

IS THE INDEPENDENCE OF THE JUDICIARY AS A PILLAR OF DEMOCRACY UNDER THREAT

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Abstract

The area of this Research paper is to cover all the possible loopholes of the independence of judiciary and problem of its freedom and independence and also some points on the Unity of our judiciary. The first political philosopher, who propounded the idea of an independent judiciary, was Montesquieu, the famous French philosopher. He believed in the theory of separation of powers of the three branches of the Government- Legislature, Executive and Judiciary. This is the primary function of government. The strength of judiciary lies in the command that it has over the hearts and minds of men. If all the person have freedom to elect their representative then there should be equal right for the judiciary to help the person in trouble without the pressure of anybody. Judiciary has very important role to play in democracy. The judiciary must be free from encroachment from other organs in its sphere. In this respect, it is called separation of powers. Our Constitution makes the judiciary absolutely independent except in certain matters where the Executive heads are given some powers of remission. It means the freedom of the judgments are free from legislative interference. In this respect, our constitutional position is not very happy because the legislature can in some respects override the decisions of the judiciary by legislation. The Income-tax Amendment Ordinance of 1954 is an example of how the independence of judiciary in pillar of democracy is under threat. Judicial independence is a dual concept. It not only means freedom from extraneous influences but it also means and independent approach by the individual judge. A judge must be also able to think independently for himself. He should not be swayed by the argument of one side and just close his eyes to the argument of the other side .he must be independently capable of evaluating the argument of both side and come to a right conclusion. He should be self reliant and not submissive.

Introduction

The independence of the judiciary is an integral part of democracy intending to shield the judicial process from external influences and to provide full legal protection to all individuals going to court for whatever reason.

Courts are expected to act as protectors of the law who independently exercise their judicial power without any functional or individual interference. Such interference usually comes from executive and legislative officials, political parties, the military, paramilitary and intelligence forces, criminal groups and the judicial hierarchy itself .

In this introductory I want to bring some of the main ideas of the Independence of Judiciary I begin by describing the role of judiciary in every situation with a brief account of the primary subject of judiciary and the basic structure of the independence of judiciary. The paper wants to present main ideas of justice as fairness a judgement that carries a higher level of mark in our society. The main aim of the research paper is to tell the need of the “Independence of Judiciary” in a democratic state. This research paper aims to give an overview of the issues surrounding judicial independence and various norms of the judiciary.

Judiciary is a very important concept which is mentioned in the constitution. It is the part of the basic structure of the constitution which cannot be sacrificed in any circumstance as judiciary is the adjudicatory body of the union which acts as an umpire between the parties in the dispute. So for giving a sound, lucid and unbiased decision umpires should be free from any kind pressure from litigants, cabinet ministers, influential personalities, big corporations, rich businessmen and also criminal elements of the society.

Independence of judiciary essentially means that separating the judiciary from other organs of the government, that is, executive and the legislature. However, the major problem in understanding this independence is that, judiciary is independent from the legislature and the executive and not accountability. It also means independence of the judges that form the judiciary.

Now the question is why the Independence of judiciary is needed?

Judiciary is the watchdog of Indian Constitution and it checks the functioning of other organs of the government. The judiciary plays a vital role in interpreting the provisions of the constitution and it is important that such interpretation is unbiased and free from any sort of pressure from the executive or legislature. The judiciary is expected to deliver impartial justice. This is what makes it the most important organ of the government. It is important that the judgements are not influenced by any sort of political inclinations.

The Concept of independence of judiciary

The concept of independence of judiciary is of modern origin and accepted as a hall-mark of a liberal democratic state. But the term independence has neither been defined in the constitution of India nor in the General Clauses Act¹. Hence for a proper comprehension of the meaning of the term 'independence' it is necessary, first to examine its etymological and dictionary meaning and then its legal meaning. A dictionary meaning ascribes to it, 'the state of being not dependent on another persons or things for support or supplies.'² In a literal sense, independence means absence of external control or support. In other words, it signifies something that it is not dependent on or controlled by any other agency or authority. In legal parlance independence of judiciary mean the power of upholding without fear or favour, the rule of law, personal freedom and liberty, equality before law and impartial and effective judicial control over administrative and executive actions of the government.³ Hence the judicial organ of the state should not be in a position of subordination to another organ or branch. In this sense the independence of judiciary depends on the power of the courts and allows to be exercised without executive interference—that when a magistrate exercises judicial functions, he should be above any influence. The judiciary has to be free from the control and subordination of the executive as well as the legislature. In this way judges should be independent and free from any restrictions, inducement, influence, pressure, threats direct or indirect from executive and legislature. Independence does not mean that a judge should be isolated, unrelated or unconnected from the system. It implies an intrinsic quality of freedom and discipline to act in accordance with standards of moral, professional and institutional conduct. Because the independence of the judiciary is a part and parcel of the discipline of law and of the eco-system of a constitutional state.⁴ Hence the responsibility of a

¹<http://www.yourarticlelibrary.com/india-2/independence-of-judiciary-in-india/49299>

²See oxford advance learner dictionary of current English, Oxford university press Delhi page-432-33

³ See Dr.L.M.Singhvi Independence of justice Indian bar review Vol.14 1987 page 515-517

⁴Judicial independence and judicial accountability <<http://ijlsr.thelawbrigade.com/index.php/2017/04/21/the-debate-between-judicial-independence-and-judicial-accountability>>

judge to constitutional and legal norms forms the foundation and the real rationale for judicial independence.

After discussing the concept of independence of judiciary the next question which requires attention is that why we need independent judiciary.

This question highlights the importance of judiciary in constitutional setting and can be examined only by taking into consideration the scheme of Constitution in totality. The need of independent judiciary is deeply rooted in the conception of written constitution. Because the written constitution is considered basic law of the Land and requires some authority to interpret it. In absence of such authority the constitution would create disorder than order in the society. Hence, independent judiciary is not only necessary but indispensable. Further, the paramount need for independent judiciary arises from the fact that we have adopted a federal constitution.⁵ Where there is division of power between centre and state. Both are supreme in their own field. Sometimes consciously and unconsciously they encroach upon each other's territory. This may lead to conflict between the centre and state. In such situation an independent judicial authority is necessary to arbitrate or settle disputes that may arise between the centre and the units. There are also disputes between the states inter se. In such situation, the matter is referred to judiciary for adjudication. All these things are possible only, when we have independent judiciary which is not biased, prejudiced and partial. It can deliver justice with an even hand⁶. To repose people's faith and confidence in it, it needs to be independent from external as well as internal influences. The stability of the country is very essential for the progress, growth and prosperity of the nation. The stability is sometimes undermined and threatened by castes, classes and religious conflicts. The parochial forces are also raising their ugly heads in the society. These things endanger our peace and consequently cast their shadow in the way of unity and integrity of the nation. The communalism is a new threat for democracy. Our political parties and leaders are not playing their roles honestly. They are sacrificing every principles of democracy at the altar of hustings. At times, the political party in power even uses judicial process to persecute their political opponent in the garb of prosecution

⁵ See D.N Saraf Limits of judge domain: Journal of india law institute vol.30 1988 page-53-54

⁶ Law and justice By Soli J Sorabjee page 108-09

In modern period, the liberty, democracy and rule of law are three important components for the growth of society⁷. The Rule of law which is deeply rooted in the constitution draws strength and sustenance from liberty and democracy itself. Thus to uphold the rule of law, there is an urgent need to have an independent judiciary. The independence of judiciary is also required by the very concept of justice. The judiciary is obliged to administer justice with even hand without taking into consideration the position of the party whether the party is strong or weak. Hence the concept of justice is one more reason in favour of having independent judiciary

CASES

In *S.P. Gupta vs. Union of India*⁸ this Court has held that: “The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law thereby making the rule of law meaningful and effective.” It is well understood that if the judiciary by their performance and conduct does not meet the expectations for which such Constitutional protection has been provided, the judiciary will be reduced to any other organ of the State which we have come to distrust in recent times.

Some of the main provisions in our constitution to protect independence of judiciary are

- i) Article 50 says that Separation of judiciary from executive is one direct provision which ensures the independence and no interference from the executive.⁹
- ii) Article 211 and Article 121 say that No discussion on the conduct of any judge from the High Court/Supreme Court in the Parliament or the state legislature with respect to their discharge of the duties or their workings.¹⁰

(1) In *Indira Gandhi v. Raj Narain (Election Case)*, AIR 1975 SC 2299 In this case, though Smt. Indira Gandhi was a Prime Minister, she had to bow her head before judiciary.

⁷ See H.R Khanna, need to Preserve Image of Judiciary, Journal of bar Council of india Vol.9 1892 page 246

⁸ S.P Gupta v. Union of India A.I.R 1982 S.C 149 India

⁹ The constitution of India 1949

¹⁰ The constitution of India 1949

In this case S.C. struck down clause 4 of Article 329-A introduced by the constitution (Thirty ninth Amendment Act, 1975) and S.C. set aside the judgment of the Allahabad H.C. and stands for good example of independence of judiciary.

UNION of India vs Sankalchand Sheth AIR 1977 SC 2328¹¹

Justice Sheth was “requested to take charge of his duties in the Andhra Pradesh High Court within four weeks from the date of issue” of the notification. The notification was issued by the Government of India in its Ministry of Law, Justice and Company Affairs, Department of Justice. Mr. Sheth complied with the order of transfer and assumed charge of his office as a Judge of the Andhra Pradesh High Court but before doing so, he filed a Writ Petition Gujarat High Court challenging the constitutional validity of the notification on the grounds inter alia that the said order was passed without his consent must be necessarily implied in Art. 222(1) of the constitution and therefore the transfer of a Judge from one High Court to another High Court without his consent was unconstitutional.

CONCLUSION

I conclude my paper on saying that according to me independence of judiciary is important for the purpose of fair justice .there should no interference by the legislature or the executive, in the proceeding of the judiciary so that it may take a judgement 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. The Independence of the judiciary is clear from the above discussion hold a prominent position as far as the institution of judiciary is concerned. It is clear from the historical overview that judicial independence has faced many obstacles in the past especially in relation to the appointment and transfer of judges. Courts have always tried to uphold the independence of judiciary and have always said that the independence of the judiciary is a basic feature of the Constitution. Courts have said to so because the independence of judiciary is the pre-requisite for the smooth functioning of the Constitution and for a realization of a democratic society based on the rule of law. It must also mentioned that appointments by the executive before independence were reasonably fair and well received. If the constitutional authorities and the executives have the interest of the judiciary at heart, there can be no difficulty in ensuring that best possible persons are appointed to the high office of Supreme Court or High Courts. Therefore, the method of appointments to the

¹¹Union of India v. SankalchandHimatlalSheth, AIR 1977 SC 2328

Supreme Court and High Courts is likely to continue as per the two decisions referred to earlier. The comparative study of the constitutional provisions reveals that the judiciary is no less important than the other organ of the State. It keeps every organ of the State or other constitutional and non-constitutional bodies within their limits assigned to them and prevent encroachment on the sphere of each other. Thus, it prevents chaos and works for peace prosperity communal harmony and amity. The study in hand also reveals that our Constitution contains certain provisions which protect the independence of the judiciary.

