

Independence of Judiciary: A Study in Indian Perspective

***Sudhansu Ranjan Mohapatra, **Tanmaya Pattnayak**

Abstract

Just like Human body needs its entire organ system to perform properly, every institution of the government also needs a diligent functioning to run smoothly. The legislative, executive and judiciary known to be the inseparable wings of the government, are required to do their duties properly. While governance is contingent on the functional consortium of the three wings, it is the judiciary which interprets and applies the law. It also adjudicates upon controversies between one citizen and another, and between a citizen and the state. It is also vested with the duty to safeguarding the supremacy of the constitution by interpreting and applying its provisions but within the constitutional framework. In this regard, the independence of judiciary from the executive and legislature as well as independence of each and every judge within the judiciary is considered necessary for a free society and a constitutional democracy. It ensures the rule of law and realisation of human rights and also the prosperity and stability of a society. The independence and impartiality of the judiciary is one of the hallmarks of the democratic system of the government. Only an impartial and independent judiciary can protect the rights of the individual and can provide equal justice without fear and favour. There are many factors which has direct and indirect impact on judicial independence. Such as powers of judicial review, modes of appointment, remuneration and immunity to judges, etc. It is essential to let the judiciary act freely and independently to unleash its full potential. Judicial review is sine qua non for the constitutional governance by the organs of the State and its instrumentalities. Additionally, the appointment of judges has direct nexus with independence of judiciary because the by-product is always dependent on the original source. If the appointments are made by the executive or political masters, it is quite obvious that such appointed judges will have allegiance towards their appointees. It is the need of the day to make the judiciary more accountable, as derogation of values in judiciary is more poisonous than in any other organs of the government. It is an absolutely undeniable fact that judicial independence is vital for the survival of any democracy but at the same time we cannot ignore the requirement of judicial accountability.

Keywords: Judicial independence, separation of power, judicial review, judicial activism and accountability

Introduction

Laws are a dead letter without court to expound
and define their true meaning and operation.

-- Alexander Hamilton

A concordance among the units of a system is salient to the system's functioning. This is invariably true for every deliverable. In this regard, even the human body can be considered analogous to the governance of a state. The organs perform their functions individually but not completely independently, since the individual functionalities together result in overall health. Similarly, in the model of governance adopted in India (the parliamentary system), the powers of a state are separated into individual units: the legislative, the judiciary and the executive, which might function independently but for the same cause, welfare of the state. While different countries might exercise their governance with several metonymic counterparts of these bodies, the system of state is essentially represented by the collective functioning of those. Hence, the executive, Legislature and judiciary are the most essential organs of any government. They have different functions but they collectively work to make the country move forward. The legislature makes law, the executive implements the law and the judiciary interprets and applies the law and adjudicates upon controversies between citizen and another and between a citizen and the state. It is also vested with duty to safeguarding the supremacy of the constitution by interpreting and applying its provisions but within the

*Prof. Head of the P.G. Department Law Sambalpur University, Burla, Odisha, India

**Associate Researcher Xavier Institute of Labour Relation, Jamshedpur, India

constitutional framework. When in a federation dispute arises regarding allocation power between centre and state, judiciary act as an arbiter. It is the Duty of the Judiciary to see whether all the other organs of the governments are discharging their duties under the provided constitutional framework or not. Judiciary also has the significant function of protecting and enforcing fundamental rights guaranteed to them by the constitution. Justice Untwalia has compared the judiciary to “A watching tower above all the big structures of the limbs of the state” from which it keeps a watch like a sentinel on the function of the other limbs of the state as to whether they are working in accordance with the law and the constitution, the constitution being supreme.

Liberty, democracy and the rule of law are most important indices of a free and civilized society. They can well be described to be the three faces of Holy Trinity which presides over the destiny of all free societies. The rule of law requires every government officials and citizens to bound by and act consistent with the law so that harmony can be established. It is again the duty of the judiciary to protect the rule of law. It can therefore, be aptly appraised that the judiciary of any country must be “sacrosanct” to perform all multi-dimensional functions. By saying sacrosanct it must be independent, impartial and proactive in exercising all of its functions. The supreme court of India in *Subhashsharma v. Union of India* observed that “An independent non-political judiciary is crucial to the sustenance of any chosen political system. The vitality of the democratic process, the ideals of social and economic egalitarianism, the imperatives of a socio-economic transformation envisioned by the constitution as well as the Rule of law and great values of liberty and equality are all dependent on the tone of the judiciary”. Further, if the judiciary were to be controlled by the legislature and / or the executive, the rule of law would become chimerical for absence of an external audit machinery of the constitutional validity of any legislative or executive action. Hence, the judiciary needs to be fully independent so that it can test the acts of the legislature or executive on the anvil of the constitution.

It is not only an ordinary expectation but the basic and fundamental rights of every citizen of a country to have an independent judiciary. It is very well said that “the weaker may prevail over the strong” which provide balance in the society. Such a balance is possible only when the judiciary remains independent and exercises its powers without any influence. So the independence judiciary is not only vital for the rights of the citizen but also for sustenance of a nation. Justice KrishnaIyer in *Sankalchand Case* was of the view that, “ In a dynamic democracy, with goals of transformation set by the Constitution, the Judge, committed to uphold the founding faiths and fighting creeds of the nation so set forth, has to act heedless of executive hubris, socio-economic pressure, and die-hard obscurantism. This occupational, heroism, professionally essential, demands the inviolable independence woven around the judiciary by our Constitution.”

Necessity of Independence of judiciary

The independence of judiciary from the executive and legislature as well as independence of each and every judge within the judiciary is considered as necessary conditions for a free society and a constitutional democracy. It ensures the rule of law and realisation of human rights and also the prosperity and stability of a society. Therefore, the Indian constitution provides for the independence not only of the Supreme Court but also of the high Courts and subordinate courts. The Indian Supreme Court has also held more than once that the independence of judiciary is basic feature of the constitution and any attempt to curtail it directly or indirectly even by an amendment of the constitution is invalid.

The independence and impartiality of the judiciary is one of the hallmarks of the democratic system of the government. Only an impartial and independent judiciary can protect the rights of the individual and can provide equal justice without fear and favour. The equality to prevail in a society full of diversity, the judiciary needs to be impartial and independent. The Constitution of India provides many privileges to maintain the independence of judiciary. Our Constitution is essentially a social document unlike the American Constitution which is essentially a political document. It is well known that underlying the constitution is the egalitarian philosophy, the concept of socio-economic justice, the theory of welfare state, secularism, dignity of the individual, unity in diversity and the spirit of 'Salus Populi Suprema Lex'. Therefore, an independent judiciary cannot remain immune to the environment surrounding it in the discharge of its role as an institution established by the Constitution armed with the supreme power of judicial review of not only executive action but also legislative action. The judiciary is most ideally placed and no other institution is perhaps in my opinion is placed in a more advantageous position than the judiciary in feeling the authentic feel of the nation's pulse as day in and day out, problems of multitudes in all hues and colours stemming from a side cross-section of society

keep pouring into the court clamouring for justice and for the enforcement of the rule of law as against of rule arbitrariness. Therefore, independence of judiciary depends on some certain conditions like mode of appointment of the judges, security of their tenure in the office and adequate remuneration and privileges, jurisdiction of courts over all issues of judicial nature, principles of non-interference by other branches of government in judicial functions, entitlement of judges to certain fundamental freedoms, posting, promotion, transfer, immunities, disqualification, discipline and removal and court administration. Satisfactory implementation of these conditions enables the judiciary to perform its due role in the society thus inviting public confidence in it. Supreme Court of India in *S.P. Gupta v. Union of India*, the court held that "the concept of independence of the judiciary is a notable concept which inspires the constitutional scheme and constitutes the foundation on which the edifice of our democratic polity rests. If there is one principle which runs through the entire fabric of 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". As Cardozo once said, "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."

Factors effecting Independence of Judiciary

There are many factors which has direct and indirect impact on judicial independence. Such as powers of judicial review, modes of appointment, remuneration and immunity to judges post-retirement benefits etc. Looking forward to this the constituent assembly has debated over a long period of time to write down the appropriate provisions to establish an independent and impartial judiciary.

Powers of judicial Review

Judiciary is and intended to be an integral part of the state, complimentary to both the Legislature and the Executive. It is essential to let the judiciary act freely and independently to unleash its full potentials. There can be no absolute or total independence. Dr. Ambedkar declared in the Constituent Assembly that Article 32 is the "soul" and "Conscience" of the Constitution implying thereby that the rights given to the citizens remains nebulous without judicial remedy which Article 32 does give remedy. Judicial review is sine qua non for the constitutional governance by the organs of the State and its instrumentalities. By using the power of judicial review the judiciary can declare any law or administrative action, which is inconsistent with the provisions of the constitution as void or invalid. Thus putting a constraint on the power of the executive, it restricts the executive from over using its powers. It is the duty of the judiciary to keep the organs of the government under the framework of law and to make rule of law stronger. Article 13 of the constitution of India clearly states that any law which is inconsistent with the fundamental rights can be declared void by the Judiciary. There is plethora of cases where the judiciary has protected the fundamental rights of the citizens from arbitrary laws made by the legislature. Referring to the doctrine of separation of power it provides checks to the arbitrary use of power by the legislature. The Indian constitution gives power to grant pardon and to commute sentence in certain cases.

The Supreme Court in *Maru Ram v. Union of India* expressly stated that, the power of pardon, commutation and release under Article 72 (Also under Article 161) can run riot and must keep sensibly to a steady course and that public power "shall never be exercisable arbitrarily and mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. Again in *Keharsingh v. Union of India*, the court reiterated: "It appears to us clearly that the question as to the area of the president's power under Article 72 falls squarely under the judicial domain and can be examined by the court by way of judicial review. In *Swaransingh v. State of U.P.* the court held: If such power was exercised arbitrarily, mala fide and absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it." By all these judgments, it was made clear that even the executive action of the highest position can even brought into question by using the power of judicial review. Summing it up in one word now the executive is under the scanner of the judiciary and accountable to every action it makes because anything which is outside the framework of law can be declared invalid by the judiciary. So it is vital for any country to have an independent judiciary to make entire of its organ to perform flawlessly.

Modes of appointment

In the matter of choosing judges, the Constituent Assembly sought hard to ensure that the executive does not exercise unfettered discretion and complete control over the appointments process. The Assembly's concern was to create a judiciary that was independent and efficient. The Constitution provides for appointment of Supreme Court Judges by Article 124(2), which only requires appointment by the President by a warrant under his hand and seal 'after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem for the purpose'. Article 217 provides that every judge of the High Court shall be appointed by the President by a warrant under his hand and seal 'after consultation with the Chief Justice of India, the Governor of the State, and, in the case of the appointment of a judge other than the Chief Justice, the Chief Justice of the High Court. The interpretation of these provisions has been the primary issue on which the debate over judicial independence has played in India. Appointment of judges has direct nexus with independence of judiciary because the by-product is always dependent on the original source. If the appointments are made by the executive or political masters, it is quite obvious that such appointed judges will have allegiance towards their appointer. Besides, yielding to someone's pressure or acting on account of ill will or affection or corrupt motives, often the judge may act from benign motives but because of deep seated prejudices. During the days of discussion on committed judiciary, while advocating an active role for a judge and 'value packing' a learned judge of the Supreme Court delivered how political bias is destructive of the independence of judiciary, it was observed, "It is not unlikely that the total insulation may breed ivory tower attitude, a bishop delivering sermon from the pulpit and therefore no claim to be imperium in imperio can be extended to the judiciary or for that matter to any other instrumentality under the constitution. It is not as if judicial independence is an absolute thing like a brooding omnipresence, nor should the judges be independent of the broad accountability to the nation and it's indigent and injustice ridden millions. Therefore, consequently one need not too much idolise this independence of judiciary so as to become counter-productive... The judiciary cannot stand aloof and apart from the mainstream of society". It would therefore only be an illusion to expect justice from such judges as in plethora of petitions the executive and the legislature are a party to it. The Indian scenario is quite a lot reflects the same values discussed below in the three judges case.

The story of three judge's case

The Supreme Court of India's collegium system, which appoints judges to the nation's constitutional courts, has its genesis in, and continued basis resting on, three of its own judgments which are collectively known as the Three Judges Cases.

The collegium system, which appoints the constitutional courts in India, has its genesis in, three supreme court's Judgements which collectively known as the three judges case. Those are;

- S. P. Gupta v. Union of India
- Supreme Court Advocates-on Record Association vs. Union of India
- In re Special Reference

Over the course of these three cases, the court made it clear that there should not be any executive or legislative interference in appointment of judiciary, showing the significance of independence of judiciary. Since the decision of second judge's case the court created the collegium system. The constitution is silent on such a system in its original text and successive amendments. In the third judges case an opinion was delivered by the Supreme Court responding to the question of law relating to the collegium system. In this case the responsibility to make recommendation for appointment as Supreme Court judges has been taken away from the central executive and has now been placed on a collegium consisting of the chief justice of India and four senior most puisne judges.

In 2014 the central government framed a National Judicial Appointment Commission vide 99th constitutional amendments and the National Judicial Accountability Act that put in place a framework that gives the executive considerable power over the appointments process. Article 124A of the Constitution established a six-member National Judicial Appointments Commission (NJAC) of which only half the members were to be judges. Three members were to consist of the Union Minister of Law and Justice and the two 'eminent persons' nominated by the Prime Minister, Chief Justice of India and the Leader of Opposition in the Lok Sabha, the lower house of the Indian Parliament. The Supreme Court quashed the NJAC Act along with the amendment and held that primacy of judiciary extends to not only rejection of unworthy candidates, but also

to ensure appointment of worthy candidates thus NJAC Act which provides veto to two members or law minister or an “eminent person” is struck down as being violative of basic structure of the constitution. The Supreme Court very aptly noted in L.Chandra Kumar, “While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Courts, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of judges as well as the mechanism for selecting judges to the superior courts. The inclusion of such elaborate provisions appear to have been occasioned by the belief that, armed with such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions.”

Immunity to Judges

The constitution insulates the Court from political criticism, and, thus ensures its independence from political pressures and influence, by laying down that neither in Parliament nor in a State Legislature the conduct of a 'supreme court judge in the discharge of his duties can be discussed. The provision amounts to an absolute constitutional prohibition against any discussion in a House with respect to a Supreme Court Judge. There should be no fear, no burden in the mind of the adjudicator which causes derailment of justice system. Judges must be protected against any attack on their conducts in court. Any pronouncement of judgment can't be brought under the scope of law of defamation everything said in the course of adjudication is absolutely privileged. It gives the judge the privilege to act and opine freely to secure justice. The judiciary is not required to give cause for their verdict nor are they punished for not giving a verdict. As only an independent and unburdened mind can distinguish between right and wrong.

Post Retirement Benefit

A very pertinent and significant question is raised sometimes in the knowledgeable quarter as to whether the retired Supreme Court and High Court judges take any quasi-judicial jobs, or any post-retirement benefits or contest election for the legislature which hampers independence of the judiciary. Many a time, they are appointed to pure and simple executive posts. There is no specific bar in the Constitution against this but actions like this are highly condemnable because it makes the judges obligated to the executive. K. Narayana Kurup J. has expressed a firm opinion against this practice. To maintain the dignity and independence of the judiciary as well as public confidence in the institution, it is necessary that a judge should not allow his judicial position to be compromised at any cost. He remarked that, “The general public reposing absolute faith in the judiciary, see in it, justifiably an institution, that can rein in, if not eliminate, the rapacity, nepotism and corruption, especially at high places which have come to be associated with governance. The judiciary should continue to merit the exalted position it occupies in the minds and hearts of the people as the 'saviour of democracy'. It cannot be gainsaid that the one necessary condition for this is its independence. Independence in the sense free from the executive, meaning the bureaucracy and politician's interference and influence of every type. And fundamental to freedom from such influence and pressures on the judiciary is to eschew active politics and acceptance of positions by judges after retirement.” On the other hand, if the executive desires to exploit the talent of a retired judge for public benefit by appointment to a commission or a tribunal, there can in principle be no conceivable objection to it, if it is done honestly and transparently. What is objectionable would be any attempt to offer an allurements to a sitting judge or attempts to negotiate terms with a sitting judge with regard to post-retirement benefits.

Independence and Accountability

The goal of judicial independence must be considered alongside the goal of judicial accountability. Power implies responsibility, independence is tyranny without accountability. Our judges must realize their immense powers and sensitive obligation to keep abreast of advances of events, information, knowledge and wisdom. Further, independence of judiciary cannot be viewed in an abstract sense. It has to be gauged in terms of the quality of justice which ultimately dispensed to the one who is craving for it, the beneficiary may be the ordinary citizen, or an institution or the State or a system. The means adopted may be conventional or unconventional, through social activism or juristic activism, through judicialism or through pragmatic instrumentalism. The challenge in any modern constitutional democracy is to design a system that institutionally secures the independence of the judiciary as well as produces a degree of

accountability. Therefore, Swamy Vivekananda is very apt in his saying, "The tree is judged by the fruit it bears." The goals of judicial independence and judicial accountability are necessarily at odds. In a system where judges have a greater degree of autonomy will itself produce a greater degree of accountability. This idea of accountability will be based on self-regulation. Judicial accountability and answerability of the judges is not a new concept. Several countries in their constitutions have already provided for ensuring accountability of judiciary. Thus, there is no difficulty in accepting the principle that in a society based on the rule of law and democratic principles of governance, every power holder is, in the final analysis, accountable to the people. There is no reason why the judiciary should not be accountable to the community for due performance of the functions vested in it. Power is given on trust and judicial power is no exception. But at the same time it must be developed consistent with the principles of judicial independence. The independence of judiciary is assured when we are internally free subject to the accountability to our judicial conscience.

The two Judge Bench of the Supreme Court examined this question in detail. Justice D.M. Dharmadhikari speaking for the Bench held that a teacher is not an employee within the meaning of the expression "employee" as defined under Section 2(e) of the Payment of Gratuity Act, 1972 and hence he/she is not entitled to claim any gratuity amount from his employer under the Act. In other words, it was held that since a teacher is not an employee under Section 2(e) of the Act, he has no right to invoke the provisions of the Act for claiming gratuity under the Act from his/her employer. The Court has relied on *Ahmadabad Pvt. Primary Teachers Association v. Administrative Officer and Others*.

On 9th January 2019, the Supreme Court realised that Section 2(e) and Section 13A which were amended in 2009 has not been considered hence the decision of the Court falls squarely as per incuriam and the Court declared suo motu that the decision pronounced by the Court will not be enforced. Thanks to the social media which at least prevented the judges from taking a wrong decision. So where is the accountability? As Lord Denning said there must be restraint over the power of judiciary. It is the need of the day to make judiciary more accountable, as derogation of values in judiciary is more poisonous than in any other organs of the government.

Conclusion

The Supreme Court of India holds a unique status for several reasons. It is the apex court of the largest common-law court system in the world. The Indian Constitution grants it far reaching authority to initiate actions and direct appellate authority over all other courts in the country. The basic structure doctrine gives the apex judiciary the power to review constitutional amendments. These features distinguish it from other powerful supreme courts, such as the Supreme Court of United States of America. And the Supreme Court of India remains a highly respected institution by the people of India and beyond giving it legitimacy when it exercises its broad powers.

Therefore, from the above discussion an inference can be drawn that judicial branch is sacrosanct, an institution to uphold the "Rule of law", a messiah to secure to all citizens of the country, their fundamental and human rights, a dispute settler for people and state etc. the sanctity of the same would remain unblemished if it remains Independent from any interference. As to fulfil their unbridled expectations, the political leaders and executives have not left a single organisation functioning within the bounds of law. Corrupt practices are the only food to be served in every meal of the day. The nation wants a society free of these heinous practices; otherwise a welfare state is just a Utopian concept beneath our soul, struggling to see the light of the day. Taking a note of this the judiciary has to maintain its sanctity and purity unaffected by any means of interference of other institutions. Moreover, it is not only the function of the judiciary to secure justice but it's an imperative duty of the same to be accountable for every decision it makes as the society at large depends upon its functioning. Therefore, to uphold the legitimacy of judicial review the judiciary must strive to maintain the respect it commands against this masses for its independence and integrity. 'Justice must not only be done it must also seem to be done' is more a truism than a legal adage. In a democracy, especially in one where the judiciary adopts an activist approach, the citizens have the right to examine the integrity of judicial process, I would like to stress that whatever may be the norms, welay down for ensuring independence of judiciary whatever may be the safeguards we may provide therefore,, and whatever may be the hazards to which individual judges may be exposed because of their independence, the devotions and adherence to the principle

of independence and impartiality in the final analysis would depend upon the personality of individual judges. In judicial process, the role of judges is more important than the written words of a statute. Krishna Iyer, J., has rightly observed, "A socially sensitized judge is better statutory armour against gender outrage than long clauses of a complex section with all protection writs into it." It is an absolutely undeniable fact that judicial independence is vital for the survival of any democracy but at the same time we cannot ignore the requirements of judicial accountability.

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