



INDEPENDENCE OF JUDICIARY AS A PILLAR OF DEMOCRACY UNDER THREAT

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ABSTRACT

Independent Judiciary: A Pillar of Democracy under Threat as the name suggests, the paper mainly focuses on the independence of the judiciary and its accountability, conflict etc. keeping an eye on the public confidence in the judicial system, maintaining its rigidity and transparency in the public domain. The main issues covered under this study are the interference from the other organs in the jurisdiction of judiciary, and how its decisions become biased.

This study involves brief analysis of conflicts and issues of the judiciary with other bodies such as executive, in different timeline, extending from ancient era to contemporary era and presenting the current issues related to it. Our thesis emphasizes mainly on explaining the current issues and providing with the analysis of the circumstances that led to these clashes. Certain illustrations have also been mentioned in order to fully understand and explain the problem in a concise and lucid way. Thus, our opinions on the topic are strengthened in view of these issues.

We have also done a comparative analysis and suggested ways how the threats on the Judiciary can be reduced and how judicial system in these countries are immune from any interference or control.

INTRODUCTION

“The bedrock of our democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing”

----Caroline Kennedy

“Lawyers have rendered immense sacrifices for the restoration of democracy and free judiciary, and their role in this regard cannot be ignored.”

----Shehbaz Sharif

There are three organs of the government namely, Legislature, Executive and Judiciary. All the three organs are imperative for the working of a democratic country. Judiciary also plays its part; it is an independent organ which is commonly regarded as a tool to administer justice to the people of the country. It also protects rights of the people whether fundamental or natural. The governments also look to the courts to interpret laws and statutes.

Judiciary has always been one of the crucial parts of a democratic country. The importance of an independent judiciary cannot be undermined. The independence of this sacred institution has always been a point of discussion among different scholars, jurists and other eminent personalities regarding its functioning, questioning the discretion.

Over the years different jurists have expressed their contrasting opinions regarding the independent functioning of this institution from which we cannot fully



conclude whether the discretion of its functioning is under threat or not. From the historical perspective one can say that it's always been under threat due to various reasons including executive interference, corruption among the judges, limitation of power, jurisdictional conflicts. Hence, it becomes extremely critical to examine and analyze the situations, existing previously and currently in order to arrive concrete conclusion.

Many questions are yet to be answered on the said topic such as whether the justice system can deliver an unbiased decision, whether the judgment delivered will create impact politically or socially etc. these questions and some more need to be answered in order to conclude whether judiciary is an independent institution or not. There's a hierarchy in the Judicial System of India. The courts are divided according to the power and importance. The highest power is vested in one court known as Supreme Court of India whose decisions are binding upon all the lower courts.

Through this paper the authors seek to show the above mentioned threats and answering the unanswered questions with the help of various illustrations in historical as well as current scenario.

It assesses the law and practices which have been and are currently practiced in India to deal with numerous features of Judiciary involving the neutrality and answerability of judges. It discusses the antiquity and present condition of the judiciary by evaluating a variety of sources which include the constitutional and statutory law, public records, available statistical data and media

reports along with secondary literature. The article also lays down the burliness and the shortcomings of the present system of Legislature and Judiciary in India and its effects on judicial sovereignty and judicial liability which involves the assignation, term and regulation of judges and examination of judges by the media and the bar. It put forwards different ways of conserving the burliness and providing appropriate remedies of the shortcomings to better the condition of judicial sovereignty, its accountability and the conflicts existing in our country. The objective of this thesis is to study the independence of the judiciary and its accountability, conflict etc. keeping an eye of the public confidence in the judicial system, maintaining its rigidity and transparency in the public domain. The main issues of this study are the uncertainty between judicial independence and accountability and to overcome these uncertainties, we have articulated certain ways by which these issues or conflicts in the future may be obviated. In this way, the judiciary can restore the public faith and an effective judicial system will be developed to deliver unbiased decisions and also the independence of the judges will be maintained.

HISTORICAL BACKGROUND

The question on the Independence of Judiciary is not new. It has been in existence from the earlier times as well. This assertion can be verified from the circumstances existed in the British Era. Even then there were several conflicts and clashes between the Judiciary and other institutions. The then Judiciary alleged other institutions of encroaching upon its domain and that it impeded the decision making power of the



authority as a result of which the condition of the judicial system deteriorated and the common people were left to suffer.

These arguments are not vague and there have been several instances where the jurisdiction of the Judiciary has been encroached in one way or the other. Listed below are some of the examples from the British Era where we saw various conflicts between the Judiciary and other organs of the government.

OBJECTIVES

- What is Judiciary and its functions.
- To study the Historical Background and show the threats on the Judiciary from various organs.
- To verify the threats by Case Analysis.
- To compare the Judicial System of other countries with India and suggest ways of how the Indian Judicial System can be improved.

RESEARCH METHODOLOGY

The research work will be completed in adherence to the doctrinal method of research and will rely on both the primary and secondary sources. It shall be descriptive in nature and will also follow an analytical approach, i.e. use the analysis of the facts to reach out the conclusion based on logical reasoning. This research shall endeavor to review the existing format and establish a relationship with the subject format.

Literature Review

The study focuses on the threats encroaching upon the independence of the Judiciary. In order to study these threats, several sub topics have been created for better understanding of the subject. Firstly we have mentioned what is Judiciary and how it functions in India. For utmost clarity we have thoroughly studied the Historical background of the Judiciary and what were the threats existing then and now. Secondly, a detailed comparative analysis has been done of other countries Judicial System and how that system can be applied in India for better judicial management. Several instances of Executive interference of Judiciary have also been shown in the form of detailed case study.

The debate on Judicial Independence is not new. Several books and research papers have been published on this topic especially in India. The previous researches have also shown that often the organs of the government encroach upon the jurisdiction of the Judiciary either by influence through political power or by controlling the appointment of judges which in turn puts a threat on independent decision making of judges. Our research also focuses on these general guidelines, however certain new topics have been added to our study like the comparative analysis with other countries and the provisions mentioned in the Indian Constitution. We have also expressed our opinion on the said topic and have suggested ways so that these conflicts can be resolved or eliminated.

EXECUTIVE INTERFERENCE

Some of the situations through which we intend to show the interference from one of



the organs of the government that is the Executive are:

- Charles II, the then king of England issued a Charter in favour of East India Company in the year 1683 to establish an Admiralty Court in Bombay and in 1684 the court was finally established. Initially this court was meant to deal with the crimes related to maritime and mercantile laws. As per the Charter the cases referred to the Admiralty Court were supposed to be decided on the basis of equity and good conscience, subsequently in the year 1686 another Admiralty Court was also established in Calcutta. Over the passage of time their jurisdiction which was earlier only limited to maritime and mercantile laws was now extended to deal with all kinds of cases. Hence, all the judicial concerns were separated from the Governor and Council and entrusted in the hands of Admiralty Courts. A year later, the judge of the Admiralty Court succeeded in taking authority to act as Chief Justice of Court of Judicature and propounded the Doctrine of Judicial Independence in their various judgments which was the main reason of conflicts between the Admiralty Court and the Governor and Council. The Governor General and Council were also not permitted to appeal the judgments propounded by the Court of Judicature. Their conflict aggravated over time and all these matters came before the Directors of East India Company in London, the Directors had the strong bias towards the Governor and Council as a result of which, the matter was decided in favour of the Governor and Council and the Admiralty Court became in operative.

- Another such instance can be traced from the Settlement of Bombay, when the charter of 1683 was introduced. It contained several provisions for the judges appointment. One of the major provisions was that the person to be appointed should have knowledge of civil laws of England. A court was established in which the abovementioned provision was a must. This court had 3 types of Jurisdiction: Civil, Criminal, and Maritime. The jury system in this court was not followed instead only one person was granted the authority to decide cases under the charter and his name was St. John. He believed that the Judiciary should be independent without any interference from an outside authority as per the Doctrine of Judicial Independence. John resuming his post started giving judgments against the East India Company and the Governor. The Governor was of the view that the John should work under and according to his orders and this led to tensions between those two persons. In order to remove the John from his post, Governor wrote a letter to the king which resulted in the passing of a new charter under which a provision for establishment of a new court was made. The new court so formed was called the Kings Court and as the name suggests, the new court was under the control of the Executive and thus it was biased to some extent. John raised some objections in which he argued how the executive persons so appointed in the Judiciary can deliver the judgment as RULE OF LAW says the Executive can't deliver judgments.
- In 1973, the then Prime Minister Indira Gandhi announced Justice A.N. Ray as the next Chief Justice of India, however Justice



Sikri was to retire the next day. The appointment of Justice A.N. Ray came as a surprise to many people as Justice Shelat, Justice Hegde and Justice Grover were senior to Justice A.N. Ray and the mode of appointment followed was on the basis of seniority. Justice Ray was considered to have good relations with Indira Gandhi led government, thus there was biasness in his appointment. In the following years, Justice Ray went on to give several judgments in favour of the then ruling government especially during the emergency period (1975-77) including the famous case of ADM Jabalpur. His appointment to the Chief Justice of India gave rise to a nationwide agitation against the perceived attack on judicial independence.

From the above instances it is clearly evident that judicial independence, independence of judges or appointment of judges has always been under the control or has had the influence from outer institution be it executive or legislature whether in form of King or Governor General. Thus we can conclude that judicial independence has always been under threat. The scenarios of unfavourable appointments in the judiciary just doesn't end here even in today's contemporary era, there have been similar such instances.

CASE STUDY

The following are the popular cases or instances from the historical era as well as contemporary era in which through any external institution the Independence of Judiciary has been brought under threat:

➤ Trial of Ascentia Dawes: This case originated in British era in the year 1665, it was the first jury trial in Madras Settlement under the governorship of Foxcroft. The husband of Ascentia Dawes, William Dawes was a Magistrate and a close friend of Mr Reade, foreman of the jury. She was charged with the murder of an Indian girl slave who was working in her house, in the trial the jury found her guilty of the murder, however the foreman of the jury, Mr. Reade who was a gave a verdict contrary to all expectations. He expressed the opinion that each member of the jury is free and they can give their opinion without any reason and pronounced her not guilty which resulted in the acquittal Ascentia Dawes from all charges.

➤ Rama Kamti Case¹: This case was decided in the Settlement of Bengal. At that time the East India Company was facing threats from the pirates. Rama Kamti was a very rich and influential person. He had been working in the East India Company for nearly 30 years. However, once he was alleged to have a nexus with the leader of the Pirates. The major charges were that the close nexus was maintained through non-direct communication and that he disclosed some confidential information of the Company to the Pirates. When the case came before the court, which was presided over by Governor Boon and Council and Parker, Chief Justice of the Court. Parker was in favour of fair trial was against the torture faced by the Kamti's servant who was being forced to give a written statement against Kamti as per the orders of Boon. After this scene, Governor Boon

¹ Rama Jois, *Legal and Constitutional History of India* (1984); Jain, *Indian Legal History*(1972)



removed Justice Parker from his post without instituting the impeachment proceedings against him according to the rule of law. Thereafter, the Governor General held the trial without hearing Kamti's side of story and believing the story from a third person without having any concrete statement to support his argument. As a result, Kamti was found guilty and her property was confiscated. The result of showing this judicial independence was his dismissal from office, by the Governor. Thus, the judiciary was under threat as looking at the above case, it can be concluded that the Executive interfered in Judicial functions. In this particular case also the Governor General concocted the evidence and this shows that the Justice System was biased.

- *State of Uttar Pradesh v Raj Narain*² : This was a landmark case which was heard by the Allahabad High Court. In this case the then Prime Minister of India Indira Gandhi was found guilty of electoral malpractices. It was a first case in India where the election of a Prime Minister was set aside. The hearing took place at a time when the country was going through a phase of emergency and the fundamental rights were suspended and several other restrictions were imposed on the media. An appeal was filed by Raj Narain, against the judgment passed by the High Court of Allahabad quashing the election of Indira Gandhi. Meanwhile, the 39th Constitutional Amendment was passed by the parliament which added a new article (footnote). According to the article, the election of the Prime Minister and the speaker cannot be

challenged by any competent court within the Indian territory. Rather, it could only be challenged before a community constituted by the parliament itself. The Supreme Court upheld the election of Indira Gandhi but pronounced the 39th Amendment as unconstitutional as it violated the Doctrine of the basic structure of Constitution.³ From the above case we can conclude the legislature was encroaching upon the Judiciary and the Supreme Court was right in setting aside the 39th Constitution Amendment as it was unconstitutional and violated the basic structure.

K.M. Joseph's Dispute: The confrontation between the Executive and the Judiciary is also evident in the present dispute of K.M. Joseph's elevation to the judge of Supreme Court. The collegium recommended Justice Joseph's name to the government for approval but the government of India returned his name for reconsideration to the collegium. The possible reasons for the government's rejection maybe that when Justice Joseph was the Chief Justice of the Uttarakhand High Court, he cancelled the President's rule in Uttarakhand and so the Congress government in the State was restored in the year 2016. The government may have taken this step in a layman approach and hence, this might be the possible reason for not approving his name to the Supreme Court. This decision of the government was heavily condemned by many eminent jurists.

As we look through the abovementioned instances, it could be derived that the Judiciary as a pillar of democracy has been

² AIR 865 (1975) 3 SCR 333

³ *KesavanandaBharati v State of Kerala* (1973) 4 SCC 225



under threat whether by the Legislature, the Executive or any other institution. Sometimes, this interference may result in biasness whereas at other times, it may lead to threat for the sitting judges. Elimination of these conflicts and confrontations is extremely important for the proper functioning of the judiciary and for the judicial system in India. People will lose faith in the judicial system if these conflicts repeat as is observed. Judicial independence is an indispensable part of the Judiciary and it should be conserved anyhow by the concerned body by taking appropriate steps.

CoMPARATIVE ANALYSIS

In Denmark the people have more faith in Judicial System rather than the other organs of the government such as the Legislature of the country as the transparency so ensured in the Judiciary can't be challenged by any other organ and its legal system is regarded as a free standing one amongst the other Scandinavian countries. Since the significant upgrade of its legal framework, Denmark keeps on enhancing its legal system by adding more courts to its legal structure to all the more likely address its nationals' issues. The Danes selected to expel the reliance of its courts from the Ministry of Defence, the administration body that managed its tasks earlier. Therefore, it is expected to protect that among the Scandinavian nations, Denmark has the most detached legitimate framework. The reason for such is the existence of Review Courts and Special Courts, their judges are subjected for inspection and all of their records are made available to the public which results in transparency in judicial matters. In contrast, India doesn't have any

sort of Review Courts or Special Courts. Also, in India there is no such system of publicizing the records of the judges.

Another example where the Judiciary is independent is Finland. It operates with a dual-court system and unlike many other countries, Finland courts have the power to pronounce verdicts as well as draft legislations. The courts are governed by a centrally administered body of the democratically established government. In spite of this, the Constitution of Finland makes sure that the independence of judiciary is maintained and not touched upon. This can be verified from the fact that there are several provisions in its Constitution to maintain the autonomy of the judges. Finland is an example of consensus democracy and hence all the decisions taken by the court are consulted from the people who may have interest in the subject matter of the judgment natives feel incorporated into the legal framework and have high amounts of trust in it. Therefore, it's no surprise that Finland ranks highest in criminal justice system whereas the courts in India don't have the power to draft legislations. However, it can instruct the parliament to make a new law on a particular subject matter.

In Sweden the Court Structure is different. There, the Ministry of Justice which is an executive branch of the government, governs the operations of the Swedish Courts. However, this does not limit the power of the Courts as the complete independency is maintained while deciding the cases. As a result, the best possible transparency is maintained whereas the situation in India is not similar. The courts are not governed by any branch of the



government but still there is interference from the external institutions. If India followed the Swedish system of Judiciary, many conflicts in the past could have been avoided as the confusion of power would not have arisen.

If India could follow any of the above three systems then it would be an ideal situation for the Judiciary in India. However, this is a very Utopian situation and it's highly improbable that these systems will ever be followed in India. This is because India and these countries differ in their ideologies, their historical background is different, their culture is different and the approach of the government framing laws is different.

CONSTITUTIONAL PROVISIONS AND CURRENT STATUS

There certain are provisions mentioned in the Constitution of India which specify that the Judiciary is Independent from any external control like Separation of Judiciary from executive and the State shall take steps to separate the judiciary from the executive in the public services of the State.⁴ Additionally, Courts not to inquire into proceedings of the Legislature⁵ is another provision mentioned in the Indian Constitution.

Earlier this year the four senior most judges of the Supreme Court namely Justices J Chelameswar, RanjanGogoi, M B Lokur and Kurian Joseph, held the press conference in the public domain made a scathing attack on the Chief Justice of India. In the words of Justice Chelameswar “democracy will not

survive”. This was an unprecedented case where the sitting judges of the Supreme Court levelled serious charges against the Chief Justice of India. Many people felt that the CJI should come before the public and take a stand. Many people were of the opinion that it is matter of the Judiciary and should be resolved within the Judiciary itself. The reason for this press conference was the assigning of cases by Chief Justice Deepak Mishra, they alleged that he assigned the cases of utmost importance to the other judges of Supreme Court who were close to him so that he could influence the decision of the case. They also said, they have issues with the assignment of the case to do with the mysterious death of Justice B.H. Loya who was hearing the Sohrabuddin Fake Encounter Case, involving the BJP president Amit Shah. The issue went ahead, be that as it may, when the CJI set up a seven-judge seat to hear the request gone by Justice Chelameswar seat in the matter of SIT test. Two of the judges, in any case, recused themselves from the seat. The five-judge seat cancelled the request gone by Justice Chelameswar. Therefore, it can be concluded that the judges were not given the autonomy in expressing any opinion whether outside or inside the court.

THE IRONY....

The Independence of the Judiciary is not only encroached by the other organs but also from the Judiciary itself, this is an irony in itself as the institution which is meant for delivering justice is Itself seeking for Justice. This can be verified by one such instance which shook the entire legal system of the country. Some experts termed this incident as “shocking”while others were of

⁴Constitution of India 1950, art.50.

⁵Constitution of India 1950, art.212.



the opinion of that there was no substantial reason for this staggering move and the reasons could have been more compelling. As a result, the credibility of the Judicial System was at stake. Thus the irony is clearly perceptible through this instance mentioned below.

CONCLUSION

From the above study it is safe to say that the Judiciary has always had a significant value in the context of the Judicial System. By analysing and studying the historical background of the Judicial System, the Independence of Judiciary has always been under question. It has faced many impediments especially with the appointment and the removal of judges. However, the courts have always tried to maintain Judicial Independence and according to them it is the most basic and fundamental feature of the Judiciary. For smooth functioning of the courts, the Judicial Independence is pre requisite. Transparency in Judicial System and Judicial actions inspires public faith and confidence in the institution.

The preamble of India also states that India is a democratic country and so, transparency is a vital requirement. Judicial Independence depends not only from external influence but also the freedom from internal influences of the judges themselves. Judicial autonomy among the judges is also crucial and involves the judges consigns a role. Hence, Judicial Independence requires independence from the other organs of the government and the Judiciary itself.

Judiciary has great respect in society and people of the country have faith in Judiciary. Additionally, Republic is people's power. Judiciary is a frank institution where secrecy has no place. In our opinion, threats on Judiciary by any factor including interference, influence and power would lead to losing faith and confidence of the people. This is an ironical statement as justice giving system is itself losing faith of the people thus making the general people vulnerable and contributing to the misery of the already suppressed class of people by not delivering justice and not helping them to restore faith in the system. The role of the Judges to decide cases by giving their opinion which implies a measure of autonomy involved.

Legal autonomy cause those individuals from the official who harbour the conviction that the freedom of legal is planned to praise legal officers or disparage the notoriety of those working in the other two mainstays of the State to acknowledge the way that the freedom is guaranteed to the judged and not for judges. While courts have a place with the general population and open trust in legal is fundamental, a Judge must stand firm against any terrorizing or weight from individuals from open. A judge must guard energetically the autonomy from society or gatherings thereof. This is any way to state that the judge isn't required to share the expectations and fears of the common natives.

The actions of the judiciary on the premise of independence of the judiciary while understandable cannot be at the expense of accountability. Accountability and Independence are not mutually exclusive.



In order to point out the faults in the Indian legal system, we have done a comparative analysis of legal systems of India with those of other countries. We have also suggested ways how the Judiciary can be more effective like that of the countries we have written. In our opinion this theoretical research has mainly focused on different threats by different institutions on the Judiciary affecting its independence, control and autonomy of the judges on deciding cases and how it results in injustice or biasness and this has been verified by the instances mentioned above both historical and the contemporary ones. Thus, it can be concluded that the Independence of Judiciary has been a critical point and has to be maintained for better functioning of the Judicial System of the country.

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