



INDEPENDENCE OF JUDICIARY

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“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

The feature of judicial independence was adopted from the United States. A functioning democratic system requires an independent judiciary. An independent judiciary is required for a functioning democratic system. Only an impartial and independent judiciary can ensure that individual rights are protected and that justice is administered without fear or favour. As we know India is a democratic country, means that the Govt. has to be by the people, for the people and of the people. The preamble of the Indian constitution expresses a strong commitment to the object of justice. 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. The independence of the judiciary is usually guaranteed by the constitution, but it can also be guaranteed through laws, agreements, and norms and practices. Although judicial independence is a relatively new idea, it is universally acknowledged as a feature of a liberal democratic society.

1.1 MEANING

The term ‘independence’ is not defined in the Indian constitution. An independent judiciary is necessary to maintain a balance between private and societal interests. An independent judicial system was considered as a necessary for the proper operation of democracy in this approach. After years of existence, the notion of judicial independence remains unclear. Our constitution only mentions judicial independence in passing, but it never defines what that means. The primary discussion of judicial independence is founded on the theory of separation of powers, which has been in place for numerous years. The doctrine of separation of powers refers to the judiciary's independence from the administration and legislative as an institution. As a result, judicial independence encompasses both the institution of the judiciary and the independence of the judges who make up the judiciary.

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

It is commonly referred to as shorthand for the judiciary's independence from the executive and legislative arms of government. "Judicial independence" means that each judge is free to make decisions based on his assessment of the facts and his understanding of the law, without undue influence, inducements, or pressure, direct or indirect, from any source or for any cause.



In the case of **SP Gupta v Union of India**¹ the court held that the judges should be fearless & should uphold the principle of rule of law. Thus it is the basis of the concept of independence of the judiciary.

In the Hon'ble Supreme Court's case **Bachan Singh v. State of Punjab**², Justice Bhagwati emphasized the doctrine of rule of law, stating that while a democratic legislature is required to make laws, its power should not be unchecked, and that there should be an independent judicial system to protect citizens from the excess of the legislative and executive powers.

1. DESCRIPTION

In the federal system like India, the authority should be free from any kind of external pressures so that it will prove to be an effective mechanism in maintaining law and order in the society. The Indian judicial system being an important organ of the government, must have independence of judiciary for its proper functioning. So there felt a basic need for the independence of judiciary, reason for which is written below.

2.1 NEED OF INDEPENDENCE OF JUDICIARY

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 jurisdiction & according to the provisions of the constitution. Judiciary acts as a guardian of

the constitution & also aids in securing the doctrine of separation of powers.

2.2 JUDICIAL INDEPENDENCE IN INDIA

The concept of judicial independence was, like many others, originated in England. The judiciary's role is to make fair and neutral decisions in accordance with their oath of office and their own sense of justice, without being influenced in any way. It has already been established that the Indian constitution does not provide for absolute separation of powers.

The judicial branch's primary function is to protect the constitution. The Hon'ble Supreme Court of India has ruled that "the constitutional scheme aims at securing an independent judiciary, which is the bulwark of democracy. The objective of judicial independence is to maintain a fair democracy. The judiciary has been assigned to uphold the Rule of Law and safeguard the fundamental rights of our citizens. In the case of **S.R. Bommai**³ the apex court laid down guidelines for dismissal of a state government in lieu of conducting the test of majority.

2.3 CONSTITUTIONAL PROVISIONS RELATED TO THE INDEPENDENCE OF JUDICIARY-

Many provisions are provided in our constitution to ensure the independence of the judiciary. They are as follows-

2.3.1 Appointment of judges-(before 99th amendment):

The judges of the SC

¹ AIR 1982 SC 149

² AIR 1989 SC 898

³ S.R. Bommai v. Union Of India , AIR 1994 SC 1918



were appointed by the President. The CJI of the SC was appointed by the President with the consultation of such judges of the SC & the HC as he deemed necessary for the purpose. But in appointing other judges, the president would always consult the CJI.

2.3.2 Transfer of judges: Art. 222 of the constitution provide the transfer of judges from one HC to another. The same procedure is also followed even for the transfer of the CJ. The president has power to transfer the judges from one HC to another. This transfer must be made only after consulting the CJ.

2.3.3 Removal of judges: Art. 124(4) of the constitution provide the removal of the judges. A judge of the SC shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House & by a majority of not less than two-thirds of the members of that house present & voting has been presented to the President in same session for such removal on the ground of proved misbehavior or incapacity.

2.3.4 Salaries & Allowances: The salaries & allowances of the judges is also a factor which makes the judges independent as their salaries & allowances are fixed & are not subject to a vote of the legislature. They are changed on the consolidated fund of India in case of SC judges & the consolidated fund of state in the case of High court judges. Their emoluments cannot be altered to their disadvantage except in the event of grave financial emergency.

2.3.5 Powers & jurisdiction of Supreme Court: Parliament can only add to the powers & jurisdiction of the SC but cannot curtail them. In the civil cases, Parliament may change the pecuniary limit for the appeals to the SC. Parliament may enhance the appellate jurisdiction of the SC. It may confer the supplementary powers on the SC to enables it work effectively. It may confer power to issue directions, orders or writs for any purpose other than those mentioned in Art. 32 powers of the SC cannot be taken away & making judiciary independent.

2.3.6 Security of Tenure: The judges of the SC and HC have been given the security of the tenure. Once appointed, they continue to remain in office till they reach the age of retirement which is 65 years in the case of judges of SC [Art. 124(2)] and 62 years in the case of the judges of the HC [Art. 217(1)]. They cannot be removed from the office except by an order of the President & that too on the ground of proven misbehavior & incapacity. A resolution has also to be accepted to that effect by a majority of no less than two third of the members of the house present & voting procedure is so complicated that there has been no case of the removal of a judge of SC or HC under the provision.

2.3.7 Power to punish for contempt: The constitutional provisions for the SC & the HC under Articles 129 and 215 being the court of record have the power to punish for its own or for the contempt of subordinate courts. Other subordinate courts do not have the power to punish for its contempt but it may.



2.3.8 Separation of the judiciary from the Executive: Art. 50, a Directive Principles of State Policies, lays down that the state shall take steps to separate the judiciary from the Executive in the public services of the state. The object behind the Directive Principle is to secure the independence of the judiciary from the executive. Art. 50 lays down that there shall be a separate judiciary free from executive control

2.4 DOCTRINE OF SEPARATION OF POWER IN INDIA

The theory of Doctrine of Separation of Power was first propounded in 1747 by a French scholar **Montesquie**. He attempted to draw strict lines of difference between the powers of the Executive, the Legislature, and the Judiciary. In Indian terms, the doctrine of separation of powers The Indian constitution establishes a functional separation of state organs. Article 50 states that the state must take steps to separate the executive from the judiciary. This is to ensure the judiciary's independence. The validity of Parliamentary proceedings is guaranteed by Articles 122 and 212, and the legislatures cannot be called into doubt in any court. This protects legislatures against judicial intervention based on procedural irregularities.

In the leading case **Keshavnanda Bharti Case**⁵, it was decided that any amendment that tampered with the fundamental features of the constitution would be

⁴ <https://blog-ipleadersin.cdn.ampproject.org/v/s/blog.ipleaders.in/independence-indian-judiciary-demonstrated-relevant-rulings> (Last Visited May 09, 2022, 08.26PM)

declared unconstitutional. This confirmed the doctrine of separation of powers' relaxation even further.

2. DISCUSSION

3.1 Comparative Study of Independence of Judiciary in UK, USA & India

Dr. Bhim Rao Ambedkar, the chairman of Constituent Assembly, expressed that the judiciary should be independent of the executive and competent in itself. Nehru felt: "Judges should be first class and seen to be first class". Independence is a bulwark of rule of law. For the applicability of law equally to all citizens in the country, then it is important that the judges should be independent in applying law and rendering judicial decisions. Judges can be subject to threats and pressures from litigants, including society's criminal element. Independence of judiciary is a recognized principle adopted by most of the democratic countries.⁶

3.1.1 United Kingdom

The concept first originated in UK. There was a long struggle between the parliament and monarchy to control judiciary. In the 17th century, the parliament passed a settlement Act, which stated that the tenure of the judges would be subject to good behavior and their removal after an address to both houses of parliament.

⁵ *Keshwanand bharti v. State of Kerala & Anr*, 1970 SC 135.

⁶ Arora Shaila, *Independence of Judiciary*, 4 (2) IJLMH, 714-720, (2021)



3.1.2 United State of America

In the 1985, attempt for independence was seen. Basic Principles on the Independence of Judiciary states “The judiciary shall decide matters before them... without any restrictions, improper influence, inducement, pressures, threats or interference, direct or indirect, from any quarter or for any reason”.

3.1.3 India

Before independence, judges were appointed by the Crown, but they were yet independent from it. After independence, this principle became a part of the basic structure of the constitution, which cannot be amended. But before focusing on the concept of independence of judiciary, we will discuss on the need of independence of judiciary. Before discussing the need of judicial independence it is necessary to discuss the scheme of Indian judicial system.

3.1.3.1 First Judges Case, 1982⁷

- A petition was filed in 1982 in the SC of India.
- This case is known as the S.P. Gupta Case or First Judges case.
- The Hon’ble Supreme Court discussed 2 major points during the proceedings of this case
- When asked the Hon’ble Supreme Court of India whether the word consultation in the constitutional

Article 124 mean concurrence, the Hon’ble Supreme Court overruled this and denied saying that Consultation does not mean concurrence. The President was not bound to make a decision based on the consultation of the Hon’ble Supreme Court.

- Another important point in the discussion, in this case, was the part where the Hon’ble Supreme Court decided that a High Court Judge can be transferred to any other high court of a state even against his will.

3.1.3.2 Second judges case, 1993⁸

- Another petition was filed in 1993 by the Supreme Court Advocates on Record Association (SCARA).
- In this case, the Supreme Court overruled its earlier verdict and changed the meaning of consultation to concurrence. Thus binding the President of India with the consultations of the Chief justice of India.
- This resulted in the birth of the Collegiums System.

3.1.3.3 Third Judges Case, 1998⁹

- In the year 1998, the presidential reference to the Hon’ble Supreme Court was issued questioning the meaning of the word consultation in Articles 124, 217, and 222 of the Constitution.
- The chief justice won’t be the only one

⁷ S.P. Gupta v. President of India and Ors., AIR 1982 SC 149.

⁸ Supreme Court Advocates on Record Association v. Union of India, 1993 SCC 441

⁹ In Re Special reference case AIR 1999 SC 1



as a part of the consultation process. Consultation would include collegiums of four senior-most judges of the Hon'ble Supreme Court. Even if two of the judges are against the opinion, the CJI will not recommend it to the government.¹⁰

3.2 National Judicial Appointments Commission

The National Judicial Appointments Commission, hereafter referred as NJAC, proposed to make the appointment of HC & SC & chief justice more transparent. They will be selected by the commission, whose members will be drawn from the judiciary, legislature & civil society. NJAC proposed to replace the collegiums, with The Constitution (Ninety-ninth Amendment) Act, 2014. Articles 124A, 124B and 124C were added to the constitution to make the NJAC valid. Articles 124 A & 124B defined the NJAC, its members & their duties, while Art. 124C empowers parliament to make laws in the future to regulate the procedure for the appointment of judges¹¹.

A bench of nine judges bench was constituted in the case of **Supreme Court Advocates- on-Record Association v. Union of India**¹². The main question that was to be decided was, 'whether the independence of judiciary is basic feature of the constitution?' In this case writ petition was filed before the SC which questioned the constitutionality of the 99th Amendment Act & the NJAC Act. The petition accused that the NJAC violated the basic structure of the

constitution by compromising the judiciary's independence. The majority verdict the CJI has the power to appoint & transfer judges. The CJI needs to consult only two senior most judges during the time of appointment

3.3 The Current system of appointment of Hon'ble Supreme Court judges

- In judicial appointments, it is obligatory for the President to take into account the opinion of the CJI.
- The opinion of the CJI is binding on the Government. The opinion of the CJI must be formed after due consultation with collegiums of at least four senior most judges of the Hon'ble Supreme Court.

Even if two judges give an adverse opinion, then he should not send the recommendation to the Government

3. CONCLUSION

The independence of the judiciary as is clear from the above discussion hold a prominent position as far as the institution of judiciary is concerned. It is also clear from the historical overview that judicial independence has faced many obstacles in the past especially in relation to the appointment and the transfer of judges. Courts have always tried to uphold the independence of judiciary and have always said that the independence of the judiciary is a basic feature of the Constitution. Courts have said so because the independence of judiciary is the pre-requisite

¹⁰ Jain M.P., Indian Constitutional Law, 400, 401, 402, 8th ed. 2018, Lexis Nexis

¹¹ Pandey J.N., Constitutional Law of India, 552,553,554, 56 ed., 2019, Central Law Agency

¹² 2016 5 SCC 1



for the smooth functioning of the Constitution. The various judgments have ensured the independence of judiciary so far and it has been given top most priority. It is recommended that there should be transparency in the appointment as well as transfer of the judges. Also, we do not need to form new laws for the Independence of judiciary; we need to form a system where judges will feel safe while delivering impartial judgments. It is the need of time we need to make sure or judicial system stays independent & judges should feel safe & free while giving judgments. According to my view it is very bad to say that day by day the most important organ i.e. judiciary which is the only ray of hope for justice for a common citizen is being manipulated.

