

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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INDEPENDENCE OF JUDICIARY: ISSUES AND CURRENT CHALLENGES

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“There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured.

– Dr. B.R. Ambedkar.¹

ABSTRACT: -

In the year 1995, Hon'ble. Mr. Justice J.S. Verma delivered the First P.K. Goswami Memorial Lecture at Guwahati with the title **“The Independence of the Judiciary—Some Latent Dangers”**. In a way, it was a sequel to my apprehensions over the years, as expressed judicially in my separate opinion in the *K. Veeraswami case*.² Followed by the events leading to the V. Ramaswami cases that I had to hear and decide. Fifteen years later, I am dismayed that some of my apprehensions are now coming true. Hence, the choice of this topic for the lecture is to pay homage to the memory of a doyen of the Madras Bar, S. Govind Swaminathan, who was a true professional practising the highest standards of professional conduct and ethics in the Bar, which is the greatest assurance for judicial independence. In my vocabulary, the word 'Bar' denotes the entire legal profession, the practising lawyers as well as the judges on the Bench.

Another reason for this choice goes back to the time of my entry to the Bar in 1955 when the first book to read and digest given to me by my senior, G.P.Singh (later Chief Justice of the M.P.High Court) was a compilation of lectures delivered by a senior member of the Madras Bar, K.V.Krishnaswami Iyer to the junior members on professional conduct and ethics. It is

¹ Ishani Samajpati, What is an independent judiciary, available at (<https://lawbhoomi.com/an-article-on-independence-of-judiciary/>), last visit on 12.07 am (04/10/2024)

² AIR 1991(3) SCC 655

not merely contextual but also of great constitutional significance at a time when prompt measures are needed to protect judicial independence from lurking dangers.³

CHAPTER - 1

INTRODUCTION: -

The Indian judiciary, being a fundamental component of democracy, performs a crucial function in maintaining the supremacy of the law and protecting the rights and freedoms of the populace. Nevertheless, the system is susceptible to obstacles that impede its effective operation.



Fig-1. Sources by CLATalogue

The Indian judiciary faces several challenges that impact its efficiency, effectiveness, and public perception. The objective of this article is to furnish a comprehensive analysis of the challenges affecting the judicial system in India.⁴

³ Hon'ble. Mr. Justice J.S.Verma , Former Chief Justice of India. "Judicial Independence: Is It Threatened?", available at (<https://search.app/4bQBFSxABiXqC7889>) last visit on 12.11am (03/10/2024)

⁴ Indrasish Majumder, "An In-Depth Analysis of the Challenges Faced by the Judiciary in India". Available at (<https://lawctopus.com/clatalogue/clat-pg/analysis-of-the-challenges-faced-by-the-judiciary-in-india/>) last visit on 12.36am (03/10/2024)

Among several global quests in search of the rule of law, due process, and legal protection of human rights, the quest for judicial independence. The banner of independence is waved by the right as a protection for investors and property more generally, by the left as essential for the judicial protection of human rights, and by champions of constitutional judicial review, as a constitutional court without independence would be a mere facade. Yet things are not so simple. Judicial independence is as much a problem as a solution. The central task of judges is to resolve disputes. Independence is essential to the success of that mission. Judges, however, do not only resolve disputes. Judicial courts are "courts of law" that resolve disputes according to the law. To settle disputes, judges must undoubtedly interpret what the law is.

Whoever interprets the law or says what a legal text means, to some degree, at some times, and under some circumstances, makes the law. If judges make law, they must not be independent. They must be accountable to someone, at least according to any political theory currently at play in the politically developed world. Once independence and accountability are seen as two sides of the judicial coin, answers to questions about how independent courts should be are not so simple. Independence and accountability constitute an antinomy subject to pragmatic compromise rather than simple answers. The politically developed nations have devised various compromises, but none of them are completely satisfactory.

Particularly, when mixed groups of Anglo-American and civil law scholars discuss judicial independence, they tend to conflate and confuse several different conceptions of judicial office and function. Some additional clarity, if not the resolution of this confusion, may be gained by carefully distinguishing between the various and sometimes differing functions labelled "judicial" in various legal systems.⁵

CHAPTER - 2

2.1 - MEANING OF INDEPENDENCE OF JUDICIARY: -

In simple terms, Independence of the Judiciary means that: –

- the other organs of the government, i.e., the Executive and Legislature, must not restrain the functioning of the judiciary in such a way that it is unable to distribute justice;

⁵ Martin Shapiro , “Judicial Independence : New Challenges in Established Nations” Volume 20 Issue 1 Globalisation and the law: The Next Twenty Years, **Indiana Journal of Global Legal Studies**. Available at (<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1504&context=ijgls>) last visit on 12.59am (03/10/2024)

- The other organs of the government should not obstruct or stand in the way of the decisions of the judiciary;
- Judges must be able to perform their functions without terror (fear) or favour. In other words, judges should be autonomous and free from restrictions, temptation, influence, constraints and threats, direct or indirect, from the executive or legislative. Not only this, judges must be independent and free of their colleagues and superiors in the discharge of their judicial functions.⁶

2.2 - PHENOMENON OF DELAYS IN THE JUDICIAL SYSTEM: -

The Indian judiciary encounters a big obstacle in the form of judicial delays. The delay of justice is attributed to the burdened courts and the accumulation of pending cases. The considerable number of legal cases, in combination with deficient infrastructure and insufficient judicial resources, imposes a burden on the legal system. As a result, litigants are subjected to prolonged waiting periods, leading to a loss of confidence in the judicial system and a denial of justice to those who require it.

The issue of prolonged court proceedings can be attributed to a multitude of factors. The issue is further compounded by the limited availability of judges. India is confronted with a persistent insufficiency of judges, resulting in an unfavourable ratio of judges to the population.



Fig-2. Sources by CLATalogue

⁶ Law Bhoomi , An Article on Independence of Judiciary. available at (<https://lawbhoomi.com/an-article-on-independence-of-judiciary/>) last visit on 11.50pm (03/10/2024)

The current state of the High Courts and lower courts in terms of available positions is a cause for concern, as it exacerbates the already existing backlog of unresolved cases. Prompt actions are necessary to tackle this matter, such as accelerating the appointment procedure and augmenting the number of judges to guarantee prompt dispensation of justice.

The antiquity of litigation procedures and the intricacy of the legal system are additional elements that contribute to the prolongation of judicial delays. Ineffective procedural barriers and out-of-date laws impede the judiciary's ability to function properly in the Indian legal system.

There exists a multitude of laws that have not been rescinded or modified, leading to superfluous intricacies and hindrances. Furthermore, the complexities of procedures frequently result in technicalities taking precedence over the attainment of substantive justice. Optimising legal procedures and modernising legislation are pivotal measures for mitigating the workload on courts and augmenting the efficacy of the judiciary.

2.3 - JUDICIAL INDEPENDENCE & ACCOUNTABILITY: -

The independence of the judiciary is a necessary concomitant of the power of judicial review under a democratic Constitution.

The foundation for judicial review without a specific provision under the American Constitution was laid by Marshall, *C.J.*, in 1803 in *Marbury v. Madison*; even though much earlier in 1608, it was Lord Coke whose opinion in *Dr. Bonham's case* germinated that concept. In the Indian Constitution, judicial review is expressly provided inter alia in Articles 13, 32, 136, 141, 142, 226 and 227. It is also recognised as a basic feature forming an indestructible part of the basic structure of the Constitution under the decision in *Keshavananda Bharti*⁷. The directive principle of State policy in Article 50 mandates the separation of the judiciary from the executive to maintain its independence, as essential for its function as the watchdog under the Constitution. However, like every organ of the State and every public functionary in a democracy, the judiciary as an institution and every judge as a public functionary are accountable to the political sovereign—the People. The only difference is in the form or nature of the mechanism needed to enforce their accountability. In short, judicial accountability is a

⁷ AIR 1973 SC 1461

facet of the independence of the judiciary, and the mechanism to enforce judicial accountability must also preserve the independence of the judiciary.

The rule of law, which is the bedrock of democracy, will be adversely affected if the independence of the judiciary is compromised by the erosion of the integrity of the judiciary. Such erosion can be from within as well as from without. Safeguards to protect judicial independence are in our Constitution in addition to the several international instruments, which can be read into the constitutional guarantees by the canons of construction evolved in *Vishakha*.⁸

In addition to the UDHR and the ICCPR, the UN has set forth a set of standards known as the 'Basic Principles on the Independence of the Judiciary'. Also, 'The Beijing Principles on the Independence of the Judiciary, 1997', adopted at Manila by the Chief Justices of the Asia Pacific Region, and 'The Bangalore Principles of Judicial Conduct, 2002' are two such documents needing particular mention.

The essential values stated in the Bangalore Principles are judicial independence, both individual and institutional, as a prerequisite to the rule of law; impartiality, not only to the decision itself but also to the process; integrity; propriety, and the appearance of propriety; equality of treatment to all; competence and diligence. It concludes with the need for effective measures to be adopted to provide mechanisms to implement these principles.

To protect the judiciary from dangers within, the framers of the Indian Constitution considered it sufficient to provide for the removal of a judge of a High Court or the Supreme Court in the extreme case of proved misbehavior or incapacity under Articles 217 and 124 respectively; and to vest the control over the subordinate judiciary in the respective High Court under Article 235. In this manner, the Constitution provides for enforcing judicial accountability, preserving the independence of the judiciary.⁹

2.4 - HISTORICAL BACKGROUND OF AN INDEPENDENT JUDICIARY: -

The concept of judicial independence has stemmed from the subject matter of the doctrine of "Separation of Powers", coined by the 18th-century French philosopher Montesquieu.

⁸ AIR 1997 SC 3011

⁹ Supra note 3

However, the concept of an independent judiciary was formally adopted by England in the Act of Settlement in 1701, though the concept of an independent judiciary took time to flourish.

Before the enactment of the Act of Settlement in 1701, the Judges used to hold their positions as per the decision of the ruler. Like any other civil servant, the judges could also be dismissed by the Crown when deemed necessary. Thus, the judges had to act subordinately to the executive and legislature. This led the judges to favour the interests of the royal family and other influential persons. The judicial independence was secured by the Act which formally recognised the principles of security of judicial tenure, formal mechanisms for the impeachment of a judge etc. Because of the Act of Settlement, 1701, it has been possible to impeach a senior judge from office through an official address to the Queen after agreement by both Houses of Parliament.

Other common law countries, such as Canada and Australia, also adopted the British model of an independent judiciary.

The Act of Settlement was used as a foundation by the Founding Fathers of the Constitution of the United States to formulate Article III of the US Constitution, which acts as a base of American judicial independence.¹⁰

2.5- INDEPENDENT JUDICIARY FROM AN INDIAN PERSPECTIVE: -

After post-independence, the concept of an independent judiciary has been enshrined in the Constitution of India itself. The idea of the independence of the judiciary was adopted from the laws of the United States of America. However, from ancient times, India had a well-maintained judicial system free from any external influences.

According to Justice S. S. Dhavan of Allahabad High Court in the essay “Judicial System in Ancient India”, *“India has the oldest judiciary in the world. No other judicial system has a more ancient or exalted pedigree.”*

Smritis in Ancient India stressed the need for an effective judicial system to carry out justice according to dharma. It also emphasised that the primary duty of the King was to administer

¹⁰ Supra note 1

the rule of law, protect the people, and punish the wrongdoer. Apart from that, the Arthashastra by Kautilya also talked about the principles of judicial independence.

Ancient jurists like Manu, Yajnavalkya, Katyayana, Brihaspati, etc, and later, commentators like Vachaspati Misra also stressed the fact that the judiciary should be independent and judges should decide a case based on facts and laws.

2.6- INTERNATIONAL INSTRUMENTS TO SECURE THE INDEPENDENCE OF A JUDICIARY: -

Maintaining an independent judiciary has been the key focus of international instruments. Some of the most prominent international instruments are as follows:

The UN Basic Principles on the Independence of the Judiciary were adopted on 6th September 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan, Italy.

The idea behind the adoption of the principles was to provide a framework to administer an independent judiciary in every country and enable a judge to do their duty impartially by following the principles.

The principles emphasised the selection, appointment, conduct and training of the judges since they play the most important role in running the judiciary.

The following are the basic principles which were formulated to guide the governments of the member states to secure and promote an independent judiciary:¹¹

2.6.1 - Independence of a judiciary: -

1. The State should guarantee the independence of the judiciary by enshrining the following in its Constitution and the laws of that country. The government must ensure an independent judiciary by removing all interference from the organs of the government.

¹¹ Supra note 1

2. On the other hand, the judiciary should observe all the cases based on facts and the laws relating to the cases without being influenced. The jurisdiction of the judiciary is extended to all judicial matters and matters that contain serious questions of law.
3. There should not be any kind of unsolicited interference in the judiciary, and judicial decisions should not be subjected to random revision. However, an individual can always approach judicial reviews and can appeal to reduce any sentences ordered by the judicial officers.
4. Every member of society should have the right to approach the judiciary whenever required.
5. An independent judiciary should ensure that the judicial proceedings are performed without any prejudices or biases toward any of the litigant parties.
6. The Member State should ensure that the judiciary has enough resources to run its function properly.

2.6.2 - Freedom of expression and association: -

According to the Universal Declaration of Human Rights (UDHR), every individual has the right and freedom to express, believe, associate, etc. Judicial officers, as members of society, also have the same rights as any other common citizen. However, while exercising those rights, the judges should maintain and preserve dignity and impartiality.

The judges are also free to form any kind of association with fellow judges to represent their interests, as well as promotion of judicial independence.¹²

2.6.3 - Qualifications, selection and training of the judicial officers: -

The judicial officers should be people with high morals and integrity, as well as should have appropriate qualifications in law and proper training.

The selection of judicial officers should not be done following any method with “improper motives”.

The judges should be selected based on their qualifications and should not be discriminated against on any grounds such as “race, colour, sex, religion, political or other opinions, national

¹² Supra note 9

or social origin, property, birth or status”. However, the candidate should be a citizen of the country concerned, and this requirement should not be termed discriminatory.

2.6.4 - Conditions of service and tenure: -

The conditions of service and tenure of the judges, such as the term of office, security, salary and pensions and the age of retirement, should be secured by the law. The appointed or elected judges should have a particular retirement age or the end of their term as a judge. The promotion of the judges should be based on the ability, integrity and experience of an individual judge instead of any other preferences. The internal judicial administration should decide the types of cases to be assigned to a particular judge.

2.6.5 - Professional secrecy and immunity: -

In the judiciary, the maintenance of professional secrecy should be prioritised. Under no circumstances, a judge be forced to testify to any confidential information other than the information acquired in public proceedings. Judges, while exercising their judicial powers, should have personal immunity from civil suits for monetary damages. However, any disciplinary proceedings, right to appeal, or the compensation provided by the State are not subject to this.¹³

2.6.6 - Bangalore Principles of Judicial Conduct (2002): -

The Bangalore Principles of Judicial Conduct (2002) were officially adopted at the Peace Palace in The Hague, Netherlands. The principles established the basic ethical standard for working in the judiciary and provided a framework of judicial conduct. It dealt with six mandatory ethical values, namely judicial independence, impartial discharge of judicial duties, integrity, propriety, equal treatment to all and lastly, performance of judicial duties with competence and due diligence and the ways to implement them.

2.6.7 - Latimer House Principles: -

The Latimer House Principles (2008) are the principles adopted by Commonwealth countries dealing with the three branches of the government. It also emphasises the independence of the judiciary to strengthen democratic values.¹⁴

¹³ Supra note 10

¹⁴ Supra note 11

2.7- NEED FOR AND IMPORTANCE OF INDEPENDENCE OF JUDICIARY: -

President Taft of the U.S.A., while emphasizing the independence of the judiciary said, “As between the individual and the State, as between the majority and the minority, as between the powerful and the weak, financially, politically, socially, courts must hold an even hand and give judgement without fear or favour.”

Thus, only an impartial and independent judiciary can stand as a defensive wall for the protection of the rights of the individuals and dispense even-handed justice without fear or favour. An independent judiciary is the sine qua non of a democratic system of government. The judiciary is the protector of the constitution, and it has the power to strike down particular laws passed by the Parliament if it believes that these are unconstitutional (Judicial Review). Also, for the rule of law to prevail, judicial independence is of prime necessity.

Keeping in view the functions of the judiciary, the judiciary must be made autonomous and independent. If the judiciary is not sovereign, it will not be able to make decisions against the government and protect fundamental rights and the constitution. Today, in all democratic countries, the independence of the judiciary is considered essential so that the fundamental rights of the people are protected. That is why in democratic countries, the judiciary is considered the custodian of the freedom of the people and of the constitution. In countries where there is no democracy, the judiciary is not independent or free, and the fundamental rights of the people are not protected. This is the position in *China, North Korea, Laos, Vietnam* and other communist countries. Thus, the independence and impartiality of the judiciary is one of the attributes of the democratic system of government.¹⁵

2.8 - DISCIPLINE, SUSPENSION AND REMOVAL: -

A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.

Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

¹⁵ Supra note 5

All disciplinary, suspension or removal proceedings shall be determined by established standards of judicial conduct.

Decisions in discipline, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.¹⁶

CHAPTER - 3

3.1 - JUDICIAL INDEPENDENCE IN INDIA: -

In the post-independent era, the concept of judicial independence has been enshrined in the Constitution of India itself. Several constitutional provisions help in securing the independence of the judiciary. The provisions are discussed below:

3.1.1 - Security of the tenure of judges: -

Article 217 of the Constitution states the conditions and appointing a judge of a High Court. Once appointed, the Supreme Court and high court judges have the tenure to continue their services until they reach the age of sixty-five years and sixty-two years respectively.

However, the age of retirement of the High Court judges was proposed to increase to 65 through the Constitution (114th Amendment) Bill, 2010. But it has not passed.

Article 124(2) lays down that the President should appoint every Supreme Court judge, and they will remain in office until the age of sixty-five years.

For the appointment of the judges in the High Court and Supreme Court, the President shall consult the Chief Justice of India and here consultation means concurrence and this was held in the case of *Supreme Court Advocates on Record Association v. Union of India (1993)*, also known as the Second Judges Case (1993).¹⁷

¹⁶ Human Rights Instruments, Basic Principles on the Independence of the Judiciary. Available at (<https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary>) last visit on 12.59 am (04/10/2024)

¹⁷ Supra note 12

3.1.2 - Salaries and Allowances of Judges: -

Article 125 of the Constitution of India deals with the salaries and allowances of judges. The salary is specified in the Second Schedule and may be decided to be changed by the Parliament by law.

In the case of judges in the Supreme Court, their salaries are provided by the Consolidated Fund of India. The judges of the High Court of the respective states are paid by the Consolidated Fund of that state.

3.1.3 - Powers and Jurisdiction of the Supreme Court: -

Under Article 32, the Supreme Court of India has the power to issue writs and an individual may move to the Supreme Court to access proper justice. Though the Parliament can change the pecuniary jurisdiction in civil matters, it cannot curtail any powers of the Supreme Court.¹⁸

3.1.4 - No discussion of judicial conduct in Parliament or state legislatures: -

Article 211 of the Constitution states that there should be no discussion of the judicial conduct of any High Court or Supreme Court held in the Legislature of a State.

3.1.5 - Contempt of Court: -

Under Article 129, the Supreme Court has the power to punish for contempt of itself. Similarly, Article 215 confers power to the High Court to punish for contempt.¹⁹

3.1.6 - Complete independence of the judiciary: -

Article 50 of the Constitution ensures complete independence of the judiciary and frees it from executive control. It contains one of the Directive Principles of State Policy, stating that the state shall take steps to separate the judiciary from the executive.

One of the most recent and landmark cases regarding judicial independence is the case of [Supreme Court Advocates-on-Record Association and another v. Union of India \(2015\)](#), the constitutionality of the [Constitution \(99th Amendment Act\), 2014](#), was challenged by the Supreme Court Advocates-on-Record Association. The amendment sought to form the National Judicial Appointment Commission (NJAC) to appoint judges. The National Judicial

¹⁸ Supra note 12

¹⁹ Supra note 16

Appointment Commission would have been a body containing the following six people:

- Chief Justice of India acting as *ex officio* Chairperson.
- Two other senior judges of the Supreme Court acting *ex officio*.
- The Union Minister of Law and Justice also acts *ex officio*; and
- Two eminent persons are to be selected by a committee consisting of the Chief Justice of India, the Prime Minister of India, and the Leader of Opposition in the Lok Sabha for three years only. One such person would be from the Scheduled Castes or Scheduled Tribes or OBC, or minority communities, or a woman.

The Supreme Court held it unconstitutional and struck it down since the amendment is a threat to the independence of the judiciary.²⁰

CHAPTER 4

4.1 - OBJECTIVE OF INDEPENDENCE OF JUDICIARY: -

Independence of the Judiciary is *sine qua non* of democracy. In a democratic polity, the supreme power of the state is shared among the three principal organs. The constitutional task assigned to the Judiciary is no less than that of other functionaries, the legislature and the executive. Indeed, it is the role of the Judiciary to carry out the constitutional message, and it is its responsibility to keep a vigilant watch over the functioning of democracy by the dictates, directives, and imperative commands of the constitution by checking the excessive authority of other constitutional functionaries. Our Constitution does not strictly adhere to the doctrine of separation of powers, but it does provide for the distribution of power to ensure that one organ of the government does not encroach on the constitutional powers of other organs. The concept of distribution of powers assumes the existence of a judicial system free from external as well as internal pressures. Under our constitution, the Judiciary has been assigned the onerous task of safeguarding the fundamental rights of our citizens and upholding the Rule of Law. Perhaps the most important power of the Supreme Court is the power of judicial review. Judicial Review means the power of the Supreme Court (or High Courts) to examine the constitutionality of any law if the Court concludes that the law is inconsistent with the provisions of the Constitution, such a law is declared unconstitutional and inapplicable. The term judicial review is nowhere mentioned in the Constitution. However, the fact that India has a written constitution and the Supreme Court can strike down a law that goes against fundamental rights implicitly gives the Supreme Court the power of judicial review. Together,

²⁰ Supra note 15

the writ powers and the review power of the Court make the judiciary very powerful. In particular, the review power means that the judiciary can interpret the Constitution and the laws passed by the legislature. Many people think that this feature enables the judiciary to protect the Constitution effectively and to protect the rights of citizens. The practice of entertaining PILs has further added to the powers of the judiciary in protecting the rights of citizens.

Since the courts are entrusted with the duty to uphold the constitution and the laws, they very often come into conflict with the state when it tries to enforce orders. Therefore, the need for an independent and impartial Judiciary manned by persons of sterling quality and character, underlying courage and determination and resolution impartiality and independence who would dispense Justice without fear or favour, ill will or affection, is the cordial creed of our constitution and a solemn assurance of every Judge to the people of this great country. The Judiciary cannot remain a mere bystander or spectator, but it must become an active participant in the judicial process, ready to use law in the service of social justice through a proactive, goal-oriented approach. But this cannot be achieved unless we have judicial cadres who share the fighting faith of the Constitution and are imbued with constitutional values.²¹

4.2- CONSTITUTIONAL PROVISIONS: -

Though in India, there is no express provision in the Constitution, the independence of the Judiciary is imbibed in the letters of various provisions of the Constitution. Independence of the judiciary and the rule of law are the basic features of the Constitution and cannot be abrogated even by constitutional amendments, as observed by the *Hon'ble Supreme Court in S.P. Gupta v Union of India*.²²

The Constitution of India is the fundamental law of the land from which all other laws derive their authority and with which they must conform. All powers of the state and its different organs have their source in it and must be exercised subject to the conditions and limitations laid down in it. The constitution provides for the parliamentary form of government, which lacks strict separation between the executive and the legislature but maintains clear separation between them and the judiciary. The Indian Constitution specifically directs the state “to separate the judiciary from the executive in the public services of the State. The Supreme Court

²¹ Shaila Arora, Independence of Judiciary in India, INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES, ISSN 2581-5369, Hein Online, MANUPATRA, Google Scholar Indexed, available at (<https://ijlmh.com/paper/independence-of-judiciary-in-india/>) last visit on 8.26 pm (20/10/2024)

²² AIR 1982 SC 149

has used this provision in support of separation between the judiciary and the other two branches of the state at all levels, from the lowest court to the Supreme Court. Although the nature of the Indian Constitution- whether it is federal or unitary- is doubtful, basically it provides for a federal structure of government consisting of the Union and the States. The Union and the States have their distinct powers and organs of governance given in the Constitution. While the Union and States have separate legislatures and executives, they do not have a separate judiciary.”

The judiciary has a single pyramidal structure with the lower or subordinate courts at the bottom, the High Courts in the middle, and the Supreme Court at the top. For funding and some administrative purposes, the subordinate courts are subject to regulation by the respective States, but they are basically under the supervision of the High Courts. The High Courts are basically under the regulative powers of the Union, subject to some involvement of the States in the appointment of judges and other staff and the finances. The Supreme Court is exclusively under the regulative powers of the Union. Subject to territorial limitations, all courts are competent to entertain and decide disputes both under the Union and the State laws.

The unitary character of the judiciary is not an accident but rather a conscious and deliberate act of the constitution makers for whom a single integrated judiciary and uniformity of law were essential for the maintenance of the unity of the country and uniform standards of judicial behaviour and independence. The members of the constituent assembly were very much concerned with the question of the independence of the judiciary and accordingly made several provisions to ensure this end. Hon'ble Supreme Court has itself laid emphasis on the independence of the judiciary from time to time and has observed that the constitutional scheme aims at securing an independent judiciary, which is the bulwark of democracy.

The constitution of India adopts diverse devices to ensure the independence of the judiciary in keeping with both the doctrines of constitutional and Parliamentary sovereignty. Elaborated provisions are in place to ensure the independent position of the Judges of the Supreme Court and the High Courts.

- First, the judges of the Supreme Court and the High Courts have to take an oath before entering that they will faithfully perform their duties without fear, favour, affection, ill-will, and defend the Constitution of India and the laws. Recognition of the doctrine of constitutional sovereignty is implicit in this oath.

- Secondly, the process of appointment of judges also ensures the independence of the judiciary in India. The judges of the Supreme Court and the High Courts are appointed by the President. The constitution of India has made it obligatory for the President to make the appointments in consultation with the highest judicial authorities. He, of course, takes the advice of the Cabinet. The constitution also prescribes necessary qualifications for such appointments. The Constitution tries to make the appointments unbiased by political considerations.
- Thirdly, the Constitution provides for the Security of Tenure of Judges. The judges of the Supreme Court and the High Courts serve “during good behavior” and not during the pleasure of the President, as is the case with other high Government officials. They cannot be arbitrarily removed by the President. They may be removed from the office only through impeachment. A Judge can be removed on the grounds of proven misbehavior or incapacity on a report by both Houses of Parliament supported by a special majority.
- Fourthly, the salaries and allowances of judges are charged to the Consolidated Fund of India. Further, the salaries and allowances of Judges of the Supreme Court and High Court cannot be reduced during their tenure, except during a financial emergency under Article 360 of the Constitution.
- Fifthly, the activities of the Judges cannot be discussed by the executive or the legislature, except in the case of their removal.
- Sixth, the retirement age is 65 years for Supreme Court judges and 62 years for High Court judges. Such a long tenure enables the judges to function impartially and independently.²³

CHAPTER 5

WHICH ARE THE PROVISIONS THAT PRESERVE THE INDEPENDENCE OF THE JUDICIARY?

5.1- INDEPENDENCE OF JUDICIARY-HOW MAINTAINED UNDER THE CONSTITUTION: -

Only an impartial and independent judiciary can protect the rights of the individual and provide equal justice without fear or favour. It is, therefore, very necessary that the Supreme Court should be allowed to perform its functions in an atmosphere of independence and be free from

²³ Supra note 21

all kinds of political pressures. The Constitution has made several provisions to ensure the independence of the Judiciary.

5.1.1- Security of tenure. -The Judges of the Supreme Court have security of tenure.

They cannot be removed from office except by an order of the President and that also only on the ground of proven misbehavior or incapacity, supported by a resolution adopted by most of the total membership of each House and by a majority of not less than 2/3 of the members of the House present and voting. Parliament may, however, regulate the procedure for the presentation of the address and investigation and proof of the misbehavior or inability of a Judge. But Parliament cannot misuse this power because the special procedure for their removal must be followed.

5.1.2- Salary of Judges fixed, not subject to vote of Legislature: -

The salaries and allowances of the Judges of the Supreme Court are fixed by the Constitution and charged to the Consolidated Fund of India. They are not subject to a vote of the Legislature. During the term of their office, their salaries and allowances cannot be altered to their disadvantage except in grave financial emergencies.

5.1.3- Parliament can extend, but cannot curtail the jurisdiction and power of the Supreme Court: -

In respect of its jurisdiction, Parliament may change the pecuniary limit for appeals to the Supreme Court in civil cases, enhance the appellate jurisdiction of the Supreme Court, confer supplementary power to enable it to work more effectively, confer power to issue directions, order or writs including all the prerogative writs for any purpose other than those mentioned in Article 32. The point to be noted in all these provisions is that the Parliament can extend but cannot curtail the jurisdiction and power of the Supreme Court [Art. 138].

5.1.4- No discussion in Legislature on the conduct of the Judges: -

Neither in Parliament nor in the State Legislature can a discussion take place concerning the conduct of a Judge of the Supreme Court in the discharge of his duties [Art. 121].

5.1.5- Power to punish for its Contempt: -

The Supreme Court and the High Court have the power to punish any person for their contempt [Arts. 129 and 215]. This power is essential for maintaining the impartiality and independence

of the Judiciary.

5.1.6- Separation of judiciary from executive: -

Art. 50 directs the State to take steps to separate the judiciary from the executive in the public services of the State. It emphasises the need to secure the judiciary from interference by the executive.

5.1.7- Judges of the Supreme Court are appointed by the Executive with the consultation of Legal Experts: -

The Constitution does not leave the appointment of the Judges of the Supreme Court to the unguided discretion of the Executive. The Executive is required to consult Judges of the Supreme Court and High Courts in the appointment of the Judges of the Supreme Court [Art. 124(2)]. The independence of the Judiciary is emphasised by Art. 229, which provides that the appointment of officers and servants shall be made by the Chief Justice or such other Judge or officer as he may appoint.

5.1.8- Prohibition on Practice after Retirement: -

Art. 124(7) prohibits a retired Judge of the Supreme Court from appearing and pleading in any court or before any authority within the territory of India.

Thus, the independence of the judiciary is adequately guaranteed. However, in Judges Transfer Case I¹, the Supreme Court held that the word "consultation" did not mean concurrence and the Executive was not bound by the advice given by the judges. Thus, the power of appointment of the Judges of the Supreme Court and the transfer of the High Court Judges was solely vested in the Executive, from whose dominance the Judiciary was expected to be free. Mr. Justice Bhagwati of the Supreme Court in *S.P. Gupta's case* had suggested the establishment of a Judicial Commission to recommend the names of people for the appointment of the Judges of the Supreme Court and High Courts. Secondly, the power of the President under Article 222 to transfer a Judge from one High Court to another may also be used to undermine the independence of the judiciary.

Fortunately, in Judges Transfer Case II, the Supreme Court by a 7: 2 majority overruled *S. P. Gupta's case* and held that the opinion of the Chief Justice of India must be given the greatest weight in the selection of the Judges of the Supreme Court and High Courts and the transfer of

the High Court Judges. The selection should be made through a participatory consultative process. The Chief Justice was required to consult two senior Judges of the Supreme Court before sending his recommendations to the Government. Thus, the executive element in the appointment process was reduced to a minimum, and any political influence was eliminated. The majority said that the initiation of the proposal for the appointment of the Judges must be started well in time, and the appointment should be duly announced soon. No appointment of any Judge to the Supreme Court or any High Court could be made unless it conformed to the opinion of the Chief Justice of India. The Judges made it clear that the opinion of the Chief Justice of India has not mere primacy but is determinative in the matter of transfer of High Court Judges and the Chief Justices.

The criterion for the appointment of the Chief Justice of India shall be seniority.

In *Transfer of Judges*, a nine-judge Bench of the Supreme Court has unanimously held that the recommendations made by the Chief Justice of India on the appointment of Judges to the Supreme Court without following the consultation process are not binding on the Government. Widening the scope of the Chief Justice of India's consultation process, the Court gave its opinion on the 9 questions in the Presidential Reference. The President had sought the Supreme Court's clarification under Art. 143, on the consultation process, as laid down in the Supreme Court Advocates on Record Association case in 1993. In that case, the Court gave primacy to the opinion of the CJI formed in consultation with two senior Judges of the Supreme Court regarding the appointment of Judges and their transfers. Thus, the main question on which the advisory opinion of the Court was sought was whether the government was bound by the recommendation of the CJI sent to it without consulting his two senior-most colleagues.

The Court held that the "consultation process to be adopted by the CJI" requires consultation of the plurality of Judges. "The expression consultation with the Chief Justice of India in Arts. 217(1) and 222(1) of the Constitution require a consultation with a plurality of Judges in the formation of the opinion of the CJI. The sole opinion of the CJI does not constitute a consultation process". The Court held that the recommendations made by the CJI without complying with the norms and guidelines regarding the consultation process are not binding on the government. The Court held that the Chief Justice of India must consult a collegium of four senior Judges of the Supreme Court and made it clear that "if two Judges give an adverse opinion, the CJI should not send the recommendation" to the President.

"The collegium should", the Court said, "make the decision in consensus and unless the opinion of the collegium is in conformity with that of the CJI, no recommendation is to be made".

Regarding the transfer of High Court Judges, the Court said, in addition to the collegium of four Judges, the CJI was obliged to consult the Chief Justices of the High Courts (one from which the Judge was being transferred and the other receiving him).

However, the Court said regarding the appointment of High Court Judges, the CJI is required to consult only two senior Judges of the Supreme Court.

The Court held that the CJI should make recommendations regarding the appointment and transfer by the guidelines laid down in the 1993 judgement, and as per the opinion given in the present Presidential Reference of 1999.²⁴

CHAPTER 7

SUGGESTIONS: -

The Indian constitution has made detailed provisions for the establishment of an independent, authoritative, and impartial judiciary. India has a single hierarchical judicial system for the whole of the country. The Executive and the legislature, the other two wings of the Government, have developed their attitudes, preferences, likings or dislikes of the system, which has ultimately led to the process of re-judicialization. All these facts point to the gravity of the situation. To repair this bad situation and to prevent the system from further erosion of its legitimacy, the following recommendations require serious consideration:²⁵

1. The Supreme Court and the High Courts are not ordinary institutions. The Constitution has accorded them with a specific duty. It becomes of paramount importance that only people of the greatest qualities of scholarship, training and character are selected for appointment to these courts. All efforts should, therefore, be made to find out the best judicial talent as judges of these courts.
2. There is no mechanism to examine the merit of candidates who qualify for nomination to the Supreme Court and High Courts. The Chief Justices of India, the Bar Council of India and the Chief Justice of different High Courts should collectively discuss this

²⁴ Dr. J.N. PANDEY, CONSTITUTION LAW OF INDIA, FIFTY NINTH EDITION, ISBN: 978-93-92140-15-0, published by: Central Law Agency

²⁵ Ayush Kothari, Critical Analysis of the Independence of the judiciary, International Journal of Research Publication and Reviews, ISSN 2582-7421, available at (<https://ijrpr.com/uploads/V5ISSUE3/IJRPR24320.pdf>) last visit on 10.26 pm (27/10/2024)

subject and request the Government to establish an independent constitutional machinery to review the merit of people who qualify for appointment to these courts.

3. We need judges who are trained for the job, whose conduct can be publicly questioned and is subject to inquiry by a judicial performance committee, judges who welcome rather than shun recognition for their work.
4. Measures must be established without damaging the general credibility of the judiciary as a body. An office dubbed “Office of Judicial Ombudsman” may be opened. The bearer of this Office would be the recipient of all complaints against the judges. The idea of the Judicial Ombudsman As a suggestion, it may be worked out to root out corruption amongst the judges.²⁶
5. Incompetence, corruption, arbitrariness and laziness are serious obstacles to the independence of the court. The judges at their regular conference or meetings should publicly and loudly exchange opinions as to how vices within the judiciary should be eliminated, and also advocate for their eradication.
6. There is a wide gap between the retirement age of judges of the Supreme Court, High Courts and the subordinate Courts. No compelling explanations are presented for it. Hence, this should be done away with. The retirement age of High Court Judges should be on par with the Supreme Court Judges.
7. Transparency in governance should be the most cherished goal in which all the organs, like the legislative, judiciary and executive, work interlinked with each other. Not only is transparency needed for the executive and legislature, but transparency is also essential for the judiciary also so that greater transparency will automatically strive to better accountability.²⁷
8. The nomination of outside judges as Chief Justices of High Courts has failed; hence, this practice must cease, since by following it, two infirmities spring up. One, that the new Chief Justices mostly hold office for a brief term in the new High Courts and are not able to make any impact on their colleagues or the functioning of the court or among the members of the Bar. This technique also leads to heartburn because some are appointed Chief Justices of the bigger state Courts and some are appointed as Chief Justice of the smaller State Courts on no explainable term, but as a rule of thumb, arbitrarily, hardly befitting judicial objectivity. Two, the policy of non-consensual transfer of judges from one High Court to another would damage the bastion of our

²⁶ Ibid.

²⁷ supra note 31

constitution, namely the independence of the judiciary; hence, if necessary, the transfer case should be selective rather than through a general policy.

The judicial system in India is a vital institution that plays a crucial role in addressing the nation's rapid social change caused by the scientific and technological revolution. The judiciary must adapt to these changes by addressing fundamental issues and ensuring its efficiency. Scholars, both legal and non-legal, are encouraged to conduct in-depth studies on these issues and devise ways to rectify the shortcomings of the judicial system, ensuring its continued relevance and effectiveness in the face of rapid social changes.²⁸

CONCLUSION: -

In the traditional concept of the judiciary, the judge is depicted as having hands holding the balance and their eyes covered with a dark cloth. This indicates that the judges are not allowed to have any personal ideas at all and are expected to have an extremely open mind on every matter. This also suggests that the judges would not permit themselves to be swayed by what was going on in the world. It has long been believed that judges ought to live in some form of seclusion to have an open mind that is impartial in all situations. Research indicates that the responsibility of any independent organization is crucial for the survival of a democracy. In a democracy, all organs of the State are accountable to the general population, and the judiciary is no exception. The High Courts and Supreme Court must set precedents and provide good examples to the public. Judges are human beings, and a ground-breaking legal executive without responsibility is not only harmful to the Constitution but also a threat to the vote-based system.

The issue of legal responsibility is essential for the functioning of a majority rule nation. Legal autonomy does not mean the absence of responsibility; responsibility guarantees transparency. Practical instruments for legal responsibility are essential for protecting legal freedom in India. The judiciary is responsible for the rights of the natives, shielding them from legislative or private infringement. Change in the judiciary to ensure straightforwardness must be a long-term process of progress in the administration of equity conveyance frameworks, the conduct of judges, and the relationship of the Judiciary with society.

²⁸ Supra note 32

The freedom of the judiciary is essential for the smooth functioning of the Constitution and an acknowledgement of a reputation-based society dependent on the principle of law. However, the First Judges' case gave primacy to the executive opinion, leading to the appointment of some Judges in contrast with the Chief Justice of India. The Second Judges' case was never intended by the framers of the Constitution, and the ratio decided in the Second Judges and Third Judges case is a significant step in this regard.

In countries like India, the judiciary plays a crucial role in addressing the challenges faced by the population. The importance of legal autonomy was recognised by the Constitution's creators and has been recognised by courts as an essential component. Legal freedom must be seen as adapting to the changing aspects of society, and it is essential to work together to achieve the true foundation of legal executives.

Judicial accountability is growing in popularity, with millions of people relying on the Supreme Court and High Courts to protect their basic rights. Legal independence and judicial accountability should work together to maintain the same attractive motion, ensuring that individuals feel secure and have access to justice.

The primary task of the judiciary is to administer justice quickly and aid the prosecutor, maintaining open trust. However, the legal executive has not fully fizzled, with Lok Adalat's and Nyaya Panchayats providing equal and reasonable equity to the general population. A judge can be considered responsible if they adhere to the societal and moral standards of their culture. The best legal change would be one where the judiciary functions according to the Constitution's reasoning. A well-structured general position and campaign are needed to achieve more prominent responsibility. The freedom of the legal executive should be considered in the context of a protected arrangement.²⁹

²⁹ Supra note 31