EMERGENCE OF JUDICIARY AND THE INDIAN VISION OF JUDICIAL INDEPENDENCE

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ABSTRACT

Justice is a very complex notion. However the spirit of such complex notion can be explained in two simple words- "Just" and "Fair". Among the three organs of the government, the judiciary holds the most prestigious position as it is entrusted with the deliverance of "Justice". We all know that a welfare state should have the implications of "Separation of Power". Hence a natural consequence of such implication is that all of the three organs will work independently without getting influenced by each other. However this is an ideal situation and in many cases one can clearly observe the opposite of this as legislative and executive wings of the government try their best to influence the judiciary to fulfil their own interest. In India, sadly many examples of such incidences existed and still exist. But whenever Indian Judiciary has faced a challenge or was put to test, it has always succeeded in upholding its authority, assuring us, the citizens, its true "independent" nature.

INTRODUCTION

"I think the first duty of a society is justice" -Alexander Hamilton

The concept of justice is as old as the history of human civilization. The word Justice has been derived from the latin word "Justus" and carries within itself the spirit of "just" and "fair". However it is to be mentioned that the very essence of justice has been relative throughout. In the pre- historic era, justice was the embodiment of "might is right", but with the linear evolution of human civilization the concept of justice became more subtle, edgy, formal and less ambiguous. With the emergence of "state" Justice slowly but steadily shed its primal notion of "revenge" and became the tool of the oppressed as they fought against the status quo to validate their rights.

Now, how do we decipher a "State"? There has been a lot of political ideologies, historical perspectives to answer this very question. The formalization of "justice" or rather the emergence of "justice" through the system of "judiciary" accelerated as soon as the state came into play and this evolution of simple society to state can properly be explained through Marx's philosophies and theories like "Social Contract" by Hobbes, Locke and Rousseau and so on which gave the idea of a state as a sovereign created through a contract, to which the people in order to protect their life, liberty and private property surrendered their rights.

SEPARATION OF POWER: THE BEGINNING OF THE "HOLY GRAIL"

Now the next logical question is "what are the functions of a state?". Although the theory of social contract was monumental in analysing the concept of "state", but it didn't lay down the proper functions of such. The functions of a state were finally explained by the French philosopher Montesquieu in his book "Spirit of Laws"(1748).

Montesquieu's "separation of Power" principle was a game changer as it clearly demarcated and distributed the functions of a sovereign government into three prominent wings-legislature, executive and judiciary.[1] This principle in its application gave birth to the idea of "checks and

[1] Stanford Encyclopedia of Philosophy, Locke's Political Philosophy,(27th March, 6:30 P.M) https://plato.stanford.edu/entries/locke-political/

balances" worldwide. To clarify the idea of checks and balances which is embedded in the principle of "separation of power" the explanation given by Montesquieu himself has to be looked into:

1. "If the judicial and legislative powers are combined in the same organ, the interpretation of laws becomes meaningless because in this case the lawmaker also acts as the law interpreter and he never accepts the errors of his laws.
2. If the judicial power is combined with the executive power and is given to one-person or one organ, the administration of justice becomes meaningless and faulty because then the police (Executive) becomes the judge (judiciary)."[2]

Thus it is safe to say that the unique, compartmentalized structure laid down by the principles of "separation of power" and the idea of "checks and balances" not only formalized the system of justice but also ensured the autonomy, freedom, independence of such in the form of the judicial wing of the government along with its two other wings.

INDEPENDENT JUDICIARY: MEANING

Giving an exhaustive definition of "independent judiciary" is a herculean task. We have to understand that this is a concept whose scope has never been restrictive in nature; rather it is inclusive in nature. Even in the absence of a "definitive" definition the concept of "independence of judiciary" has a universal application.

The then honourable CJI of Wisconsin Supreme Court *Shirley* S. *Abrahamson in an article in 2003 expressed her views in the present subject as: "*The term *judicial independence* embodies the concept that a judge decides cases fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll. Judges are constrained to maintain judicial independence by the law, their legal training, their expectations, and the judicial culture. The judicial culture and judicial education treasure intellectual honesty, fair and principled decisions, and rising above

[2]K.K. Ghai, Separation of Powers: What is the theory of Separation of Powers?(27th March, 8:15 P.M) http://www.yourarticlelibrary.com/constitution/separation-of-powers-what-is-the-theory-of-separation-of-powers/40336

partisanship and the political moment. Judicial independence is also safeguarded by statutes and ethical codes requiring judges to conform to high standards and to disqualify themselves from sitting on cases in which their impartiality would be questioned. Judicial discipline commissions and the courts can discipline judges for violations of these codes. A judge needs courage. Judges with courage resist threats to judicial independence and actively advocate judicial independence. Those lacking courage should neither apply nor run for the office. We must foster a culture that supports and rewards courageous judges."[3]

The parliamentary debate in UK regarding the establishment and declaration of their Supreme Court to secure individual rights under the Human Rights Act, 1998 clearly depicts the very spirit of the "independence of judiciary"[4] : "To satisfy the provisions of the HRA, the (then) Labour government has proposed the creation of a Supreme Court independent of the House of Lords, which would sever the judiciary from Parliament and end their role of heading investigatory commissions."[5]

Therefore, free thinking, will and functions of the judges, the fierce protection of citizen's constitutional and human rights are and have always been the goal of independent judiciary.

THE INDIAN CONTEXT-INDEPENDENCE OF JUDICIARY

Historical Background:

Judicial independence instills the ideology that the judiciary should not be influenced or abused by the legislative and executive powers. The freedom of courts and legal system of a state is the backbone that ensures good governance and creation of a social welfare state, without centralization of authority in few hands. Hence, it is the responsibility of each nation to ensure

[3]Duhaime's Law Dictionary, Judicial Independence Definition(4th March, 11:30 P.M) http://www.duhaime.org/LegalDictionary/J/JudicialIndependence.aspx

[4] "id. At 3"

[5] James Hyre, Fordham Law Review, Vol 3, issue 1, The United Kingdom's declaration of Judicial Independence:Creating a Supreme Court to protect Individual Rights under the Human Rights act,1998 https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4018&context=flr

the protection of such independence. The Constitution of a nation being the "supreme law of its land" must envisage provisions to ensure such freedom to its Judiciary.

The concept of "independence of judiciary" in India was adopted from United Kingdom but as the nature of the constitutions of both the countries is very different therefore there are significant differences on how both the countries view the "freedom" of their judicial system. The Indian Constitution like any other constitution though not explicitly, but in its essence through its provisions upholds and protects the integrity and autonomy of the judiciary paving the path for judicial independence. But that's not the end of it, with the course of time various judicial pronouncements by Indian courts have implied the same and acted as a source of nutrition to the provisions of the Indian constitution by constantly supplementing and complementing them.

A Constitutional Assembly Debate Perspective:

"Article 50: Separation of Judiciary from Executive"[6]– contained in part IV of the Indian constitution as one of the Directive Principles of State Policy states that, "The State shall take steps to separate the judiciary from the executive in the public services of the State."[7] The Doctrine of Separation of Power though has not been recognized by the constitution in *stricto senso* but it has sufficiently distributed and differentiated the powers of different organs. This directive principle calls for a separate judicial service free from the control of executive.

The drafting of this article saw a three day long Assembly debate and analysis on whether this provision thrust towards separation of all institutions of the state- the legislative, the executive and the judiciary or only separation of the executive and the judiciary. The Assembly made emphasis on the necessity of judicial independence and its inclusion to maintain and uphold the idea of justice and thus this directive principle was adopted.[8]

[6] Indian. Const. Art. 50
[7] "id. At 6"
[8]Constituent Assembly Debates, Art. 50: Separation of judiciary from executive(29th March, 3:42 A.M) https://cadindia.clpr.org.in/constitution_of_india/directive_principles_of_state_policy/articles/Article%2050?fbclid=IwAR00nGB1DeOAceEOk1sx3wAb9hy8emTW4moZ_ONyuHzWroHP2Wr49A16B1g

Indian Judiciary: Part of Basic Structure:

The concept of basic structure is a tricky one. Till today the honourable courts of India haven't exactly defined the term "basic structure". The question of "basic structure" first arose in the case of "Shankari Prasad v. UOI" (1952) in regards to the parliament's power to amend the constitution under Art.368 of Indian constitution. This question remained the focal point in the series of cases which were followed in the later years, such as the case of "Sajjan Singh v. State of Rajasthan" (1964), "Golaknath v. State of Punjab" (1967). But the discussion on basic structure in these above mentioned cases was mainly confined to the interpretation of fundamental rights enshrined in part III of the Indian Constitution.

It was the case of "Keshavananda Bharati v. State of Kerala" which put a spin in this trend and gave the age old discussion a complete makeover[9]. This famously criticized case broadened the horizon of the "basic structure" in absence of a concrete, exhaustive definition of such. In This case by a majority of 7:6[10] rightly pointed out that "basic structure" is an ever expanding philosophy and a restrictive approach to describe such is not the proper way. "Basic structure" implies the fundamentals of the Indian constitution which are inculcated in the form of ideas, ideals and various principles and gives the constitution its social, political and legal legitimacy. This broader philosophical outlook of "basic Structure" assimilated independence of judiciary as one of its vitals ingredients. Thus the lifeless words of various provisions of the Indian constitution implying the independence of judiciary finally came to a full circle with the backing of judicial pronouncement.

One of the most recent and brightest examples of the application of this "doctrine of basic structure" can be observed in the case of *"Supreme Courts Advocate on Records v. UOI"*[11] (2015). This case, famously known as the NJAC case saw the declaration of Art 124A, Art 124B and Art 124C of Indian Constitution as "Unconstitutional" and along with the 99th

[9] Prashant Tiwari, Ipleaders, Doctrine of Basic Structure(28th March, 11.00 A.M),https://blog.ipleaders.in/doctrine-of-basic-structure/
[10] https://www.jstor.org/stable/pdf/43952120.pdf?ab_segments=0%252Ftbsub-1%252Frelevance_config_with_defaults&refreqid=excelsior%3A40b10ba698ce2d08d3f976a67d19ff50
[11] Writ Petition (Civil) No. 13 OF 2015

amendment act, the NJAC act was also declared "ultra vires" on the ground of violating the independence of judiciary which is part of the "basic structure".

Recognising "Indian Judiciary" as an indivisible part of the "basic structure" ultimately ensures the "rule of law". The constitutional supremacy over the sovereign's power and the embedded failsafe program of judiciary as an acting vigilant protector of our constitution really puts it in a different pedestal than the other two organs of the government.

INDEPENDENT JUDICIARY AND ITS VARYING FACETS

Administrative Freedom of Judiciary:

The administrative independence of judiciary is the "means" through which the "end" goal of "justice" can be achieved. The bare provisions of our constitution upholding such autonomy are:

- Article 124 & Article 217**:**

a. Appointment of judges in the Supreme Court and High Courts respectively- Under these Articles the constitution has given power to the Executive to appoint the judges of the Supreme Court (Art.124(2)) and High Courts(217(1)) but its power over such appointments is not absolute, such appointments have to be made in consultation with the judges of Supreme Courts and judges of High Courts in case of Chief Justice of India and for the appointment of other judges the consultation of the Chief Justice of India along with such other judges of Supreme Court and High Courts as he deems necessary . Similarly for the appointment of Chief Justice of a High Court the President must do such in consultation with the Chief Justice of India and the Governor of the State and the appointment of other judges are done in consultation with the Chief Justice of the High Court or acting Judge .Therefore no exclusivity of appointment to the Executive.

b. Tenure and removal of judges of the Supreme Court and High Courts respectively- The judges of the Supreme Court and High Courts are provided secured tenure once appointed they continue up to 62 years of age [Art.124(2)] and 65 years of age [217(1)]

respectively. Moreover in India the process of removal of judges as envisaged in Article 124(4) requires a very lengthy and complex process and a judge can be so removed only on the grounds of proven misconduct or incapacity after investigation by an impartial tribunal the procedure of which is laid down by Judges (Inquiry) Act, 1968. The process is so strenuous that no judge has been impeached in India until now. The main aim behind this is to let the judges' work without favor, fear or ill-will by providing them security of tenure.

- Article 125 & Article 221:

  The salaries and allowances of the judges of Supreme Court and High Courts are fixed and as are charged on the Consolidated fund of India are non-votable. It is further provided that their allowances and rights in respect of leave of absence or pension cannot be varied to their disadvantage.

- Article 121 & Article 211**:**

  The judicial conduct of a judge cannot be a matter of discussion in the centre or State Legislature unless it is a motion upon presenting for removal of such judge. This was so done to assure independence of judiciary by placing judges outside controversy.

- Article 129 & Article 215**:**

  Both the Supreme Court and the High Courts have the power to punish on their contempt. This constitutional power of the court cannot be curtailed or taken away by any legislation, such as the Contempt of Courts Act, 1971.[12]

These bare provisions of our holistic bible had been applied, interpreted in innumerable cases throughout years. We find a chronology of cases through which the power and authority of judiciary in the appointment of the Judges has been established, which started with the *"Supreme Court Advocates-on-Record Assn. V. Union of India" (2nd Judges' case)* [13] over

[12] "See also", Page 518, footnote 71,V.N.Shukla, Constitution of India(13th ed. 2017)
[13] Writ Petition (civil) No. 1303 of 1987

ruling the majority decision passed by the "*S.P.Gupta V Union of India"(Judges' Case)*[14], gave a wider ambit to the word 'consultation' and considered the opinion of the Chief Justice Of India of 'greatest weight' while appointing the Judges of the Supreme Court and High Courts. This case also laid foundation to the 'collegium' system which was further clarified upon and substantiated in the *"In Re*: *Special Reference No.1 of 1998"(3rd Judges' Case)*[15] where it was opined that the Chief Justice of India should form his opinion in consultation with a collegium consisting of four senior most Judges of the Supreme Court, this plurality of judges was a step towards removing arbitrariness and favourism in selection of judges.

Power of Judicial Review:

Judicial review refers to a court's power to examine the acts of the executive and legislature and invalidate those acts which are contrary to constitutional principles.[16] Through this the legislative and executive acts are reviewed and scrutinized by a court of law. Judicial review is an indispensable aspect of Judicial Independence and it finds its place in our constitution through Articles 13, 32, 136, 141, 142, 226 and 227. Judicial Review is also acknowledged as a part of the basic structure of the constitution which cannot be altered by the parliament, following the case of *"Kesavananda Bharati V. State of Kerala"*[17]. Art 32 and Art 226 carry the essence of writ against the State. These articles stand as the protectors of the citizen's fundamental rights against the legislative and executive action. The true potential of "independence" in judiciary gets reflected through this article. The father of the Indian constitution remarked that Art 32 is "The heart and Soul of the constitution" as it not only a fundamental right in itself but it also safeguards other fundamental rights. Through this power vested in the apex and the high courts, they make sure that the government doesn't encroach upon our life and liberty and thereby checking the autocratic nature of the government.

Independence of Judicial Decision -Making:

"It is the spirit and not the form of law that keeps justice alive." ~ Earl Warren

[14] AIR 1982 SC 149
[15] 1998 Supp 2 SCR 400
[16] The free dictionary by Farlex, Judicial Review (31st March, 2:58 A.M), https://legal-dictionary.thefreedictionary.com/judicial+review
[17] (1973) 4 SCC 225

Having the aforementioned quoted, emphasis is given that, it's not the dictum of enacted laws that are to be strictly adhered to but it is the essence of justice that is to be upheld. The judges being open to apply their judicial minds and weighing the laws on the grounds of what is right, just and fair. Such independence of applying reason and righteousness to weigh laws and pass judgments accordingly finds its roots embedded in the theories of Natural Law. According to Prof. Cohen, natural law is not a body of actual enacted or interpreted laws enforced by courts; it is in a fact a way of looking at things and a humanistic approach of the judges and jurists.[18] And in view of Italian jurist Del Vecchio, "natural law is the criterion which permits us to evaluate positive law and measure its intrinsic justice". It is a way of looking at things in the quest of ensuring justice.[19] Modern legal systems find impression of natural law while leading the society towards social metamorphosis to protect it from idleness.

The Indian Judicial system has also observed milestone incidents of application of judicial minds which have broken the norm of interpreting law as it is and passed judgments, set precedents which have tested the laws passed by the legislature and protected the true meaning of justice. To further substantiate, we analyse from the initial to the final interpretation of the expression "procedure established by law" provided in Article 21; Protection to life and personal liberty[20] by our Supreme Court, through a series of cases.

The question of clarifying the meaning of the phrase "procedure established by law" brought up in *"A.K. Gopalan V. State of Madras"*[21] saw a mechanical and circumscribed interpretation of what is being meant here by the word "law" and the "procedure established by law". According to Honorable CJ Kania, "the word law has been used in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of Natural Justice; and procedure established by law means procedure made by law made by Sate, that is to say the Union Parliament or Legislatures of the Sates"[22] the court in its majority also rejected to view this phrase in light of "due process of law" as envisaged in the US Constitution.

[18] "See also" Page 147, Dr. N.V. Paranjape, Jurisprudence and Legal Theory(2016)
[19] "id. At 18"
[20] Indian. Const. Art. 21
[21] 1950 SCR 88
[22] "id. At 20"

By such judgement the court resulted Article 21 in being a safeguard against the executive power but not against the legislature.

This precedent was carried forward in the infamous case of *"ADM Jabalpur V. Shivkant Shukla"*[23] where it was held by majority decision that the court had no power to adjudicate, if in case of proclamation of emergency the right conferred by Article 21 is suspended by presidential orders under Article 359, and no enquiry could be made as to the executive operation depriving a person of his life or personal liberty was legally authorized. Here we can see the judicial organ being subverted by the executive and legislative powers.

This highly criticized judgement was then succeeded by the landmark case of *"Maneka Gandhi V. Union of India"*[24] where by the application of judicial minds the Supreme Court checked the powers of the Legislature in making laws and of the executive on their actions by weighing the laws and procedures established on the scales of what is fair, just and reasonable[25] and those falling short cannot prevail.

Thus it is safe to conclude that the widening horizon in the interpretation of laws and free judicial thinking forms a key element to establish the independence of Judiciary.

CRITICISM

Our constitution though, envisages several provisions and considers independence of judiciary a part of its basic structure, it has been observed time and again that such independence has come across several hindrances and is prone to political influence, legislative and executive dominance; from dispute in appointment of Judges to upsetting rift among Supreme Court Judges, the extent of freedom of our judiciary has always been on test. Such an instance can be pointed out with regards to appointment of Judges, in the case of *S.P.Gupta V Union of India (Judges' Case)*[26] where the Apex Court succumbed to the dominance of Executive and passed a judgement which gave primacy to the executive (President) in appointment of judges which

[23] 1976 SCR 172
[24] 1978 AIR 597
[25] "id. At 23"
[26] Supra note 13

has been now over ruled by the 2nd and 3rd Judges' *Case* establishing the authority of the Chief Justice of India and the collegium system. Though our Supreme Court has passed several judgments upholding the essence of independence of judiciary, the government through its legislations has time and again tried to create and impose its dominance over the judicial organ, one such notable incident took place in 2014 when the National Democratic Alliance(NDA) government proposed and brought in laws relating to the formation of National Judicial Appointments Commission (NJAC)[27] which was to be made the deciding body for selection and appointment of judges of the Supreme Court and High Courts, striking out the collegium system set out in 1998, by incorporating Articles 124 A,B and C into the constitution and further attempted to curtail its freedom as Article 124 C gave authority to the legislature to regulate the power and lay down functioning procedures of NJAC by passing laws, if it deemed necessary; therefore undermining the authority of the judiciary[28]. These laws were objected and public interest litigations (PIL) were filed in Supreme Court opposing them. Finally in 2015, as we have mentioned the Supreme Court in its judgment pronounced NJAC as unconstitutional and struck down the amendments made to the constitution by the Constitution (99th Amendment) Amendment Act,2014.[29]

In the recent past, we have witnessed a quite a few events which have led us to question the credibility of judiciary. There have been increasing allegations of indecorum among the judges. The most recent example being four senior judges of Supreme Court revolting against the former Chief Justice of India, Deepak Mishra, alleging him of distributing arbitrarily important cases to junior benches at his own preference, the event took a political turn when impeachment motion was led by the Congress against CJI Deepak Mishra, based on such allegations without any substantial proof, the MP's supporting such motion went to public disparaging the institution of the CJI. This motion was rejected by the Vice- President Mr. Venkaiah Naidu as there was "no proof of misconduct".

Political moves and imposition of authority by the other organs of the government (legislation and executive) have tried to undermine the freedom of Judiciary since its inception.

[27] Supra note 11
[28] Harleen Kaur, Livemint, All you need to know about NJAC(4th April, 11.30 P.M) https://www.livemint.com/Politics/rcsu24yGQ0frdanyQ9fVVL/All-you-need-to-know-about-NJAC.html
[29] "id. At 28"

CONCLUSION

"So long as we may have an independent Judiciary, the great interests of the people will be safe."-John Rutledge[30]

Judiciary, the ultimate pillar, the "statue of liberty" protects the rights and interests of the citizens. The philosophy of independent judiciary which was subtle in the principles of separation of power now has its own identity, status and implications. The judiciary is the protector of the constitution of a country and such protection can only be possible when the judiciary is truly "independent". Absence of such "independence" in judiciary, leads to the absence of "constitutionalism", which ultimately underlines the procedure of sabotaging a country's constitution. But as much as such independence needs to be ensured there is also a need for 'judicial accountability' to check its power. The whistle- blower provision as recommended by the law commission in its 195th report for inclusion, in order to protect the complainant by keeping his/her identity confidential[31] is a notable development in this regards. A balance must be sought for between accountability of a judge and his freedom to adjudicate. The importance of independence of judiciary had been well understood by the framers of our constitution and was received by the courts which pointed it as a part of the basic constitutional structure and with subsequent changes in society judicial independence must also be seen with a dynamic view.

Judiciary is the medium through which people question the "validity" of the government legislations. It also provides protection to citizens from the arbitrary actions of the executive and keeps the power of government and its instrumentalities in check. Hence such an organ should be always given its due independence to further the vision of India being a welfare state.

[30] Encyclopedia.com(1st April, 7:45 P.M)https://www.encyclopedia.com/people/history/us-history-biographies/john-rutledge
[31]Law Commission of India, 195th Report on The Judges (Inquiry) Bill, 2005, http://lawcommissionofindia.nic.in/reports/report195.pdf