

INDEPENDENCE OF JUDICIARY VIS JUDICIAL GOVERNANCE

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Abstract

“The Independence that is most difficult for a judge to achieve is independence from those influences which unconsciously affect our attitude to particular classes of people”

The independence of Judiciary is one of the most integral parts of democracy, intending to shield and protect the judicial process from external influences and to provide full legal protection to all the individuals going to courts for whatever reason. Court is always expected to act as protectors of the law, who independently exercise their judicial power without any functional or individual interference. Such interferences usually come from legislative and executive officials, political parties, paramilitary and intelligent forces, criminal group and judicial hierarchy itself. The United Nations also has endorsed the essential importance of an independent judiciary by its adoption of the *Basic Principles on the Independence of the Judiciary* at its Seventh Congress in 1985.¹ in simple words the term “Independence of the judiciary” means that the judiciary as an organ of the government should be free from influence and control of the other two organs i.e. the executive and the legislature, of the government. Freedom from the influence and control of the executive is of crucial importance. Every democratic country adopts various means to ensure freedom of the judiciary and thereby to ensure individual freedom. The Constitution of India has provided for an independent and impartial judiciary in India as it can only protect the rights of the individual and provide equal justice to all without fear or favour.

¹ General Assembly resolution 40/146, 1985

Introduction

*“At the heart of any system based on the rule of law, there is a strong judicial system, independent and equipped with powers, financial resources, material and skills that are necessary to protect human rights within the framework of administering justice”.*²

An independent judiciary is an essential element for a free society and a constitutional democracy. Independent of judiciary means adjudication of a dispute with the assessment of the facts and application of law to the understanding of law without any improper inducement, pressure or any other guiding factor. Judiciary has a fiduciary relation with every single individual of any Society irrespective of its class or caste. Whether judiciary without being independent will be able to secure the concept of justice-Social, economic and political? The answer would always be no because a judiciary without being independent is like human body who is closed in that room where there is no oxygen. As we cannot live without oxygen similar a judiciary which is not independent cannot sustain and provide justice to masses. As rightly said by Martin Luther King-*“Law and Order exist for the purpose of establishing justice and when they fail in this purpose they become dangerously structured dam that block the flow of social progress”*³, a judiciary without being independent become a dam that block the flow of social progress. Independence of judiciary ensures the rule of law and realization of human rights and also the prosperity and stability of a society.⁴ The impartial application of the rule of law demands independence of the judicial branch of government from the political branches of government.⁵ Though unarticulated but “rule of law” of is the aspiration of every single individual residing in society whether civilized or uncivilised.

An Independent Judiciary is the *sine qua non* to protect Rule of Law in any civilized society.⁶ The central theme of independence of judiciary is apparently based upon the concept of separation of powers. The doctrine of separation of power ensures the liberty by preventing the concentration of power in the hand of single person and thereby puts a restrain on the executive and legislative and ensures the exercise of judicial power that is unhindered by the other two organs i.e. legislature and executive. The underlying principle behind the independence of judiciary is to make the judiciary independent from the executive and legislature. The

² Report of the General Secretary on the Rule of Law and transitional justice for societies that are prone or emerging from conflict (s/2004/616), paragraph. 35)

³ Letter From Birmingham Jail [Martin Luther King]

⁴ Philip S. Anderson, *Foreword to Symposium, Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 1, 2 (Summer 1998);

⁵ http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_ajc.htm

⁶ S S NAGANAND, independence of judiciary, Sri PGC Chengappa Memorial lecture, 30/11/2012

independent judiciary in real sense means a judiciary independent from every kind of guiding factors which could or is stuck to the judiciary like Salary and allowances, atmosphere etc. The independence of judiciary does not amount to create the autonomous powers and institution but it merely means an institution free from the control of executive and legislature so that it can impart the concept of “justice” to all without any obstruction and biasness. The independence of the judiciary also needs to be constantly guarded against the unexpected events and changing social, political, and economic conditions; it is too fragile to be left unguarded.⁷ The underlying object for having independence of judiciary is to ensure that judges must be able to decide a dispute before them according to the law, uninfluenced by any realistic factors. This is the reason why independence of judiciary is called independence of each and every judge for imparting and provides justice for all. Therefore it is the separation of power that is playing crucial and the most important role in order to have independence of judiciary. Separation of power is the fundamental principles of the modern constitutionalism and rule of law.⁸

*“All will be lost, if the same man, or the same bodies of principles, or nobles, or people, were to exercise the three powers: the power of making laws, that of implementing public resolutions and the power to judge the crimes or disagreements of individuals”.*⁹

*“There is no freedom, if the judicial power is not separated from the legislative and executive powers. If it joined to the legislative power, the power on live and freedom of citizens will be arbitrary; since the judge will be the law maker. If it is enjoined to the executive power, the judge will have power of an oppressor”.*¹⁰ It was Montesquieu who observed the dangers of power concentration in the judicial spheres, the weak link of the “chain” of the three organs of the government.

Necessity of an Independent Judiciary

“We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Court’s independent of the

⁷ Singh M.P, Securing the Independence of Judiciary- The Indian Experience, IND. INT’L & COMP. L. REV, Volume2

⁸ Troper, M, «Separation of powers», Dictionnaire électronique Montesquieu [En ligne], mis à jour le : 14/02/2008, URL : <http://dictionnaire-montesquieu.ens-lsh.fr/index.php?id=286>

⁹ The principle of separation of powers devotes the theory triumph of Charles de Gaulle and Montesquieu, in 1748

¹⁰ Montesquieu, *De l’Esprit des lois*, livre XI, chap. 6, Paris, Éd. Garnier-Flammarion, 1979, tome 1, pp. 294-295

influence of the executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence".¹¹

Can we thought to have words like Justice, Liberty, Equality, Fraternity, unity and dignity in action without having independence of Judiciary? We even can't dream to have any of these words in the life of human existence without Independence of judiciary. Independence of Judiciary is very important facet to have democracy in free society. Therefore this is the reason why the framers of the Indian constitution at the time of framing the constitution of India were very much concerned to have independence of judiciary otherwise the term "fundamental rights" would become mere commodity or toy in the hands of political leaders. The Judiciary is many times referred as the custodian of Rights, Guardian of Constitution, Watchdog only an independent Judiciary could be regarded as these otherwise these words would lose its relevancy.

In Judges transfer case¹², the Hon'ble Supreme 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."

This concern to have independence of judiciary was also responded by Dr. B.R. Ambedkar in the constituent assembly through words-

"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 it, and the question is how these two objects could be secured".¹³

Now the question that arises is what made the framers of the Indian constitution to be very much concerned about to have Independence of judiciary? Thus the answer to this question lies in the basic understanding to secure the stability and prosperity of the nation as well society by guaranteeing Fundamental rights and it is only the independence of Judiciary that is going to

¹¹ Dr. Rajendra Prasad, President of the Constituent Assembly and later President of India, Speech to the Constituent Assembly of India preceding the motion to adopt the Constitution (Nov. 29, 1949), in *I I CONSTITUENT ASSEMBLY DEBATES* 498.

¹² *S.P Gupta vs. President of India And Ors.* AIR 1982 SC 149

¹³ Dr. B. R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly and later Law Minister of India **Reply** to the debate on the draft provisions of the Constitution on the Supreme Court, (May 24, 1949), in *CONSTITUENT ASSEMBLY DEBATES*, vol.VIII, 258.

guard and enforce those fundamental rights. Therefore for a country like India where there is diversity of religion and culture it is only and only the independence of judiciary which is upholding the pillar of democratic system in free society. *“Democracy would not be functional if there is not an impartial body to review the state’s action as state can’t be the judge in its own cause”*.

Caroline Kennedy rightly said about this *“The bedrock of our democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing.”*

Judiciary acts as a watchdog by ensuring that all the organs of the state function within their respective areas and according to the provisions of the constitution. Judiciary acts as a guardian of the constitution and also aids in securing the doctrine of separation of powers. So independence of Judiciary is the basic requisite for ensuring the objectives of the constitution that is the-

JUSTICE, social, economic and political

LIBERTY of thoughts, expression, belief, faith and worship;

EQUALITY of status and opportunity; and to promote among them all,

FRATERNITY assuring the dignity of individual and unity and integrity of the Nation:

Role of Judiciary

“All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.”-Andrew Jackson.

It is fact that the role of judiciary with advancement in the thought process of human being had shifted its traditional role to more participatory one to cater to the changing needs of the society. Apart from the basic role, the judiciary is also concerned with the function of acting as a final interpreter of the Constitution and other organic laws, protector of Fundamental rights of the citizens and guardian to keep necessary checks upon the constitutional transgressions by other organs of the state.¹⁴ Under the constitutional scheme Judiciary has been endowed with the various powers from issuing writs of certain nature to the entertainment of petition by special leave. Our nation has not adhered to the principle of Separation of power in strict Sense that is

¹⁴ The range of judicial review recognized in the superior judiciary of India is perhaps the widest and most extensive known in the world of law. See Pathak CJ. In *Union of India v. Raghbir Singh* (1989) 2 SCC 754 at 766.

the reason judiciary is conferred with the power of judicial review to check and pass the every act of legislation and executive through the Constitutional filters. Further the new innovations and measures resulting in the broader and wider expansion of powers also serve as a tool in the hands of Judiciary to carry out the objectives inserted in the Preamble of the Indian Constitution. The concept of PIL and its rhetoric journey in the modern century clearly defines the crucial role that has been played by the judiciary in this regard.¹⁵ In recent times there has been wider expansion of the role of Judiciary and such role has attracted the attention of the masses. But the thing that is to be noted is that there has been remarkable shift in the working patterns of the courts by virtue of which Judiciary has acquired an ascendant position within the nation's politics.¹⁶ The Judiciary has to carry out the constitutional message and it is its responsibility to keep a vigilant watch over the functioning of democracy in accordance with the dictates, directives, and imperative commands of the constitution by checking excessive authority of other constitutional functionaries beyond the ken of constitution. So the Judiciary has to act as the sentinel sine qua vive.¹⁷

Judiciary as a protector of core constitutional values:

The foremost function that Judiciary performs is to protect the core constitutional values and the decisions. The inclusion of such function is based upon the assumption that “purely value free judicial decision making is not only impossible but also untenable.”¹⁸ Naturally the question that arises that how much core values is judiciary going to protect? Thus judiciary in every country has an obligation and a constitutional role to protect the human rights of the citizens and ensure smoothing functioning of the State without acting arbitrarily and unfairly As per according to this mandate of the constitution of India, this protective role is assigned to the superior judiciary namely the Supreme Court of India and the High Courts. These two Constitutional Courts ensures that the Government (though the most appropriate word is state) is Functioning according to the principles laid down by the forefathers of our nation in Preamble to the Constitution i.e. Democracy, Sovereignty, Social, Secular and Republic. Performing this Function the Apex Court in the case of *Keshavanada Bharathi* (1973) held for

¹⁵ P.P.Craig & S.L.Deshpande, Rights, Autonomy and Process: Public Interest Litigation in India 9 *Oxford Journal of legal Studies* 356 (1989).

¹⁶ Pratap Bhanu Mehta, —The Rise of Judicial Sovereignty| 18 *Journal of Democracy* 70 (2007). To the same tune Anndhyarujina opines that a body which can theoretically review each and every action of other organs functioning under the Constitution and order their courses of action necessarily possesses power in a political sense

¹⁷ <https://www.legalindia.com/independency-of-judiciary/>

¹⁸ H.R.Khanna, *Judiciary in India and Judicial Process* 47 (1985)

the first time that a constitutional amendment duly passed by the legislature was invalid for damaging or destroying its basic structure. The supreme court of India perhaps is most associated with function of protective role of the constitution when it comes to the matter of Human rights violation. The preamble of the constitution of India encapsulates the objectives of the constitution makers to build up a society which secures all the objectives mentioned in the constitution. The basic objective of the constitution mandates every organ of the state i.e. Legislature, Executive and Judiciary working harmoniously to strive to realize the objective concretized in the fundamental rights and directive principle of State policy. The judiciary has adopted the practical approach in order to have wider interpretation of human rights. It is due to the judiciary that there has been expansion of Human Rights Jurisprudence in two folds

1. The substantive expansion of Human rights under Article 21 of Indian Constitution
2. The Procedural innovation of Public Interest Litigation.

It is thus only the protective role of judiciary that has given new insight which has earlier being observed by the makers of the Indian constitution especially by B.R Ambedkar-

“It was, indeed, a way of life, which recognizes liberty, equality and fraternity as the principles of life and which cannot be divorced from each other: liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without liberty, equality would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without liberty, equality and fraternity could not become a natural course of things and Judiciary is supposed to protect these constitutional values”.

Judicial Independence over judicial overreach

“The line between judicial independence and judicial overreach is a thin one. A takeover of function of other organ may become a case of overreach”¹⁹ - Dr.Manmohan Singh

The line of conflict that is drawn is that whether independence of judiciary is not exceeding to have judicial overreach to the powers of other organs of the government namely as Executive and Legislature. The above words of our former Prime Minister of India says that Supreme court is accused of having Judicial overreach and taking over legislative and executive functions. There have been several high profile instances where the courts taking the plea of independence of Judiciary have crossed the line and had interfered in the functioning of other

¹⁹ Speaking at the *Conference of Chief Ministers and Chief Justices* held in New Delhi in Apr 08, 2007.

organ. In the case of Delhi sealing drive case²⁰ the Prime Minister was of the opinion that Supreme Court by taking the plea of independence of judiciary has crossed its power and had interfered in the functioning of executive. Justice Balkrishnan's view was that, the application of judicial review was to determine the constitutionality of the legislation and to review the executive decision, sometimes creates tension between the Judiciary and the legislative and executive branch. Such tension is natural and to some extent desirable.

But in the view of ours *“independence of Judiciary does not hamper the functioning of other organs of the government, in spite Judiciary has been tagged with word of “watchdog” which aims to check the arbitrary powers of other organs of the government. If Judiciary was not independent will it be able provide justice to masses? Whether the objectives mentioned in the constitution of India would be able to achieve? Why Independence of Judiciary is said to have Judicial Overreach, just because it interferes with functioning of the other organs of the government. But nobody looks the protective role that has been played by the Judiciary that it is the overreaching power of the Judiciary that it has been able to provide rights to masses which earlier was to far too seek”*.

The Supreme Court of India is well aware of its limitations, and hence exercises self-restraint and caution over encroachment of the field exclusively reserved for the legislature and the executive but when the legislature fails to make the necessary legislation and executive fails to perform its function and fails to suit the changing times, it leads to a stage of erosion of confidence of the citizens in the constitutional values and democracy. In such an extraordinary scenario, the judiciary steps into the areas usually earmarked for the legislature and executive.

It is said that even if the Parliament and State Legislatures in India make laws for 24 hours a day and 365 days a year, the quantum of law cannot be sufficient to the changing needs of the modern society.²¹ The judiciary steps forward to cover the uncovered areas though this is regarded as overreach but independence has more weigh over it.

The best and prominent examples of judicial independence is of *Vishaka v State of Rajasthan*²² and *D.K Basu v. State of West Bengal*²³ where Supreme Court lamented over that legislature

²⁰ *M.C.Mehta v. Union of India* AIR 2006 SC 1325: (2006) 3 SCC 399.

²¹ I.P.Massey, *Administrative Law* (2005)

²² (1997) 6 SCC 241

²³ (1997) 1 SCC 416

had not brought in comprehensive legislation to deal with Sexual Harassment and Rights of arrested persons. The Apex Court exercising the power granted Under Article 32 of the Constitution and laid the guidelines which would be treated as law declared by the Supreme Court under Article 141 of the Constitution.

Constitutional provisions

The constitution of India under its different provision has provided for the concept of independence of Judiciary. These provisions have clearly drawn the “Lakshman Rekha” for both the legislature and Judiciary to maintain their independence in their respective functioning. Articles 121 and 211 forbid the legislature from discussing the conduct of any judge in their discharge of his duties. Articles 122 and 212 on the other hand preclude the courts from sitting in judgement over the internal proceedings of the legislature. Article 105 (2) and 194(2) protect the legislators from interference of the Courts with regards to his/her freedom of speech and freedom to vote. Thus, in theory, there is ample provision for each side to maintain its autonomy. But independence of any sort, whether by the judiciary or the legislature, throws up a million-dollar question: what happens when one side does not abide by the separation envisioned in the Constitution? On this, the Constitution is apparently silent, leaving it to the learned and responsible legislators and the judges to themselves ensure that they remain within their bounds. The sad fact, however, is that there have been numerous instances where these rather pious intents of the Constitution have been flouted without check by both the sides. For example, during the phase of stand-off between the Supreme Court and the Delhi government on the issue of converting the public vehicles from diesel to CNG mode in Delhi, the Chief Minister Ms. Sheila Dikshit had lambasted the Apex Court inside the Legislative Assembly. Taking note of this from the media reports, the Apex Court sought explanations from the CM. The CM simply made an affidavit denying the media reports, and there ended the story. Similarly, in another such instance, a Janata Dal (S) MLA of the Karnataka Assembly cast grave aspersions on the integrity of judges who gave a ruling against the State Government in the Bangalore-Mysore Infrastructure Corridor project case. On July 19, 2006 presiding over a Bench comprising Justices C.K. Thakkar and P.K. Balasubramanian, Chief Justice Y.K. Sabharwal reacted with restraint and dignity: —We express our deepest anguish over such statements made on the floor of the House.

Therefore, broadly speaking, in so far as adhering to the separation of powers by different organs of the state is concerned, this can only be done by self-restraint and self-discipline; there

is no punitive mechanism in case of violation of the aforesaid provisions. Mechanisms like “contempt of court” and “breach of privilege “are not effective in maintaining the separation, and merely make passing appearances during individual incidents.

Judicial Activism

In its literal parlance, the term ‘Judicial Activism’ is defined as a —judicial philosophy which motives the judges to depart from the strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions in the legislative and executive matters.²⁴ Considering it an abstractive term Professor Upendra Baxi defines it as —that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes.²⁵ To it, he further adds that judicial activism‘is the use of judicial power to articulate and enforce counter ideologies which when effective initiates significant re-codifications of power relations within the institutions of governance. Judicial Activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court. It is a counter-majoritarian check on democracy. Judicial Activism however does not mean governance by the judiciary. Judicial Activism must also function within the limits of the judicial process. Within those limits, it performs the function of stigmatizing, as well as legitimatizing, the actions of the other bodies of government—more often legitimizing than stigmatizing. Prof. Laxminath, —if the court leaps into a new territory by enunciating the widest decision possible in a particular case, even though the case could be decided on narrower grounds, then it is said to be indulging in Judicial Activism.²⁶ He further points out another definition which concerns the court’s relationship with other branches of the government, and says that —if the court becomes a principal legislator in the governmental process and if its decisions pronounce it fit to assume this role then others will call it judicial activism.

Judicial independence and Appointment of Judges

²⁴ Brayan A. Garner(ed.), *Black’s Dictionary* 850 (1999).

²⁵ As Prof. Baxi rightly suggests that judges are evaluated as activists by various social groups in terms of their interest, ideologies and values. See Upendra Baxi, *Courage, Craft & Contention* 7 (1985).

²⁶ Prof.A Laximinath and Anuradha Namballa, *Judicial Activism and Judicial Restraint* 2 *Andhra University Law Journal* 125 (1996).

The appointment of judges is directly concerned with the judicial independence. Appointment shall be made without any direct or indirect influences. Appointment of judges to the higher judiciary has been the most recurrent theme in the history of the judiciary since independence and in the immediately preceding years.²⁷

In constituent assembly appointment of judges was a crucial question and in appointment maintaining independence was another one. Dr B. R Ambedkar in Constituent assembly said in relation to the appointment of judges as:-

I find three different proposals. The first proposal is that the Judges of the Supreme Court should be appointed with the concurrence of the Chief Justice. That is one view. The other view is that the appointments made by the President should be subject to the confirmation of two-thirds vote by Parliament; and the third suggestion is that they should be appointed in consultation with the Council of States.

*With regard to this matter, I quite agree that the point raised is of the greatest importance. 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.*²⁸

First Judges Case²⁹

The Supreme Court held by a majority (4:3) that among the opinion of the three constitutional functionaries, the opinion of the Chief Justice of India did not enjoy primacy over those of the other two in the matter of appointment of judges and there is no such word like primacy in the constitution. The word 'consultation' is not an ambiguous word at all.

Second Judges Case³⁰

²⁷ Supra note 6 at page 16

²⁸ <http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm>

²⁹ S.P Gupta v. Union of India AIR 1982 SC 149

³⁰ Supreme Court Advocates on Record Ass'n v. Union of India, A.I.R. 1994 S.C. 268

Dissatisfaction with the First Judges case verdict and filling of vacancies in various High Courts a writ petition was filed and in the Course of hearing doubting the correctness of the First Judges case the two judge bench of the Supreme Court referred the matter to the larger bench.

Majority (7:2) again rewrote the Constitution. The Supreme Court devised a specific provision for the appointment of judges to the High Court and the Supreme Court. The Court reiterated Independence of Judiciary as basic feature of the Constitution. The majority laid emphasis on the consultative process. The decision of the First Judges case was overruled in which primacy of chief justice was deleted. The Court also held that the proposal for the appointment of judges to the Supreme Court and the High Courts must be initiated by the Chief Justices of the respective courts. The Chief Justice of Supreme will forward proposals to the President. The President must consider these proposals within a set time frame. In case of a difference of opinion between different constitutional functionaries, the opinion of the Chief Justice of India has primacy.

In the making of a recommendation, the Chief Justice of India represents the judiciary and does not act as an individual. So the Chief Justice's opinion is the opinion of the judiciary, "symbolised by the view of the Chief Justice of India." To rule out any arbitrariness on the part of Chief Justice of India and to ensure observance of the rule of law, the opinion of the Chief Justice of India must be formed in the case of appointment to the Supreme Court by "taking into account the views of the two senior most Judges of the Supreme Court."³¹

Third Judges Case³²

The next confrontation between Judiciary and executive existed in the year 1997-1998. The then Chief Justice of India recommended the names of five people for appointment but the executive refused to do so, expressing doubts about the competence of the persons recommended. The President made reference to the Supreme Court Under article 143. The nine Judge bench of the Supreme Court held unanimously that the judicial appointments to be made according to the Second Judges Case; the only revision they made was that in place of two judges the collegium would consist of 5 senior most judges.

³¹ Supra note 6 at Page 26

³² Special Reference No. 1 of 1998

The ruling of the third Judges case is the current practice in appointment of Judges.

Unconstitutionality of NJAC

A National Judicial Appointment Commission was created by the 99th amendment act, 2014. The Supreme Court exercising its Constitutional Duty and preventing other functionaries encroaching the independence of Judiciary struck down the said Amendment by majority of 4:1. The amendment violates the basic structure of the constitution. Justices J S Khehar, MB Lokur, Kurian Joseph and Adarsh Kumar Goel declared the 99th Amendment and NJAC Act unconstitutional while Justice Chelameswar upheld this amendment. The reason for declaring the NJAC to be unconstitutional was narrated by Justice Khehar in para 254- 256 of the Judgement

“Article 124A constitutes the edifice of the Constitution (99th Amendment) Act, 2014. The striking down of Article 124A would automatically lead to the undoing of the amendments made to Articles 124, 124B, 124C, 127, 128, 217, 222, 224, 224A and 231. This, for the simple reason, that the latter Articles are sustainable only if Article 124A is upheld. Article 124A(1) provides for the constitution and the composition of the National Judicial Appointments Commission (NJAC). Its perusal reveals, that it is composed of the following: (a) the Chief Justice of India, Chairperson, ex officio; (b) two other senior Judges of Supreme Court, next to the Chief Justice of India –Members, ex officio; (c) the Union Minister in charge of Law and Justice – Member, ex officio; (d) two eminent persons, to be nominated – Members. If the inclusion of anyone of the Members of the NJAC is held to be unconstitutional, Article 124A will be rendered nugatory, in its entirety. While adjudicating upon the merits of the submissions advanced at the hands of the learned counsel for the rival parties, I have arrived at the conclusion, that clauses (a) and (b) of Article 124A(1) do not provide an adequate representation, to the judicial component in the NJAC, clauses (a) and (b) of Article 124A(1) are insufficient to preserve the primacy of the judiciary, in the matter of selection and appointment of Judges, to the higher judiciary. The same are accordingly, violative of the principle of “independence of the judiciary”. I have independently arrived at the conclusion, that clause (c) of Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an ex officio Member of the NJAC. Clause (c) of Article 124A(1), in my view, impinges upon the principles of

“independence of the judiciary”, as well as, “separation of powers. It has also been concluded by me, that clause (d) of Article 124A(1) which provides for the inclusion of two “eminent persons” as Members of the NJAC is ultra vires the provisions of the Constitution, for a variety of reasons. The same has also been held as violative of the “basic structure” of the Constitution. In the above view of the matter, I am of the considered view, that all the clauses (a) to (d) of Article 124A(1) are liable to be set aside. The same are, accordingly struck down. In view of the striking down of Article 124A(1), the entire Constitution (99th Amendment) Act, 2014 is liable to be set aside. The same is accordingly hereby struck down in its entirety, as being ultra vires the provisions of the Constitution.”³³

CONCLUSION

“Judicial Independence not only exist to serve the judiciary, nor to serve the interest of two branches of government. It exists to serve and protect not the governors but the governed.”³⁴

A true judicial system that is respectful of human rights must be able to offer the guarantee of an unbiased judgment made by an independent judge at the end of a fair trial. That presupposes first a State that respects, in terms of law and practices, the principle of the separation of powers. Besides, even in a system that dedicates the separation of powers in the legal texts, the judge's independence is the essential condition for a good administration of justice.

Like any freedom, the independence of the judge cannot be offered on a golden platter. The judge must also feel and act as a major player in the fight for this independence. As one author wrote:

*History has demonstrated that irrespective of the content of legal texts, men of character have kept intact their independence despite the threats or entreaties. It has been asserted, and rightly so, that all the value of judicial power depends on them who exert it”.*³⁵

³³ : <http://www.livelaw.in/njac-unconstitutional-constitution-bench-41-2/>

³⁴ The Hon Sir Gerard Brennan, AC KBE, Chief Justice of Australia, Judicial Independence, http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_aic.htm Accessed on 30/1/18, 9:30 P.M

³⁵ Apostu, I., The legal independence of the judges and the unitary application of the law, s.d, p.4. <http://www.juridica-danubius.ro/continut/arhiva/A12.pdf>.