

Independence Of Indian Judiciary: Need for vast and in all aspect of Judicial Activism

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Abstract: There is a vast change in judicial process but on various points judiciary is silent whether the promotion of judges in High Courts or Supreme Court, the response ability of giving information under the right to information act., the corruption of judges. Is there no need of activism in this era? No doubt law regulate the society, but some time society also regulates the law. Is there need of the procedure of public opinion how judiciary should do their function through judicial activism? As it is clear changing aspirations of people also affects law. Constitutions, Courts, and other part of judicial system are made for common people. In the view of Justice Y. V. Chandrachud observed "it is really the poor, starved and mindless millions who need the court protection for securing the enjoyment human rights". So being some need of more activism in judiciary, judicial activism has played an important role in human life. Although on the one hand Judiciary has touched almost every aspect of life through judicial activism whether the case of bonded labour, rehabilitation of freed bounded labour, payment of minimum wages, juvenile offenders, child labour, illegal detention, torture and maltreatment of police lock-up, implementation of various provisions of the Constitution, environment problems, the court took cognizance of each case and laid down various judgments to protect the basic human rights of each and every member of society, but on the other hand there is need of transparency itself in judiciary. **Dr. B. R. Ambedkar** opined-"**There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself. And the question is how these two objects can be secured**". The courts in India have also given a new interpretation to the constitutional provision relating to protection and improvement of the environment may be explained with reference to the following heads-(1)The constitution 42nd Amendment. (2) Federal System of Government (Distribution of Legislative Power). (3) Fundamental Rights. (4) Directive Principles of State Policy. (5) Fundamental Duties.

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1. **Introduction:** The meaning of judicial activism is philosophy of judicial decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions. Judicial activism is closely tied with personal standpoint of 'liberal. It is basically being more 'activist' or more in turn with 'adding' to the U S constitution rather than merely interpreting it. Additionally, it could be argued that judicial activism is necessarily because it is difficult to decide the court cases based on constitution. During the last two posture and come forward to the rescue of aggrieved citizens. In a number of case, subsequent to the Maneka Gandhi case, the judiciary interpreted the constitutional provisions in its wider possible meaning to protect basic civil liberties and fundamental rights. During this period, our judiciary developed the concept of social action litigation and public interest litigation by discarding the traditional and self imposed limitations on its on jurisdiction. For the first time Justice Krishna Iyer in Bar Council of India case, advocated the liberal interpretation of locus Standi in public interest litigation. He observed that in a developing country

like India, public oriented litigation better fulfills the rule of law if it is to run close to the rule of life.

The question that arises at first instance in our mind is that what made the framers of our Constitution to be so much concerned about providing the separate entity to the judiciary and making it self competent. The answer to this question lies in the very basic understanding that is to secure the stability and prosperity of the society, the framers at that time understood that such a society could be created only by guaranteeing the fundamental rights. The independence and transparency of the judiciary was much needed to guard and enforce fundamental rights. In India, the independence and transparency of judiciary is of utmost importance in upholding the pillars of the democratic system. It is a well-known fact that the independence and transparency of the judiciary are the basic requisite for ensuring a free and fair society under the rule of law which is responsible for good governance of the country and that too can be secured through unbiased judiciary.

2. The famous French philosopher Montesquieu had first of all given the idea of the independence of judiciary. He believed in the Theory of Separation of Powers of the three branches of the Government. Legislature, Executive and Judiciary. The Doctrine of Separation of Powers provides for a responsibility to the judiciary to act as a watchdog and to check whether the executive and the legislature are functioning within their limits under the Constitution and not interfering in each others functioning. This task given to the judiciary to supervise the doctrine of separation of powers cannot be carried on in true spirit if the judiciary is not independent in itself.

Inspired by his theory, the framers of the American Constitution established an independent judiciary in their country. The American people have great confidence in the independence of judiciary. They feel that their rights and liberties will be endangered if judiciary is weakened in anyway.

In United Kingdom, earlier the judiciary had not specifically been made independent but now in 2009 it has been separated from the Legislature and the Supreme Court has been established as the highest court of appeal in England. But the judges long before the establishment of the Supreme Court have been acting in a highly independent and fearless manner in their decisions. In spite of the fact that English people do not have any written fundamental rights, still they enjoy no less liberty than the Americans. The credit for this goes to the independent, impartial and transparent judiciary.

There is no doubt that a fearless, impartial and transparent judicial system is must for any civilized nation. It is also an essential condition for a federal type of government as practised in India. If the judges of the higher courts are fearless, impartial, independent and transparent, only then it can be expected that they can protect the fundamental rights of the persons. On the other hand, if the judges themselves are weak and fearful they cannot uphold the rights of the persons. In India too, the Constitution has established a separate, independent and impartial judiciary and Indian Supreme Court has proved its independence and impartiality since its inception. On many occasions it pronounced several historical judgments fearlessly, which sometimes even went against the government. Indian Supreme Court has been acting as a protector and guardian of the Indian Constitution.

In modern times, the independence of judiciary does not mean that it should not keep in mind the social and economic ideals and aspirations of the people while delivering its judgments. Rather the judiciary should actively participate in the sacred task of building a welfare society in the country and the regeneration of the nation. Similarly, the executive or

the Parliament should not do anything to undermine the independence of judiciary.

The major task lies in creating a favorable environment for the functioning of judiciary in which all the other state organs function in cooperation so that the independence of the judiciary can be achieved practically. The independence of the judiciary has also to be guarded against the changing economic, political and social scenario. Whenever there is a talk regarding the independence of the judiciary, there is also a talk of the restrictions that must be imposed on the judiciary as an institution and on the individual judges that form part of the judiciary. In order to ensure smooth functioning of the system there must be a proper blend of the two.

On the other hand, its opponents want to uphold the supremacy of the Parliament. They want to limit the powers of judiciary. They say that it should not stand in the path of economic and social reforms for the establishment of a socialistic society. One instance of this is regarding the appointments of the Judges of Supreme Court and High Courts performed by the judiciary itself, giving primacy to the opinion of the Chief Justice of India and undermining the view of the President.

If we talk about independence and transparency of judiciary, our Constitution by the way of the provisions just talks about it but it is nowhere construed what is independence and transparency of the judiciary in real senses. The primary independence of the judiciary is based on the doctrine of separation of powers which holds its existence from medieval period. The doctrine of separation of powers talks of the independence of judiciary as an institution separate from the executive and the legislature. Scholars try to define judiciary by talking about the independence of the judges. Therefore, the independence of the judiciary is the independence of the exercise of the functions by the judges in an unbiased manner i. e. free from any external factor.

2. 1. Shetreet in his work tries to explain the words "**Independence**" and "**Judiciary**" separately, and says that the judiciary is "the organ of the government not forming a part of the executive or the legislative which is not subject to personal, substantive and collective control and which performs the primary function of adjudication". The final outcome that can be derived from Shetreet's writings is that the independence of the judiciary as an institution and the independence of the individual judges both have to go hand in hand, as the independence of the judiciary as a transparent institution is not possible without the independence of the individual judges.

2. 2. Need for the Independence of the Judiciary: -

Although on the one hand Judiciary has touched almost every aspect of life through judicial

activism whether the case of bonded labour, rehabilitation of freed bounded labour, payment of minimum wages, juvenile offenders, child labour, illegal detention, torture and maltreatment of police lock-up, implementation of various provisions of the Constitution, environment problems, the court took cognizance of each case and laid down various judgments to protect the basic human rights of each and every member of society, but on the other hand there is need of transparency in itself (judiciary). The need for the independence of judiciary is felt so as to keep a check that the judicial institution is working in a transparent manner. Thus the basic need for the independence of the judiciary rests upon the following points: -

2. 2. 1. To check the functioning of the organs:

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 meeting the doctrine of separation of powers.

2. 2. 2. Interpreting the provisions of the Constitution:

It was well known to the framers of the constitution that in future the ambiguity will arise with the provisions of the constitution, so they ensured that the judiciary must be independent and self-competent to interpret the provision of the constitution in such a way to clear the ambiguity but such an interpretation must be unbiased i. e. free from any pressure from any organ. If the judiciary is not independent, the other organs may pressurize the judiciary to interpret the provisions of the constitution in their interest.

2. 2. 3. Disputes referred to the Judiciary: It is expected of the Judiciary to deliver judicial justice and not partial or committed justice. By committed justice we mean to say that when a judge emphasizes on a particular aspect while giving justice and not considering all the aspects involved in a particular situation. Similarly, judiciary must act in an unbiased manner.

3. Constitutional Provisions for the Independence of the Judiciary: -

Many provisions are provided in our Constitution to ensure the independence of the judiciary which are discussed below: -

3. 1. Security of Tenure: The Judges of the Supreme Court and High Courts have been given the security of the tenure. Once appointed, they continue to remain in office till they reach the age of retirement which is 65 years in the case of judges of Supreme Court [Art 124 (2)] and 62 years in the case of judges of the High Courts [Art 217 (1)]. They cannot be removed from the office except by an order of the President and that too on the ground of proven misbehavior and incapacity [Art 124 (4)]. A resolution has to be

accepted to that effect by a majority of total membership of each House of Parliament and also by a majority of not less than two third of the members of the house present and voting. Procedure is so complicated that there has been no case of the removal of a Judge of Supreme Court or High Court under this provision.

3. 2. Salaries and Allowances: The salaries and allowances of the judges is also a factor which makes the judges independent as their salaries and allowances are fixed and are not subject to a vote of the legislature. There are charged on the Consolidated Fund of India in case of Supreme Court Judges and on the Consolidated Fund of State in case of High Court Judges. Their emoluments cannot be altered to their disadvantage [Art 125 (2)] except in the event of grave financial emergency.

3. 3. Powers and Jurisdiction of the Supreme Court:

Parliament can only add to the powers and jurisdiction of the Supreme Court but cannot curtail it. In civil cases, Parliament may change the pecuniary limit for the appeals to the Supreme Court. Parliament may enhance the appellate jurisdiction of the Supreme Court. It may confer supplementary powers on Supreme Court to enable it work more effectively. It may confer power to issue directions, orders or writs for any purpose other than those mentioned in Art 32. Powers of the Supreme Court cannot be taken away. This all makes judiciary independent ensuring a better role in adjudication of the cases.

3. 4. No discussion on conduct of Judge in State Legislature/Parliament:

Art 211 provides that there shall be no discussion in the legislature of the State with respect to the conduct of any judge of Supreme Court or of a High Court in the discharge of his duties. A similar provision is made in **Art 121** which lays down that no discussion shall take place in Parliament with respect to the conduct of the judge of Supreme Court or 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.

3. 5. Power to punish for contempt: Both the Supreme Court and High Courts have power to punish any person for their contempt. **Art 129** provides that the Supreme Court shall have the power to punish for contempt of itself. Likewise, **Art 215** lays down that every High Court shall have power to punish for contempt of itself.

3. 6. Separation of Judiciary from the Executive:

Art 50 contains one of the Directive Principles of State Policy and lays down that the State shall take steps to separate the judiciary from the executive in the public services of the state. The object behind the DPSP is to secure the independence of judiciary from the executive. Art 50 says that there shall be a separate judicial service free from executive control.

4. Discussion: Courts have always tried to uphold the independence of judiciary and have always ruled that the independence of the judiciary is a basic feature of the Constitution. Courts hold this view because the independence of judiciary is the pre-requisite for the smooth functioning of the Constitution and for a realization of a democratic society based on the rule of law. The interpretation in the **First Judges Case, S. P. Gupta v. UOI**, giving primacy to the executive, has led to the appointment of at least some judges against the opinion of the Chief Justice of India. This case could never have been intended by the framers of the Constitution as they always set the task of keeping judiciary free from executive and making it self-competent. The ratio in **Second Judges Case, Re Presidential Reference**, and the **Third Judges Case, Supreme Court Advocates-on-Record Association v. Union of India**, is a praiseworthy step by the Supreme Court in this regard.

Let me extend my humble opinion, whenever there is a mention of the independence of the judiciary, there is always a concern about the latent dangers of the judicial independence and there arises the importance of "**Judicial Accountability**". The recent development in this regard is the recommendation of the Law Commission in 2010 for the inclusion of a **whistleblower** provision which aims at protecting those making complaints against judges, in a draft bill called **The Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010**. Introduction of such a bill by the Law Commission is a major step in the direction of making changes to the rigid procedure in our Constitution for the removal of the Judges of Supreme Court and High Courts. Thus judicial independence and judicial transparency have to work hand in hand to ensure the real purpose of setting up of the institution of judiciary. To sum up we can say that there is vast change in judicial process but on various points judiciary is silent whether the promotion of judges in High Court or Supreme Court, the responsibility of giving information under the right to information act., the corruption of judges Is there no need of activism in this era ? No doubt law regulate the society, but some time society also regulates the

law. Is there need of the procedure of public opinion how judiciary should do their function through judicial activism? As it is clear changing aspiration of people also affects law. Constitutions, courts, and other part of judicial system are made for common people.

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