

A Study on the “Independence” of Judiciary and the “Political” Nature of Judicial Process

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ABSTRACT

Purpose of my paper is to highlight independence of judiciary in the constitution of India and political nature of judicial process. Doctrine of power of separation is defined very well by distribution of powers between Legislature, Executive and the Judiciary in our constitution. The Indian judiciary act as watchdog and to check on the executive and the legislature that they are within their constitutional limit or not. This task is completed only when the judiciary is itself independence so here the main purpose is to see whether Indian judiciary is independence and to what extent judicial process have influence by political environment. A study based on secondary data for find out need, benefit, issues and challenges regarding independence of judiciary. The result of this study would help to understand independence and restriction on the judiciary for a proper functioning democratic system. This study is probably the first to analysis the independency of judiciary and the political nature of judicial process.

Keywords: Constitution of India, Independence, Judiciary, Political, Supreme Court, Appointment of judges

The first sentence of our constitution of India assure that, ‘WE THE PEPOLE OF INDIA, having solemnly resolved to constitute India into a SOVERIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC...

SO When we talked about democratic country, we must have liberty. And when we talked about liberty, there must be independent and impartial judiciary in the country.

According to Dr. Ambedkar, “there can be no difference of opinion in the House that our judiciary must be independent of the executive and must also be competent in itself. And the question is how these two objects can be secured.”

India constitution is in the form of federal structure. We can also say that India has a two-tier government system- Central and state government. And both governments further divided in

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three organ like executive, legislature and the judiciary. All three organs are worked under doctrine of separation. Indian constitution has not recognised the doctrine of separation of powers in its absolute form but the function of each organs are well distributed so no one can be interrupted.

The Indian constitution assigned crucial role to the judiciary. Judiciary is also authorised to study the governmental order and interpret constitution. The judiciary not only protect rights of the people but also guardian of the constitution. The independence of judiciary is necessary for a free society and a constitutional democracy. It is also important that each and every judges in the judiciary should be independent in judiciary as well as from political influence. So judiciary must be independent and free from political power or other effect.

Research Objectives

1. To highlight independence of judiciary in the constitution of India and political nature of judicial process.
2. To see whether Indian judiciary is independence and to what extent judicial process have influence by political environment.

RESEARCH METHODOLOGY

A study based on secondary data for is to highlight independence of judiciary in the constitution of India and political nature of judicial process. Doctrinal Research limited to secondary data.

Meaning :

Independence of judiciary does not define by the Indian constitution.

The supreme court held more than once that the independence of the judiciary is a basic structure of the constitution and any attempt to curtail it, is invalid.²

Independence of judiciary and Indian constitution :

The framer of the constitution gave emphasized on a judiciary as independent and powerful organ. A noted jurist Dr. L.M. Singhvi has succinctly observed on the principles of independence and impartiality of the judiciary in the following words³ :

“The principal of impartiality and independence of the judiciary does not depend on the existence of a particular kind or manner or breadth of judicial review; it is a characteristic of the judicial function and it depends on certain basic institutional and structural conditions, on the culture and ethos of society and its legal system, and on character, temperament and ability of the individual judge and of the judiciary as a whole... Independence and impartiality are, in the ultimate analysis, personal virtues and a matter of mental attitude and temperament, but they are also norms of institutional as well as professional ethos which nature and sustain them.”

1. Appointment of judges :

Article 124 clause (2) of the Indian constitution deals with the modes of appointing the chief justice of India and other judges of the Supreme Court similarly Article 217 clause

² S.c. Advocate-on-record Assn. v. union of India (1993),Indira Nehru Gandhi v. Raj Narain (1975) Minerva Mills Ltd. V. Union of India (1980)

³ Dr. L.M. Singhvi : “Independence of Justice”, Indian Bar Review, Vol. 14 (4) , 1987 p. 518

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(1) deals with the modes of appointing chief justice and other justices of the High Courts in India.

The President of India is main authority to appoint the Chief Justice and other judges of the Supreme Court and High Court. But a clear cut reading of the article proved that every judge of the Supreme Court shall be appointed by the President after consultation with such of the judges of the Supreme Court and of the High Court in a state. Same as every judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India and Governor of the state. And for the appointment of other judges in a High Court, the President must consult the Chief Justice of High Court. Thus the power of appointment of judges is not remaining absolutely in the hand of executive. At the time of appointment of judges, organ of judiciary is important factor.

2. Tenure of the judges:

Tenure of the Supreme Court and high courts judges are secured and fixed. Judges are continued in their office till they do not cross the age limit as per constitution provides in article 124(2) 65 years for supreme courts judges and as per article 217 (1) 62 years for high courts judges.

They are removed from office only on ground of misbehaviour or incapacity.

The President can remove judge when a resolution has been addressed by each house of parliament against any such judge.

3. Salaries and allowances :

The salaries and allowances of the judges are fixed by the constitution. The salaries of Supreme Court judges and High Court judges paid from the consolidated fund of India and the consolidated fund of state respectively. Salaries cannot be changed except in financial emergency. Neither privileges nor allowances of a judge in respect of absence of leave of allowance or pension shall be varied to his disadvantages.

4. Power to punish:

Both the Supreme Court and High Court have the power to punish for contempt of court. Article 129 gave this power to courts.

5. Restriction on discussion about conduct of judges :

No discussion shall be take place in parliament about conduct of judge of the Supreme Court or of a high court according to article 121. And similar privilege is also given to the judges in the state legislature according to article 211.

6. Separation of the judiciary from the executive :

According to article 50 – ‘the state shall take steps to separate the judiciary from the executive in the public services of the state.’ The aim behind this article is to ensure independence of the judiciary.

7. Power and jurisdiction of supreme court :

Parliament cannot curtail the power and jurisdiction of Supreme Court. The parliament has the only power to change the pecuniary limits for appeal to Supreme Court, confer supplementary powers on Supreme Court and confer power to issue direction, orders or writ for any purpose other than mention in Article 32.

8. Power of Judicial Review :

Articles 13, 32, 226, 131-136 and 143 of Indian Constitution deal with power of judicial review of the Supreme Court and High Court. The Supreme Court and high court can struck down any law made by legislature which are invalid and against fundamental

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rights. This power is so enlarge that the Supreme Court and High Court also struck down constitutional amendment on ground of violation of basic structure.

9. Power of interpretation :

The Supreme Court is final authority to decide the final interpretation to the validity of any law, constitutional provision and constitutional amendment.

PROTECTING THE INDEPENDENCE OF THE JUDICIARY

Judicial Independence in the first two decades of the Supreme Court from 1950 to 1973 was very much in question. There were shown many differences between the Supreme Court’s decision on property, aggression and economic reforms. But after 1973, judiciary move on new era of human right, civil right of the citizen and community rights.

After the emergency in 1977, the Supreme Court was called upon to protect independence of judiciary with the bad experience of executive regarding interference in judicial appointment and arbitrary transfers of judiciary. And this phase was shown in three remarkable cases known as First, Second and Third Judge’s cases.

The First Judge’s Case:

In 1982 in **S.P.Gupta vs Union of India**⁴ (the First Judge’s Case), a bench of Five judges of the Supreme court considered the method of appointment of judges of the Supreme Court and the High Court.

The appointment of Supreme Court judge is described in Sub-clause (2) of Article 124, as follows “124. Establishment and constitution of Supreme Court (2) Every Judge of the Supreme Court shall be appointed by the President by 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 necessary for the purpose and shall hold office until he attains the age of sixty-five years :

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.”

The appointment of High Court judge is described in Sub-clause (1) of Article 217, as follows:- “217. Appointment and conditions of the office of a Judge of a High Court.

(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court.”

According to Article 124(1) and Article 217(1), the Supreme Court and High Court Judges are required to be appointed by the president. Here the President means an executive body, purely political factor. One condition is there in favour of the judiciary that appointment is made after “Consultation” amongst other functionaries mentioned in the article of the Chief Justice of India. In present case court held that the expression ‘consultation’ does not in ordinary parlance mean

⁴ AIR 1982 SC 149

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“concurrence”. The supreme court further held that the President is not bound to follow the advice of those whom he consults but he cannot ignore anyone whose consultation is required under the constitution. And if there is any reason for not accepting the advice of those whom the President is required to consult, he can ignore it.

The Second Judge’s Case:

Since 1982, there is no clear cut evidence that the Executive misused the power of appointment. Ten year later in 1993, the Supreme Court in the case of Advocates on Record Association vs. Union of India⁵, nine-judge Bench of the Supreme Court by a majority of 7 to 2 had overruled the principle laid down in S.P. Gupta’s case and held that in the matter of appointment of judges of the Supreme Court and the High Courts, the President is bound to act in accordance with the opinion of the Chief Justice of India who would tender his opinion on the matter after consulting his colleagues. The court further held that the appointment of the Chief Justice of India shall be on the basis of seniority. The majority held that the primacy in initiating of proposal for appointment of judges of the Supreme Court and the High Courts to the matter of transfer of judges from one High Court to the other rests with the Chief Justice of India. Mr. Justice J.S. Verma who delivered the majority judgement along with A.N. Ray, A.S. Anand and S.P. Bharucha observed in this context:-

“..... The executive element in the appointment process has been reduced to minimum and political influence is eliminated. It is for this reason that the word ‘consultation’ instead of ‘concurrence’ was used in the constitution but that was done merely to indicate the absolute discretion was not given to any one, not even to the Chief Justice of India as an individual, much less to the executive.” Thus, the Supreme Court has effectively declared that ‘consultation’ means ‘concurrence’.

The Third Judge’s Case

The Second Judge’s Case left an area of uncertainty as regards the collective opinion of the Chief Justice and his senior colleagues. It presumed that the Chief Justice would consult his senior most colleagues and his recommendation would be generally acceptable and not controversial. What was the position if the chief Justice had not consulted his senior colleagues or if it was apparent that majority of the existing Supreme Court judges were against the Chief Justice’s appointments? During eight months of Chief Justice Punchhi’s tenure as the Chief Justice of India, a number of recommendations for appointments were found controversial and the Law Ministry alleged that the Chief Justice of India had not consulted with his colleagues as required by the Second Judge’s case.

In *Re : Presidential Reference*⁶, a nine – Judges bench of the Court held that “ It is desirable that the collegium should consist of the Chief Justice of India and four senior most puisne judges of the Supreme Court. The opinion of the Chief Justice of India which has primacy in the matter of recommendation for appointment to the Supreme Court has to be formed in consultation with a “collegium of judges”.

⁵ (1993) 4 SCC 441

⁶ AIR 1999 SC 1

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Independence of judiciary and politics:

Judiciary is protected by given so many privileges through constitutional provision. Despite of appointment of judiciary is affected by political background at many occasions. Political influence on judiciary always renders injustice to people. If judiciary is not independent in matter of appointment, transfer or so on, executive may overruled the judiciary and justice might be in danger.

National Judicial Appointment Commission

The parliament passes the 121st constitutional amendment bill 2014 with object to change the collegiums system for the appointment of judges to the Supreme Court and the High Court. The bill amends article 124 (2) of the constitution to provide a commission to be known as the National Judicial Appointment Commission (NJAC).

NJAC Struck Down as Unconstitutional:

The validity of NJAC was challenged before the Supreme Court in Supreme Court Advocate-On-Record v. Union of India⁷. In a landmark Judgement, a five judge’s bench of Supreme Court by 4:1 majority struck down the 99th constitutional amendment act, 2014 as ultra vires to constitution. The bench held that NJAC disturbing the independence and primacy of the judiciary in appointment process. NJAC violates the basic structure by veto provision and judicial appointments with executive participation is also the part of the basic structure of the constitution.

CONCLUSION:

Judicial independence is a pre-requisite to the rule of law and fundamental guarantee of a fair trial. Thus, the independence of the judiciary got an eminent position as far as the institution of judiciary is concerned. It’s shown from the constitutional provision the judiciary is directly or indirectly appointed through executive head called the President. The President is a political factor. And it is also emerged by the Judiciary that the executive is also important functionary in the appointment of the judiciary and its participation in the appointment procedure is also basic structure of the constitution. The judiciary needs to able to distinguish strong, legitimate cases from those are weak or politically motivated. Judicial Accountability and Judicial Independence have to work hand to ensure the real purpose of setting up of the constitution.

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⁷ Supreme Court Advocate-On-Record Association & Anr. VS Union of India (Supreme Court), Writ petition (civil) no. 13 of 265

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Conflict of Interest

The author declared no conflict of interest.

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