

# Constitutional Provisions of Judicial Independence in India: An Overview

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*Abstract : The meaning of judicial independence has different meanings to different people over period of time also to several members of the constituent assembly. Our constitution by the way of the Articles just talks about the independence of judiciary but it is no where defined what actually is meant by independence of 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.*

**Keywords :** constitution, judicial, independence, legislature

## Introduction

The independence of judiciary is not a new concept but its meaning is still imprecise. The starting and the central point of this concept is apparently the doctrine of separation of powers. Therefore, it primarily means the independence of judiciary from legislature and executive. But that amounts to only the independence of judiciary as an independent institution from the other two institutions of the state without regards to the independence of the judges in exercising of their functions. In such a case there is not much that is achieved. The independence of judiciary does not mean just creation of an autonomous institution free from control and influence of the legislature and the executive.

## Judicial Independence

The underlying purpose of independence of judiciary is that judges must be able to decide disputes before them, according to the law, uninfluenced by any other factor. For this reason independence of judiciary is the independence of each and every judge. Whether such independence would be ensured to the judge only as members of an institution or irrespective of it is one of the most important considerations in determining and understanding the meaning of independence of judiciary.

The meaning of judicial independence has different meanings to different people over period of time also to several members of the constituent assembly. Our constitution by the way of the Articles just talks about the independence of judiciary but it is no where defined what actually is meant by independence of 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.

The other meaning of judicial independence 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 meaning of 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 the part of the judiciary

## Constitutional Provisions maintaining Independence of Judiciary

The independence of judiciary and the protection of its constitutional provisions are not achieved by a single act but rather over a period of time by a continuous struggle that takes place within the framework of the ongoing and the dynamic process. Therefore it may not be possible to lay down all the conditions in advance either in the constitution or otherwise which will ensure and secure perpetual independence of the judiciary. Such conditions will have to be checked and revised from time to time. A few conditions are, however, so basic to the independence of the judiciary that without them the judicial independence will not exist. Some of them may be assigned to the collective independence of the Judiciary as an institution, while others may be assigned to the independence of the independence of the individual judges.

The Independence of judiciary in particular with reference to the supremacy and Independence of Supreme Court is implicit in a number of Articles 124 to Articles 127 in Chapter IV of Part V of the Constitution. In fact as discussed above the objective of all this conflict provision is made explicit in the Art. 50. Many provisions are provided in our constitution to ensure the independence of the judiciary. The constitutional provisions are discussed below:

1. **ARTICLE 50:** It provides for separation of judiciary from executive. It says that the state shall take steps to separate judiciary from the executive in the public services of the State.
2. **ARTICLE 124(2):** Art 124 specifies that the Chief Justice is appointed by the president after consulting with the judges of the Supreme Court and the high courts. Further, that while appointing other judges, the CJ must be consulted. Thus, the constitution clearly tried to prevent the executive from having complete discretionary powers in the appointment of the judges.
3. **ARTICLE 124 (2) (b):** It states that a Judge may be removed from his office in the manner provided in clause 4 of the Article. Clause 4 states that a Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address

by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity.

4. **ARTICLE 124(7):** it states that no person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.
5. **ARTICLE 125:** The salary of the judges cannot be changed after the appointment for their disadvantage. The Proviso to the section states that Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.
6. **ARTICLE 129:** It provides that Supreme Court is to be a court of record it states that The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.
7. **ARTICLE 121:** It provides for restrictions on discussions in Parliament it states that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a 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 as hereinafter provided.
8. **ARTICLE 145:** it talks about the rules made by Supreme Court it says that Supreme Court may from time to time with the approval of President can make rules for regulating generally the practice and procedure of the Court
9. **ARTICLE 146:** the appointment of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or officer of the Court as directed

The most important aspect in the independence of the judiciary is its constitutional position. Just as the constitution provides the composition and powers of the legislature and, the executive, it should also provide for the judiciary. Otherwise the constitution may provide for the composition of the courts and their jurisdiction, and for the appointment, the term of office, and the tenure of the judges. The constitution must ensure a constitutional position of dignity to the judiciary.

The constitution must also ensure administrative independence of the Judiciary, such as supervision and control over the administrative staff, preparation of its budget and maintenance of the court buildings. It must not prohibit ad hoc tribunals and diversion of the cases from the ordinary courts, ensure the natural judge principle, ordain respect for and provide for separation of judge from the civil services, and prohibit diminution of judges' service conditions. Some of these matters may be entrusted to legislation; however there must be enough assurance in the constitution to the effect so that the judiciary is able to command respect in the eyes of the people and is able to attract the ablest persons as the judges.

### Judicial Immunities

Judicial independence requires that the judges should be protected against the attacks on their conduct in court. This is secured from two branches of law.

Firstly, judges are immune from personal action for damages in respect of their personal action. Anything said by the judge in the court by judges, advocates or witnesses is absolutely privileged against an action of libel and slander and to this extent is similar to parliamentary privilege.

Enforcing the independence of judges, convention dictate that there should be no criticism leveled at them from the members of the executive-but not of the legislature. Parliamentary practice prohibits the criticism of the judges other than the motion expressing criticism or leading to impeachment of the judge.

The judges are also immune from suits if they have acted within their jurisdiction or their powers. The situation here remains unclear. If a superior court acts beyond its jurisdiction, it remains immune to suit till it does not come to know about the violation of jurisdiction. On the contrary, if the magistrate acts beyond his authority, whether innocently or knowingly, he is not immune from a suit. Part of the immunity enjoyed by the judiciary is extended to other participants of the judicial proceedings. This relates to the law of defamation so that everything said in the court is absolutely privileged. They also enjoy certain protection. They are not required to give reasons for their verdict nor will they be punished for not giving a verdict.

### Implications of Independence of Judiciary

#### Judicial Review

In many countries with written constitution, there prevails the doctrine of Judicial Review. It means that constitution is the Supreme law of the land and any law in consistent with it is void the courts perform the side of expounding the provisions of the constitution and exercise power of declaring any law or administrative action which may be in consistent with the constitution as unconstitutional and hence void this judicial function stems from the feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also that it is necessary to restrain governmental organs from exercising powers which may not be sanctioned by the constitution.

#### Judicial Activism

The Supreme Court identified Art. 142 of the Constitution as an unlimited source of power, verbatim, on which it could draw for whatever the Judges felt, were the demands of the justice. In seeking the aid of the poor, the illiterate and the disadvantaged sections of the society, the post 1980 court emigrated upon a path of judicial activism unparalleled in the history of any modern democracy. It became a center of political power. Activist lawyers and Public Interest groups invoked its jurisdiction.

The constitution provides for a judiciary, which is independent. Independence of judiciary is important for the purpose of fair justice. There should be no interference by the legislature or the executive, in the proceedings of the judiciary so that it may take a judgment that seems reasonably fair. In case of intervention, there may be an element of bias on the part of the judges in taking a fair decision. It is difficult to suggest any other way to make the Indian courts more self reliant and keep them away from the influence of the other two organs.

#### **Independence of Judiciary maintained by Article 124**

Article 124(2) of our constitution acknowledges that in the present state of the country, it would be dangerous to let the executive alone in the matter of appointment of judges, which would render the appointments liable to be made on a political basis, undermining consideration of merit in possible cases. Hence the Executive should be in consultation with persons who are well-qualified to give advice on these matters. On the other hand it does not give sole power to the Chief Justice to make the appointments of his colleagues, recognizing the failings and prejudices of a single person, notwithstanding his eminence.

The president is not bound to follow the advice of those whom he consults.

The power of the President to appoint Judges is purely formal because in this matter he acts on the advice of the Council of Ministers. The Indian Constitution does not leave the appointment of Judges on the discretion of the President who acts on the evidence of the Council of Ministers. Hence the Constitution emphasizes by insisting to consult persons who are ex-hypothesis well qualified to give proper advice in matters of appointment of Judges.

Consultation would generally mean concurrence. The consultation during the process in which an advice is sought by the President cannot be easily brushed aside as an empty formality or futile exercise or mere casual one attached with no sanctity. The context in which the expression "shall always be consulted" is used in the first proviso of Article 124(2) and expression "shall be appointed.... after consultation" is deployed in Article 217(1), denote the mandatory character of consultation which has to be and is of binding character.

Article 124(2) talks about two type of consultation. One being discretionary on the part of the President and the other being mandatory under the proviso<sup>6</sup>. Under Article 217(1) the process of 'consultation' by the President is mandatory and this clause does not speak of any discretionary consultation

#### **By Article 217**

Article 217(1) provides that 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, and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years.

The question of selection and appointment of the judges is crucial to the maintenance of independence of the judiciary. If the final power in this respect is left with the executive then it is possible for the executive to subvert the independence of the judiciary by appointing pliable judges.

In 1991 in *Subhash Sharma v. Union of India*<sup>1</sup> a three Judges Benches of Supreme Court emphasized

"an independent non-political judiciary is crucial to the sustenance of our chosen political system. The vitality of the democratic process, the ideals of social and economic egalitarianism, the imperative of a socio-economic transformation envisioned by the Constitution as well as Rule of law and great values of liberty and equality are all dependent on the tone of the judiciary. The quality of the judiciary cannot remain unaffected in turn by the process of selection of judges"

#### **Conclusion**

The Indian Constitution incorporates the concept of separation of power by virtue of which the judiciary has to remain separate from the other two organs of the government. Though it is nowhere mentioned that judiciary is independent. There are various provisions which maintain the independence of judiciary. One of them is section 124 regarding appointment of judges. The appointment of judges maintains the independence of judiciary by declaring NJAC and 99<sup>th</sup> Constitutional Amendment Act unconstitutional. The Judiciary in India has to act as an impartial compare to reduce the disputes between the Governments and the private individuals as well as between the governments inter se. It has also to protect the fundamental rights of the Individuals guaranteed under part III of the constitution. The courts in the country have already expanded the scope of the judicial review by bringing in its ambit social, economic and political Justice. Keeping in view this expanding horizon of judicial review, it is the paramount need of the time that the Judiciary must be independent from executive pressure or influence.

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