

An Overview of the Various Facets of Independence of Higher Judiciary in India

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It is well-said that Judicial Independence and accountability are inseparable. The Judges (Inquiry) Bill, 2005 and the Law Commission of India 195th report thereon; The Judges (Inquiry) Bill, 2006 and the Department related Parliamentary Standing Committee on Personnel, Public Grievances, Law and order 21st report thereon; the Judges (inquiry) Bill, 2008; 214th Report of the 18th Law Commission of India (2008) on “Proposal for Reconsideration of Judges cases I, II and III - S. P. Gupta Vs UOI reported in AIR 1982 SC 149, Supreme Court Advocates-on-Record Association Vs UOI reported in 1993 (4) SCC 441 and Special Reference 1 of 1998 reported in 1998 (7) SCC 739”, 230th Report of the 18th Law Commission of India (2009) inter alias on selection and appointment of the judges in the higher judiciary; Vision Statement, 2009; National Mission for Delivery of Justice and Legal Reform 2009-2012 envisioned by the Ministry of Law and Justice; The Judicial Standards and Accountability Bill, 2010 and other miscellaneous views and proposal from different sections of the civil society regarding the prevalent state of affairs of the higher judiciary in the Country have triggered off a hot debate on the important aspects of judicial independence, transparency and accountability. The recent spate of demands for making Judges of the Supreme Court and High Courts, including the Chief Justice of India answerable to queries under Right to Information Act, has also given an impetus to the existing debates and controversies. The unrest arising from various quarters regarding the present mode of appointments in higher judiciary through a system of collegium is also bringing to the fore the important issue of independence of higher judiciary. The much-awaited Judgment of the Supreme Court in the case of Supreme Court Advocates-on-Record - Association v. Union of India (Writ Petition (Civil) No. 13 of 2015) on October 16, 2015 held that the Constitution (Ninety-ninth Amendment) Act, 2014, and the National Judicial Appointments Commission Act, 2014, are unconstitutional and void and the consequence is that the collegium system existing prior to the Constitution (Ninety-ninth Amendment) Act, 2014, were declared to be operative.

The present write-up is an earnest endeavor to enlist the various facets of Independence of Higher Judiciary in India.

(1) Arrangements for Institutional and Individual Independence of Judiciary:-

(a) Structure, Organization, Jurisdiction, Power and Procedure of the Courts

At the apex of the entire judicial system, exists the Supreme Court of India below which are the High Courts in each State or group of States. Below the High Court's lies a hierarchy of Subordinate Courts. Panchayat Courts also function in some States under various names like Nyaya Panchayat, Panchayat Adalat, Gram Kachheri, etc. to decide civil and criminal disputes of petty and local nature. Different State laws provide for different kinds of jurisdiction of courts. Each State is divided into judicial districts presided over by a District and Sessions Judge, which is the principal civil court of original jurisdiction and can try all offences including those punishable with death. The Sessions Judge is the highest judicial authority in a district. Below him, there are Courts of civil jurisdiction, known in different States as Munsifs, Sub-Judges, Civil Judges and the like. Similarly, the criminal judiciary comprises the Chief Judicial Magistrates and Judicial Magistrates of First and Second Class.¹ The Articles 323-A and 323-B of the Constitution enables the Legislature to constitute administrative tribunals for dealing with the Specified matters. While administrative tribunals falling within the scope of Article 323-A can be established by the Parliament only, tribunals under Articles 323-B may be established both by the Parliament and State Legislatures with respect to matters falling within their legislative competence.

There are various tribunals that have been set up in India that look into various matters of grave concern.

(b) Judicial Selection, Appointment and Transfer procedure in Higher Judiciary:-

(i) Appointment of Judges in Supreme Court of India

Article 124 of the Indian Constitution, inter alias, deals with the matters of appointment, qualifications etc. of a Judge in the Supreme Court of India. The Article reads as hereunder:

124. Establishment and Constitution of Supreme Court- (1) There shall be a Supreme Court of India and, until Parliament by Law prescribes a larger number, of not more than seven² other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the State as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted :

(ii) Appointments of Judges in High Courts in India

The Article 217 of the Constitution inter alias, deals with the mode of appointment of Judges of High Courts. The said Article reads as hereunder:

217. Appointment and conditions of the office of a Judge of a High Court- (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the

1 . See "Law, Courts and the Constitution" at [http:// www. Supremecourtsofindia.nic.in/news/constitution.htm](http://www.Supremecourtsofindia.nic.in/news/constitution.htm)

2 . Now "Twenty-five", vide Act 22 of 1986.

Chief Justice of the High Court, and ³[shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of ⁴[sixty-two years]] :

(iii) Transfer of Judges of High Courts in India

The Article 222 deals with the matter of Transfer of a Judge from one High Court to another. The Article 222 reads as here under:

222. Transfer of a Judge from one High Court to another- (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court ⁵[***]. The consultation with the Chief Justice of India as envisaged by Article 222(1) should be “full and effective” and not merely a formality.

(c) Tenure and Removal of Judges of Higher Judiciary

The Independence of Judiciary depends to a great extent on the security of tenure of the Judges. If the Judge’s tenure is uncertain or precarious, it will be difficult for him to perform the duties of his office without fear or favour.⁶

(i) Tenure and removal of Judges of Supreme Court of India

A Judge of the Supreme Court may be removed from his office in the manner provided in clause (4) of Article 124 of the Constitution which reads as follows:

“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-third 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 misbehaviour or incapacity”.

Clause (5) of the Article 124 empowers Parliament to regulate by law 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). In pursuance of power conferred under clause (5) of Article 124, the Parliament has enacted the Judges (Inquiry) Act, 1958 and framed Judges (Inquiry) Rules, 1959 there under.

(ii) Tenure and removal of Judges of High Courts in India

(a₁) With respect to Permanent Judges of the High Court

According to clause (1) of Article 217 of the Constitution a Permanent (Regular) Judge of a High Court shall hold office until he attains the age of 62 years. However, a Judge of the High Court may be removed from

3 . Subs. by the Constitution (Seventh Amendment) Act, 1956, S. 12, for “shall hold office until he attains the age of sixty years”.

4 . Subs. by the Constitution (Fifteenth Amendment) Act, 1963, S. 4, for “sixty years”.

5 . The words “with in the territory of India” omitted by the Constitution (Seventh Amendment) Act, 1956, Sec. 14.

6 . Per Justice A.C. Gupta in S.P. Gupta and others v. President of India and others, AIR 1982 SC 149 at 284

his office by the President in the same manner and on the same grounds as a Judge of the Supreme Court under Article 124(4) of the Constitution.⁷

(d) The Judges of Higher Judiciary has no employer

It has now been judicially well-settled that the Judges of the Supreme Court and the High Courts are not government servant in the ordinary sense of the term.

In *Union of India v. Shankalchand Himatlal Seth*,⁸ the Supreme Court has loftily intoned about the position of the Judges of High Court as follows:

“..... Judges of the High Court owe their appointment to the Constitution and hold a position of privilege under it... They, the Judges of the High Court, are not government servant in the ordinary signification of the expression... In fact a High Court Judge has no employer, he occupies a high constitutional office which is coordinate with the executive and the legislature. The independence of the judiciary is a fighting faith of our Constitution.

(e) Restriction on discussion in Legislature on the conduct of the Judges of Higher Judiciary

Article 121 of the Constitution mandates that “no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided”. Similarly, Article 211 of the Constitution reiterates that “no discussion shall take place in the Legislature of the State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties”.

(f) Prohibition on Practice after Retirement

The Constitution debar the Judges of the Supreme Court to plead or act in any Court or before any authority within the territory of India after demitting his office.⁹ Similarly, Article 220 of the Constitution declares that “no person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any Court or before any authority in India except the Supreme Court and the other High Court.

(g) Power to Punish for Contempt

The Supreme Court and the High Courts are vested with power to punish any person for their contempt. This power is very essential for maintaining the impartiality and independence of judiciary.¹⁰

(h) Separation of Judiciary in the Constitution

7. Article 217(1)(b)

8. AIR 1977 SC 2279

9. Article 124 (7)

¹⁰. See Articles 129 and 215

Realizing the significance of the independence of judiciary and in order to give a full life to that concept, felt the need of separation of the judiciary from the executive and designedly inserted Art. 50 in the Constitution after a heated debate; because judiciary under our constitutional scheme has to take up a positive and creative function in securing socio-economic justice to the people.¹¹ In the Indian Constitution, Article 50 appears in para IV dealing with “Directive Principles of State Policy” under the heading ‘Separation of Judiciary from Executive’ and it reads as follows:

“Article 50- The State shall take steps to separate the judiciary from the executive in the public services of the State.”

(i) Protection and Immunity conferred on Judges under various Laws

- (a) The protection under The Judicial Officers Protection Act, 1850.
- (b) Protection under [The] Judges (Protection) Act, 1985
- (c) Protection under Indian Penal Code, 1860
- (d) The Indian Penal Code, 1860 also provides for protection and immunity to the Judges. The relevant provisions are incorporated under Sections 76-78.

(2) Arrangements for Financial and Administrative Independence of Judiciary

(i) Salary and Allowances of Judges

(a₁) Salary and Allowances of Judges of the Supreme Court of India

The Articles 125, 112 (3) (d) (i) and 113 (1) of Indian Constitution governs the matters of salary, privileges and allowance of the Judges of the Supreme Court of India.

b₁) Salary and Allowances of Judges of the High Courts in India

The Articles 221, 202 (3) (d) and 203 of Indian Constitution governs the matters of salary, privileges and allowance of the Judges of the High Courts in India.

(ii) Expenditure of Courts

(a₁) Expenses of the Supreme Court of India

Article 146 (2) & (3) incorporates provisions regarding expenses of the Supreme Court of India.

(b₁) Expenses of the High Courts in India

Article 229 of the Constitution deals with the matters of expenses of the High Courts in India.

(iii) Appointment of Staff

(a₁) The Appointment of staff in the Supreme Court of India

Article 146 (1) of the Constitution provides for the appointment of officers and servants of the Supreme Court.

(b₁) Appointment of staff in the High Courts

Article 229 (1) of the Constitution provides for the appointment of officers and servants of a High Court.

(3) Judicial Independence: Ancillary Aspects

¹¹ . Ibid.

(a) Prosecution of Judges of Higher Judiciary and Independence of Higher Judiciary

In the case of *K. Veeraswami v. Union of India*¹², inter alia, a central question came for decision in an appeal before the Supreme Court was Whether the Judges of Higher Judiciary could be prosecuted for offence under the Prevention of Corruption Act, 1947 (Here-in-after cited as ‘The Act’).¹³ Hence it is necessary that the Chief Justice of India is not kept out of the picture of any criminal case contemplated against the Judge. He would be in a better position to give his opinion in the case and consultation with the Chief Justice of India would be of immense assistance to the government in coming to the right conclusion. We therefore, direct that no criminal case shall be registered under Section 154, CrPC against a Judge of the High Court, Chief Justice of High Court or Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter. Due regard must be given by the government to the opinion expressed by the Chief Justice. If the Chief Justice is of opinion that it is not a fit case for proceeding under the Act, the case shall not be registered. If the Chief Justice of India himself is the person against whom the allegations of criminal misconduct are received the government shall consult any other Judge or Judges of the Supreme Court. There shall be similar consultation at the stage of examining the question of granting sanction for prosecution and it shall be necessary and appropriate that the question of sanction be guided by and in accordance with the advice of the Chief Justice of India.

(b) Impact of Recurring Confrontation between Judiciary and Executive, or/and Legislature on the Independence of Higher Judiciary

As is well known, the doctrine of separation of powers is an inseparable part of the evolution of democracy itself. No democracy contemplates conferment of absolute power in any one authority. Separation of powers with the system of check and balance is one of the most characteristic features of our constitutional scheme. Our Institutions of governance have been intentionally founded on the principle of separation of powers as a bulwark against tyranny of any one or more organs of the State and the Constitution does not give any unfettered power to any organ and all the principal organ are expected to work in harmony.¹⁴

(c) Right to Information and Independence of Higher Judiciary

According to our Country’s constitutional scheme, the executive, legislature and judiciary are the three arms of our constitution. The Executive is accountable to the Legislature, which in turn is democratically accountable to the people. Of the three pillars of democracy, Judiciary is the most powerful, primarily because it has the power of judicial review over every action of the executive and the legislature. While all other institutions of the state are accountable to the system of checks and balances, no one has been able to keep a tab on the Indian Judiciary. The question that arises at this critical juncture is, as to whom is the judiciary accountable to? The

12 . (1991) 3 SCC 655

13 . As of now, the, relevant Act is ‘The Prevention of Corruption Act, 1988’. The section 30 (1) repealed ‘The Prevention of Corruption Act, 1947’.

14 . Somnath Chatterjee, “No single authority is supreme”, The Tribune, April 28, 2007, p. 11. This article is based on excerpts from the Dr. K.N.

Katju Memorial Lecture on “Separation of Powers and Judicial Activism in India”, delivered in New Delhi on April 26, 2007.

judges further accentuate the problem of lack of accountability by calling an inquiry about their conduct or into allegations against them as an encroachment into “Independence of judiciary”. While acting on the premise of independence of judiciary, the judges expediently exclude themselves from disclosure of any kind of information to public as that might be a compromise with such independence. Our constitution has given independence to judges, to freely make their own inference, interpretation of law, so as to be impartial and just in their judgment. This responsibility was bestowed upon the judges considering them wise enough to perform within the realm of established jurisprudence & logical reasoning. The law says that the public doesn't have a right to question the action or jurisprudence of a judge with respect to any judgment, one of the only available alternatives to the people is appeal. This independence of decision making coupled with legal immunity given to the judges is being misused by some corrupt judges by giving out biased judicial orders without the backing of any logical reasoning or established jurisprudence.¹⁵

(d) Retirement Age of Judges of Supreme Court and High Courts and Independence of Higher Judiciary

A Judge of the Supreme Court holds office until he attains the age of 65 years¹⁶ and a Judge of a High Court holds office until he attains the age of 62 years.¹⁷ The Raising of retirement age of Judges of Higher Judiciary preferably to the age of seventy years will go a long way in preserving the independence of Higher Judiciary.

(e) Post- Retirement Employment / Engagement and Chamber Practice of/by the Judges of Higher Judiciary and Independence of Higher Judiciary

Judges of Higher Judiciary are expected to conform to the highest standards of rectitude and despite occasional aberrations, our constitutional courts command great respect both with in the country and abroad which is quite vital to maintain the independence of higher judiciary.

There is however a danger of the judicial independence being imperiled by the prevailing practice of the post-retirement employment/engagement and indulging in chamber practices of/by the Judges of Higher Judiciary.

(f) Appointment of a sitting Judge of a High Court as Chairman, President, Members of any Commission or Tribunal and Independence of Higher Judiciary

Holding that independence of judiciary is a part of the basic structure of the Constitution to secure the rule of law essential for the preservation of the democratic system, the Hon'ble Supreme Court in T. Fenu Walter v.

15 . Ibid

16 . Article 124(2).

17 . Article 217.

Union of India¹⁸, opined that the appointment of a sitting Judge of a High Court as Chairman, President or members of any Commission or Tribunal, should be made only on rare occasion.



18 . AIR 2002 SC 2679.