INDEPENDENCE OF JUDICIARY IN INDIA UNDER ARTICLE 124 OF CONSTITUTION: STUDY OF SOME IMPORTANT CASES

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Abstract: 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 form 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. The paper will study some important cases and will throw light on the independence of judiciary.

Keywords: constitution, judiciary, independence, legislation

Introduction

India has adopted a federal constitution with distribution of powers between center and the states. An independent judiciary is the essence of the federal character of the constitution. It is imperative that the judiciary be impartial and independent of the legislative and executive branches of the country to ensure the functioning of the government in accordance with the constitution. The Supreme Court, being the guardian of the constitution, ensures that the fundamental rights of the citizens are not violated.

At the time when Indian constitution was getting framed, the framers of the Indian constitution were concerned about the kind of judiciary our country should have. Dr. B.R. Ambedkar responded the concern of the framers in the following words:

“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”

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The question comes in the mind that what were the reasons that made the framers of our constitution to get so much concerned to make the judiciary as a separate entity and making itself competent.

The answer to this question is this that to secure the stability and prosperity the framers understood that to achieve this there must be fundamental rights and that too must be secured when independence of judiciary is there. Also independence of judiciary is of utmost importance in upholding the pillars of democratic countries such as India and hence ensuring a free society.

**Meaning:**
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 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.

**Article 124 Of the Indian Constitution:**

**Establishment and constitution of Supreme Court:**
(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in article 124A and shall hold office until he attains the age of sixty-five years:

Provided that—
(a) A Judge may, by writing under his hand addressed to the President, resign his office;
(b) A Judge may be removed from his office in the manner provided in clause (4).

(2A) the age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—

(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
(c) is, in the opinion of the President, a distinguished jurist.

Explanation I.—In this clause “High Court” means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.
Explanation II.—In computing for the purpose of this clause the period during which a person has been an
advocate, any period during which a person has held judicial office not inferior to that of a district judge
after he became an advocate shall be included.

(4) 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.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the
investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office,
make and subscribe before the President, or some person appointed in that behalf by him, an oath or
affirmation according to the form set out for the purpose in the Third Schedule.

(7) 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.

Some Important Cases

The independence and impartiality of Judiciary is one of the hall-marks of the democratic set-up of the
government. To give the judiciary an unfettered discretion to decide the philosophy of judges is to make
the Judiciary subservient to the Executive. It is therefore essential to establish a healthy convention so as
to exclude the arbitrary interference of Executive in the matter of appointment of Chief Justice of India

1. S. P. GUPTA v. UNION OF INDIA AIR 1982 SC 149

This case is popularly known as the Judges Transfer Case it has been held that the ultimate power to
appoint judges is vested in the Executive from whose dominance and subordination it was sought to be
protected. It has been observed that the Executive should have primacy since it is accountable to the
people while the Judiciary has no such accountability. The Supreme Court had merely a consultative role
and the power of appointment of Judges is solely and exclusively vested in the Central Government.

Supreme Court unanimously agreed with the meaning of the word 'consultation' as determined in the
Sankalchand's case. It further held that the only ground on which the decision of the government can be
challenged is that it is based on mala fide and irrelevant consideration. In doing so, it substantially
reduced its own power in appointing the judges and gave control to the executive.

The Supreme Court held that the meaning of the word ‘consultation’ in Article 124(2) is same as the
meaning of the word ‘consultation’ in Article 217 and Article 222 of the Constitution.

This meant that the executive ultimately had the power to appoint the judges. This created an adverse
effect on the independence and impartiality of judiciary. Therefore Bhagwati, J., said “it is unwise to
entrust power in any significant or sensitive area to a single individual however high or important may be
the office, which he is occupying”.

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The majority of the Court held that while judicial independence did not require the view of the Chief Justice of India in the matter of appointments and transfers to be determinative, nonetheless consultation with him would have to be full and effective and his opinion should not ordinarily be departed from. The power of the executive in appointing judges was accordingly circumscribed although it continued to have the last word on who would be appointed.

This decision, which adhered to a literal interpretation of the constitutional provisions for appointment and transfer of judges, was widely perceived as failing to sufficiently secure judicial independence. Academics, lawyers and political commentators all felt that it gave primacy to the executive in the process of appointment of judges and failed to institute adequate safeguards.

The controversies regarding the procedure of appointment of judges came for determination before the Apex Court in the First Judges Case. 21 Different judges, in the decision expressed their views on various issues, which also included transfer and appointment of judges.

On the issue of appointment of judges, the Court gave primacy to the executive actions. The Court held with regards to appointment of High Court Judges, that there must be “full and effective consultation” between each of the constitutional functionaries viz., the Chief Justice of the High Court concerned, the governor of the State, the Chief Justice of India and the President. However, in such consultation, in case of any difference of opinion amongst these authorities, the opinion of the President will have an overriding effect and will thus, prevail over other opinions. Further, the majority held that the decision of the President cannot be challenged in the Court either on the mala fide intentions or on the ground that it was based on irrelevant considerations. The Judges case, therefore, virtually gave the President the power of veto over the appointment.

In 1991, in the case of Subhash Sharma v. Union of India, a three-judge Bench expressed the view with regards the word 'consultation' in Article 124(2) that "The Constitutional phraseology would require to be read and expounded in the context of constitutional philosophy of separation of powers to the extent recognized and adumbrated and the cherished values of judicial independence". The Bench suggested that this question be considered by a larger Bench.

2. SUPREME COURT ADVOCATE –on- RECORD ASSOCIATION v. UNION OF INDIA

In the Second Judges Case substantially overruled The First Judges’ Case and fundamentally altered the nature of the appointments process. It established a judicial collegiums consisting of the Chief Justice of India accompanied by the senior most judges of the Supreme Court as the focal body for appointment after tracing the need for vesting the Chief Justice of India, acting as the paterfamilias of the judiciary, with primacy in the appointments process. In doing so, it expounded its conception of judicial independence, echoing a view expressed by the Law.

The case arose out of a public interest writ petition filed in the Supreme Court by the Lawyers Association questioning several critical issues concerning the judges of the Supreme Court and the High Courts. The majority opinion was given by J.S.Verma J., and four other judges.

The Court, referring to the 'consultative' process envisaged in Art 124(2) emphasized that the executive does not enjoy 'primacy' or 'absolute discretion' in the matter of appointment of Supreme Court judges.
The Court also indicated that it was not considered desirable to vest absolute discretion on the Chief Justice on the matter of appointments, and the executive should act as a check, whenever necessary.

Further clarifying "the primacy of the opinion of the Chief Justice of India", the Court said that it is not merely his individual opinion but "the collective opinion formed after taking into account the views of some other judges who are traditionally associated with this function.

Thus, the judgment laid down by the nine-judge bench can be summarized into following points:-
1. The proposal for appointment of a Supreme Court judge should be initiated by the Chief Justice of India.
2. All the appointments of the judges of the Supreme Court should be in conformity of the Chief Justice of India and the consulted judges.
3. The appointment recommended by the Chief Justice may not be made only in exceptional cases, and for stated and cogent reasons. However, if these reasons are not accepted by the Chief Justice and other consulted judges, the appointment should be made as a healthy convention.
4. Everyone involved in the consultative process, including the consulted judges should give their opinion in writing as it acts as an inbuilt check on the exercise of power.
5. The senior-most judge fit to hold the office should be appointed as the Chief Justice of India. In case there are any doubts regarding his fitness to hold the office, it should be clearly stated, which alone may permit a departure from the long standing convention.
6. Unless there is a strong cogent reason to justify departure, seniority should be the basis for making appointment from amongst the High Court judges to the Supreme Court.

The Court, by the way of this judgment minimized political influence on the part of the executive and individual discretion on the part of all the constitutional functionaries involved in the process of appointment of Supreme Court judges.

A nine judge bench of the Supreme Court by a 7-2 majority overruled its earlier judgment in the Judges Transfer case and it was held by the court that the Chief Justice of India should have primacy in the case of the appointment of the judges. The appointment of Chief Justice of India shall be on the basis of the seniority.

The view of the Chief Justice of India will be formed after taking into account the views of two senior most judges of the Supreme Court. It has reduced to the minimum individual discretion conferred upon the President and the Chief Justice of India so that there would not be any sort of partiality in the appointment of the judges.

In this case, the Supreme Court overruled the decision of the S P Gupta case and held that in the matter of appointment of judges of high courts and Supreme Court, the Chief Justice should have the primacy and the appointment of the Chief Justice should be based on seniority. It further held that the CJ must consult his two senior most judges and the recommendation must be made only if there is a consensus among them.

A public interest writ petition was filed in the Supreme Court by the Lawyers Association raising several crucial issues concerning the judges of the Supreme Court and the High Court. The petition was considered by a bench of nine judges.
The court considered the question of the primacy of the opinion of the Chief Justice of India in regard to the appointment of the Supreme Court. The court emphasized that the question has to be considered in the context of achieving “the constitutional purpose of selecting the best suitable for composition of the Supreme Court so essential to ensure the independence of the judiciary and thereby to preserve democracy.”

Referring to the consultative process for appointment of Supreme Court Judges, the Court emphasized that this procedure indicates that the Government does not enjoy primacy or absolute discretion in the matter of appointment of the Supreme Court Judges.

So it was held that the opinion of Chief Justice of India which has primacy in the matter of recommendation for appointment to the Supreme Court has to be formed in consultation with a collegium consisting of two senior-most Judges of the Supreme Court who give their opinion in writing. Constitutional functionaries must act collectively in judicial appointments. No can be appointed by the Union Government without consulting the Chief Justice of India. The Chief Justice is appointed by seniority.

3. **Re PRESIDENTIAL REFERENCE AIR 1999 SC 1**

A controversy arose again when the CJ recommended the names for appointment without consulting with other judges in 1999. The president sought advice from the SC (re Presidential Reference 1999) and a 9 member bench held that an advice given by the CJ without proper consultation with other judges is not binding on the govt.

A nine Judge Bench of the Supreme Court gave its opinion on the nine questions raised by the President in his reference to the Supreme Court.

A nine judge bench of the Supreme Court has held that the recommendation made by the Chief Justice of India without following the consultation process on the appointment of the judges of the Supreme Court and the High Court are not binding on the government. The consultation process which is adopted by the Chief Justice of India requires the consultation of the ‘Plurality of Judges’.

A nine-judge Bench unanimously held with regards to appointment of judges that the Chief Justice of India shall consult "a collegium of four senior-most judges of the Supreme Court" thereby widening the scope of consultation process. Before this opinion was delivered, this collegium consisted of the Chief Justice of India and two senior-most judges of the Supreme Court. The Court specifically stated that an opinion formed by the Chief Justice of India in any other manner has no primacy in the appointments to the Supreme Court and the Government in not obliged to act thereon

Further, the Court said that if majority of the collegium is against the appointment of a particular person, that person shall not be appointed. The Court even went to say that if two of the judges forming the collegium express strong views for good reasons, that are adverse to the appointment of a particular person, the Chief Justice shall not press such appointment.
The process of appointment of the judges of the High Courts should be initiated by the Chief Justice of the High Court concerned, who must for his opinion after ascertaining the views of at least two senior-most judges of the High Court. Before making its opinion, the collegiums of the Supreme Court judges shall consider the recommendations of the Chief Justice of the High Court and consult other High Court judges and judges from the Supreme Court who may be conversant with that High Court. In case of disagreement between the President of India and the Chief Justice, the opinion of the latter will prevail. The only opinion of the Chief Justice of India does not constitute ‘consultation’ within the meaning of the said articles. Under Article 124(2) the Chief Justice of India should consult “collegiums and if the two judges of that collegiums give the adverse opinion the Chief Justice of India should not send the recommendation to the government of India. Also the opinion must be in writing and Chief Justice of India should send the recommendation along with his opinion to the President. This decision of the Supreme Court has made the consultation process more democratic and transparent. In this case a reference made to the Supreme Court by the President, the following guidelines were laid down:

- The recommendation made by the Chief Justice of India without complying with the “norms and requirement of the consultation process” was not binding on the Central government.
- As to appointment of the Supreme Court Judges the Chief Justice of India should consult collegiums of four senior most judges of the apex court. Even if two judges give an adverse opinion, the CJI should not send the recommendation to the government.
- Regarding to the transfer of High Court judges, in addition to the collegiums of four senior most Judges, the CJI was obliged to consult the Chief Justice of the Two High Courts, i.e. one from which the Judges was transferred and other receiving him.
- In regard to appointment of High court Judges, the CLI was required to consult only two senior most judges of the apex court.
- The consultation process requires “consultation of plurality of judges.” The sole opinion of the CJI does not constitute other consultation” process.

4. Supreme Court Advocates-On-Record Association and ANR. Vs. Union of India

The Supreme Court rejected the National Judicial Appointments Commission (NJAC) Act and the 99th Constitutional Amendment which sought to give politicians and civil society a final say in the appointment of judges to the highest courts.

NJAC

The National Judicial Appointments Commission (NJAC) is a constitutional body proposed to replace the present Collegium system of appointing judges. The NJAC was established by amending the Constitution [Constitution (Ninety-Ninth Amendment) Act, 2014] passed by the Lok Sabha on August 13, 2014 and by the Rajya Sabha on August 14 2014. Alongside, the Parliament also passed the National Judicial Appointments Commission Act, 2014, to regulate the NJAC’s functions. Both Bills were ratified.
by 16 of the State legislatures and the President gave his assent on December 31, 2014. The NJAC Act and the Constitutional Amendment Act came into force from April 13, 2015.

It will consist of six people — the Chief Justice of India, the two most senior judges of the Supreme Court, the Law Minister, and two ‘eminent persons’. These eminent persons are to be nominated for a three-year term by a committee consisting of the Chief Justice, the Prime Minister, and the Leader of the Opposition in the Lok Sabha, and are not eligible for re-nomination.

The Supreme Court declared unconstitutional an amendment to validate the National Judicial Appointments Commission (NJAC) Act, which had contemplated a significant role for the executive in appointing judges in the higher judiciary.

Effectively sealing the fate of the proposed system, which was unanimously passed by both Houses of parliament, a five-judge Constitution Bench ruled with a 4:1 majority that judges’ appointments shall continue to be made by the Collegiums system in which the Chief Justice of India will have “the last word”.

The Collegiums system is one where the Chief Justice of India and a forum of four senior-most judges of the Supreme Court recommend appointments and transfers of judges. However, it has no place in the Indian Constitution. The system was evolved through Supreme Court judgments in the Three Judges Cases (October 28, 1998)

**ORDER OF THE COURT**

1. The prayer for reference to a larger Bench, and for reconsideration of the Second and Third Judges cases (1993) 4 SCC 441, and (1998) 7 SCC 739, respectively, was rejected.


4. The system of appointment of Judges to the Supreme Court, and Chief Justices and Judges to the High Court’s; and transfer of Chief Justices and Judges of High Courts from one High Court, to another, as existing prior to the Constitution (Ninety-ninth Amendment) Act, 2014 (called the "collegiums system"), is declared to be operative.

**Conclusion**

It can be concluded that 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.

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 no where 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 99th Constitutional Amendment Act unconstitutional.

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