



## INDEPENDENCE OF JUDICIARY IN INDIA AND ITS REFERENCE IN OTHER COUNTRIES

By *Pragati raj*

From *Faculty of Law, University of Allahabad*

**Abstract:** Constitution of India has three organs working independent of each other. There powers are enshrined in the constitution separately. The framers of the Constitution have deliberately ensured the independence of judiciary through various articles such as Art 50, Art 121 and many more. This paper seeks to focus upon the need and meaning of independence of judiciary. It lays is emphasis upon how the Constitution of India has ensured judicial independence, what are the means of ensuring it. This paper also focuses on international aspect of independence of judiciary by a study of document of basic principles for independence of judiciary and also position of independence of judiciary in the Canada, United Kingdom and United States of America.

### INTRODUCTION

WE THE PEOPLE OF INDIA.....  
HEREBY ADOPT, ENACT AND GIVE  
TO OURSELVES THIS CONSTITUTION.  
The people of India devoted ourselves in the hands of the Constitution. The framers of the Constitution of India aimed at constituting India as a democratic power which could be achieved by the preservation of rule of law. Rule of law can be established in any nation only when the law of land or the most basic law of the nation is the supreme law. The government and the people of the country

are governed by the Constitution and not the other way around.

The Constitution is the sacrosanct. It is standing high in its glory upon the three pillars, namely the legislature; one who enacts the law, the executive; one who implement the law and the judiciary; one who protects the law. Professor K.T. Shah, representative of Bihar in the constituent assembly, also member of advisory committee and sub-committee on fundamental rights proposed before the Constitutional assembly during the framing of the Constitution that for the preservation of the rule of law, the three pillars mainly the judiciary should be kept separate from each other and away from any kind of interference in the workings of each organ. For judiciary, Professor K.T. Shah envisioned a greater role in providing social transformation. In a debate on 19<sup>th</sup> day of November in the year of 1948, he said, “the judiciary is the only authority that we are going to set up in the Constitution to give effect to whatever hopes and aspirations, ambitions and desires we may have in making these laws and in laying down this Constitution”. Supremacy of the Constitution in a democratic legal order does not result from an abstract legal postulate, but rather from the importance of the Constitution has as a political Act with the corresponding democratic contents, which precisely make it the most important Act in a state<sup>1</sup>. The concept of judicial activism or active judiciary is the concept enshrined by the concept of separation of powers. Judiciary acts as the guardian of the

<sup>1</sup>Professor P.K. Tripathi, *Comparative Constitutional Law*, pg 36, (Mahendra P. Singh second edition 2011).



Constitution or the protector of the basic structure of the Constitution by protecting the rights and privileges protected to its people by the Constitution. Judicial activism denotes the proactive role played by the judiciary in the protection of the rights of citizens and in the promotion of justice in the society. In other words, it implies the assertive role played by the judiciary to force the other two organs of the government namely the executive and the legislature to discharge their Constitutional duties<sup>2</sup>. Professor K.T. Shah was very much adamant on his proposal that every pillar (organ) of the Constitution should be kept separate and independent of each other especially the judiciary, which is true and necessary. Judiciary came into existence and exists to deliver JUSTICE. The term justice implies the quality of being 'just', 'right' or 'reasonable'. It is opposed to what is 'unjust', 'wrong' or 'unreasonable'<sup>3</sup>. In any democratic country justice delivered can be just, right, reasonable and fair only when judiciary is free from any coercion through any improper means. The ideals of justice can be achieved only when judiciary is independent from any higher or improper influence.

#### INDEPENDENCE OF JUDICIARY

The Constitution of India has created a unified and an integrated judicial system. The federal nature of the Constitution of India necessitated the establishment of the Supreme Court of India. It serves as the safeguard for the rights and privileges provided by the Constitution to its people. Judiciary serves as a foundation and

protector of law and democracy. The respect the people have for the law is dependent upon the independence of the judiciary. The provisions of the Constitution of India regarding the relations of the Supreme Court with parliament and union government indicate that the framers of the Constitution have tried their best to secure independence of the judiciary under the Constitution. The framers of the Constitution ensure that the Judges of the Supreme Court and the High Courts would be independent of the executive and the legislature. Parliament is prohibited from discussing the conduct of Judges of the Supreme Court and High Courts while they are sitting in discharge of their duties. The executive makes appointment of Judges only on the advice of chief justice of India who acts in consultation with and as per the decision taken in a collegium of Judges. Judges of the Supreme Court and high court can be removed only when an address is presented to the President of India by both the houses of parliament after following a particular procedure<sup>4</sup>. The importance judiciary holds can be perceived through the quote Dr. B.R. Ambedkar once quoted that "the people of a nation may lose confidence in the legislature and executive, but, it will be an "evil day" when they lose confidence in the judiciary. This question of independence of judiciary was raised before the bench of seven Judges consisting of A. Gupta, D. Desai, E. Venkataramaiah, P. Bhagwati, R. Pathak, S.M. Ali, V. Tulzapurkar in the case of *S.P. Gupta v. Union of India*<sup>5</sup>. In this case Bhagwati J. described independence of judiciary, like a living faith which must derive its inspiration

<sup>2</sup>M. Laxmikant, Indian Polity, pg.28.1, (fifth edition).

<sup>3</sup> An Introduction to Political Theory, O.P. Gauba, pg 504 (seventh edition,2014).

<sup>4</sup>Constitutional Law of India, T.K. Tope pg 711,754 (Sujata V. Manohar, third edition 2010).

<sup>5</sup>*S.P. Gupta v. Union of India*(1981) Supp SC 87



from the Constitution. Widening the scope of judicial independence, he further quoted “it is necessary to remind ourselves that the concept of independence of judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices such as fearlessness of other power centers such as economic of political and freedom from prejudices acquired and nourished by the class to which the Judge belong...”. Judiciary in itself doesn’t preserve the Constitution. Ultimately it is the Judge who acts as the guardian of the Constitution. He must have the courage to decide against the judiciary<sup>6</sup>.

#### HOW INDEPENDENCE OF JUDICIARY IS ENSURED?

A federal Constitution of considered to be a relatively rigid Constitution in its nature. In a federal state the State and the Centre are separate from each other dealing with their own subject-matter and linked with the relationship between them through Constitution. In such circumstances, naturally there are chances of conflict. Such conflicts are dealt by the judiciary. In such cases it is necessary that judiciary remains unbiased which is possible only when in is independent from any kind of influence, higher or improper, at any stage. To ensure the independence of the judiciary certain measures are enshrined in the Constitution of India. Those measures are:

1. **FIXED TENURE:** Judges have fixed tenure i.e. retirement age. Judges can only be removed presenting to the President of

<sup>6</sup>Constitutional Law of India, T.K. Tope pg758 (Sujata V. Manohar, third edition 2010).

India for the removal of the Judge by both the houses of parliament following certain procedures.

2. **SALARY:** Judges are provided with a handsome amount of salary and it cannot be changed for their disadvantage after their appointment. They are also provided with various kinds of remunerations for a good living.
3. **JURISDICTION:** Jurisdiction of court can only be increased. It can never be decreased.
4. **SEPARATION FROM EXECUTIVE AND LEGISLATURE:** Art 50 of the Constitution urges the state to separate the judiciary from the executive in the public service of state.
5. **APPOINTMENT OF JUDGES:** Judges are appointed by the executive but only after the consultation from the chief justice of India who act on par the consultation of the collegium.
6. **NO DISCUSSION ABOUT CONDUCT OF JUDGES IN DISCHARGE OF THEIR DUTY:** Art 121 prohibits any kind of discussion on the conduct of Judge performed in discharge of their duty. They can only be discussed at the time of discussion of removal.

#### INDEPENDENCE OF JUDICIARY IN INTERNATIONAL ASPECT:

One of the most prominent document in international sphere for the independence of judiciary is the “Basic Principles on the Independence of Judiciary”. It is adopted by the “Seventh United Nations Congress of the Prevention of Crime and Treatment of Offenders”. It was held in Milan from 26<sup>th</sup> august to 6<sup>th</sup> September 1985.



This document includes various number of principles which the state parties should be taken into account and respected by their governments in their framework.

Some important principles include:

- The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
- The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
- Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
- Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of Judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.
- The term of office of Judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
- A charge or complaint made against a Judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The Judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the Judge<sup>7</sup>.

#### INDEPENDENCE OF JUDICIARY IN DIFFERENT COUNTRIES

Different countries deal with the concept of independence of judiciary differently. Some ensure it through different means of judicial selection of some by granting guaranteed tenure.

1. **CANADA:** Canada has ensured the independence of judiciary through section 96 to 100 of its CONSTITUTION ACT, 1867. Through its Constitution, Canada ensures its Judges certain rights, such as right to tenure and right to salary. Canada has also faced various challenges in establishing the judicial independence. In 1982, these rights were extended only to the Judges of inferior courts dealing the jurisdiction of criminal laws only. But in 1986, in case of *Valente v. The Queen*<sup>8</sup>, it was observed that these right are not absolute but limited. Further in year 1997, a major shift was witnessed. The Supreme Court of Canada found an unwritten

<sup>7</sup> United Nation's office of Human Rights Commission, (Feb 13 2019, 11:59) <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>.

<sup>8</sup> *Valente v R*, [1985] 2 S.C.R. 673



Constitutional norm enshrined in preamble which guaranteed the judicial independence.

2. UNITED KINGDOM: There are two important conventions preserving judicial independence. The first and foremost convention is that the Parliament of United Kingdom does not comment on the judiciary or the cases which are before the court. And secondly, it is of parliamentary privileges preventing the member of parliament from conviction. The salary of Judges is selected by the independent pay review body. Also the selection process of Judges is kept separate from politics and with least political interference.
3. UNITED STATES OF AMERICA: In USA there are two classes of courts- Federal Courts and State Courts. Federal court Judges are appointed by the President with the consent of the Senate and shall hold office till death or resignation or impeachment.

On other hand, Judges of State Courts also deal with independence of judiciary in many ways. Their selection process differs from state to states and sometimes within states. In some States Judges are appointed by ballot and in some States, Governor appoints the Judge.

hampering the “Constitution or its essence”. Independence of judiciary is ensured through different means such as by giving the right of tenure, by providing the Judges economic and social security. But it is also necessary to ensure that while maintaining its check upon the legislature and the executive, judiciary itself doesn’t become a tyrant or act arbitrarily. A Judge must act as a Judge. He must not have favorites nor he should entertain prejudices against certain members of bar. Possibilities of Judges being corrupt are there. Also Judges with political ambitions are likely to compromise judicial independence<sup>9</sup>. In such circumstances justice can never be just or fair- justice would fail to deliver its purpose. No doubt independence of judiciary is crucial and unavoidable but such independence should also be always kept in check and ensured it is serving the purpose it is meant for and not otherwise.

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### CONCLUSION

Judiciary is among the most important organs of the Constitution. It acts as the guardian of the Constitution- the Supreme Law of Land, having the responsibility of preserving the essence of it. But ultimately it is not the judiciary but the Judge himself who acts as the guardian of the Constitution through his own conscious. There does not lie the problem of Judge’s own likes or dislikes but has the sole question of the

<sup>9</sup>Constitutional Law of India, T.K. Tope pg759 (Sujata V. Manohar, third edition 2010).