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Dynamic facets of 'Independence of the Judiciary'- A Constitutional Perspective

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Abstract

The Constitution of India as an '*organic document'* has been time-tested and has lived the expectation with the flexibility of interpretation that even when first Law Minister and the Chairman of the Drafting Committee of the Constitution, Dr BR Ambedkar once said that, "*The values inbuilt in the Constitution of India provide the basis and the very purpose of interpretation where dynamic interpretation would evolve with the passage of time*". The 'Accessibility' has another dimension of '*trust'* and the '*belief on the system'*, where the judiciary has to maintain the highest standards and the level of transparency which the citizens of the country expect and such aspirations are inbuilt in the 'independence of the judiciary' with uniformity of law in entire country. The instant article is an attempt to review and analyse the 'Independence of the Judiciary' from the prism of Constitution of India in context of *inter alia* '*Contempt of Court', 'Removal of Judges'* and *'Appointment and Selection of Judges'*. A perspective from the view of 'Comparative Law' including that of the UK, the US and South Africa has been done quintessentially to enable the readers to have a holistic opinion in line with catena of cases surfacing before the Hon'ble Courts of the Law of the Land in varied timelines to bring in perspective diverse norms, rules, processes and practices which are prevalent in International parlance.

Keywords: *Jurisdiction; Contempt of Court; Removal of Judges; Appointment and Selection of Judges.*

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Introduction

Jurisdiction defines the limits and a legal term to denote the authority exercised by a legal entity for delivery of justice. The highest court of the country, Hon'ble Supreme Court's Jurisdiction has multiple facets in the form of

1. Original Jurisdiction[2]
2. Appellate Jurisdiction[3]
3. Advisory Jurisdiction[4]

The emerging parlance of greater authoritative power of Apex Constitutional Court has multiple evolving dimensions as enumerated:

1. Supreme Court of India and High Courts of India as 'Court of Record'
2. Writ jurisdiction of the Supreme Court of India and High Courts of India pertaining to upholding the Fundamental Rights[5].
3. Review Jurisdiction with respect to **Article 137**[6], the Hon'ble Supreme Court's power to review its own judgment and orders. The aforesaid Article finds applicability as it has to read conjointly with **Order 47** of the Code of Civil Procedure 1908, on the varied grounds:
    a. Whether there has been 'discovery' of 'new and important matter' with respect to evidence
    b. Whether there is any apparent error or mistake in the record which has to be adjudicated upon.
    c. Whether there are any sufficient reasons to be adjudicated upon.
4. Binding nature of the law as pronounced by Hon'ble Supreme Court of India on all the Courts in India vide **Article 141** as has been re-emphasised and exemplified in the case, ***Vineet Narain v Union of India***[7].

[2] As enshrined in Article 131 of Constitution of India, 1950
[3] As enshrined in Article 132, 133 and 134 of Constitution of India, 1950
[4] As enshrined in Article 143 of Constitution of India, 1950
[5] In line with provisions of Article 32 of the Constitution of India, 1950 in case of Hon'ble Supreme Court of India and Article 226 of Indian Constitution in case of Hon'ble High Courts of India.
[6] Article 137 of the Constitution of India, 1950
[7] Vineet Narain v Union of India AIR 1998 SC 889

5. The case ***Supreme Court Employees v Union of India***[8], reiterated the stance on Hon'ble Supreme Court decision is not bound or restricted by its decision rendered by it before and has power to review its previous decision.
6. Power to transfer and withdraw cases *suo moto* with amendment to Article 139A by Constitution (Amendment) Act 1978 holds importance as it involves substantial question of law.

Contempt of the Court

The roots of 'Contempt of the Court' have its origin from **Rex v Almon**[9], where it was observed by **Hon'ble Justice Wilmont** that "*man allegiance to law is fundamentally shaken, leading to obstruction of justice...*" In ***Delhi Judicial Services Association v State of Gujarat***[10], the Hon'ble Supreme Court of India observed that, "*efficacy of the Court and particularly the subordinate Court's protection is necessary at grass root level to preserve the confidence of the people in judicial efficacy. The Apex Court further observed that Article 32, 136, 141 and 142 form part of the basic structure of the Constitution of India…*" Further in the case In *Re: Vinay Chandra Mishra*[11], the Apex Court went on to observe that, "*Article 129 declares the Supreme Court to be the Court of Record and as such it can punish for the contempt of itself…*" The Court observed that it demonstrates the intent of the framers of the Constitution. The 'Contempt of Court' could be founded on three grounds, Firstly, on '*active and open disobedience to order of the Court*' and it may involve disobedience in appearance when called for or summoned. Secondly, on '*Sensationalism of media'* which casts that aspersion and leading to prejudice in fair trial and thereby, obstructive in meeting the finality or needs of justice; while thirdly, it may pertain to '*Scandalizing of the Court'*. Shri R.K Sidhva in his comment that once said, "*Judges have no two horns; they are human beings and as such liable to mistake*" is pertinent to be noted as the framers of the Constitution had an omnibus term 'Contempt of the Court'. The Parliament while enacting the Contempt of the Court Act 1971[12], had provided the primacy to the objective that any scandalizing activity with the views of lower the authority and dignity of the Court was deemed to be a contempt. Furthermore, the aforesaid

[8] Supreme Court Employees v Union of India AIR 1991 SC 334
[9] Rex v. Almon (1765)
[10] Delhi Judicial Services Association v State of Gujarat AIR 1991 SC 2176
[11] Re: Vinay Chandra Mishra, (1995) 2 SCC 584
[12] Reference is drawn to Section 2(c)(1) of Contempt of the Court Act, 1971 which provides for, "*Criminal Contempt as publication of words, spoke or written or via, visual representation to scandalise or lower or tending to lower the dignity and authority of the Court…*"

premise and objective was strengthened via rules which enabled regulating proceedings for the Contempt of the Supreme Court in 1975. Interpretation of Rule 2[13] in this context, over a period of time brought forth the 'ambit' of the applicability as, *derogatory comments/libel to scandalise the Court*, making a *prejudicial comments* by one party in Hon'ble Court, flattering comments for influencing the judges, garnering traction in *unwarranted fashion to develop or galvanise the 'public opinion building'* with the purpose of '*influencing the decision of the highest statutory authorities'* which *cast aspersion or brings a preconception of prejudice and via publication of material derogatory* without any substantive evidence in the eyes of law, were all deemed to be attempts to 'contempt'.

A Perspective from Comparative Law

Looking from the perspective of Comparative Law, In ***Bridges v California[14],*** **Hon'ble Justice Hugo Black** had succinctly observed that 'resentment, suspicion and contempt' has to be seen in the light of 'respect for judiciary' with shielding the judges from any published 'criticism'. It is pertinent to note that **Hon'ble Justice Felix Frankfurter** said that, "*scandalising of the Court brings the disrepute…"*. He went on to opine that, "*protecting the Court as mystical entity or judges as individual anointed priests set apart from community…*" In ***State v Mambolo[15]*** in South African Constitutional Court parlance, weighed a vital dimension in the context as "need for sustaining the public confidence in the eyes of the Court of the law" and prescribed for a strict and 'highly defined' limits of the offence of 'scandalising of the Court'. **Hon'ble Justice Sachs** had pertinently asserted in his observation that 'real prejudice which is provoking in nature' is deemed to an ingredient affecting the administration of justice and usage of word should be limited not to bring disrepute to justice delivery system. The '*Clear and Imminent danger*' test advocated in US in the judgment ***R. v Kopyto[16]***, conviction of lawyer with criticism delivered to Court as '*mockery of justice'* are the vital observation with a 'Comparative Law' perspective, warranting an analysis of the gravity and the seriousness which is posed by criticism of the nature of 'Contempt of the Court'. In Indian context, the matter in reference to the case, In **Re: Arundhati Roy[17]** involved the criticism of the judgment of the Hon'ble Supreme Court by a famed or outspoken person, was adjudicated by Hon'ble Court with observation that "*statements which are made in public interest have to be gauged*

[13] Rule 2 of "The Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975"
[14] Bridges v California, 314 U.S. 252 (1941)
[15] State v Mambolo, (CCT 44/00) [2001] ZACC
[16] R. v. Kopyto, (1987) 24 O.A.C. 81 (CA)
[17] Re: Arundhati Roy, AIR 2002 SC 1375

from the prism of surrounding circumstances and knowledge of the person who made the comment and what purpose did it achieve..."

Appointment and Selection of Judges

The Qualification for a judge of Supreme Court of India has two vital essentials, "*firstly, a person of Indian citizen and secondly, on at least five years of the in succession as a judge of High Court or two or more High Courts in succession...*" The same as mentioned in **Article 124(3),** specifies that the President is his opinion can appoint a person considered as 'distinguished jurist'. The appointment and selection of Judges has to looked from the perspective of two vital aspects, firstly, '***accessibility***' and secondly, '***inherent independence in selection'***. Such a procedure of selection has multiple dimension which warrants analysis. The appointment by a judicial collegiums vis-a-vis the formation or constitution of a body or institution, say of the type of 'National Judicial Appointments Committee (NJAC)' is one such facet of contextual analysis. The constitutional validity of the '**National Judicial Appointments Committee'** has been the moot point of contention in number of occasions. A judgment delivered by five- judge bench in ***Supreme Court Advocate-on-Record Association v. Union of India***[18] held that, "*NJAC was unconstitutional and stuck it down with the view that independence of the judiciary was violative of the basic structure doctrine…*" In this context, catena of cases subsequently surfaced before the Hon'ble Supreme Court of India including the Second Judges case[19] where Hon'ble Justice Verma, succinctly put the interpretation of the 'Consultation' as a 'Concurrence Process'. He observed the consultation involved is not with any 'individual' but with 'an institution' *per se*. The analysis of the '***independence of the judiciary'*** has been the talking point for many research scholars and experts. Hon'ble Justice Verma, closely analysing the debate in the context when seen in consonance with the 'intent' of the framers of the Constitution, had construed the 'consultation' as a unique process. Such a process, he opined that should be interpreted in a unique sense in the working of the setup. Alluding to Article 124[20], Hon'ble Justice Verma said that there is a difference in the consultative process, its purpose, intent which led to the idea of "Collegiums System of appointment of Judges".

[18] Supreme Court Advocate-on-Record Association v. Union of India (2015) AIR 2015 SC 5457
[19] Supreme Court Advocates-on-Record Association v. Union of India (1993) 4 SCC 441
[20] Article 124 of the Constitution of India, 1950

In this endeavour of what 'Independence' means has multiple dimensions such as 'Oath of the Judges' including that of the Chief Justice of India of the Hon'ble Supreme Court of India and the Chief Justices of Hon'ble High Courts in India, the ceremonious character of administering the oath of the Chief Justice of India by President of India and likewise, for the Chief Justice of the Hon'ble High Courts by Governor of the State, the salary and the remunerations of the Judges which cannot be downgraded in the tenure of the judges, the immunity to the judges provide an unmistakeable sense that the primacy to the opinion of the judges are of paramount importance.

Removal of Judges

As categorically enunciated in the Constitution of India vide Article 124 read along with Article 218 that the removal of Judges has to be on two grounds, *firstly*, for 'Proved Misbehaviour' and *secondly*, for 'Incapacity'. 'Incapacity' includes the period during which the person holds the office of Judgeship, while interpretation of the word 'misbehaviour' is capacious enough to include even the period or the time before assuming the charge of the office. As such a removal has to happen with 'President's order' and as laid down in the Constitution provisions, "*which has to be passed in each House of the Parliament, that is Lok Sabha and Rajya Sabha, supported by majority of total membership of the House. The conditions are well established that such majority has to be construed as not less than two-third of the members present and voting. Furthermore, it has to be presented to the President in the very same session…*"

There is a historic backdrop of the procedure which is having relevance from the perspective of 'Comparative Law', where the provision of the removal of the judge in the Constitution of India is being taken from the UK and the US. Another facet is the inquiry[21] conducted on the allegation of the judges. History is of relevance when Hon'ble Justice V Ramaswami was arraigned for trial before the august Lower house of Parliament, that is in 9th Lok Sabha on 10th May 1993, on charges of misuse or misappropriation of funds. With the committee establish the charges of misconduct and the motion for presentation to President fell for the want of

[21] Inquiry into the allegation of the judges is, "*In pursuance of the Article 124(5) of the Constitution of India, lead to the passage of the Judges (Inquiry) Act, 1968 which has to be seen in tandem with Judges (Inquiry) Rule, 1969 with detailing of procedures and for the consequent inquiry on or against the allegation of the judges. As per the Constitution, not less than 100 members of Lok Sabha or 50 members of the Rajya Sabha could bring that notice where the Speaker in Lok Sabha or the Chairman in case of Rajya Sabha has to decide the admissibility of such motion. If it does happen, then a committee is appointed for holding the investigation…*"

requisite votes and though Hon'ble Justice V. Ramaswami continued till the year 1994, his normal scheduled date of retirement. The salient takeaways from the entire aforesaid exercise, was that 'Removal of Judges' is a cumbersome, highly political and dilatory in nature.

The other instances were of Hon'ble Justice Soumitra Sen and Hon'ble Justice P.D. Dinakaran where the entire procedure was never tested as they demitted office before completion of any process initiated for the 'Removal of Judges'. Hon'ble Justice Soumitra Sen case involved purported allegation on sitting judge of Calcutta High Court on financial irregularity and with Rajya Sabha passing the motion and Hon'ble Justice Sen moving out of the service one day before it was to be taken up in Lok Sabha. The question of credible statutory mechanism has been the subject matter of analysis and while the 'Comparative Law' perspective of US is vital in this context to take cognizance of, the enactment of *Judicial Reform and Judicial Conduct and Disabilities Act, 1980* in US made in consultation with Hon'ble United States Supreme Court, a methodology which is construed in US is for disciplining by co-judges and peers for efficacious implementation.

In ***C. Ravi Chandran Iyer v Justice A.M. Bhattacharjee***[22], the Hon'ble Supreme Court held that, "the point of self-regulation with legal sanction power provided to Chief Justice of India to discipline the errant and delinquent Chief Justices of High Court and other judges was vital fulcrum in that endeavour. It is pertinent to note that it further observed that Chief Justice of India is to be considered *first among judges* for such responsibility to decide on matter…"[23] The contextual analysis has to be done in harmonious and synergistic manner along with "Judges (inquiry) Amendment Bill, 2008" which suggested for setting of "National Judicial Council" to enquire into such allegations and misconduct against the judges. In this context, even the 195th Law Commission report along with Judges (Inquiry) Act 1968 with recommendation for amendment helped in galvanising views from various quarters and the sections of society, particularly the legal fraternity in those times.

Conclusion

Contempt of Courts Act, 1971 has to be seen in light of Supreme Court of India role as "protector and Guarantor of the Constitution" and in this context, the responsibility of the

[22] C. Ravi Chandran Iyer v Justice A.M. Bhattacharjee (1995) 5 SCC 457
[23] Ibid.

judicial system as ‘Arbiter’ garners traction, as the common people approach the judiciary to assert their rights under the writ jurisdiction. In sequitur, there are two areas in which ‘Independence’ of judiciary is non-negotiable. Firstly, in process of appointment of the judges and secondly, in post-appointment process where the role of the Judiciary and the other wings of the Constitution are well delineated and well defined. The primacy of the ‘independence of the Judiciary’ is set out on myriads of provisions making the intent of the farmers of the Constitution with clarity that the ‘ecosystem’ of the judiciary in the broader canvas has to be established as ‘independent institutional framework’ which is the fundamental and quintessential element in the discharge of function for effective justice delivery system and having the ‘belief system’ intact for the “*sustainability and the viability of a dynamic system as envisioned by the framers of the Constitution where the touchstone of the provisions of the Constitution is the guiding light for the young generation as well as in the broader parlance of the functioning of three synergistic wings of the Constitution, that is the Legislature, the Executive and the Judiciary…*”