
INDEPENDENCE OF JUDICIARY

Arpit Khandelwal , LLM, Chanakya National Law University, Patna

ABSTRACT

An independent judiciary is solid foundation for any democratic country. Independence of judiciary means the judges should be free they should not make any decision based on political pressure, they are holding constitutional post under oath so they should be able to perform their duties without fear or favor to anyone. Independence of judiciary also indicates that the two organs of government i.e the executive and the legislature should not enter into the domain of judiciary & they should not restrict judiciary in any form from discharging its duty. The term Independence of Judiciary is nowhere mentioned & defined in Constitution of India but it is basic structure of constitution thus no amendment can remove or separate it. Montesquieu gave the idea of Independent judiciary for the first time as he relied on the concept of separation of power¹.

¹ S S Naganand, Senior Advocate “Independence of the Judiciary” Just Law , June 2019

Introduction

“ Judicial independence is the bulwark of our system. It gives life to the words of Constitution”.

- *Douglas Abrams*

The term independence of judiciary is nowhere defined in Constitution in bare provision but independence of judiciary is one of the basic structure of Indian Constitution. India follows doctrine of separation of power but that separation is not followed in strict or literal sense but when it comes to judiciary it follows absolute separation from the other two organs of the government because in any free democratic country independent judiciary is the bedrock. Normally in a free democratic country independence of judiciary is guaranteed through Constitution but at the same time it is also guaranteed through legislation and conventions.

Characteristics of Independent Judiciary

1. Judges should act without fear or favour. They should not make decision out of any favour which means impartial decision.
2. Executive and Legislature should not interfere in decision making process.
3. Judges are not removed in arbitrary manner or threatened².

Need for Judicial Independence

Judiciary is guardian of Constitution. Its main task is to interpret law and act as the guardian of holy constitution. We live in a society and it is obvious that disputes will arise between two individuals, group of individual or between groups or between individual and government then such disputes need to be settled down by an independent body in conformity with the rule of law. The main work of judiciary is to adjudicate the matter without fear or favour. The judiciary passes independent decision based on facts and evidence. So, in order to do this and to complete this procedure an independent judiciary is required who acts without fear or favor.

Independence of Judiciary - A basic feature

An independent judiciary is what makes a democratic constitution significant for its

² United Nations Human Rights Office of the High Commissioner, “ Basic Principle on the Independence of Judiciary”.

citizenry³. One of the basic feature of indian constitution is independence of judiciary. Role of judiciary is to act as the guardian of constitution and to interpret law. Independence of judges means freedom of judges in the decision making process what ever decision the render it should be free from fear or favor and judiciary should be separate from executive and the legislature. Judges should render decision in such a way that it should be been that justice has been done. For maintaining the independence of judiciary there should be restrictions and checks on judges. No one can be judge in his own case. Judicial independence rests on the defense that a judge feels to decide a case based upon his analysis of law, without fear of retribution for deviating from the public, legislative or executive opinion.

Article 124 (2) provides for appointment of Judges of Supreme Court⁴. The president of India appoint the judges in conformity with the collegium. The names recommended by the collegium is binding on president. The judges of Supreme Court and High Court have fixed tenure and they can be removed on the ground of misbehaviour or incapacity. The salary of judges are charged from the consolidated fund of India.

Constitutional Provisions

Part V , Chapter IV of the Indian Constitution deals with Union Judiciary.

Separation of Judiciary from Executive⁵ : Article 50 of the Indian Constitution states that the state should take step to separate the judiciary from executive in public services which is free from executive control.

Constitution of Courts:

Article 124 & 217 talks about the establishment of Supreme Court and High Court respectively. It also talks about the procedure of removing judges from office. Removal of the judges can be done on the ground of incapacity or proved misbehavior.

Supreme Court⁶ : The Supreme Court consist of the Chief Justice and 30 other judges. The judges of Supreme Court are appointed by the president of India after the consultation of

³ Meera Mathew, “ Judicial Independence at stake : Analysis of Indian Judicial Appointments,” Indian Bar Review, Vol 41, No. 4 (Oct- Dec 2014) 170.

⁴ Article 124, Constitution of India 1950.

⁵ Article 50, Constitution of India, 1950.

⁶ Article 124 , Constitution of India 1950

Judges of Supreme Court, Chief Justice of India, Judges of High Court⁷. The Senior most judge in the SC will be the Chief Justice of India and other judges will be appointed after the consultation of CJI.

High Court : There are High Court for each state or there can be a common high court for two or more states or for two or more states and Union Territory⁸. The High Court consist of Chief Justice and other number of judges as president appoints. The judges of high court are appointed by president in consultation with Chief Justice of India, Chief justice of High Court and Governor of state. Every high court is court of record with power to punish for contempt⁹.

Subordinate Court : Subordinate court comes under the control of High Court under Art 235. Judges in the subordinate judiciary are appointed by governor after the consultation of High Court of the state¹⁰, the recommendation of High Court is binding on Subordinate Court.

Tenure : Constitution provides tenure for the judges of Supreme Court and High Court respectively. A judge of Supreme court holds office till he attains the age of 65 years¹¹ and the Judge of High Court holds office till he attains the age of 62¹². They may resign and if the decide to resign the letter should be addressed to the president.

Removal : When a judge is removed, then the parliament acts as a adjudicating authority and its members decide the guilt. A committee can also be constituted by Chief Justice and two Senior Judges to inquire into the matter and need not wait for the MP's.

Once the impeachment process was applied in 2011 against Justice Somitra Sen former Judge of Calcutta HC as he was found guilty for misappropriation of public fund a committee of 3 judges was formed by the CJI K.G. Balakrishnan and later Rajya Sabha passed impeachment motion against him and before lok sabha could passed he resigned.

Salary and Allowance : The salaries of the judges of Supreme Court will charged from the Consolidated fund of India and the salaries to high court judges will be charged from the consolidated fund of the respective state. The salaries will be paid as determined by the

⁷ Id 124

⁸ Article 214 , 231 Constitution of India 1950

⁹ Article 215 , Constitution of India 1950

¹⁰ Article 202 (3) (d) 229(3) , Constitution of India 1950

¹¹ Article 124 (2) , Constitution of India 1950

¹² Article 217 (1) Constitution of India 1950

parliament by law and every judge is entitled to such privilege and allowances as determined by parliament and mentioned in the Second Schedule.

Restriction on discussion in Parliament : According to Article 121 & 211 of Indian Constitution there shall be a total restriction on the discussion of conduct of judges in parliament while they are discharging the constitutional duty except during the time of removal on the motion of president.

Power to Punish for Contempt of Court : Supreme Court and High Courts are courts of record and the by virtue of Article 129 & 215 they are vested with the power to punish for the contempt.

Selection and Appointment of Judges

The process of selection and appointment are subject to judicial review. The process of appointment of judges are changed after 3 judgments passed by Hon'ble Supreme Court.

In 1st judges transfer case¹³ the court considered the issue of transfer of judges from one High Court to another High Court without the consultation process. The majority judgment and the operative part held that the word "Consultation" used in Article 124(2) and Art 217 does not mean "Concurrence" and held that president could appoint judges even if the view of Chief Justice of India does not match or he forms a different opinion regarding the same.

In the case of Subhash Sharma Vs. UOI¹⁴ the matter was transferred to a higher bench with regard to the correct interpretation of the word "Consultation".

In 2nd judges case¹⁵ a nine bench judge pronounced judgment and held that opinion given by Chief Justice in the consultation process has to be taken, taking in consideration of 2 senior most judges of Supreme Court.

Collegium System

The word Collegium is nowhere defined in Indian Constitution but it has been created for garrulous reasons. "Collegium means a group or college of peoples". The main function of Collegium system is to recommend and appoint judges of Supreme Court and High Courts.

¹³ S.P Gupta Vs. Union of India 1982 , AIR 1982 SC 149

¹⁴ 1991 AIR 631

¹⁵ Supreme Court Advocate on Record Association V. Union of India, Air 1994 SC 268

The Collegium system consist of the Chief Justice of India and the four senior most judges of supreme court and the senior most judge of supreme court will be appointed as Chief Justice of India. The Indian Constitution provides qualification for persons to be appointed as judges of High Court and Supreme Court but it does not provide qualification for appointment of judicial officers but it was decided through judicial interpretation in many landmark cases. But since from the beginning of this collegium system it remains very controversial. The word collegium itself remained into debate. The meaning of the word was first discussed in the Supreme Court Advocate on Record Association V. Union of India¹⁶. The collegium system is criticized over the time for many reasons some of them are mentioned below :

1. *Biasness* : The judges themselves appoint other judges so there is high chance of biasness that they might select such persons with whom they have strong bonding & relation.
2. *Lack of Transparency* : Appointment of judges through collegium system also point finger on transparency, it is not crystal clear. The procedure of appointment and recommendation process in not in the public domain but it remains with the collegium system.
3. *Lack of Accountability* : As there is lack of transparency so accountability also comes into question as the collegium system is not answerable to any one for the appointment they made, once the appointment is made it is full and final.
4. *Lack of benefit to practicing lawyers in various courts* : As the collegium system works within the four wall and they are not accountable to anyone for the appointment here the lawyers who are practicing in various courts across the nation they doesn't have any role in the appointment process neither they get too chances for selection in higher judiciary. There are very less no. of advocates from bar association who get selected in higher judiciary.
5. *Collegium can commit mistake* : Collegium system consist of judges and they are also human it is very common that they can also commit error. The collegium system consist

¹⁶ Supra

of very small no. of peoples and there can be instances where they can commit mistakes but there is no check and balances for such instances moreover they are not accountable to anyone which can be more dangerous at time.

National Judicial Appointment Commission

Appointments of judges in Supreme Court and High Court have always been a point of issue between the judiciary and the executive as any of the government wanted a little bit of interference of executive in the appointment of judges for their political gain. From the time of independence the judicial appointment was based on favouritism or suitability rather than merit many times it was tried to bring some change in the process of appointment and most of the times it was in the form of Law Commission Report. Both the UPA and the NDA government wanted control or interference of executive in judiciary according to them. So the appointment of judges has been a controversial issue.

National Judicial Appointment Commission was an act passed by parliament having constitutional support. The establishment of NJAC by the parliament was in reaction to the criticism of Collegium system¹⁷. Before NJAC collegium system was there for appointment of judges of High Court and Supreme Court. National Judicial Appointment Commission tried to bring a balance between executive and judiciary. The bill was passed by both houses of the parliament without a single negative vote¹⁸.

Composition of NJAC

The National Judicial Appointment Commission consist of the Chief Justice of India as its exofficio chairman and 2 senior most judges of Supreme Court as ex- officio members , Union Minister for Law & Justice and 2 eminent persons the two eminent persons will be selected by a committee consisting of Prime Minister of India, Chief Justice of India and the Leader of Opposition amongst the two member one should be SC or ST or OBC or from Minority Community or a Women.

¹⁷ Prof. Dr. Rattan Singh and Dr. Sikha Dhiman , Appointment , Independence & Accountability of Judges (Allahabad Law Agency, Harayana , 2021.

¹⁸ Satyam Rathore, “ Judicial primacy and the Basic structure - A legal Analysis of the NJAC Judgement “ , Economical and Political weekly, Vol. 50 No. 8

Advocacy of National Judicial Appointment Commission

The National Judicial appointment commission also remained controversial like the collegium system but the majority were happy with this system as enacted by the act of parliament and it was likely to bring transparency into the system. There were some major arguments why people think that NJAC was a good step taken by the parliament. Some of the reasons are mentioned below :

1. *Transparency* : Transparency means the process should be known to the people or it should be in public domain. The main reason why collegium system was controversial was lack of transparency the appointment of judges was done within the four walls of the system here when the whole process would be in public domain and everybody can know what is happening and how appointment is made then automatically the controversy would come to an end.
2. *Accountability* : In the working of NJAC every organ which is working is accountable for the things done under their jurisdiction. Till now Collegium was in controversy because of accountability as the judges were not accountable to anyone but here when two other organs are accountable then why judiciary will not be accountable for the same. In Supreme Court Advocate on Record Association V. UOI , Justice Chelameswar in his dissenting opinion has mentioned about accountability he took a note and majorly highlighted that collegium should be more accountable and judges should make it more accountable.
3. *Speedy Appointment of Judges* : Over the years collegium system failed in the fast and smooth appointment of judges. There were many vacancies lying in the higher judiciary as well as subordinate judiciary as result number of pendency of cases also increased due to shortage of judges. So it was opined that with this system there will be speedy appointment of judges which will automatically result in speedy disposal.
4. *Involving Eminent Person* : The involvement of eminent person is based upon the system of United Kingdom. In U.K while appointing judges the commission also appoint some eminent person in the commission it is optional that may be from legal or non legal background. Involving eminent person will ensure accountability and transparency. Moreover this involvement will ensure how does a layman contributes to appointment its suggestion and how a layman reacts.

5. *Act Passed by Parliament* : The advocacy of NJAC was so stronger because the bill was passed from both house of parliament and it was ratified by most of the states.

Opposition of National Judicial Appointment Commission

It was contended by many persons that in the name of reform of Collegium system the government was trying to bring the appointing system under the domain of executive so it was also opposed on many points some of them are :

1. *Independence of Judiciary* : The term independence of judiciary means judiciary and its function to be free from interference of executive and legislature. The inclusion of law minister in the commission as an ex- officio member was under question as the law minister is a political man so his inclusion is question on independence of judiciary and this was criticized by judges themselves. NJAC is not only runious of separation of power but also of judicial independence which was declared as basic structure of Constitution in fundamental right case¹⁹ and later in Minerva Mills Case²⁰.
2. *Violation of Speration of Power* : Part IV of Constitution says about separation of judiciary from executive²¹ but here in NJAC executive is directly involved thus this is violation of basic structure.
3. *Eminent Person* : The word eminent person is no where defined or mentioned and when it comes to appointment of judges it becomes much absurd. There is no specification whether this eminent persons will be from legal background or non legal background and this word itself carries a big loophole.

Constitutionality of National Judicial Appointment Commission

Before NJAC, collegium system was working for the appointment of judges but with the increase of criticism and controversy of collegium there was need of another mechanism for selection of judges in higher judiciary so the parliament introduced NJAC bill in the year 2014 and the 99th amendment to replace collegium system.

But soon after when the both bill was passed by Lok Sabha and Rajya Sabha some petitions

¹⁹ Kesavananda Bharti Vs. State of Kerala , AIR 1973 SC 1461

²⁰ Minerva Mills Vs. Union of India , AIR 1980 SC 1789

²¹ Article 50 , Constitution of India 1950

were filed in Supreme Court challenging the law as unconstitutional violative of basic structure.

At first the petition was heard by a three judge bench but later it was argued that matter should be heard by a constitutional bench as it involved substantial question of law and as constitutional interpretation was required it was requested to court that till the decision is not pronounced the act should not come in force. One more issue was that the whole process of appointment of judges by NJAC was accepted by the judges as there was interference of executive.

The five judge bench consisting of J. Kehar, J. Lokur, J. K Joseph, J. A.K. Goel and J. Chelameswar pronounced the judgement in the ratio of 4:1. Justice Jasti Chelameswar gave dissenting opinion and the majority said that the National Judicial Appointment Commission was infringing/seizing the independence of judiciary violating the basic structure.

The court held that the independence of judiciary is one of the important aspect of basic structure doctrine and the involvement of executive and legislature is directly infringing the independence and the appointment of judges comes under the ambit of basic structure as it is totally an independent act. The presence of the law minister in the commission itself raises a doubt and put question mark on the independence. Direct participation of judiciary, executive and non judicial members in appointment of judges lead to a compromised judiciary. The judges also viewed that the collegium system was into question because of transparency and accountability but here the whole role of appointment process is in question and the judges asked to multiply the issue unnecessary and held 99th Amendment unconstitutional violative of basic structure doctrine and separation of power.

Justice Chelameswar gave dissenting opinion and held that there was a need of reform in the collegium system. He says that the present system was non transparent and it was cloudy and there was no accountability he said that the present collegium system was not fair and rational so he upheld the 99th Amendment as it was more transparent.

Accountability of Judges

Accountability of judges is a part of judicial independence. Accountability along with it brings fairness and transparency but in the judicial system there is problem of accountability and transparency. Some of the issues are mentioned below

1. *Corruption* : Corruption is not only in executive but there is also judicial corruption. Corruption not only means monetary corruption or bribe but it also includes misuse of power, purposely pronouncing judgement in somebody's favour. It also includes different maligned ways. Judiciary acts as the guardian of constitution it also vests with a function of keeping check on the other organs of government whether they are working freely or not. Judiciary is also responsible for eliminating corruption²² but sometimes we see that it itself gets corrupted and this can be mostly seen in subordinate judiciary it makes the whole system weak as this is only the organ which is completely independent.

2. *Contempt of Court* : Right to freedom of speech and expression is right given under Art 19(1)(a) of the Indian Constitution but there are some reasonable restriction amongst which one is Contempt of Court. The Supreme Court and High Courts are courts of record they have power to punish for its contempt but the court cannot use the power in arbitrary manner without valid grounds.

3. *Right to Information* : Right to Information Act is applied on public servants. We have seen generally that this act is mostly applied on Executive & legislature but it remains in question for a long time that whether it applies to judiciary or not. But as Judges comes under the definition of "Public Servant" it also applies to them. RTI is also applicable to the office of CJI but it is not a absolute right. Applicability of this act on CJI office increases accountability and transparency.

4. *Judicial Overreach* : Judicial activism enables the judges sitting and pronouncing judgments to rationalize decisions and empowerment of judiciary but sometimes its overreach is injurious it raises question on its accountability. The judicial activism should be within the limits it should not overreach otherwise it interrupt in its functioning.

Comparison between Indian Judiciary and USA Judiciary

Article III of US Constitution deals with the judiciary and mentions the judicial powers but it does not define the appointment process of judges under Art. III while under the Indian Constitution it is well defined under part V.

The president of United State appoint the judges of supreme court but with the consent of

²² Maushmi Bhattacharya and Prakhar Galaw " The Debate between judicial Independence and Judicial Accountability" : Who is judging the judges ?

Senate. The advise of Senate is binding on the president in India also it is the president who appoints the judges of India but with the consent and advice of Chief Justice of India.

In USA there is not so much of transparency while appointing judges as there is say and inclusion of executive and Judiciary but in India it is not as such. In India it is said that the judges themselves carries capacity to appoint the next judges but this process has also remained in controversy as this attracts biasness.

Comparison between Indian and Australian Judiciary

In Australia during the appointment process the sole power vests with the governor general to appoint the judges but he does not carries same power while disqualification but the position is not similar in India in terms of appointment and disqualification president is not given unlimited power to appoint judges while appointing judges president is bound to take and accept advice of the Chief Justice of India. At one time supremacy was given to executive over judiciary in S.P Gupta Case²³ but that supremacy was also exercised after consulting the council of ministers and the power of president to appoint judges has always remained formal in nature. This is difference between constitution of both the countries regards to judicial appointment in context of executive power.

Conclusion

Independence of judiciary is one of the basic structure of Indian Constitution. Judiciary acts as a guardian of constitution it also vests with power keeping check and it is important for rendering fair judgement or decisions. Independent judiciary means free from executive and legislative control. For any democratic country in the world a free & independent judiciary is must because it also keeps a eye on the fair working on other organs and it targets for a corruption free society. The appointment of judges has remain a very controversial issue right from the time of Pt. Jawahar lal Nehru and along with it the accountability and transparency remains in question because of old collegium system but there has been some major change in appointment and accountability of judges from collegium system to NJAC and again to Collegium. The range of accountability and transparency has been increased with time by various means and improvements one of them is Right to Information.

²³ S. P Gupta V. Union of India , AIR 1982BSC 140

Case List

1. S.P Gupta V. Union of India 1982, AIR 1982 SC 149
2. Subhash Sharma V. Union of India 1991 AIR 631
3. Supreme Court Advocate on Record Association V. Union of India AIR 1994 SC 268
4. Keshvananda Bharti V. State of Kerala AIR 1973 SC 1461
5. Minerva Mills V. Union of India AIR 1980 SC 1789

Bibliography

1. Appointment, Independence & Accountability of Judges , Prof. Dr. Rattan Singh & Dr. Shikha Dhiman , First Edition 2021, Allahabad Law Agency.
2. Comparative Public Law , Subhram Rajkhowa , Eastern Publishers , Guwahati.
3. Comparative Constitutional Law , D.D. Basu , 3rd Edition , Lexis Nexis
4. Constitutional Law of India , H.M Seervai , 4th Edition , Vol. 3 , Law & Justice Publishing Co.
5. Independence of Judiciary in India , Article, International Journal for Law management & Humanities
6. Independence of Judiciary , Legal Service India
7. A legislative study of Independence of Judiciary in India and UK , I Pleaders , Dignath Raj Sehgal , Aug 2020.