctrines of constitutional and Parliamentary sovereignty. Elaborated provision are in place for ensuring the independent position of the Judges of the Supreme Court and the High Courts.

Firstly, the judges of the Supreme Court and the High Courts have to take an oath before entering once that they will faithfully perform their duties without fear, favour, affection, ill-will, and defend the constitution of India and the laws. Recognition of the doctrine of constitutional sovereignty is implicit in this oath.

Secondly, the process of appointment of judges also ensures the independence of judiciary in India.

The judges of the Supreme Court and the High Courts are appointed by the President. The constitution of India has made it obligatory on the President to make 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 Constitution provides for the security of tenure of Judges. 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 cannot be arbitrarily removed by the President. They may be removed from once only through impeachment. A Judge can be removed on the ground of proved misbehavior or incapacity on a report by both Houses of Parliament supported by a special majority.

Fourthly, their salaries and allowances are charged upon the Consolidated Fund of India. Further, the salaries and allowances of Judges of Supreme court and High courts cannot be reduced during their tenure, except during a financial emergency under Article 360 of the constitution.

Fifthly, the activities of the Judges cannot be discussed by the executive or the legislature, except in case of removal of them. Sixth, the retirement age is 65 years for Supreme court judges and 62 years for High court judges. Such long tenure enable the judges to function impartially and independently. Seventh, a retired Supreme court judge cannot practice engage in legal practice in any court in India.

However, a retired High court judge can practice law in a state other than the state in which he served as a High Court judge. These restrictions ensure that a retired judge is not able to influence the decision of the courts. 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 states. Then, there are People's courts known as Lok Adalats. If no decision is reached at these Lok Adalats, then the cases move to courts.

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.

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