

# COMPARATIVE ANALYSIS OF THE JUDICIARY OF INDIA AND SOUTH AFRICA

Written by *Shourya Batta\** & *Priya Sharma\*\**

\* *1st year LLM Student, Symbiosis Law School, Nagpur, India*

\*\* *1st year LLM Student, G.H. Rasoni University, Amravati, India*

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## ABSTRACT

Judiciary, the third organ of the government is the department that is entrusted with the definitive adjudication of disputes regarding the enforcement of laws and the arbitration of disputes that may be placed before them. In different cases, the real meaning of the law is what the judges decide during the course of giving their judgment. From the point of view of people, judiciary can be referred to as the government's most significant institution as it serves as a defender of their guaranteed rights. The position of the judiciary as the protector of the constitution as well as people's constitutional rights makes it more worthy than the other two bodies. This paper is made with the intention of making a comparative analysis of the judiciary of India and South Africa with reference to the hierarchical structure of the courts, the independence of judiciary along with the concept of judicial review in these two countries.

**Keywords** – High Court, Supreme Court, constitutional court, magistrates court, supreme court of appeal, Judicial Independence, Judicial Review.

## INTRODUCTION

### *Classification of Courts:*

#### **India**

In India, the judicial system is like a pyramid, where The Supreme Court is at the top of this hierarchy, below it is the High Courts, then comes the district courts which function below the High Courts, and the subordinate courts that are at the base of this judicial pyramid. In India, from top-to-bottom courts deal with cases occurring under the policies made by the Legislature of the Union and the states legislatures. This pyramid of courts is discussed below:

#### Supreme Court:

The Supreme Court, accompanied by 25 High Courts, is the apex court, which in turn regulates and rules several District Courts. “The Constitution of India renders the Supreme Court a court of record”<sup>i</sup> and bestows upon it all the authority of such a court, including that of the power to punish its contempt and its subordinate courts. “The Constitution of India specifies, that the law proclaimed by the Supreme Court is binding on all courts”.<sup>ii</sup> The “Jurisdiction of the Supreme Court of India can broadly be categorised into original jurisdiction, appellate jurisdiction and advisory jurisdiction”.

The followings are some of the important functions of the Supreme Court:

- 1) The Supreme Court is the ultimate court of appeal, also recognized as India's apex court and even the last resort.
- (2) “The people of India can specifically seek a redress through writs if they feel that their fundamental rights are infringed”.<sup>iii</sup>
- (3) The power of Judicial Review is vested with the Supreme Court.<sup>iv</sup>

### High Court:

The Chief of the Judiciary of a State is the High Court. In the state, “it enjoys both civil and criminal, ordinary as well as extraordinary and general and special jurisdiction”. The High Court is granted with the Original Jurisdiction. “The High Courts is also empowered to enjoy extraordinary jurisdiction to issue various writs”.<sup>v</sup> High Courts can exercise supervisory jurisdiction over all the subordinate courts that come under their jurisdiction. “Each High Court, being a court of record enjoys the power to punish for its contempt as well as of its subordinate courts”<sup>vi</sup>. As of now there are 25 High Courts in India. “The appointment, removal and transfer of High Court Judge are dealt with under Article 217 of the Constitution”.<sup>vii</sup>

### Subordinate Courts:

The Subordinate Courts of India are the courts that are subordinate to the High Courts. They are protector of justice at a district level. These courts are under “administrative control of the High Court of the State to which the district concerned belongs”. They are authorised to deal with any civil or criminal cases which comes before them according to their corresponding jurisdictions.

The subordinate judiciary in each district is led by a District and Sessions Judge. “The Governor in consultation with the High Court of that particular State appoints the District judges”.<sup>viii</sup> “A person who is not already in Government Service should have at least seven years of experience at the bar to become eligible for the position of a District Judge”.<sup>ix</sup>

## **South Africa**

### Constitutional Court:

The Constitutional Court is the primary court for all the matters that involve a question about constitution in South Africa. The range of its jurisdiction to hear cases is limited to constitutional issues and conflicts relating to rulings on constitutional matters. In resolving conflicts over the rights and constitutional status of different branches of government of government, only the Constitutional Court has exclusive jurisdiction in the matters relating to:

- “Deciding on conflicts involving national or provincial state organs concerning the constitutional status, powers or duties of each of those state organs”.
- “Deciding on the constitutionality of any legislative or provincial Bill”.
- “Deciding on the constitutionality of every constitutional amendment”.
- “Decide if a constitutional duty was not met by the parliament or the president”.<sup>x</sup>

The Supreme Court of Appeal:

“The Supreme Court of Appeal is the highest court in South Africa, except for the Constitutional Court, and it only deals with cases submitted to it by the High Court. With regard to the Constitution, the Supreme Court of Appeal may determine any matter, with the exception of some matters relating to labour and competition, but it is solely an appellate court and may decide only appeals and appeals-related issues. An order involving the constitutional validity of an Act of Parliament, of the Provincial Act or of any actions of the President can be rendered by the Supreme Court of Appeal, but a decision of unconstitutionality has no effect unless it is validated by the Constitutional Court”.<sup>xi</sup> No other court other than the constitutional court has the power to change the judgment of the Supreme Court of Appeal. However, its own rulings may be reversed or altered by the Supreme Court of Appeal itself.

High Courts:

“A high court has jurisdiction over all persons residing or present in that area in its own territory. These courts hear such severe matters that the lower courts may not have authority to render an effective decision or to enforce a penalty. Except where a minimum or maximum penalty is prescribed by statute, their statutory authority is limitless and, in some defined situations, involves handing down a sentence of life imprisonment”.<sup>xii</sup>

Magistrate Courts:

For the majority of people who go to court, Magistrates' Courts are the normal point of entry. The role of Magistrate's court is to deal with crimes and civil cases which are not serious in nature. They can be split into “district courts and regional courts”. People breaking the law are prosecuted by the state in the criminal courts. Criminal Courts are split into two:

- Regional Magistrate's Courts
- Ordinary Magistrate's Courts or the District Courts

The Regional Magistrates' Courts has jurisdiction only upon criminal cases, while the District Magistrates' Courts have the jurisdiction over the civil as well as criminal cases.

## **INDEPENDENCE OF JUDICIARY**

Judicial independence refers to the capacity of courts and the judges, to exercise their functions free of interference or influence by other branches of the government. In a normative context, this term is often used to refer to the sort of freedom that courts and judges should embody. The rule of law is the foundation of this theory. It can be said that the authenticity of the judicial system solely rests on independent judges. A comparative analysis of judicial independence in India and South Africa is discussed below.

### ***India***

The Indian Constitution provides for various provisions so that the judiciary acts independently. A consolidated three-tier structure for judiciary in India has been developed by the Constitution of India, with the Supreme Court at the top, the High Courts in States, the Subordinate Courts at district level, and several provisions are subsequently made to guarantee independence of judiciary in our country, some of the provisions are as follows:

#### ***1. Appointment of Judges***

“The President of India, nominates both the Judges of the Supreme Court as well as the High Courts”. However, the President, in the matter of nomination of these judges, is required to exercise such power after consulting with Judges of the Supreme Court and the High Courts. The Constitution, therefore, doesn't really grant the executive a stronger hand in this subject.

#### ***2. Security of Tenure of Office***

The Constitution forbids the dismissal of the judges of the Supreme Court and the High Court, from office with the exception of impeachment on specific charges of proven misconduct or incapacity.

### ***3. Salaries and Allowances of the Judges***

After a judge is appointed and his pay and benefits are decided by Parliament by statute, within the tenure of his office, they cannot be adjusted to his detriment.

### ***4. Appointment of Staff***

The Constitution empowers the Chief Justice of Supreme Court and the Chief Justice of every High Court to recruit the officers and servants of their courts as well as to regulate their conditions of service.

### ***5. Expenditure of the Court***

Administrative costs of both the Supreme Court and the High Courts, along with all wages, benefits and pensions owed to officials and staff, shall be paid by the Combined Fund of India and States and, therefore, they are not subject to the vote of the Legislature.

### ***6. Restriction on Discussion in Parliament***

The Constitution forbids any State from debating in Parliament or in the Legislature of the state the actions of any Justice of the Supreme Court or of the High Court while discharging their duties.

### ***7. Power to Punish for its Contempt***

The Supreme Court and the High Courts were proclaimed to be Courts of Record and given the right to prosecute any individual for their contempt. The reasoning underlying Contempt of Court is that, in order to serve the function of delivering justice, courts must have the ability to ensure adherence to their decisions.

### **8. *Power to make rules***

The Constitution enriches the Supreme Court of India to establish rules controlling the standard practise and operation of the Court of Justice, including, rules specifying the required number of judges to sit for any purpose, and specifying the roles of individual judges and divisional courts.

### **9. *Separation of Judiciary from the Executive***

The Constitution allows the State to take reasonable measures to distinguish the judiciary from the executive. The aim behind such a division is to ensure judicial independence, which is one of our Constitution's fundamental elements and a central necessity.

### **10. *Protection from Prosecution***

The Code of Criminal Procedure 1973 orders the magisterial courts not to take cognizance of any crime suspected to have been conducted by a judge or magistrate, acting or intending to act in performance of his official duty, except, as the case may be, with the prior sanction of the central or state government.

## **South Africa**

The independence of the judiciary is a “distinctive feature of a constitutional democracy”<sup>xiii</sup> and is an important feature of the doctrine of the separation of powers. The Constitution demands that the courts remain independent, subject only to the Constitution and the law.<sup>xiv</sup> As the branch of government that applies the law, it is important that the courts are able to apply it to the other branches of government too this gives effect to the principle that no one is above the law, not even the most powerful political actors in society. The independence of the judiciary in democratic South Africa is protected in a number of ways.

1. From a historical point of view, the decision to constitute the Constitutional Court and to dedicate it with the implementation of the Supreme Constitution was a move targeted at increasing the independence and credibility of the post-apartheid judiciary, during which, in

the eyes of the general public of South Africans, the credibility of the institution was unquestionably eroded.

2. South African courts have interpreted the concept of independence as it pertains to the judiciary as comprising two ideals: impartiality and freedom from external intervention. Therefore, the degree to which the judiciary can be said to be autonomous depends on the degree to which other branches of the government clearly preserve and endorse these values. Impartiality allows judges to view their arbitral duty with a free and unbiased mindset, and to suspend the power of their own political and ideological responsibilities while interpreting and applying the rules to the best of their ability. The participation of the Committee of the Judicial Service in the selection of all judges to the “Constitutional Court, the Supreme Court of Appeal and the High Courts” preserves integrity by reducing the possibility of the recruitment of judges on the basis of partisan political interests.
3. Secure from external intervention, the third significant element connected with the independence of the judiciary, is protected by various methods.
  - a) Insecurity of tenure: that is, an assurance that judges will not be removed or threatened with dismissal from office for the performance of their duties. The Constitution ensures that, regardless of political counter-pressure, all judges of the Constitutional Court and judges of the Supreme Court of Appeal and High Courts hold office for a prescribed period of time. However, premature retirement is not a question of tenure protection.<sup>xv</sup>
  - b) Second, freedom from external interference is protected by the Constitution, which guarantees that judges have financial security.<sup>xvi</sup> Specifically, judges’ salaries, compensation and benefits will not be decreased to their disadvantage.
4. The Constitutional court has held that the lower degree of independence available to the lower courts does not compromise the necessary standard of judicial independence and integrity, as it is the duty of higher courts, mainly through judicial review, to safeguard the independence and impartiality of lower courts.



## JUDICIAL REVIEW

The power of Judicial Review is referred to as that process under which the actions of the legislative or executive can be reviewed by the judiciary when such legislative or executive body exceed their authority. Under judicial review the court which is given such authority may check the validation of any law, act, or any action of the government that are incompatible or inconsistent with the constitution of the state.

### *India*

The basic structure of India's constitution is Judicial Review, and any attempts to defeat or harm the basic structure is unconstitutional. According to statutory and constitutional regulations, the courts in India get a vast array of judicial review powers. In “Keshvananda Bharti v. State of Kerala, judicial review was regarded as a one of the basic features of the Constitution after a long tussle between parliamentary sovereignty and judicial supremacy”<sup>xvii</sup>. In later many cases, the Supreme Court considered judicial review to be the grounded and essential value of the Constitution. Thus, judicial review was formally embedded to be a core constitutional value of the Constitution. An express provision for judicial review in the form of Article 13 is provided for in the constitution of India. Under the constitution, “laws that detract or abrogate fundamental rights are liable to be struck down by the courts as ultra-vires or void by exercising their power of judicial review”.<sup>xviii</sup> In fact, “Article 13 provides for the judicial review of all laws in India, both past and future”, and “article 32 and 226 talk about the protection of fundamental rights through writs issued by the Supreme Court and the High courts”. The scope of judicial review is an integral feature deeply ingrained into the Indian Constitution and is enshrined in “Articles 13, 32, 131-136, 142, 143, 226 and 246 of the constitution”.

### *South Africa*

*Section 2 of the constitution of South Africa says that*

*“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”<sup>xix</sup>.*

The Constitution of South Africa has bestowed upon the judiciary with the power of judicial review against the inconsistent actions of the government and to check the same.<sup>xx</sup> The judiciary has the power as well as the duty to uphold the constitution. Thus, via this provision, judicial review may be recognized as a core constitutional value in South Africa. The Constitutional Courts have been given the sound authority of judicial review to verify the constitutionality of a constitutional amendment under the Constitution of South Africa. “Section 38 of the constitution of South Africa specifically provides that every person has right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief”<sup>xxi</sup>. Judicial review has been an important element in South Africa's functional legal framework. The South African model of judicial review can therefore also be seen to consist of a special mixture of the judicial framework borrowed from the civil legal system and the procedural principles inherited from common law system.

## CONCLUSION

Globally we see that the judiciary of different countries are being governed differently. In this research paper the researcher tried to compare the judicial system of India with South Africa. In analyzing the judiciary in these two countries more stress was given upon the hierarchy of courts, Independence of Judiciary along with the power of judicial review in these two countries. The major difference between the hierarchical structure of judiciary of these two countries was the establishment of constitutional court in South Africa for resolving all the matters that are related to the Constitution or constitutional interpretation. However, there are no special establishments in India for the same. the power to check the constitutionality of a constitutional amendment lies only with the Constitutional Courts of South Africa. The judiciary in both these countries enjoy judicial independence along with the power of judicial review. Section 2 of the constitution of South Africa and Article 13 of the Indian Constitution specifically provides for the power of Judicial Review to the judiciary. Consequently, under the Constitution of South Africa, the wholesome right of judicial review has been given to the Constitutional Courts in the constitutional matters also sec 38 of the constitution specifically

provide that every person has right to make an appeal to a competent court, if any of his right provided to him by the Bill of Rights has been infringed. In India both the Supreme Court and the High Courts have the right of judicial review under the Constitution of India, The Supreme Court, with its Constitutional interpretation, has the final say and the Supreme Court and the High Courts have been given the power to protect the fundamental rights given to the public by the constitution on India. All the civil and judicial authorities within the territory of India are required to act in the aid of the Supreme Court, thus, demonstrating how all the authorities have to comply with the orders of the Supreme Court. The courts in India have been firmly entrusted with the responsibility to uphold the supremacy of the Constitution and to check the actions of the government by employing their power of judicial review.

Even though the constitution of South Africa came at a much later date as compared to the constitution of India even then South African constitution has been successful in setting up an effective judicial system. They have also been successful in making their judiciary independent from the interference of other government bodies. In India, yet there is independence of judiciary and safeguards have been taken to protect it but still there are some cases where we can see this independence getting violated. It can be concluded by saying that South Africa even with a new born constitution is setting a great example for other countries with setting up a constitutional court specifically for handling constitutional matters.

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## ENDNOTES

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i Article 129

ii Article 141

iii Article 32

iv Article 13

v Article 226

vi Article 215

vii Article 217

viii Article 233

ix Article 233

x Section 167(4)

xi Home. (n.d.). Retrieved January 10, 2021, from <http://www.supremecourtofappeal.org.za/index.php/about-us>

xii Home. (n.d.). Retrieved January 10, 2021, from <https://www.judiciary.org.za/index.php/the-south-african-judicial-system>

xiii De Vos & Freedman op cite note 8 at 225.

xiv Section 165(2) of the Constitution

xv Section 176 of the Constitution

xvi Section 176(3) of the Constitution

xvii (1983) 4 SCC 225; AIR 1973 SC 1461

xviii Article 13(2)

xix Section 2

xx Section 2

xxi Section 38