# ***Independence of Judiciary***

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***Abstract:*** ***Independence of judiciary is something which is indispensable for the smooth running of a democracy. Judicial system is one which should be free of pressures of fear or favor.***
***There have been various measures taken in different countries for the protection of the independent stance of the judicial system.***
***There are constitutional as well as other means which work towards the independent working, however that hasn't prevented various attacks on the autonomic working of the judicial body. In India there has been instances with one significant one, wherein there was an attempt to encroach upon the autonomy of judiciary, but it was remedied by the Courts thereby rescuing its own independence.***
***But there have also been allegations regarding the Courts being "too independent" and hence, "counter-majoritarian".***
***The article will be a study and analysis of the aforementioned topics and issues.***

## IMPORTANCE OF INDEPENDENCE OF JUDICIARY

As quoted by the seventh President of the United States of America,
"*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.*"
The judiciary in any 'real'[1] democracy would be vested with not just a significant amount of power but also those powers would be vital to the survival of the spirit democracy and upholding the basic rights of the citizens.
The Indian judiciary is regarded as one of the most powerful judiciaries in the world.
The Indian Constitution itself accords a dignified and crucial position to the judiciary.[2]
It is not just well organised but also well structured, it can very well pass Waldron's procedural test, which is crucial in determining the legitimacy of any legal system.

[1] 'Real' meaning not just purporting to be one but actually striving to achieve all the features of democracy.
[2] M.P. Jain, Indian Constitutional Law, Pg. 19, (8 ed. 2018)

The unified judicial system has the Supreme Court at its apex and it has very broad jurisdiction. It is the Court of appeal from the High Courts, who themselves have an extensive scope with vital powers in their respective States with respect to enforcement of fundamental rights and keeping a check on administrative processes.

The judiciary India not only has powers to decide matters of disputes between two individual entities but also to keep a check on the legislation made to govern the society so as to make it compatible with the rights of citizens.

The main factor for the Indian Judiciary's strength as pointed out by former Chief Justice of India, Hon'ble Justice Altamas Kabir, is its power of judicial review.

It also has advisory jurisdiction provided for in Article 143 of the Indian Constitution.

Additionally, the power to choose the judges for the judicial system also lies with the judiciary itself, as decided in the three judges case.

Most of the judiciary's powers have, the supreme law of the land, the Constitution as their source and hence are almost concrete.

Now, with such power comes great responsibility.

And the only way that such power is not misused arbitrarily by people in influential positions and influenced by people at powerful posts, is by making the whole system independent and giving enough incentive so as to free the judiciary of any burden of fear or favour.

The independence aspect is what this project will focus on with reference to foreign judiciaries as well.

## INDEPENDENCE OF JUDICIARY IN DIFFERENT COUNTRIES

As stated before, the independence of judiciary is necessary for the smooth functioning of a democracy.

Article 1 of the *United Nations Basic Principles on the Independence of the Judiciary* requires that judicial independence 'be guaranteed by the State and enshrined in the Constitution or the law of the country', and says that 'it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary'.[3]

It is unarguable that every nation purporting to showcase itself as a democracy needs to strive for an independent judiciary.

The foundation of any such legal system would be based on the independence of its judicial structure.

[3] Basic Principles on the Independence of the Judiciary, UN Doc A/CONF.121/22/Rev.1 (26 August–6 September 1985) art 1 ('Basic Principles').

AUSTRALIA

Colonial Australia never really developed the concept of an independent judiciary, however independence of judiciary is one of the primary pillars that form the base of Australia's modern legal systems.
It was the High Court of Australia, that stated in 2004,
"A court capable of exercising federal judicial power must be, and must appear to be, an independent and impartial tribunal."[4]

Immunity from being sued

In colonial Australia, the common law principles applied which stated that a judge may not be sued for not deciding the case properly, even if they acted maliciously or corruptly.
This view was upheld by the High Court of Australia in the case *Ryan D'orta-Ekenaike v. Victoria Legal Aid And Ian Denis Mcivor*[5].

Security of tenure

Initially, in Australia the removal of judges could take place just by an address being passed by the parliament, however, later this was limited by further development that the judge may only be removed on grounds of misbehavior or incapacity.
Further, through conventions it was added that proof must be produced regarding incapacity or misbehavior, and thereafter the judge should be given a chance to present his case, much like the Indian system of procedure for impeachment of judges.
Also, the Courts stated that the judge's tenure must be for life for that particular Court rather than defined in term of years.[6]

Salaries

Similar to that of India, the judge's salary is protected from being cut down upon easily.

[4] North Australian Aboriginal Legal Aid Service Inc v Bradley [2004] HCA 31, (2004) 218 CLR 146.
[5] D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 at [40], (2005) 223 CLR 1.
[6] Waterside Workers' Federation of Australia v J W Alexander Ltd [1918] HCA 56, (1918) 25 CLR 434.

It is a well-established rule in Australia that the salary for judges may not be reduced during their tenure[7] (from what has been decided when they were instated).
The Court further excluded the judge' salary from being reduced due to taxes.[8]
However, their salaries are subject to inflation and may be cut if circumstances lead to the same.

Weaknesses

One of the fundamental weaknesses of the Australian judicial system is the difference between the protection to independence as provided to the Federal Court (High Court), as compared to the protection given to regional/local judicial bodies.
They are often subject to ambiguous and weaker protection with regards to independence.

There are certain 'loopholes' so as to endanger the independence of judiciary in almost all its protections.
Such as,
The requirement of proof for the disqualification of a judge on the basis of incapacity or misbehavior is minimal, and the powers of the parliament may dominate the proceedings thereby precluding it from being fair.
Next, there is strict separation of powers, wherein the Courts are strictly barred from formulating any laws or exercise any executive or legislative powers like policy reconsiderations, they're strictly restricted to implementing laws made by the Parliament.
Further, the appointment of judges rests solely in the hands of the executive, which provides for scope of political interference.
Lastly, the Courts are funded entirely by the executive and there may be some arbitrariness and budget/funds cut for any ulterior motive which threatens the independent position of the Australian judicial system.

UNITED STATES OF AMERICA

Appointments

The judges of the U.S. Courts (including District Courts) are appointed by the president on advice of the Senate.

[7] North Australian Aboriginal Legal Aid Service Inc v Bradley [2004] HCA 31, (2004) 218 CLR 146.
[8] Cooper v Commissioner of Income Tax (Qld) [1907] HCA 27, (1907) 4 CLR 1304.

This basically shows that the executive wholly controls the judicial appointments, however, this is not true.
Firstly, the president only makes appointments on the basis of his nominations, which are done on the basis of the recommendations by the Department of Justice and White House staff.
The Department of Justice is overlooked by the attorney general, who is himself a judicial officer.

This being said, the question that arises is that, whether the executive has powers which the judiciary cannot keep a check on?
The precedents and judicial history answer this question in the negative.
There have been numerous instances where the judiciary has either checked the actions of the government or directly/decided upon directed the President's actions.
In the case of United States v. Nixon[9],
The Court had ordered the president to submit certain evidence in its custody, which the president had to promptly follow, thereafter which he resigned from office.
The President of the U.S. has a great deal of power, which is also by the U.S.A. is often said to have a presidential form of government, and if the Courts can even direct the actions of the head of the State, then its powers being compromised or 'too less' isn't a questionable aspect.
Even with regards to the government of the United States and not just the president in personal capacity, the Court may intervene and decide the legitimacy of the government's claims and actions.
As showcased in the case of Rasul v. Bush,
The Court disagreed with the U.S. government's claim that the detainees as Guantanamo bay were not entitled to question their detention and stated that they were allowed to do so, which the government complied with.

Tenure and Salaries

The tenure of the judges, just like in Australia is no fixed to a particular term but only vacate office upon death, resignation or removal/impeachment by Congress (similar to the impeachment in India).
Their salaries, again like in the case of Australia, are fixed throughout their tenure and may not be diminished by any legislation.
Both of these provisions are given for in Article III Section 1 of the American Constitution which states,

[9] 418 U.S. 683 (1974).

"…both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."

Weaknesses

The main issue in this case is not really the independence of judiciary, but its effectiveness.
The independence of judiciary is essential for the establishment of rule of law in a country, however if as it is in the case of U.S.A., the government keeps ignoring the rule of law to further its own political interests, then the independence has lost its purpose.
Such instances where the rule of law has been ignored include the Human Rights abuses by U.S.-Mexico border patrol, police use of deadly force etc.

UNITED KINGDOM

The United Kingdom has always had a monarch at its head due to which the political system in place today which suited such history was the governance by parliamentary supremacy.
The parliament is the supreme authority in the United Kingdom and along with an unwritten Constitution, its powers have no codified tethers.
This has been said to compromise the judicial independence, however this is not the case with the increasingly modern legal system changes.

Appointment

Previously, the judicial appointments fell wholly under the Queen of England, who appointed judges on the basis of the recommendation by the Lord Chancellor, however, the Judicial Appointments Commission, an independent commission removed the appointment process from this politically charged sphere.
This commission selects the candidates for holding judicial office by open competition based on seniority/experience.
The members are not political, it includes 12 members who are selected by open competition and two senior members of Courts and one senior member of tribunals.

Currently, the Queen merely appoints the person who is recommended to her by the Prime Minister, to whom that individual is recommended by a special selection committee consisting of members of the Judicial Appointments Commission and the Judicial Appointments Board of Scotland and Northern Ireland.

Tenure and salaries

The judges may serve until they are either removed or wish to retire before they reach the mandatory retirement age of 70.
Their removal is done by the Queen but without leaving scope of external pressure or arbitrariness, she may only remove them after the motion has been passed by the parliament.
The salaries of judges are taken care of by an independent pay commission. Which makes recommendations regarding the same to the government.

Weaknesses

The main issue here is again, not solely of judicial independence, but for United Kingdom, the unlimited powers vested in the parliament due to parliamentary supremacy and there being fewer provisions for checks and balances in Westminster form of government.
Also, the Lord Chancellors role in appointments of judges, wherein he can accept or reject the nomination made by appropriate authority is a threat to judiciary.
Additionally, the salaries of the judicial office holders are not really protected.
The parliamentary supremacy again leads to ignorance of rule of law according to the government's whims and fancies hurts the purpose of judicial autonomy.

CANADA

The independence of judiciary has been given much importance in Canada.
It is regarded as one of the foundations of the Canadian legal system. The judiciary of Canada is kept separate from other branches by a clear division of power and its independence guaranteed by various measures.

Appointments

The judges are appointed only after an independent advisory committee assesses the eligibility of all the lawyers who apply for being appointed to judicial bodies. (Qualifications needed include experience of practicing law for at least 10 years, and practicing in the jurisdiction being appointed to, hence it's all on the basis of merit).
The advisory committees exist for the federal judicial body as well as in all provinces and territories.
The committees consist of seven (7) members representing the bench, the bar and the general public, and one (1) ex-officio non-voting member being either the Commissioner for Federal Judicial Affairs Canada, the Executive Director, Judicial Appointments, or their designate.[10]

The governor in Council on behalf of the government appoints the judges only on the advice of the Prime Minister and Minister of justice (thereby giving the minister for law a say in judiciary), and these recommendations are based on the assessment of the advisory council.

Tenure and salaries

The judges are to serve the bench until the mandatory age of requirement which is 75, for federal judges and 70, for provincial or territorial judges.
Their removal may only be by the joint address by the Parliament after following the due free and fair trail giving the judge accused of misconduct a chance to present his case.
And additionally, the 'misconduct' is subject to the official judicial conduct.
There are councils for both federal judges[11] and provincial judges that administer the judicial conduct and provide for certain guidelines to be adhered.
The council also has the task of investigating any allegation of misconduct.
These councils consist of judges, lawyers and general citizens, this composition leaves no scope for political interference.

The judges in question are given lucrative salaries in Canada so as to not be subject to financial lures.
Their salaries may not be changed by the government unless until the independent pay commission makes a recommendation for the same which removes the scope of arbitrariness.

[10] http://www.fja.gc.ca/appointments-nominations/committees-comites/members-membres/index-eng.html
[11] Canadian Judicial Council.

And finally, only the chief justice has the power to decide how and on what basis are cases assigned to judges. No other branch of the government has any say in the same.

Weaknesses

The Chief Justice of Canada, Hon'ble Beverly Mclachlin stated,
"*Worrisome cases where the judiciary is the target of more drastic measures to undermine or co-opt it are not hard to find.*"
He stated this in reference to how even when judiciary is given independence, still loopholes are found by governing institutions to undermine the same and supress rule of law in the nation.
The current status of Canadian judicial independence in comparison with other judicial systems may be even referred to as impeccable, however the government is still trying to encroach upon this independence as there are talks so as to how there must be a provision for legislative review of judicial decisions and the parliament appointing judges by discretion so as to allow political ideologies to interfere with the same, as brought to light by the Canadian Chief Justice Hon'ble Beverly Mclachlin in his address at the Vancouver 300th Anniversary of the Act of Settlement conference.

## JUDICIAL INDEPENDENCE IN INDIA

The independence of judiciary in India is extremely necessary as it has been provided with a lot of powers and responsibilities which are integral to the functioning of the nation and the rights of its citizens.
The judiciary in India is regarded as one of the most powerful ones which most definitely strives to uphold the rule of law in the nation as it has consistently kept a check on the functions and working of all branches of the government to make sure that they're consistent with the Constitution.
The Courts have been made the guardian of the Constitution at different levels with the Supreme Court at the apex and with the Constitution being the supreme law of the land, being its guardian is nothing less of a sacred duty.
The judiciary has been granted with powers to not only settle disputes but also regulate the whole political and legal framework.
One of the main strengths of the judiciary is its power of judicial review, which has been attacked many times in various ways, but the judiciary has always seemed to have prevailed.
The judiciary ensures that the legislature discharges its duties in accordance with the rights of the citizens.

Finally, the judiciary also has advisory jurisdiction, by virtue of which, it also occasionally gets a say in policy decisions of the government.

Keeping all of the aforementioned in mind, the independence of judiciary in India is indispensable and the measures for the same have been provided for in the Constitution and the judiciary itself has enlarged its scope of powers through judicial pronouncements.

Appointments

The appointment of judges is something which has been highly debated but eventually decided in favor of judicial supremacy.
The judges of the Supreme Court and High Court are appointed by the President of India in consultation with the Chief Justice of India and other judges of the Supreme and High Court.[12][13]
The judges of the District Court are appointed by the Governor of the State in consultation with the High Court of that state.[14]

This more or less shows that the power to appoint the judges lies in the hands of the executive with the mere provision that they may 'consult' the other judicial bodies.
However, even if this may have been the intention of the constitution makers, still the apex Court enlarged its supremacy by overlooking the dictionary meaning of 'consult' and held that the advice of the Chief Justice and other judges is of primacy.

[12] Art. 124 Indian Constitution, 1949.
124(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted.

[13] Art 217 Indian Constitution, 1949.
217(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court.

[14] Art. 233 Indian Constitution, 1949.
233(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

The three judges case-The three cases which decided the supremacy of judiciary in appointments in India

It started with the Indira Gandhi led government coming to power.
The government started to transfer judges according to its own terms and by disregarding any and all advices. The judges were transferred due to their decisions being in non-conformity with the policies and political ideologies of the government.
In a matter of 21 months (during emergency), 56 High Court judges were transferred.
Also, another incident which shook the judiciary was the appointment of Justice A.N.Ray as the next chief justice when by seniority two other judges were lined up for that post. (Justice A.N. Ray dissented from the majority in Kesavnanda Bharti case).
This showed that there was something wrong with the balance of power which was a direct threat to the rule of law.
In the first judges case[15] the extent of the President's power was questioned.
It was held that the President is not bound to follow the advice of the Chief Justice in appointing and transferring judges. The advice of C.J.I. is not to be given primacy.
The Supreme Court itself compromised its independent stance, however, this was solely on the basis of the strict text of the constitution.
Now, in the second Judge's case[16] this question was again raised and this time the Supreme Court completely tipped the vessel of powers towards itself.
The Court made the advice given by the Chief Justice one of primacy and which the President has to follow.
To not concentrate power, it came up with the system of collegium, wherein, the advice would come from a collegium consisting of two senior most judges of the Supreme Court and the C.J.I. and for High Courts, two senior most judges of the High Court.
In the third judge's case[17], when this was challenged, the Supreme Court stuck to its decision in the second judge's case, with the only modification that the collegium members must be raised to four senior most judges.

This decision was later criticized as the Court overcompensating for its decision in the first judge's case and enlarging its own power to a such an extent that the remedy for imbalance of power came as imbalance of power, with just the parties in opposite positions. This will be discussed later.

[15] S.P. Gupta vs President Of India And Ors. SC 149. (30 Dec, 1981).
[16] Supreme Court Advocates-on Record Association vs Union of India, SC268 (AIR 1994).
[17] In re Special Reference 1 of 1998 SC 1 (AIR 1999).

Tenure and salaries

The tenure of the judges is fixed by the mandatory age of retirement.
The Supreme Court judges serve till the age of 65 and the judges of subordinate Courts serve till the age of 62.
Their removal has been made significantly rigid in terms of process.
The President may remove the judges of the Supreme Court or High Court after the parliament passes the motion for the same by special majority (2/3rd majority of the people present and voting).
And this may be done, only on the grounds of misbehavior or incapacity and after going through a thoroughly impartial and fair trial where the judge is allowed to present his case.
The process has intentionally been made rigid so as to keep the judiciary secure of any pressure.
This is the reason so as to why no judge of Supreme Court or High Court has been impeached till date.
There is no defined procedure regarding the removal of the District Judges, but they may be removed by the State Government only after consulting the High Court of that State, hence even here, the process is not devoid of judicial role in it.

The salaries given to the judges are quite high and additionally they are also given other incentives so as to preclude them from being lured otherwise.
Their salaries of the judges come directly from the consolidated fund of India[18] and the parliament has no power to cut their salaries, it can however, increase it.
Further the Courts also have the power to recruit its own staff and decide their salaries and privileges, thereby closing that path for any pressures.

Judicial Review

This is one of the greatest strengths of the Indian judiciary. It helps it not only to exercise its powers over such a wide jurisdiction, which encompasses all executive and legislative activities but also supports its independence and its ability to uphold the rule of law.
The power of judicial review in India has been adopted on lines of the U.S. judicial review which was first brought to light in the case of Marbury *v.* Maddison[19].

[18] Indian Constitution Art.112.
[19] Marbury v. Maddison, 5 U.S. 137 (1803).

Though, there is no express mention of the judiciary reviewing laws or of the term 'judicial review', there still are provisions which imply the same.

- Article 372(1) provides for the reviewing of pre-constitutional legislations.
- Article 13 clearly states that any law in contravention to fundamental rights of the citizens shall be null and void. (The Courts being the guarding of Fundamental Rights, thus have the role of declaring such laws as ultra vires and striking them down).
- Article 32 and 226 make the Courts the Supreme protectors of fundamental rights, by virtue of which they can review any State action or legislation for any violations.
- The Courts also have the role of deciding disputes between two States which basically gives them power to decide upon the rightness or wrongness of the State's actions.

Therefore, the principle of Judicial Review is clearly established in India which is directly ancillary to judicial independence.

Issues

In all democracies or basically any nation with a division of power between different organs thereby defining the powers of the government and the judiciary as distinct, there is always the struggle for having more power than the other.
In India too, just like the other examples, there is no less effort on part of the Parliament to be more superior.
But by the force of Constitution of India and judicial precedents, the judiciary is stronger than ever. Then what may be the issue?
The question that pops is that 'Is the judiciary too powerful?'

Alexander Bickel (An American Jurist) in his book[20] coined a term 'Counter-majoritarian'.
He explained it as
Unelected judges overruling the law-making of elected representatives, thus undermining the will of the majority.[21]

The judiciary is a very powerful body, but is it really democratic?

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[20] The Least Dangerous Branch. (Bobbs-Merrill, 1962) ISBN 9780300032994.
[21] *Ibid.*

There is wide criticism mainly due to increasing judicial activism, that how can a body of non-elected members decide upon the validity or invalidity of laws which the democratically elected representatives of the people have made and go as far as striking them down and recommending new laws and directing policies of the State.

Even in the three judges case, the criticism circled around the fact that how can the judiciary deal with the issue of having too much power in the executive's hands by taking all of it in its own hand.

Dealing with this needs an understanding on part of the judiciary itself so as to not encroach upon other jurisdictions so much as to defeat constitutional provisions and to undermine democratic spirit, and this can only be brought into action by the people showing their discontent with judicial activism and India not being a nation of parliamentary supremacy, the government's hands are tied.

The second issue would be the corruption that the judiciary has within its structure.
The threat to the independence of judiciary may not only be external and by the political rulers but by general entities with pecuniary power.
The judges are not only given ample salary and incentives but also security for the same, but still greed is a bottomless pit.[22]
This is an issue which needs to be rectified by the judiciary itself as it is apparent that it has enough say in its own appointments to be responsible for the same.
There have been many allegations and judges of various Courts have gone under investigation under corruption allegations.
Recently the incident wherein four senior judges of the Supreme Court held a press conference to show discontent with the CJI's partial case allocation was a shameful incident that had to take place, that too in matters of the most sacred organ of the nation.
In the Transparency international report published in the year 2007, revealed that 77% of the subjects to the survey believed the Indian judiciary to be corrupt.[23]
This is a serious issue as belief of the people in an institution vested with so much power for a democracy is indispensable specially when it is an unelected one.

[22] Erich Fromm.

[23]Chetan Chauhan & Satya Prakash 77 per cent believe Indian judiciary is corrupt: survey https://www.hindustantimes.com/india/77-per-cent-believe-indian-judiciary-is-corrupt-survey/story-uAiGMs9kWfP9iqFnUsFqpL.html.

Finally, there is one way by which the government may put pressure on the judicial system and that is by budget cuts, however, this is not a path that is utilized as that would jeopardize the image of the government very evidently.

And even if the budget is not sufficient, the chief justice may intervene and ask for an increase in funds. Nevertheless, it is still an issue as pointed out by Former Chief Justice of India, Hon'ble P. Sathasivam in his farewell speech.

"Budget allocation for the judiciary is a serious concern. In so far as the Supreme Court is concerned, the government is not providing sufficient budget and, time and again, the Chief Justice has to intervene to seek sufficient allocation of Budget."[24]

## CONCLUSION

In conclusion, it wouldn't be wrong to say that India has sufficiently achieved judicial independence and even when there are threats to the same, the judiciary eventually prevails as its powers, directly derived from the Constitution and it being the body responsible for interpreting the same, puts it on top of the hierarchy.

The parliament may still try to overpower the judiciary, with measures like legislative overruling of decisions as took place in I.C. Golaknath case by virtue of 24th amendment.

However, it still seems like a long shot, with the situation not changing in the future.

It is a very fortunate situation that such powerful structure remains independent from political pressures, however that does not preclude it from being subject to internal pressures mainly but not limited to, greed, which is the main threat to independence of judiciary that must be looked into as soon as possible.

Corrupt practices in such a sacred and powerful institutions can be catastrophic, and this factor needs to be rectified by the judiciary itself.

Finally, the main issue, regarding judicial activism and counter-majoritarianism can only be solved by an understanding by the judiciary and respecting the jurisdictional limits that the Constitution has placed upon every organ of the governing structure of the nation.

[24] Usha Rani Das, Budget allocation in Judiciary: Financially Strangled (Oct 20, 2018 13:10) http://www.indialegallive.com/special-story/budget-allocation-in-judiciary-financially-strangled-49117.