

INDIAN JUDICIARY: INDEPENDENCE FROM INTERFERENCES VS LIBERTY TO INTERFERE

Jayant Boruah*

Abstract

India being a democratic country has adhered to the Principle of Rule of Law by adopting a Constitution supporting Independence of Judiciary. Even though the Doctrine of Separation of Powers has not been followed in India as strictly as is followed in United States, but India still has managed to secure an independent position for the Judiciary from rest of the organs of the Government through various Constitutional provisions. However, at present several allegations have been made against the functioning of Indian Judiciary and a much debatable question is now put on the reality of its Independence. It therefore becomes important to analyze the various provisions providing for such Independence of the Judiciary in India along with the ability of the law-keepers in maintaining it in reality. This Article will therefore try to analyze and understand the provisions in theory relating to Independence of Judiciary on the lines of the facts alleging them to be incapable of maintaining such independence and also will try to understand the Role of Judiciary as well as the other organs of the Government in securing such Independence.

Keywords

Independence of Judiciary; Doctrine of Separation of Powers; interference; Judicial Activism; and Democracy

* Student, North-Eastern Hill University, Shillong.

I. INTRODUCTION

India adopted a democratic Constitution and established the Rule of Law based on the parameters of the Doctrine of Separation of Powers (SOP from herein after). By this it becomes evident that there must be minimum non-interference between the three organs of the government.¹ Although, India does not adhere strictly to the American notion of the SOP² and follows the principle of mutual checks and balances,³ yet the Judiciary has often held this Doctrine as one of the Basic Structure of the Indian Constitution.⁴ Thus, we can say that Independence of Judiciary (IOJ from herein after) is an essential element of our Constitution since it ensures non-interference by the other organs in the field of Judiciary to make justice fair and unbiased and at the same time to make Judiciary capable of maintaining a check on the other two organs in cases of violation of the Constitution.⁵ In short, it gets established that

IOJ as a concept was framed by the Framers of the Constitution not for the purpose of protecting the Judiciary but for the broader interest of protecting the Constitution itself. But, at present few questions are enhancing the grounds for debates amongst the legal academia and political as well as Judicial Activists. Some of such questions are- whether IOJ as in existence today is relevant for the protection of the Constitution? Whether the concept of IOJ as intended by the Framers of the Constitution is same with what is prevailing or is understood by the concept today? Is judiciary really independent or is subject to any Political Intervention? Are the methods for securing the IOJ really valid in the present-day context? And at last but not the least does IOJ means liberty of the Judiciary and if not then is there any need to control Judicial Activism that is initiated in the name of defending Constitutional Morality?

II. CONSTITUTIONAL PROVISIONS ON INDEPENDENCE OF JUDICIARY AND OTHER METHODS FOR SECURING IT

In the simple terms IOJ means that Judiciary must not be dependent on any other organs of the government for conducting its day-to-day activities and also while delivering its judgment.⁶ This concept has even gained the

¹Upendra Baxi, *Rule of Law in India*, HEINONLINE (Aug. 09, 2018, 04:21 AM) <https://heinonline.org/HOL/PDFsearchable?handle=hein.journals/surij68collection=journals§ion==5&id=7&print=section§ioncount=1&ext=pdf&from=qrcode>.

²A. K. Roy v. Union of India AIR 1982, SCR (2) 272.

³Karan Tyagi, *The Doctrine of Separation of Powers and Its Relevance in Times on Coalition Politics*, 69(3), Int. Jor. Pol. Sc. (Sept 20098) <https://www.jstor.org/stable/411856450>.

⁴M P Singh, *Securing the Independence of Judiciary- The Indian Experience*, 10(2) IND.INT'L&COMP.L.REV. (Mar. 29, 2020, 11:11 PM) <https://mokimeylaw.iu.edu/pdfvol110p245.pdf>.

⁵*Constituent Assembly Debate, May 24, 1949*, INDIAN KANOON (Mar 29, 2020 11:45 PM) <https://indiankanoon.org/doc/1538555/>

⁶Santosh Kumar Pandey, *Independence of Judiciary in India*, 4(2), IJL (Mar 28, 2020, 01:15 AM) <http://www.lawjournals.org/download/286/4-2-62-783.pdf>.

status of human rights by virtue of International Convention⁷ and in India it has been given Basic Structure Status of the Indian Constitution⁸ which means that this concept even though not a new one, still is very relevant even at present and will remain a relevant topic for discussion in future also. By looking at the status of this concept we can easily hold that this concept is not only relevant for the State in protecting the very morale of the Constitution that is Rule of Law but also is important from the citizens point of view since IOJ is assumed to be essential for protecting the individual rights of the citizens of the land.⁹

However, in order to achieve an Independent Judiciary, we must understand the requirements of such a system. At first, it is essential that law must be blind meaning that law must not consider any physical attributes of its subjects while delivering Justice and must ensure Equality before Law and Equal Protection of Law. This will enable the Judges to be free from subjective bias while delivering justice. Second, there must be institutional independence, meaning Judiciary must be capable enough to regulate its day-to-day activities without interference of any other sources. Third, the persons involved in judicial processes must be self-sufficient and well qualified in their respective fields of expertise, since only then

they will be eligible for delivering justice without depending on any other sources. And at last, they must be given some amount of power to have a say in the law-making process but with limitations, so that they can apply their practical expertise in removing the gap between law as in theory and law as in practice.¹⁰

Looking at the above attributes the Constitution has made several provisions for achieving IOJ. Those includes-

a. Judicial Appointments

The appointment of Judges to Supreme Court and High Courts in India are provided in Article 124 and 217 of the Indian Constitution respectively. On a literal interpretation of these two Articles one can say that the Central Government is the major authority that is entrusted with the responsibility for making appointments of Judges to both Supreme Court and the High Courts, since it's the President who makes appointment of the Chief Justice of India in consultation with other Supreme Court and High Court Judges while he makes appointment of the other Supreme Court Judges in consultation with the Chief Justice of India,¹¹ and for making appointments of the Chief Justice of High Courts, he needs to consult the CJI, other Judges of the concerned High Court

⁷Subhojit Sadhu, *Judicial Accountability of the Indian Judiciary*, SCJ, P 27.

⁸Santosh, supra note6.

⁹Saisama Bhat, *Right to Information v. Independence of the Judiciary: A Relook*, 39(4), IBR (2012), pdf.

¹⁰*Basic Principles of the Independence of Judiciary*, UNHR, Office of the Commissioner (Mar 29, 2020, 02:10 PM)

<https://www.ohchr.org/EN/Professionalinterest/Pages/Independence..Judiciary.aspx>.

¹¹IND. CONST. Art 124.

and the Governors of the respective States.¹² It means that the appointment of Judges is mostly in the hands of the Executive.

The Supreme Court in *Supreme Court's Advocates on Record Association v. Union of India*¹³ held that under Article 121 and 211 of the Constitution, the legislature has no merit to discuss any individual appointment to the Supreme Court and the High Court respectively and in case of any unsuitable appointments the Judges of Supreme Court and the High Court who are involved and whose opinion is taken into account will bear the consequences and become accountable. But there seems to be arbitrariness and lack of transparency in the collegium system. Since, when the National Judicial Appointments Commission Bill was rejected the Supreme Court itself acknowledged the lack of transparency and shortcomings of collegium system.¹⁴ After four years the Supreme Court posted the decisions of collegium online to show transparency¹⁵ but all the questions remained unanswered regarding the rationale and criteria behind the appointment and rejection of the judges. This is in case of Supreme Court but similar scenario is witnessed

in cases of appointments and transfer of Judges in the High Courts also.

For independent and incorruptible judiciary there is a need for efficient judges. In order to achieve this goal, the bright and young legal talent need to lure towards judiciary. This could be achieved through increasing the perks and rewards or creating an efficient mechanism to attract those talents. All India Judicial Services (AIJS) under Article 312¹⁶ might give a solution to judicial vacancies. It might be able to provide for a centralised and efficient mechanism to fill the vacancies across the District and Subordinate Judiciary based on merits.¹⁷ But many High Courts are opposing AIJS as it involves executive in the appointment of judges and will be against the IOJ.¹⁸ The lower judiciary in India is in a critical situation, for which something needs to be done soon otherwise public will lose faith in the judicial system. All these issues make it appear as if the current mechanism of appointment is filled with corruption and nepotism.

It should be kept in mind that IOJ can be achieved when there will be centralised and mechanised system for the appointment and transfer of judges in the higher judiciary and

¹²Id. Art 217.

¹³Supreme Court's Advocates on Record Association v. Union of India, AIR 1994 SC 268

¹⁴Supreme Court Advocates-on-Record-Association and another v. Union of India. 2016 (5) SCC 1.

¹⁵SamanwayaRautray, *Supreme Court Collegium decides to upload its decision on website*, ETBureau (Mar 29, 2020, 02:45 PM)

<https://m.economictimes.com/news/politics-and-nation/sc-collegium-decides-to-uphold-its-decisions-on-website/articleshow/60967090.cms>.

¹⁶ IND. CONST.

¹⁷ Formation of All Indian Judicial Service, One Hundred Sixteenth Law Commission Report (1986).

¹⁸ Raghav Ohri, *High Courts, states stay tepid to idea of Judicial Service*, ETBureau (Mar 29, 2020, 06:45 PM) <https://m.economictimes.com/news/politics-and-nation/high-courts-states-stay-tepid-to-idea-of-judicial-service/articleshow/73039267.cms>.

when the judges will act without any fear that a controversial decision might affect their elevation and when the recommendations for transfer or elevation to higher Judiciary will be made on the basis of merits and judges involved in the process are held accountable.

b. Tenure of Judges

The Constitution provides for the fixed tenure of Judges to the Supreme Court and the High Court respectively. The Constituent assembly in order to achieve IOJ understood the requirement of fixed tenure of the judges in order to enable them to work freely without any fear or favor.¹⁹

In India, unlike the US Constitution does not provide for life tenure, the retiring age in India is 65 years. Under Article 128, a retired judge can be reappointed as a judge by Chief Justice of India with the consent of the President. Article 124(2) sets the retirement age of the Judges of the Supreme Court at 65 years. A judge can resign his office by writing under his hand addressed to the President. Article 217(1) provides for the retirement age of the judges of High Court at 62years.²⁰ It seems that the provisions regarding tenure of Judges are still quite satisfactory for protection of Independence of Judiciary.

c. Salary of the Judges

¹⁹Constituent Assembly of India Debates (Proceedings)- Vol- 10, 1949 (Mar 29, 2020, 07:20 PM)

<http://164.100.47.194/loksabha/writereaddata/cadebat/efiles/Cf2101949.pdf>.

²⁰supra note 16.

The one who controls the purse can influence the action of those dependent upon it. The executive control over Judicial Salary fixation has been never seen as the threat to Independence of Judiciary until now. The salary of the judges in case of Supreme Court is charged from the Consolidated Funds of India and in case of High Courts it is charged from the Consolidated Funds of States. Under Article 125(2) the salary of judges cannot be altered to their disadvantages.²¹

Earlier the District Judge had a superior position than the District Magistrate. But now District Magistrate is made part of Indian Administrative service, it is a service of all India character but District Judge is a higher judicial service which is a part of state service. In the past, lawyers used to take the job of judge as a matter of great honour and reward. But now may be because of this reason, students graduating from prestigious National Law Schools mostly prefer to choose corporate jobs or join the bar. This will heavily impact the efficiency of judiciary and will lead to increasing burden on the sitting judges causing pendency and delays.²²

There is need of increasing the salary and allowances of the judges not only in higher judiciary but also in the lower judiciary. This will motivate the judges as they are burdened

²¹supra note 16.

²² Chapter 4 *Independence of the Judiciary: A Constitutional Response*, SHODHGANGA (Mar 29, 2020, 08:10 PM)

<https://shodhganga.inflibret.ac.in/bitstream/10603/128562/17/11...chapter%204.pdf>.

with cases. Judicial system requires young, efficient and talented judges then only the issue of delay in the disposal of cases could be done away with.²³

d. Transfer of Judges

The issue of transfer of judges is always raised whenever IOJ is discussed. Under Article 222(1), The President after consultation with the Chief Justice of India (CJI, herein after) may transfer a judge.²⁴ But this transfer of judges is seen as opportunity by the governments and judges to reward and punish individuals. It becomes evident from the fact that during the emergency, 16 HC judges were transferred which was seen as a punitive action by the governments to punish those judges who gave judgments against it. Justice Shivakant Shukla from the ADM Jabalpur case²⁵ nearly made it to Supreme Court but final report prevented it. Transfer of judges is necessary for uniformity in judgments and so that no judge could develop a syndicate in their respective home state. However, it needs to be regulated by policies that are more systematic, transparent and more predictable in nature.

In the recent practice it has been observed that the consent is obtained for his/her transfer to other high court soon after their appointments. But this system also lack transparency. Justice

PD Dinakaran whose reputation was tainted due to charges of corruption against him but when refused to go on a leave was given punishment posting to Sikkim.²⁶ Transfer cannot be a method to punish judges with doubtful integrity. Judges with doubtful integrity should be made to retire early after proper assessment by competent authority like the Judicial Committee or by National Judicial Commission.

III. CONTENTIOUS ISSUES OF POLITICAL INTERVENTION AND JUDICIAL ACTIVISM TOWARDS INDEPENDENCE OF JUDICIARY

Political Intervention

Besides having many indirect attempts to compromise with the independence of judiciary, there have been some direct ones also, including the one in 1971 when the then law minister started giving names instead of Chief Justice that led to deals being struck. The government never holds the hand of a judge and makes them give a judgment in their favor but they create pressure from „lobby” that it could affect their appointment or make an atmosphere which forces the judges to favor the government. And this got proved for the first time in 1975 in the *State of Uttar Pradesh v. Raj Narain*²⁷ when Allahabad High Court invalidated the Indira Gandhi election it led to National emergency being declared.

²³Ibid.

²⁴supra note 16.

²⁵ ADM Jabalpur v. Shivkant Shukla, 2 SCC 521 (1976)

²⁶Justice P.D. Dinakaran v. Hon'Ble Judges Inquiry Committee, Writ Petition (Civil) No.217 OF 2011

²⁷State of Uttar Pradesh v. Raj Narain, 1975 AIR 865

In the present-day context some academicians might argue that there is no direct intervention of legislature into judiciary. We all know justice is blind but it is not deaf. When the former CJI Ranjan Gogoi after taking the oath as a nominated member to Rajya Sabha in an interview to Times of India said that half-a-dozen people has made a stranglehold over judiciary and for judiciary to be independent this stranglehold needs to be broken. He added that if a case is not decided in a particular way they favored, they question the judge's integrity and malign him in every way possible.²⁸ This is most obvious evidence of political intervention into judiciary. There are some serious issues that the former CJI has raised but it is not the first time that the issues of corruption and loss of IOJ is being raised. The judges misuse their powers by giving vague judgments as they have no accountability. Parliament has failed to impeach sitting corrupt judges like Mr. Justice V. Ramaswami.²⁹ The judges at several occasions have put morality and their position at stake like Justice Arun Madan- Sex for acquittal case.³⁰

²⁸Dhananjay Mahapatra & Diwakar, *Judicial independence threatened by stranglehold of a 'lobby' over it: Ranjan Gogoi*, THE TIMES OF INDIA (Mar 20, 2020, 04:34 AM), <https://timesofindia.indiatimes.com/india/judicial-independence-threatened-by-stranglehold-of-a-lobby-over-it-gogoi/articleshow/74721259.cms>.

²⁹ Sarojini Ramaswami v. Union Of India & Ors citation, (1991) 4 SCC 699

³⁰ Sudhanshu Mishra, *HC judge indicted in sex scandal - Rajasthan Bar Association demands Justice Madan be sent on leave*, THE TELEGRAPH, (Mar 26, 2020, 11:12 PM), <https://www.telegraphindia.com/india/hc-judge->

In 2010, even the former Law minister Shanti Bhushan moved an application in the Supreme Court alleging that 8 former Chief Justices were corrupt.³¹

The judges are human being themselves so they can also commit mistakes but the main issue is the external intervention into judicial process which the former CJI has raised. There is certain „lobby“ which try to allure judges with money, alleviation, and post-retirement benefits or try to pressurize them by threatening them that their reputation will be maligned, as judges have sub conscious too, so an environment is created around the country with the help of social media to influence them. The recent question of MeToo controversy on CJ Ranjan Gogoi and the manner it was disposed by the SC and even before this case the suicide letter of the Former Chief Minister of Arunachal Pradesh that alleged the then three Senior Judges of SC and other senior Advocates in 2017 put a lot of questions on the integrity of Judiciary and the relation between political leaders and Judiciary which are yet not answered.³² We must even not

indicted-in-sex-scandal-rajasthan-bar-association-demands-justice-madan-be-sent-on-leave/cid/849583.

³¹ J. Venkatesan, Eight out of 16 former CJIs were corrupt: Shanti Bhushan, THE HINDU (Mar. 27, 2020, 02:26 AM) <https://www.thehindu.com/news/national/Eight-out-of-16-former-CJIs-were-corrupt-Shanti-Bhushan/article15952059.ece>.

³²Upamanyu Trivedi, #MeToo Reviews: CJI Ranjan Gogoi's exoneration sparks protests across India, BUSINESS STANDARD (Mar 29, 2020, 08:23 PM) <https://wap.business-standard.com/article/current-affairs/metoo-reviews-ranjan-gogoi-s-exoneration->

forget that it was during the reign of CJI Ranjan Gogoi that Ram Mandir dispute and few such other disputes were solved. It seems that the term IOJ is also used to influence the judges and hold them on ransom. If the judgment is in the particular way they wanted, then only they will certify the judge as independent. The former CJI is acting as whistleblower on the issue of political intervention into judiciary and how it affects the judiciary's independence.³³ This issue needs to be addressed otherwise the idea which the framers of our constitution were keen to protect and which the Supreme Court held as the basic feature³⁴ will become archaic and judiciary will lose its independence.

Judicial Activism

It has been observed that the judiciary is acting as executive as well as legislative to some extent. Judges sometimes while giving judgments give out guidelines on areas of legislative vacuum like the Vishaka Guidelines³⁵. These are cases of judicial „legislating“ rather than judicial interpretation of the laws. There are cases where Supreme Court issued administrative guidelines to government department like Supreme Court ordered Election Commission of India to take action against all those political parties who have chosen

candidate with criminal background.³⁶ Courts have also laid policy guidelines or given out directives like Supreme Court has recently directed State Governments to improve the condition of Jails in India.³⁷ These instances of Judicial Activism were necessary and therefore are even appreciated, but again question arises that what will happen if it does not go well in future? What will be the consequences if the Judiciary utilizes such power to satisfy political lusts on issues where the Ruling Party in power might not intend to legislate since they are directly accountable to the public and might have to lose their power after five years? The executive and legislative are elected by the people and so executive is accountable to parliament and legislative is answerable to the people and hence they can make laws and give directives that affect the people but the judiciary is unaccountable and answerable to the citizens since they are not elected democratically.

However, we must also admit to the fact that the Supreme Court has the Constitutional power to pass any decree or order to secure complete

sparks-protests-across-country-119051200077_1.html.

³³Supra nOTE 27.

³⁴ Kumar Padma Prasad v. Union Of India And Ors, 1992 AIR 1213

³⁵Vishaka and others v. State of Rajasthan, AIR 1997 SC 3011.

³⁶Krishnadas Rajagopal, *Supreme Court orders parties to publish criminal history of Lok Sabha, Assembly candidates*, THE HINDU(Mar 13, 2020, 12:36 AM), <https://www.thehindu.com/news/national/supreme-court-orders-parties-to-publish-criminal-history-of-candidates/article30808148.ece>.

³⁷*Supreme Court shocked at over 600 per cent overcrowding in jails*, THE ECONOMIC TIMES (Mar 30, 2020, 05.52 PM), <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-shocked-at-over-600-per-cent-overcrowding-in-jails/articleshow/63546381.cms?from=mdr>.

Justice in matters pending before it and such decrees or orders will be binding across the whole of India subject to the laws passed by the Parliament or orders passed by the President³⁸ and even it is also essential for the Apex Court to make laws or to issue directions to fill up the vacuums in law. But question arises that who actually holds power to legislate in a country like India which follows the pattern of Parliamentary Democracy and where citizens are the absolute Sovereign? The answer is obvious to be the Parliament and the State Legislatures over State matters since they represent the will of the people. But, if Supreme Court which is a nominated body makes or drafts any law on a topic where the Parliament does not intend to pass any law or forbids itself from interfering into the Judiciary over such topic, then will the people of the Nation have a say in such law-making process? Judiciary can pass any Judgment, Rule or even Guidelines on matters pending before it and such Judgments, Rules or Guidelines shall intend to affect the Rights of the Parties involved in such matters but if any such Judgment, Rules or Guidelines takes into concern the Rights of the entire Citizens of the country who are not even direct parties to the matter, then will it be justified for the Citizens to be Ruled by a Judgment or Rules passed by an Authority whom they have not voted for or who neither has the representation of the will of the ultimate sovereign?

³⁸ IND. CONST. Art 142.

Under the umbrella to achieve IOJ, it appears as if the transparency and accountability of the judiciary has been done away with. In the recent years it has been observed that there is an increasing judicial activism to defend constitutional morality. This judicial activism is interfering in working of both the legislature and the executive. For instance, the role played by the Supreme Court in the matter of NRC where the Court exercised lot of influence and power over the Executive for implementation of NRC. For this reason, it is expected that around 1100 crore of money was invested along with many other Resources. It even created a lot of panic in the entire administration³⁹ but the biggest question is where NRC is now? The question whether such intervention was needed or not is not important, rather the most important question is- did the people get any opportunity to hold the Executive or Legislative accountable for this or whether they can take a decision before voting in the next election where Judiciary will never context any election? One another example where Judiciary tried to impose forceful patriotism,⁴⁰ passed guidelines ignoring not only previously passed Judgments,⁴¹ enacted

³⁹Ruhi Tewari, *With Assam NRC, the truth is also out- it was a pointless exercise all along*, THEPRINT (Mar 29, 2020, 12:23 AM)

<https://theprint.in/opinion/with-assam-nrc-the-truth-is-also-out-it-was-a-pointless-exercise-all-along/284929/>

⁴⁰ Ranjan Baradwaj, *Reeling out patriotism*, THE HINDU (Mar 29, 2020, 01:15 AM)

<https://www.thehindu.com/opinion/op-ed/Reeling-out-patriotism/article1631712.ece>.

⁴¹Bijoe Emmanuel &Ors v. State of Kerela&Ors, AIR 748, 1986 SCR (3) 518.

laws⁴² or other such reasons but has also ignored the fact that patriotism cannot be imposed rather it is possessed by the Citizens of a Nation from their heart if they really love their mother land. Similarly there are many such instances like-Proactive Censorship in case of Jolly LLB 2 where the judgment was not only illegal rather it is alleged to have committed miscarriage of justice; the cancellation of telecom licenses in 2G Case where it is alleged, that it was not a fit case for application of Article 142; and several such other cases have made critiques to argue that these are not only instances of Judicial Activism rather these can be attributed as Judicial Overreach.⁴³From all these we have seen how these judicial activists are interfering with the judicial process and influencing judges to get judgments in their favor. These activists then try to interfere in the law-making process and bargain with the government, if laws favorable to them are brought about, it won't be challenged in the judiciary and if not then it will be challenged in the court of law and the law will be struck down since they exercise control over judiciary. This will lead government image getting tainted in front of the public because public might not even get an opportunity to showcase their opinion which they can if a law is made by the Parliament since every

⁴² Prevention of Insults to National Honor Act 1971, No. 69 of 1971, Acts of Parliament (India).

⁴³ Utkarsh Sarma, *5 Examples of Judicial Overreach*, iPLEADERS (Mar 29, 2020, 02:13 AM) <https://blog.ipleaders.in/judicial-overreach-india/amp/>

Government will have to pass the election after every five years.

In India there is SOP although not strict.⁴⁴ This SOP is necessary for IOJ.⁴⁵But what if IOJ is being threatened from inside? From the discussions so far, it becomes evident that Judiciary is becoming more and more opaque to protect it from external intervention. Any attempts to improve the accountability would eventually turn out to be attempts to interfere. This has given breeding ground for corrupt practices, unaccountability and even exercising power outside their jurisdiction. Now this unaccountability is not only threatening the judiciary's independence but has also started interfering in the law-making process. There are certain functions of the legislature, executive and judiciary that are overlapping. Judicial Activism or Judicial Overreach whatsoever is defended on the ground of defending Constitutional Morality, but such Activism is how far democratic? And if such Activisms are not democratic since they lack people's representation, then how come such Activism defends Constitutional Morality when Democracy is the soul of such Morality?

IV. CONCLUSION AND SUGGESTIONS

In the beginning of the paper few questions were raised relating to the IOJ. And in attempt to answer those questions we have found that the word Independence is not present in the

⁴⁴supra note 2.

⁴⁵supra note 5.

Constitution of India but the Constituent Assembly was very keen to protect IOJ.⁴⁶ There are certain institutions which are required for subsistence of democratic temper in India like independent Election Commission, Comptroller and Auditor General of India, but above all is Judiciary. So, IOJ is relevant for the protection of Constitution.⁴⁷ The provisions that are given in the Constitution to secure IOJ are not being strictly followed. There is no clear parameter in judicial appointment and transfer of judges and so it will be erroneous to assume that Judiciary in India is Independent. There is no transparency and accountability in judicial transfers and appointments. Retired Supreme Court Justice Chelameswar in an interview on the controversy of transfer of high court judges said “I never understood as even a member of the collegium as to why a particular high court judge is being transferred”.⁴⁸ Then in a recent interview to Times of India former CJI Ranjan Gogoi raised the issue of political intervention into judiciary by stating that a “lobby” has formed stranglehold around the judiciary.⁴⁹ Judiciary in order to shield itself from intervention has become opaque and unaccountable. This has given breeding grounds for corrupt practices and this might become a reason for young legal

talents of the country to get discouraged from opting for judiciary as career. There is a need for a centralized transparent mechanism for the appointment, elevation and transfer of judges on the basis of merits. But the question that remained unanswered is whether there is any need to control judicial activism that is initiated in the name of defending constitutional morality. There is a difference between judiciary which is independent of any improper inducement, influence or pressure from any quarter and liberty of judiciary. Liberty of Judiciary does not mean unaccounted exercise of power of judiciary and interference of judiciary into executive and legislative. Unethical practices in the name of IOJ should not be tolerated otherwise the concept of IOJ that our framers sought will lose its relevance.

All the above issues require a highly transparent system in order to protect the IOJ. Such transparency will have to be maintained by making the Citizens vigilant through awareness and education. Political education for all must be taken seriously at all levels of development. It is likely that Political Agendas will never desire to make the Citizens politically educated and thus it becomes a vital responsibility of the Academicians to spread awareness amongst the ignorant masses.

Further, looking at the Institutional Framework in India, we can say that when the Executive Head passes an Ordinance, it is required to be placed before both the Houses of the Parliament

⁴⁶supra note 5.

⁴⁷supra note 4.

⁴⁸ Kaushik Vaidya, *Why High Court Judges Are Transferred: Justice Chelameswar's Account*, BLOOMBERG QUINT (Mar 28, 2020, 11:11 AM) Bloomberg, <https://www.bloombergquint.com/law-and-policy/how-high-court-judges-are-transferred-justice-chelameswars-account>.

⁴⁹supra note 28.

in order to make such ordinance operate beyond a certain period of time, besides having the same force as of law.⁵⁰ Similarly, the laws passed by the Parliament can be reviewed by the Judiciary under the Constitutional Power of Judicial Review⁵¹ and moreover, if such laws do not satisfy the will of the People then the Party in Power might have to lose in the next election. But the question is who has the power to review laws made by Judiciary? It is the Judiciary itself and if we analyze this fact then we can hold that it's a violation of the First Principle of Natural Justice- No One shall be the Judge of His Own Cause. Judiciary, no doubt has the power to pass any Judgment in a matter pending before it but if such judgment provides guidelines or rules that are going to regulate the life of the entire citizens then such guidelines or rules losses the element of democracy. And since it's on the will of the Parliament to legislate on such guidelines or rules passed by the Judiciary, the Party in power might not do so and such guidelines or rules may remain in operation forever without any scrutiny. In such a situation, we would like to suggest making scope for a new provision of Parliamentary Review. It means like the Ordinance if once issued requires to be placed before both the Houses of the Parliament beyond a certain period of time which is a compulsion, similarly every guidelines passed by the Judiciary, that are going to influence the Rights of people in access of those that are actually

parties to the matter pending before the Judiciary , to be placed before both the Houses of the Parliament to be passed as a law or else such guidelines or rules shall cease to operate beyond a certain period of time. This might make a proper balance between the three organs of the Government. By equating the process of Ordinance making and validating with that of law-making process of the Judiciary that lacks a democratic element, such guidelines will be given more strength and also the powers of Judiciary can be checked from getting misused. Although, Parliament has the power to legislate over the guidelines passed by Judiciary, and on several occasions, it has been done, yet the Parliament even may ignore to do so or might take a long delay in bringing a valid law. But by making this a compulsion will ensure better Independence of Judiciary, since then no one will be in a position to force Judiciary to make laws on topic where the Party in Power might not intend, to escape public accountability and scrutiny.

⁵⁰ IND. CONST. Art 123.

⁵¹ Id. Art 13.