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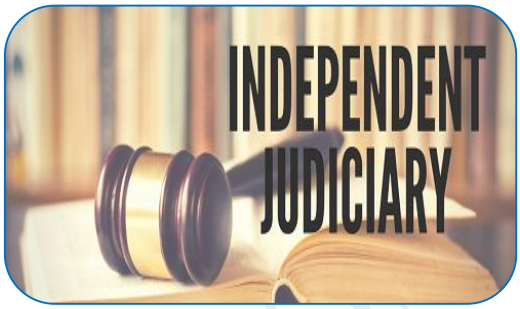
INDEPENDENCE OF JUDICIARY: AN ANALYTICAL STUDY



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ABSTRACT :

"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".[1]

Indian Constitution has given high importance to the Independence of Judiciary System. Every democratic country puts a great emphasis on the independence of the judiciary as a guarantee of individual freedom. The Constitution of India envisages an independency of judiciary. In fact, independence of judiciary is necessitated essentially for maintaining purity of justice in the social system and enabling them to earn public confidence in the administration of justice. Independence of Judiciary refers to an environment where judges are free to make decisions or pass judgment without any pressure from the government or other powerful entities. Independence of Judiciary means that the judiciary as an organ of the State should be free from influence and control of the other two organs i.e., the executive and the legislature of the State. In the present time independence of judiciary has even acquired great importance and therefore it is one of the most debatable issues in the Indian democratic set up.

The aim of this paper is to analyze the status of independence of the judiciary in India. It is recognized worldwide that an independent judiciary is the most important element of democracy and good governance. However, without separation of the judiciary from other organs of the state absolute independence of judiciary is not possible. An attempt has been made in this paper to discuss the brief historical background of judicial system in India through analyzing the meaning and basic principles of judicial independence and to what extent these principles exists in India. The study is qualitative in nature and based on secondary sources of materials like books, journal articles, government rules, newspaper reports, etc.

KEYWORDS : *Independence of Judiciary, Legislature, Executive, Democracy etc.*

INTRODUCTION

The existence of an independent judiciary is one of the core elements of modern constitutionalism and a cornerstone of democracy and good governance.[2] It is a well-known fact that

[1] The framers of the Indian Constitution at the time of framing of our constitution were concerned about the kind of judiciary our country should have. This concern of the members of the constituent assembly was responded by Dr. B.R. Ambedkar, *available at*, http://mulnivasiorganiser.bamcef.org/?p=482.

[2] *Charles Manga Fombad*, "Some Perspectives On The Prospects For Judicial Independence In Post-1990 African Constitutions" *The Denning Law Journal, available at*

the independence of the judiciary is the basic requisite for ensuring a free and fair society under the rule of law. The Rule of law that is responsible for good governance of the country can be secured through unbiased judiciary. It is theoretically very easy to talk about the independence of the judiciary as for which the provisions are provided for in our Constitution but these provisions introduced by the framers of our constitution can only initiate towards the independence of the judiciary. The major task lies in creating a favourable environment for the functioning of the judiciary in which all the other state organs functions in cooperation so that the independence of the judiciary can be achieved practically. The independence of the judiciary has also to be guarded against the changing economic, political and social scenario. Whenever there is a talk regarding the independence of the judiciary, there is also a talk of the restrictions that must be imposed on the judiciary as an institution and on the individual judges that forms a part of the judiciary. In order to ensure smooth functioning of the system there must be a right blend of the two.

The doctrine of Separation of Powers which was brought into existence to draw upon the boundaries for the functioning of all the three organs of the state: Legislature, Executive and the Judiciary, provides for a responsibility to the judiciary to act as a watchdog and to check whether the executive and the legislature are functioning within their limits under the constitution and not interfering in each other's functioning. This task given to the judiciary to supervise the doctrine of separation of powers cannot be carried on in true spirit if the judiciary is not independent in itself. An independent judiciary supports the base of doctrine of separation of powers to a large extent.

MEANING – THE INDEPENDENCE OF THE JUDICIARY:

The meaning of the independence of the judiciary is still not clear after years of its existence. Our constitution by the way of the provisions just talks of the independence of the judiciary but it is no where defined what actually is the independence of the judiciary. The primary talk on the independence of the judiciary is based on the doctrine of separation of powers which holds its existence from several years. The doctrine of separation of powers talks of the independence of the judiciary as an institution from the executive and the legislature. Therefore the independence of the judiciary is the independence of the exercise of the functions by the judges in an unbiased manner i.e. free from any external factor. So the independence of the judiciary can be understood as the independence of the institution of the judiciary and also the independence of the judges which forms a part of the judiciary.

Securing Independence of judiciary

Many provisions are provided in our constitution to ensure the independence of the judiciary. The constitutional provisions are discussed below:

1. Security of Tenure

The judges of the Supreme Court and High Courts have been given the security of the tenure. Once appointed, they continue to remain in office till they reach the age of retirement which is 65 years in the case of judges of Supreme Court (Art. 124(2)) and 62 years in the case of judges of the High Courts (Art. 217(1)). They cannot be removed from the office except by an order of the President and that too on the ground of proven misbehaviour 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. Procedure is so complicated that there has been no case of the removal of a Judge of Supreme Court or High Court under this provision.

2. Salaries and Allowances

http://www.ubplj.org/index.php/dlj/article/viewFile/298/326.

The salaries and allowances of the judges is also a factor which makes the judges independent as their salaries and allowances are fixed and are not subject to a vote of the legislature. They are charged on the Consolidated Fund of India in case of Supreme Court judges and the Consolidated Fund of state in the case of High Court judges. Their emoluments cannot be altered to their disadvantage (Art. 125(2)) except in the event of grave financial emergency.

3. Powers and Jurisdiction of Supreme Court

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

4. No discussion on conduct of Judge in State Legislature / Parliament

Art. 211 provides that there shall be no discussion in the legislature of the state with respect to the conduct of any judge of Supreme Court or of a High Court in the discharge of his duties. A similar provision is made in Art. 121 which lays down that no discussion shall take place in Parliament with respect to the conduct of the judge of Supreme Court or High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the judge.

5. Power to punish for contempt

Both the Supreme Court and the High Court have the power to punish any person for their contempt. Art. 129 provides that the Supreme Court shall have the power to punish for contempt of itself. Likewise, Art. 215 lays down that every High Court shall have the power to punish for contempt of itself.

6. Separation of the Judiciary from the Executive

Art. 50 contains one of the Directive Principles of State Policy and lays down that the state shall take steps to separate the judiciary from the executive in the public services of the state. The object behind the Directive Principle is to secure the independence of the judiciary from the executive. Art. 50 says that there shall be a separate judicial service free from executive control.

7. Appointment of judges

There are two different ways in which this matter is governed in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the United States where, for instance, offices of the Supreme Court as well as other offices of the State shall be made only with the concurrence of the Senate in the United States. On this point Dr, B.R Ambedkar said in his speech :

"*It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbrous, it also involves the possibility of the appointment being influenced by political pressure and political considerations....*"

➢ What is the collegium system?

It is the system of appointment and transfer of judges that has evolved through judgments of the Supreme Court, and not by an Act of Parliament or by a provision of the Constitution. The Supreme Court collegium is headed by the Chief Justice of India and comprises four other senior most judges of

the court. A High Court collegium is led by its Chief Justice and four other senior most judges of that court. Names recommended for appointment by a High Court collegium reaches the government only after approval by the CJI and the Supreme Court collegium. Judges of the higher judiciary are appointed only through the collegium system and the government has a role only after names have been decided by the collegium. The government's role is limited to getting an inquiry conducted by the Intelligence Bureau (IB) if a lawyer is to be elevated as a judge in a High Court or the Supreme Court. It can also raise objections and seek clarifications regarding the collegium's choices, but if the collegium reiterates the same names, the government is bound, under Constitution Bench judgments, to appoint them as judges.

What does the Constitution say regarding the appointments of judges? Judges of the Supreme Court and High Courts are appointed by the President under Articles 124(2) and 217 of the Constitution. The President is required to hold consultations with such of the judges of the Supreme Court and of the High Courts as he may deem necessary. Article 124(2) says:

"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." According to Article 217:

"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." So how did the collegium system evolve when the Constitution is silent on it? The collegium system has its genesis in a series of judgments called "Judges Cases." The collegium came into being through interpretations of pertinent constitutional provisions by the Supreme Court in the Judges Cases.

First Judges Case:

In S P Gupta Vs Union of India, 1981, the Supreme Court by a majority judgment held that the concept of primacy of the Chief Justice of India was not really to be found in the Constitution. It held that the proposal for appointment to a High Court can emanate from any of the constitutional functionaries mentioned in Article 217 and not necessarily from the Chief Justice of the High Court. The Constitution Bench also held that the term "consultation" used in Articles 124 and 217 was not "concurrence" — meaning that although the President will consult these functionaries, his decision was not bound to be in concurrence with all of them. The judgment tilted the balance of power in appointments of judges of High Courts in favour of the executive. This situation prevailed for the next 12 years.

Second Judges Case:

In The Supreme Court Advocates-on-Record Association Vs Union of India, 1993, a nine-judge Constitution Bench overruled the decision in S.P Gupta and devised a specific procedure called 'Collegium System' for the appointment and transfer of judges in the higher judiciary. Underlining that the top court must act in "protecting the integrity and guarding the independence of the judiciary", the majority verdict accorded primacy to the CJI in matters of appointment and transfers while also ruling that the the term "consultation" would not diminish the primary role of the CJI in judicial appointments. "The role of the CJI is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter. Here the word 'consultation' would shrink in a mini form. Should the executive have an equal role and be in divergence of many a proposal, germs of indiscipline would grow in the judiciary," it held, "Ushering in the collegium system, the court said that the recommendation should be made by the CJI in consultation with his two seniormost colleagues, and that such recommendation should normally be given effect to by the executive. It added that although it was open to the executive to ask the collegium to reconsider the matter if it had an objection to the name recommended, if, on reconsideration, the collegium reiterated the recommendation, the executive was bound to make the appointment."

Third Judges Case:

In 1998, President K R Narayanan issued a Presidential Reference to the Supreme Court over the meaning of the term "consultation" under Article 143 of the Constitution (advisory jurisdiction). The question was whether "consultation" required consultation with a number of judges in forming the CJI's opinion, or whether the sole opinion of CJI could by itself constitute a "consultation". In response, the Supreme Court laid down 9 guidelines for the functioning of the coram for appointments and transfers — this has come to be the present form of the collegium, and has been prevalent ever since. This opinion laid down that the recommendation should be made by the CJI and his four seniormost colleagues, instead of two. It also held that Supreme Court judges who hailed from the High Court for which the proposed name came, should also be consulted. It was also held that even if two judges gave an adverse opinion, the CJI should not send the recommendation to the government.

Why has the collegium system been criticised?

Critics argue that the system is non-transparent, since it does not involve any official mechanism or secretariat. It is seen as a closed-door affair with no prescribed norms regarding eligibility criteria or even the selection procedure. How judges appoint judges, the debate around it. There is no public knowledge of how and when a collegium meets, and how it takes its decisions. Lawyers too are usually in the dark on whether their names have been considered for elevation as a judge.

What efforts have been made to address these concerns?

The NDA government has tried twice, unsuccessfully both times, to replace the collegium system with a National Judicial Appointments Commission (NJAC). The BJP-led government of **1998-2003** had appointed the Justice M N Venkatachaliah Commission to opine whether there was need to change the collegium system. The Commission favoured change, and prescribed an NJAC consisting of the CJI and two senior most judges, the Law Minister, and an eminent person from the public, to be chosen by the President in consultation with the CJI. The NDA second regime had NJAC as one of its priorities, and the constitutional amendment and NJAC Act were cleared swiftly. A clutch of petitions were subsequently filed in the Supreme Court, arguing that the law undermined the independence of the judiciary, and the basic structure of the Constitution. A five-judge Constitution Bench declared as unconstitutional the constitutional amendment that sought to create the NJAC, which had envisioned a significant role for the executive in appointing judges in the higher judiciary. The Bench sealed the fate of the proposed system with a 4:1 majority verdict that held that judges' appointments shall continue to be made by the collegium system in which the CJI will have "the last word". "There is no question of accepting an alternative procedure, which does not ensure primacy of the judiciary in the matter of selection and appointment of judges to the higher judiciary," said the majority opinion. Justice J Chelameswar wrote a dissenting verdict, criticising the collegiums system by holding that "proceedings of the collegium were absolutely opaque and inaccessible both to public and history, barring occasional leaks".

➢ CONCLUSION

From the foregoing account of the constitutional provisions, their history, interpretation, and application, the problems faced and the solutions suggested, several conclusions emerge. First, the constitution makers did not want to leave the appointment ofjudges exclusively to the executive.

Second, doubts were expressed from the very beginning whether the formula adopted in the Indian Constitution would serve the purpose of establishing and maintaining an independent judiciary. Third, doubts were confirmed with respect to the High Courts even before the commencement of the constitution and soon after the commencement of the constitution even with respect to the Supreme Court. Fourth, though the constitution makers intended effective involvement of the judges, particularly of the Chief Justice of India and the Chief Justices of High Courts, they refused to

permit the Chief Justice of India to have the last word. Fifth, the constitution makers did not agree to make the appointments subject to the recommendations of any panel or approval of the legislature. Sixth, the constitution makers sincerely believed that the arrangement they had made in the constitution was the most suitable and appropriate for India and hoped that the high constitutional functionaries involved in the process would discharge their constitutional obligation with full responsibility. Seventh, the Constitution makers were not completely wrong in their assessment and, subject to occasional aberrations, the system has worked well.