



## Independence of judiciary in India: A critical analysis

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### Abstract

Researcher feels that "Justice without law is lame, law without justice is blind" i.e. why independence of judiciary is a sine quo non & in a normative sense, judicial independence would be independence from any factor influencing the judge to deviate from the oath of office, namely to uphold the constitution and the laws, and to act without fear or favour, affection or ill will. Anything short of these would spell absence of independence. Researcher also feels that mettle of a judge is tested by his ability to stand firm like Rock of Gibraltar in the face of tides and currents. That would be hallmark of true independence & by this quality its proved that judges ultimately are products of society & judicial independence ultimately would be directly proportional to the value attached by the citizens of the country & the judges to that signal virtue.

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### 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**

"All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary."

**-Andrew Jackson**

Our country India is a democratic country, means that the government has to be 'by the people, for the people and of the people'. It guarantees to its citizens various rights through its Constitution & the supremacy of the constitution can be maintained only through an impartial and independent judiciary<sup>[1]</sup>. The framers of the constitution at the time of framing our constitution were concerned about the independence and the kind of judiciary this country needed. The concern regarding this among all the members of the constituent assembly, could be seen from the following words of the B. R. Ambedkar:

*"There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself. And the question is how these two objects can be secured".*

But the meaning of independence is judiciary is still not very clear and that has led to the inherent tussle between the legislature, executive and judiciary from quite a long time now.

In *S.P. Gupta vs. Union of India*<sup>[2]</sup>, this Court has held that:-

"The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law thereby making the rule of law meaningful and effective." It is well understood that if the judiciary by their performance and conduct does not meet the expectations for which such Constitutional protection has been provided, the judiciary will be reduced to any other organ of the State which we have come to distrust in recent times.

During the last few years, the question of independence of judiciary has been hotly debated in India. This question has agitated the minds of jurists, politicians and the laymen. The supporters and the opponents have both given very effective and sound arguments.

Those who believe in the absolute independence of judiciary say that democracy cannot be possible in the absence of an independent judiciary. They say that rule of law can only be upheld by a supreme judiciary. And this rule of law is very essential for the successful working of democracy.

There are various provisions in the constitution of India themselves which ensure the independence of the judiciary.

### Some of the provisions are

- i) Article 50 says that Separation of judiciary from executive is one direct provision which ensures the independence and no interference from the executive.
- ii) Article 211 and Article 121 say that No discussion on the conduct of any judge from the High Court/Supreme Court in the Parliament or the state legislature with respect to their discharge of the duties or their workings.

- iii) Tenure: Judges of the High Courts/Supreme Court cannot be removed from the office except by an order of the President and that too on the ground of proven misbehavior and incapacity. A resolution has also to be accepted to that effect by a majority of total membership of each House of Parliament and also by a majority of no less than two third of the members of the house present and voting.

### **The Concept of Judicial Independence**

Understanding the concept of judicial independence requires defining from whom judges are to be independent. While judicial independence is a dynamic concept that may be defined in different ways, it is generally referred to as shorthand for the judiciary's independence from the executive and legislative branches of government. This is the Supreme Court's essential understanding of the phrase. At a minimum, it means that judges cannot be punished physically or economically for the content of the decisions they reach. Consequently, judges need not fear deciding cases on their merits, even when contrary to the interests or desires of the other branches of government. Thus, other branches of government have no power over case outcomes. Judicial independence thereby frees judges to apply the rule of law and do justice in individual cases. Judicial independence is an instrumental means to an end, not an end in itself. The concept is not attractive because it makes judges happy, but because it protects against other branches forcing unfair judicial outcomes, grounded in self-interest or ideological fervor. Justice Brayer has thus noted that the "question of judicial independence revolves around the theme of how to assure that judges decide according to law, rather than according to their own whims or to the will of the political branches of government [3]." Freed from threats from the other branches, judges may be better able to render dispassionate judgments and apply the law fairly to the facts. They are to be principled decision makers impartially deciding cases according to the rule of law. It is against this standard that judicial independence must be measured, and there is no intrinsic guarantee that independence will further the standard.

Thus, conceptually, as well as from the point of view of practical reality, the independence of the judiciary comprises two basic postulates, viz., "independence of the judiciary as an institutionalized organ" and "independence of the individual judges," and no judiciary can be said to be independent unless these two essentials are present.

"In India, the need for judicial independence is enhanced by the fact that India has a written Constitution with a Bill of Rights and Judicial Review and a federal structure as a result of which the Union of India and the Governments of the States figure as the largest single litigants before the Supreme Court and the High Courts [4].

### **Need for the 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 areas and according to the provisions of the constitution.

### **Areas of Concern**

- The interlocking of state organs and their functions
- The human factor, since judges and juridical officials remain part of the community with all its vicissitudes.

### **Defining Judicial Independence**

"Independence of the judiciary means... (1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducements or pressures, direct or indirect, from any quarter or for any reason.... [5]" Much of the debate on judicial independence is confused by how various discussants define the term "judicial independence".

### **Simply stated independence of judiciary means that**

- The other organs of the government like the executive and legislature must not restrain the functioning of the judiciary in such a way that it is unable to do justice.
- The other organs of the government should not interfere with the decision of the judiciary.
- Judges must be able to perform their functions without fear or favour. Independence of the judiciary does not imply arbitrariness or absence of accountability. Judiciary is a part of the democratic political structure of the country. It is therefore accountable to the Constitution, to the democratic traditions and to the people of the country.

### **The concept of judicial Independence**

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### **Components of the independence of judiciary**

The most important aspect in the independence of the judiciary is its constitutional position. Just as the constitution provides for the composition and powers of the executive and the legislature, it should also provide for the judiciary. If the constitution vests the judicial power in the judiciary, so much the better. Otherwise the constitution may provide for the composition of the courts and their jurisdiction, and for the appointment, terms of office, and 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 administrative staff, preparation of its budget, and maintenance of court buildings. It must prohibit ad hoc tribunals and the diversion of cases from ordinary courts, ensure the natural judge principle, ordain respect for and

enforcement by the other branches of the government of court decisions, provide for separation of judges from the civil services, and prohibit diminution of judges' service conditions. Some of these matters may be trusted to legislation; however, there must be enough assurance in the Indian Constitution to that 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 judges.

### **The Principle of Independence Of The judiciary**

The independence of the judiciary from the executive and the legislature as well as independence of each and every judge within the Judiciary is considered as a necessary condition for a free society and a Constitutional democracy. It ensures the rule of law; and realization of human rights and also the prosperity and stability of a society. Therefore, the Constitution provides for the independence not only of the Supreme Court, but also the High Courts and the subordinate courts. Independence of judiciary being a basic feature of the Constitution, any attempt to curtail it directly or indirectly even by an amendment of the Constitution would be invalid<sup>[7]</sup>. The role of the judiciary under the Constitution is a pious trust reposed by the people. The Constitution and the democratic polity there under shall not survive, the day judiciary fails to justify the said trust. If the judiciary fails, the Constitution fails and the people might opt, for some other alternative. In view of the role of the judiciary in the context of the Constitution it is fallacious to say that the Legislators alone are answerable to the people regarding the functioning of the judiciary.

- i) Independence of judiciary is therefore not a private right of judges but the very foundation of judicial impartiality – and a constitutional right of the people of India to be governed by the rule of law that shuns all arbitrariness. Judicial independence characterizes a state of mind, which is concerned with the judge's impartiality in fact and reality, and a set of institutional and operational arrangements, which define the relationships between judiciary and others, particularly the other branches of the government so as to assure both, the reality and appearance of independence and impartiality. Individual independence of a judge is reflected in such matters as security of tenure, while; the institutional independence of the court over which the judge presides is reflected in its institutional or administrative relationships to the executive and legislative branches of the State. The Judges are undoubtedly servants of the public but they are not public servants whose essential obligation is, consistently with law, to give effect to the policy of the government of the day. The duty of a judge, on the other hand, is to administer justice according to law, without fear or favour, and without regard to the wishes or policy of the Executive<sup>[8]</sup>.
- ii) Judicial independence, however, is not only a matter of appropriate external and operational arrangement, but it is also a matter of independent and impartial decision making by each and every judge. The judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not.

This is the cornerstone of the rule of law. Judges individually and collectively should protect, encourage and defend judicial independence. One rule, said Alfred the Great, applied everywhere: "Judge not one judgment for the rich and another for the poor".

### **Doctrine of separation of power**

In every State there are three organs; the legislature, the executive and the judiciary, functioning in relation to each other at the same time functioning independently of each other. The doctrine of separation of powers propounded by Montesquieu says that if the power is vested with one authority it will lead to a situation of no liberty and there would be an end of everything, where the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of exacting laws, that of executing the public resolutions and of trying the causes of the individuals<sup>[9]</sup>. Thus, the doctrine of separation of powers idealizes situation wherein one person or a single authority is not wheeling the whole power.

*Marbury v. Madison*<sup>[10]</sup> first case in which the power of judiciary to review legislative actions was laid down. At the very same time the system of government in United Kingdom, under whom India was a colony and later adopted governmental system there, does not flow the separation of powers.

As it's the Montesquies Doctrine and he said "To become truly great, one has to stand with people, not above them."

### **Doctrine of separation of powers in Indian perspective**

The constitution of India lays down a functional separation of the organs of the State. Article 50 lays down that State shall take steps to separate the judiciary from the executive. This is for the purpose of ensuring the independence of judiciary. Article 122 and 212 provides validity of proceedings in Parliament and the legislatures cannot be called into question in any Court. This ensures the separation and immunity of the legislatures from judicial intervention on the allegation of procedural irregularity<sup>[11]</sup>.

### **The Practice**

The Constitutional provisions relating to separation of powers, as discussed above has in the actual practice been made flexible to benefit the supremacy of each organ, leading to a situation where in each organ has infringed into the functional sphere of the other. The judicial interference in the power of executive and the legislature in exercise of judicial review should always necessarily be with the constitutional bounds<sup>[12]</sup>.

The dispute regarding the election of the Prime Minister, the Court held that the when a constituent body declared that the election is not void, it was discharging a judicial function, is the first instance in which the position of doctrine separation of power was challenged and clarified. The adjudication of a specific dispute is a judicial function, which cannot be exercised by the Parliament even by using the amending powers<sup>[13]</sup>. Separation of power is a method of avoiding concentration of power in a group's hand, making it difficult to abuse.

### Judicial Independence and the Constitution-Making

The Superior Courts like the other branches of the government belong to the Indian people; they are the repository of the confidence of the Indian people. "An independent judiciary need not be a mysterious area of government or appear to be an occult priesthood or remain a remote, austere marble temple housing... seldom seen jurists who periodically issue pronouncements on the law of the land <sup>[14]</sup>".

In the backdrop of this, Sardar Vallabhbhai Patel while explaining the manner of appointing the superior judges a multo fortiori stated "the judiciary should be above suspicion and should be above party influence <sup>[15]</sup>". So that none may have the complaint to say that "higher courts are right because they are superior, not superior because they are right <sup>[16]</sup>". The subject of the independence of the judiciary was close to the minds of the members of the Constituent Assembly inasmuch as the issues of the powers of the superior courts and the judicial review. They further believed that the independence of the superior courts was essential in free India with a federal Constitution and it should not be endangered. In answer to a question concerning the independence of the superior courts, they expressed that the judiciary must be above reproach, free from coercion external as well as internal, and free from political influences "if the beacon of the judiciary was to remain bright <sup>[17]</sup>".

"The framers of the Constitution made it known in an emphatic voice that separation of judiciary from Executive, which is the life line of 'independent judiciary <sup>[18]</sup>', is a basic feature of the Constitution. Dr. B.R. Ambedkar in his speech in the Constituent Assembly on June 7, 1949 observed as under:

"I do not think there is any dispute that there should be separation between the executive and the judiciary and in fact all the articles relating to the High Court as well as the Supreme Court have prominently kept that object in mind."

The need for independence of the judiciary under any system of Constitutional Government can best be explained in the words of JUSTICE FRANKFURTER in *Cooper v. Aaron* <sup>[19]</sup>

"The most prized liberties themselves presuppose an independent judiciary through which these liberties may be, as they often have been, vindicated. When in a real controversy such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy <sup>[20]</sup>."

In India, even though appointed by the Government, Judges of the Supreme Court or of the High Courts are not 'government servants' in the ordinary signification of that expression because the following features distinguish these Judges from other government servants:

- i) Government has no power to direct what work or the manner in which a Judge shall discharge his judicial duties <sup>[21]</sup>.
- ii) Their tenure of service, salary and other conditions of service are guaranteed by the Constitution <sup>[22]</sup>.

### Criticism of Judges

The freedom of expression to any person cannot extend to scandalise the judiciary as a whole or the members of the judiciary who have not issued order favourable to the accused,

in particular. No such freedom of expression is recognised and the accused cannot claim such a right to scandalise and hurl abuses against the Judges who do not issue orders in his favour <sup>[23]</sup>.

Bona fide criticism of any system or institution including judiciary is aimed at inducing the administration of the system or institution to look inward and improve its public image. Courts, the instrumentalities of the State, are subject to the Constitution and the laws and are not above criticism. Healthy and constructive criticism is a tool to augment its forensic tools for improving its functions. A harmonious blend and balanced existence of free speech and fearless justice counsel that law ought to be astute to criticism. Constructive public criticism even if it slightly oversteps its limits thus has fruitful play in preserving health of public institutions. Section 5 of the Contempt of Courts Act, 1971, accords protection to such fair criticism and saves from the court The best way to sustain the dignity and respect for the office of Judge is to deserve respect from the public at large by fearlessness and objectivity of the approach to the issues arising for decision, quality of the judgment, restraint, dignity and decorum a Judge observes in judicial conduct off and on the Bench and rectitude <sup>[24]</sup>.

"In *D.C. Saxena v. Hon'ble the Chief Justice of India* <sup>[25]</sup>, the Supreme Court observed:"

Advocacy touches and asserts the primary value of freedom of expression. It is a practical manifestation, of the principle of freedom of speech. Freedom of expression in arguments encourages the development of judicial dignity, forensic skills of advocacy and enables protection of fraternity, equality and justice. It plays its part in helping to secure the protection of other fundamental human rights. Freedom of expression, therefore, is one of the basic conditions for the progress of advocacy and for the development of every man including legal fraternity practising the profession of law. Freedom of expression, therefore, is vital to the maintenance of free society. It is essential to the rule of law and liberty of the citizens. The advocate or the party appearing in person, therefore, is given liberty of expression. But they equally owe counter vailing duty to maintain dignity, decorum and order in the Court proceedings or judicial process. The liberty of free expression is not to be confounded or confused with licence to make unfounded allegations against any institution, much less the judiciary..... In other words, imputing partiality, corruption, bias, improper motives to a Judge is scandalisation of the Court and would be contempt of the Court. Even imputation of lack of impartiality fairness to a judge in the discharge of his official duties amounts to contempt gravamen of the offence is that of lowering his dignity or authority or an affront to the majesty of justice. When the condemner challenges the authority of the Court, he interferes with the performance of duties of Judge's office or judicial process or administration of justice or generation or production of tendency bringing the Judge or judiciary into contempt. Judicial Response to "Independence of Judiciary"

In the backdrop of the above analysis, it is expedient to analyze judicial response to judicial independence and selection as well as appointment of justices of superior courts in order to understand the supremacy - bureaucratic - juristocratic bureaucracy! *Union of India v. Sankalchani* <sup>[26]</sup> was the first case concerning the transfer of Judges from one

High Court by invoking Article 222 as the Central Government seemed to initiate the steps on the recommendation' of the Law Commission of 1958 in mid-seventies. Whether the government had intended to transfer Judges of High Courts for the purposes of justice or for political reasons is for anyone to guess. Article 222 stipulates that the President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court. A plain reading of the language of this Article tells that notwithstanding the legal position that a Judge can be transferred without his consent; there is an element- of discretion in the matter of transfer of judges; there may be proximity of extraneous as well as political influences in the matter of transfer of a judge. In order to belittle the possibility of political influence the Supreme Court suggested that Article 222 cannot be construed to mean that for transfer of a Judge to another High Court, it is necessary to obtain his consent as a matter of constitutional obligation. Though the language of the Article does not say so, however, by healthy constitutional convention normally the consent of the Judge concerned should be taken, not so much as a constitutional necessity, but as a matter of courtesy. Where the Judge does not consent and public interest compels, the power under Article 222 can, be exercised; the Chief Justice of India owes a corresponding duty to the President and that he shall consider every relevant fact, and, indeed, as a matter of constitutional duty, to elicit and ascertain facts either directly from the Judge concerned or from other reliable sources<sup>[27]</sup>.

*In S.P. Gupta v. Union of India*<sup>[28]</sup> the Supreme Court was grappled with two questions, namely, the transfer of Judges including the Chief Justice of High Courts, and, appointment of Justices to the superior courts. As regards the question of transfer of Judges, the principle of "Constitutional convention of courtesy" evolved in *Sankalchand's case*<sup>[29]</sup> was affirmed by a larger Bench in this case. And, as regards the question of appointment of justices to the superior courts, the Supreme Court opined: The Central Government is bound to consult at least one Judge out of the Judges of the Supreme Court and of the High Courts besides the Chief Justice of India. The practice, however, has been to consult the Chief Justice of India only. This is not a very satisfactory mode of appointment, because wisdom and experience demand that no power should be vested in a single individual howsoever high and great he may be and howsoever honest and well meaning. It is not concurrence but only consultation and the Central Government is not bound to act in accordance with the opinion of Chief Justice of India though it is entitled to great weight as being the opinion of the Indian Judiciary<sup>[30]</sup>

### Conclusion

In a democratic polity wedded to rule of law and independent judiciary is a sine qua non. In a democratic state governed by a written constitution, the task of interpreting the constitution and being the sole arbiter in constitutional disputes is assigned to the judiciary and it is here that it is required to be totally free of any direct or indirect influence by the legislative or the executive. It is in the role that the judiciary has to enjoy complete freedom.

The principle of complete independence of the judiciary from the executive is the foundation of many things in our island life.....The Judge has not only to do justice between man and man. He also-and this is one of the most important functions considered incomprehensible in some large parts of the world-has to do justice between the citizens and the state-

**Winston Churchill**

Even a despot like Churchill understood the requirement of the complete independence of the judiciary from the executive influences. Independent judicial power is implicit in the 'basic concept of separation of powers' among a plurality of agencies and the tripartite scheme of checks and balances. This concept is the very 'heart of the constitutional scheme'.

Judiciary got its Constitutional strength in terms of its special power of judicial review. The judiciary also managed to establish its Constitutional ascendancy in terms of possessing its sole discretionary right in progressive interpretations of law. As a result one can witness the changing role of judiciary in Indian polity since independence. The Supreme Court thus perceives the Indian judiciary as both the protector of individual liberties against political branch aggression and the ultimate arbiter of the Constitution's meaning.

In India the Supreme Court will stand firm and aloof from party politics and it is unconcerned with the changes in the government. The court stands for administration of law, for the time being in force and thus has sympathy for all, but allied to none.

Our Supreme Court has very zealously been protecting the fundamental rights of the citizens. Thus it has been acting as a protector and guardian of the Indian Constitution as well as the rights of the citizens. But in the modern age the independence of the judiciary doesn't mean that it should not keep in mind the social and economic needs and aspirations of the people, while delivering its judgments. Rather the judiciary should actively participate in the sacred task of building a welfare society in the country and the regeneration of the nation. Similarly the executive or the Parliament should not do anything to undermine the independence of judiciary.

Future years are likely to see further debates on how to balance judicial independence with accountability in India. What remains clear is that whatever changes may occur in future years,, whether they involve new procedure for appointing judges or new means for disciplining their behavior, they are likely to be the subject of major constitutional debate and adjudication. Judges ultimately are products of society and we shall always get the judges that we deserve. Judicial independence ultimately would be directly proportional to the value attached by the citizens of the country and the judges to that signal virtue.

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