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# Judicial Independence: Separation of Power

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## ABSTRACT

*The Supreme Court of our country is treated as the guardian of the constitution. The Constitution is the supreme law of the land. Our constitution is the lengthiest written constitution of the world and therefore it is not free from ambiguities and its meaning is likely to be interpreted differently by different authorities at different times. This is one of the reasons behind having an independent judiciary. Independent judiciary maintains the supremacy of the constitution, as it is an independent and impartial authority to decide any dispute arising between centre and state. The Supreme Court has been called upon to safeguard civil and minority rights and plays the role of guardian of the social revolution. The doctrine of separation of power is in existence to draw upon the boundaries for the functioning of all the three organs of the state: Legislature, Executive, & Judiciary. This doctrine also provides the judiciary to act as a watchdog and to check whether the executive and the legislature are functioning within their limits under the constitution. An independent judiciary supports the base of the doctrine of separation of power to a larger extent.*

**Keywords:** *Doctrine of Separation of Power, Composition of Supreme Court, Removal of Judges, Independent and Impartial Judiciary.*

## I. INTRODUCTION

Only an impartial & independent judiciary can protect the right of the individual & provide equal justice without fear or favour. During the framing of the constitution, a question was asked by the framers of our constitution that what would be the status of the judicial system, which was answered by Dr B.R. Ambedkar in the following words:

*“There can be no difference of opinion in the house that our judiciary must be both independent of the executive & must also be competent in itself.”<sup>2</sup>*

The framers of the constitution thought of making the judiciary independent & make it self sufficient in itself the reason behind doing so was to secure the stability & prosperity of the society. This is the reason why fundamental rights were guaranteed to the citizens & several

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<sup>2</sup> Available at, <http://hanumant.com/Judiciary.html> (last visited on 2/4/21)

provisions regarding independent judiciary were incorporated in the constitution to guard & enforce those fundamental right.

In a country like India, the independence of the judiciary is of utmost importance in upholding the pillars of the democratic system, to ensure a free society. Society should be free & fair under the rule of law. Rule of law is responsible for the good governance of the country which can only be achieved if there is an unbiased judiciary prevailing in the country.

In a federation, there is the possibility of a state encroaching upon the field of another state. There is also the possibility of the union trespassing on the rights of one or more states as also the state purporting to exercise the function of the union.

Our Constitution confers original jurisdiction on the Supreme Court regarding federal matters under Article 131. Thus it makes quite evident that the Supreme Court has been constituted arbiter in all dispute involving the units.

Several provisions are included in our constitution which talks about the independence of the judiciary but it is nowhere defined what is meant by the independence of the judiciary. The independence of the judiciary is based on the doctrine of separation of power which is in existence for several years.

The doctrine of separation of power was brought together to have a check & make boundaries for the functioning of all the three organs of the country, i.e.: Executive, Legislative, & Judiciary. It empowers the judiciary to act as a guardian for the protection of law & also empowers it to have a check on the legislature & executive so that they not only work within their limits but do not interfere in the functioning of each other. Therefore the independent judiciary supports the base of the doctrine of separation of power.

There are several provisions incorporated in our constitution that talks about the independence of the judiciary which is only an initiation was taken by the framers of our constitution the huge task lies in creating a free environment for the proper functioning of the judiciary to achieve the independence of the judiciary in real sense. Churchill stated:

*“Our aim is not to make our judges wealthy men, but to satisfy their needs and to maintain a modest and a dignified way of life suited to the gravity, and indeed, the majesty of the duties they discharge.”*

## **II. DOCTRINE OF SEPARATION OF POWER**

The Three Organs of the Constitution are:

### *1. The Legislative,*

2. *The Executive,*
3. *The Judiciary.*

All the three institutions derive their respective power from the constitution itself because the constitution has provided separation of powers for these three institutions. The Power, Scope and Role of each organ are specifically demarcated in the constitution is Supreme. These three Organs not only derive powers from the constitution exercise those powers within the framework of the constitution. They cannot overlap from such a framework while exercising their respective powers.

The doctrine of separation of powers is the very important salient feature of the constitution. Among the three Institutions, one is not superior to the other, and one will not control the other, in any manner. But, the expectation of the frames of the constitution is the harmonious working of these three Organs collectively towards the realisation of objects enunciated in the constitution. In the case of the legislature, a stigma is imposed on it, that the legislature cannot legislate a statute or a law that is beyond its powers. It cannot encroach into the powers of the other two organs.

If the legislature attempts or makes a breach of Fundamental Rights or attempts to alter and change the basic features of neither the constitution nor the legislature assumes the role of the other two organs, in the above instances, even though the legislature has powers to legislate, it will be declared as unconstitutional, ultra vires its powers, void and ultimately that piece of legislation, as passed by the legislature, will be declared as Null and Void by the Constitutional Courts in India. Therefore, the scope of power of the legislature is very limited and an embargo is imposed on its powers by the constitution itself. On the other hand, the Judiciary has got powers to review.

Whether it is within the framework of the constitution or whether it is violative of powers of the legislature so conferred on it, and in any such event, the law passed by the legislature will be declared by the Judiciary as unconstitutional ultra vires the powers. If the legislation is found as colourable, it will also be declared as by such under judicial review.

The checks on Judiciary are also imposed by the constitution. The basic power and function of the Judiciary is the Review of the action of the legislature and the Executive. Judiciary is the Vanguard for the Fundamental Rights, assumed to the citizens of the country under chapter III. But the framers of the constitution did not envisage any superior powers on the Judiciary over the other two organs. But viewing as a guardian custodian in safeguarding the analysis, the three organs are the creatures of the constitution and as such they owe elegance to the

constitution. However, an independent Judiciary is the indispensable requisite of a free society under the principles of the Rule of Law.

### III. OBJECTIVE & NEED FOR HAVING INDEPENDENT JUDICIARY

*“Justice can become fearless and free only if institutional immunity and autonomy are guaranteed.”<sup>3</sup>*

The importance of the judiciary in a democratic setup is unparalleled. The judiciary plays an important role in interpreting and applying the law and adjudicating upon controversies. It is the function of the courts to maintain rule of law in the country. Judiciary is a watching tower above all the other limbs of the state. In a country with a written constitution, courts have to safeguard the supremacy of the Constitution by interpreting and applying its provisions.

Independence of the judiciary is the sine guenon of democracy. The role of the judiciary in a democratic country is very much vital. Judiciary is responsible to carry out constitutional message & keeps a vigilant watch over the functioning of the democracy. Nowhere in our constitution it adheres to the doctrine of separation of power but it does provide for the distribution of power to ensure that each of the three organs of the government is independent in respect to constitutional powers with each other. Under our constitution, the Judiciary has been assigned the onerous task of safeguarding the fundamental rights of our citizens and upholding the Rule of Law.

The constitution of our country has made the judiciary responsible to safeguard the fundamental rights of our citizens & uphold the rule of law. Many times when the judiciary tries to safeguard the fundamental right, it's very often when conflicts arise with the state. Therefore it is essential to have an independent judiciary which works impartially.

There are certain basic needs for having an independent judiciary:

- To check the functioning of the organs: Judiciary acts as a watchdog and is responsible to keep a check on all the organs of the state which should function within their respective areas & according to the provision of the constitution. Judiciary acts as a guardian of our constitution.

Even Dr B.R. Ambedkar in constituent assembly debate termed, Article 32 of the constitution as *“the heart & soul”* of our constitution.

- To interpret the provision of the constitution: The framers of the constitution knew that ambiguity would arise in the future regarding the provisions, so they ensured that the

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<sup>3</sup> *Union of India v Sakalchand Himatlal Sheth*, (1978) 1 SCR 423

judiciary must be independent & self-competent to interpret the provision of the constitution. Therefore it was essential for the framers to make the judiciary independent so that it can function impartially & must be free from any type of pressure from other organs of the government. If the provision of the constitution had not made the judiciary independent then the other organs (Executive & Legislative) would pressurize the judiciary to interpret the provision of the constitution according to them. The judiciary needs to interpret the constitution according to constitutional philosophy & constitutional norms.

- The dispute referred to the judiciary: The judiciary in our country is responsible to deliver judicial justice & not partial or committed justice. Judiciary should act in an impartial & an unbiased manner. If any dispute is referred to the judiciary by any organs of the state whether it is regarding interpreting any statute or to keep a check on the functions of any other statute it should act impartially & should deliver judicial justice which is the essence of any judicial pronouncement.

#### **IV. CONSTITUTIONAL PROVISIONS RELATING INDEPENDENT JUDICIARY**

It is essential to protect the rights of the individuals & provide justice bethought any type of pressure, fear, or favour to any one party. Therefore it becomes necessary that the courts in our country should be allowed to perform their functions in an atmosphere of independence & be free from all kinds of pressures.

##### **(A) Composition of Supreme Court**

The Supreme Court of India has been established by Article 124 of the constitution which prescribes about establishment and constitution of the Supreme Court. The fundamental principle behind this is that:

*“The number of judges of the Supreme Court shall be in increasing order & cannot be decreased by the parliament.”*

The parliament can increase the number of judges but it should be as per law. In 1950 when the constitution of India has enacted the Supreme Court comprised of 7 judges and one Chief Justice. The strength of Supreme Court judges in 1956 was 10 but in 1977 and again this was increased to 17 excluding the Chief Justice of India. In 1986 it was again increased to 25 excluding the Chief Justice.<sup>4</sup> The strength of the Supreme Court was again increased to 30 excluding the Chief Justice.<sup>5</sup> No where in the constitution it prescribe minimum number of

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<sup>4</sup> The Supreme Court (Number of Judges) Amendment Act, 1986

<sup>5</sup> The Supreme Court (Number of Judges) Amendment Act, 2009

judges who will constitute a bench for hearing cases.

There are several provision in our constitution which ensures independence of judiciary:

**(B) Appointment of Judges:**

*Article 124(2) of the Constitution of India provides for:*

*“Every judge of the Supreme Court shall be appointed by the President by warrant under his hand & 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 & shall hold office until he attains the age of sixty-five years”.*

The judges of the Supreme Court are appointed by the executive with the consultation of legal experts. Our constitution does not provide any discretionary power to the executive regarding the appointment of the judges. Before appointing a judge the executive has to consult the judges of the Supreme Court & High Court in the appointment of the judges of the Supreme Court.

*Article 229(1) of the Constitution provides for:*

*“Appointment of officers & servants of a High Court shall be made by the Chief Justice of the courts or such other judges or officers of the courts as he may direct”.*

The independence of the judiciary is emphasised under this article, which provides that appointment of officers & servant shall be made by the Chief Justice or other such judges or officer as he may appoint.

## **V. PROCEDURE FOR APPOINTMENT OF SUPREME COURT JUDGE**

The judge of the Supreme Court shall be appointed by the President of India. The constitution empowers for the same under Article 124(2).

In case of appointment of a judge of a Supreme Court, the President of India has to consult the Chief Justice of India & the other two senior most judges of the Supreme Court. President of India must consult the Chief Justice of India for appointing a judge in Supreme Court. This provision which gave the Chief Justice & other Judges the status of a consultant & left the decision to the executive has been interpreted by the Supreme Court in different cases in different ways.

### **RELEVANT CASES**

*S.P. Gupta v Union of India:*<sup>6</sup> *Judges Transfer Case Number I*

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<sup>6</sup> AIR 1982 SC 149

A seven-judge bench, led by Justice P. Bhagwati, declared that the executive has absolute control over judicial appointments, the judiciary is merely to be consulted in appointments; “primacy” of the CJI’S recommendation to the president can be refused for “cogent reasons”. It meant that the power of appointment of judges is “solely & exclusively” vested in central government. The court further stated that consultation does not mean concurrence.

The Supreme Court unanimously agreed with the meaning of the term ‘consultation’ in Article 124 (2) is the same as the meaning of the word ‘consultation’ in Article 212 & Article 222 of the constitution. Supreme Court further stated that the only ground on which the decision of the government can be challenged is that it is based on mala fide & irrelevant considerations. Which mean that the ultimate power to appoint judges is vested in the executive from whose dominance & subordinate it was ought to be protected.

This judgement rendered by the Honourable Supreme Court harmed independence & impartiality of the judiciary.

Continuance of ad hoc judge in Delhi high court

***Supreme Court Advocates-on-Record Association v Union of India:***<sup>7</sup> *Judges Transfer Case Number II*

A writ petition through a Public Interest Litigation was filed by an advocate of the Supreme Court seeking relief of filling up of vacancies in the higher judiciary.

A nine-bench judge of the Supreme Court by a 7:2 majority overruled its earlier decision of *Judges Transfer Case Number I*, & held that in the matter regarding the appointment of judges of the Supreme Court or any High Court the Chief Justice of India should have primacy. The CJI should have a “primal” role in the appointment & transfer of judges, in consultation with the president. The Chief Justice was empowered to take into accounts the views of the two senior most judges, who are required to be consulted by him. The Chief Justice’s views would be the collective opinion of himself & other senior most judges. The role of the executive in the appointment process was reduced to a minimum & political influence was eliminated.

***In re Presidential Reference:***<sup>8</sup> *Transfer of Judges Case III*

In July 1998, the President has sought the court’s opinion on the nine issues relating to the appointment of Supreme Court judges & transfer of High Court judges. The 11<sup>th</sup> Presidential reference sought clarification on certain doubts over the consultation process to be adopted by

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<sup>7</sup> (1993) 4 SCC 441

<sup>8</sup> AIR 1999 SC 1

the Chief Justice of India as provided in the 1993 case relating to judges appointment & transfer opinion.

Supreme Court held that the “consultation process to be adopted by the CJI requires consultation of the plurality of judges.” The sole opinion of the CJI would not constitute a consultation process and if the guidelines regarding the recommendation are not complied with then it would not be binding on the government.

“The collegiums should make the decision in consensus & unless the opinion of the collegiums is in conformity with that of the CJI, no recommendation should be made.”

The following propositions were laid down in this case:

1. As to the appointment of the Supreme Court Judges, the Chief Justice of India should consult collegiums of four senior most judges of the Apex Court. Even if two judges give an adverse opinion, the CJI should not send the recommendation to the government.
2. Giving primacy to the CJI’s opinion as laid down in the 1993 judgement, the judges stated, “The collegiums should make the decision in consensus & unless the opinion of the collegiums is in conformity with that of the Chief Justice of India, no recommendation is to be made”.
3. Regarding the transfer of judges of the High Court, in addition to the collegiums system of four most senior most judges, the CJI was obliged to consult the Chief Justice of the High Court (one from which the judges were transferred and the other receiving him).
4. Regarding the appointment of a High Court judge, the CJI was required to consult only two senior most judges of the Supreme Court.
5. The consultation process requires “consultation of the plurality of judges.” The sole opinion of the CJI does not constitute the consultation process.
6. The transfer of puisne judge of the High Court was judicially reviewable, only if the CJI had recommended the transfer without consulting four senior most judges of the Supreme Court & two Chief Justice of the concerned High Courts.
7. The requirement of consultation by the CJI with his colleagues does not exclude consultation with those judges who are conversant with the affairs of the High Court concerned- either as a parent court (the high Court from where the transfer is made) or who have occupied the office of a judge or Chief Justice of that court on transfer from his parent High Court or any other court.

8. Strong & cogent reasons must exist regarding a person's name not being recommended. Only positive reasons may be given. The view of others consulted by the CJI should be in writing and the same should be conveyed to the government, along with the recommendation by the CJI.

#### **(A) Tenure of Judges are Fixed**

*Article 124(4) of the Constitution provides for:*

*“A judge of the Supreme Court shall not be removed from his office except by an order of the president passed after an address by each house of parliament supported by a majority of the total membership of that house and by a majority of not less than two-thirds of the members of the house present & voting has been presented to the president in the same session for such removal on the grounds of proved misbehaviour or incapacity”.*

*“A judge of the Supreme Court holds office until he attains the age of 65 years”.*

In the case of Executive, it holds its office during the pleasure of the President. But in the case of Judiciary, the judges are not subject to the doctrine of pleasure. They hold office during their whole tenure up to the age of retirement.

The judges of the Supreme Court have the security of tenure. Removal of a judge from his office can only be done by the orders of the president. The judges can only be removed if certain grounds are fulfilled like proved misbehaviour or incapacity, supported by a resolution adopted by a majority of the total membership in each house & also by a majority of not less than 2/3<sup>rd</sup> of the members of the house present & voting. The legislative cannot misuse the power because the certain special procedure for the removal of judges must be followed. A judge can resign from his office by writing to the President.<sup>9</sup>

#### **(B) Judges (Inquiry) Act, 1968**

The legislature had passed the Judges Inquiry Act, 1968 under which the procedure for an investigation into misbehaviour or incapacity of a judge shall be done by a committee constituted by the speaker of the Lok Sabha or the speaker of the Rajya Sabha. The committee shall consist of three members which would consist of:

1. one member shall be chosen among the chief justices and other judges of the Supreme Court,
2. one shall be chosen from amongst the Chief Justices of the High Court,

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<sup>9</sup> Art. 124 (2)(a)

3. one shall be a person chosen from the speaker or chairman who is a distinguished jurist.

## VI. REMOVAL OF A JUDGE BY IMPEACHMENT

A Judge of the Supreme Court can be removed from his office on grounds of a) misbehaviour, or b) incapacity by the procedure prescribed by the constitution under Article 124(4). The parliament is empowered to exercise the power to supplement the provision of constitution in regard to enacted The Judges Inquiry Act, 1968.

The procedure regarding the impeachment process is described below:

- A motion for presenting an address to the President praying for the removal of a judge must be signed by at least 100 members of Lok Sabha (if notice is given in the Lok Sabha) or 50 members of the Rajya Sabha (if the notice is given in Rajya Sabha).
- The Chairman (in case of Rajya Sabha) or the Speaker (in case of Lok Sabha) may consult the person as they may think fit & consider such material as may be available & may admit the motion or refuse to admit the same.
- If the motion is admitted, a committee consisting of 3 persons will be constituted.
- From incapacity then the motion for removal of the judge together with the report of the committee will be taken up for consideration in the house in which it is pending.
- The motion must be passed by each house by a majority of the total membership of that house & by a majority of not less than two-third of the members of that house present & voting. After this, the address is present to the president.
- The president signs & passes an order of removing the judge.

### RELEVANT CASES

#### *In Sub Committee v Union of India*<sup>10</sup>,

In 1991 during the end of the 9<sup>th</sup> Lok Sabha 108 member gave notice of motion to remove Justice V. Ramaswamy a Judge of the Supreme Court. The motion was admitted in the Lok Sabha and a committee was constituted under the Judges Inquiry Act, 1968.

There was question raised regarding the motion put forth to impeach a judge by the Lok Sabha after the 9<sup>th</sup> Lok Sabha was dissolved the Supreme Court held that:

1. A motion that has started for removal of a judge does not lapse merely on the ground that the dissolution of Lok Sabha took place,
2. The process for removal of a judge comprise of two stages:

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<sup>10</sup> (1991) 4 SCC 699; AIR 1992 SC 320

The first stage is the initiation of proceeding, investigation, & proof under the Judges Inquiry Act. This stage is subject to judicial review.

After the proving of the charge, the second stage commences. It is part of the parliament process & is not subject to judicial review.

3. The Supreme Court has no jurisdiction to inquire into the alleged misbehaviour or incapacity of a judge. Neither the court can restrain a judge against whom allegation have been made from functioning as a judge.

The committee was appointed by the speaker of the Lok Sabha and the committee found that the judge was guilty of misbehaviour. Therefore the motion for removal could not be passed in the Lok Sabha with the requisite special majority because the congress party had abstained from voting. The judge was not impeached.

***In C Ravichandran Iyer v Justice A.M Bhattacharjee<sup>11</sup>,***

Allegations was published in the press that Chief Justice of Bombay High Court A.M. Bhattacharjee was paid an extraordinary amount by a foreign publisher as royalty for publication of two books written by him.

The Bar Association passed a resolution against the judge and demanded his resignation. The matter went before the Supreme Court.

The Supreme Court did not approve the conduct of the Bar Association. It further elaborated in the judgement that the constitution does not permit any agency other than parliament to initiate action against a judge. If the matter is regarding the behaviour of a judge the matter can be approached to the Chief Justice of India. The court called in house procedure of self regulation by the judiciary.

Though this observation was put up by the two judge bench & need of an elaborate discussion was required regarding this issue and therefore the constitutional bench should discuss the matter because the constitution confers no such power on the Chief Justice of India.

***In K. Veeraswami v Union of India:<sup>12</sup>***

In this case, K. Veereswami who was a retired Chief Justice of Madras High Court was prosecuted under the Prevention of Corruption Act<sup>13</sup>. He contended that a judge cannot be prosecuted, the only remedy available against him is provided under Article 124 (Impeachment). An FIR was lodged with the CBI. The appellant filed a petition in the High

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<sup>11</sup> (1995) 3 SCC 655

<sup>12</sup> (1991) 3 SCC 655

<sup>13</sup> PCA, 1988

Court for quashing the FIR filed by CBI which was dismissed by the High Court. A special leave petition was filed before the Supreme Court.

The expression “misbehaviour” in Article 124 (5) includes criminal misconduct defined in the Prevention of Corruption Act. The expression “public servant” in section 6 (1)(c) & (2) includes judges of Supreme Court & High Court.

The Supreme Court dismissed his appeal against the Madras High Court & ordered his prosecution. A five judge bench of the Supreme Court held that a Judge of the Supreme Court or High Court can be prosecuted & convicted for criminal misconduct. Supreme Court held that under Article 124 of the constitution it is not a provision providing shield conferring immunity to a judge from being prosecuted on a charge under the Prevention of Corruption Act.

#### **(A) No discussion in the legislature regarding the conduct of the Judges**

*Article 121 of the Constitution provides for:*

*“No discussion shall take place in parliament with respect to the conduct of any judge of the Supreme Court or of a 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 judges as hereinafter provided”.*

The conduct of the judges can neither be discussed in the parliament nor in a state legislature when the judge is discharging his official duties. Article 121 of the constitution puts a restriction on the parliament not to discuss the conduct of the judges.

Parliamentary practice prohibits the criticism of the judges other than the motion expressing criticism or leading to the impeachment of the judge.

#### **(B) Parliament can extend, but cannot curtail the jurisdiction & power of the Supreme Court**

*Article 138 of the Constitution provides for:*

- 1. The Supreme Court shall have such further jurisdiction & powers with respect to any of the matters in the union list as parliament may by law confer.*
- 2. The Supreme Court shall have such further jurisdiction & powers with respect to any matter as the government of India, & the government of any State may by special agreement confer, if parliament by law provides for the exercise of such jurisdiction & powers by the Supreme Court.*

In case of jurisdiction issues the parliament is empowered to change the pecuniary limits for

appeals to the Supreme Court in civil cases, it can even enhance the appellate jurisdiction of the Supreme Court, confer supplementary power to enable it to work more effectively, confer power to issue directions, order, or writs including all the prerogative writs for any purpose other than those mentioned in Article 32. Under Article 138 of the constitution it empowers the parliament to exceed the jurisdiction of the courts, but at the same time it puts a restriction on the parliament not to curtail the jurisdiction & power of the Supreme Court.

The legislature can provide that an appeal may lie to the Supreme Court in civil matters from the judgement, decree, or final order of a single judge of a High Court.<sup>14</sup> Parliament can provide that the Supreme Court shall not have jurisdiction & powers of the Federal Court beyond what it already has under Article 133 & 134 of the constitution. It can even regulate the courts power to review its own decision or orders. Parliament can confer further jurisdiction, in the form of quantitatively or qualitatively on the Supreme Court regarding any matter in the union or concurrent list.<sup>15</sup> The Supreme Court can be conferred with supplementary power so as to enable it to exercise its jurisdiction more effectively.

The provision under our constitution makes it clear that the parliament can expand the jurisdiction & powers of the Supreme Court in several respects over & above what the constitution confers.

### **(C) Power to punish for its contempt**

*Article 129 of the Constitution provides for:*

*“The Supreme Court shall be a court of record & shall have all the powers of such a court including the power to punish for contempt of itself.*

The Supreme Court & the High Court have the power to punish any person for its contempt under Article 129 & 215 respectively. They do not confer a new power. Contempt may be civil or criminal.

Civil contempt takes place only when a person wilfully disobeys any judgement, decree, order, or process of a court, or breaches or fails to honour an undertaking given to a court. Criminal contempt consists of the publication of any matter or doing an act that scandalizes or lowers the authority of a court or prejudices or interferes with the due course of a judicial proceeding or interferes with the administration of justice in any other matter. Mere defamation of a judge is not contempt unless it crosses the limit of fair comment & casts reflection on the dignity and

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<sup>14</sup> Art. 133(3)

<sup>15</sup> Art. 138(1)

prestige of the court.

The Supreme's Court power to punish for the contempt is not limited to contempt of itself but extends to punishing contempt of all courts & tribunals throughout the country. Criminal Contempt provides wide power enough to include any act which would tend to interfere with the administration of justice or which would lower the dignity and authority of the court. This power is one of the essences to keep the judiciary independent & impartial. The Supreme Court acts as a guardian of the right to personal liberty, it cannot do anything by which that right is taken away or abridged, especially when Supreme Court is acting *suo motu* as in proceeding for its contempt.<sup>16</sup>

***In Delhi Judicial Service Association v State of Gujarat:*<sup>17</sup>**

The Chief Judicial Magistrate was assaulted, & arrested on flimsy grounds, handcuffed, tied with rope. His photos were taken and were published in the newspaper by the police officer. The police officer was charged for contempt of court and proceeding against the officials started.

It was contended by the respondent that the Supreme Court had no power to quash the criminal proceeding against the Chief Judicial Magistrate. But the court stated that the inherent power under Article 142 coupled with the plenary & residuary power under Article 32 & 136 give it the power to quash criminal proceeding pending before any court to do complete justice in the matter before Supreme Court.

The Supreme Court sentenced the police officers and quashed the criminal proceeding against the Chief Judicial Magistrate. The police officials were held for criminal contempt under the Contempt of Courts Act, 1971. The objective behind punishing for criminal contempt is to protect the administration of public justice & not to protect the judges personally.

***In Re. Vinay Chandra Mishra:*<sup>18</sup>**

In this case, an advocate misbehaved with the judge of a High Court while appearing for a case in the court.

The Supreme Court examined the scope and extent of the power of contempt in detail and held that under Article 129, 215, & 142 of the constitution it has the power suo moto to take cognizance of contempt proceeding against the contemner. The Supreme Court held that the power of the courts under Article 129 & 142 cannot be limited or curtailed by any statute. The

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<sup>16</sup> *Leila David v State of Maharashtra*, (2009) 4 SCC 578

<sup>17</sup> (1991) 4 SCC 406

<sup>18</sup> (1995) 2 SCC 584

jurisdiction under Article 129 is independent of statutory law.

The advocate Vinay Chandra Mishra, President of the Bar Council of India was held guilty by the Supreme Court for committing Contempt of Court for misbehaving with Justice Kishore of Allahabad High Court and was sentenced to 6 month imprisonment. The court found advocate guilty of misconduct & debarred him from practising as an advocate for a period of 3 years.

***In Supreme Court Bar Association v Union of India:*<sup>19</sup>**

The advocate was charged for committing criminal contempt of court for having interfered with and “obstructing the course of justice by trying to threaten, overawe and overbear the court by using insulting, disrespectful and threatening language”.

The five judge bench of the Supreme Court overruled the judgement passed by three judge bench in *Vinay Chandra Mishra Case*<sup>20</sup>, and held that the power of the Supreme Court under Article 129 to punish for contempt is though wide yet limited and cannot extend to include the power to determine whether an advocate is also guilty of “professional misconduct” in a summary manner by passing the procedure prescribed under the Advocates Act.

**(D) Separation of Judiciary from executive**

*Article 50 of the Constitution provides for:*

*“The state shall take steps to separate the judiciary from the executive in the public service of the state.*

The provision under the constitution provides for the separation of the judiciary from the executive in the public service of the state. The provision emphasises the need for securing judiciary from the interference by the executive. The parliament has by law assigned the judicial function exclusively to the judiciary.

Before the separation of judiciary from the executive in some states the executive officers were dealing with cases under the Indian Penal Code. The executive officers in these states were also empowered to hear bail application & they could also grant bail. But after the enactment of the Criminal Procedure Code, 1973 the executive officers have no function to perform in the judicial system. Therefore the doctrine of separation of power is of great importance to achieve the independence of the judiciary.

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<sup>19</sup> (1998) 4 SCC 409

<sup>20</sup> Ibid

## VII. CONCLUSION

The independence of the judiciary as is clear from the above discussion hold a prominent position as far as the institution of judiciary is concerned. It is clear from the historical overview that judicial independence has faced many obstacles in the past especially about the appointment and the transfer of judges. Courts have always tried to uphold the independence of the judiciary and have always said that the independence of the judiciary is a basic feature of the Constitution. Courts have said so because the independence of the judiciary is the prerequisite for the smooth functioning of the Constitution and a realization of a democratic society based on the rule of law.

The interpretation in the *Judges Case* giving primacy to the executive, as we have discussed has led to the appointment of at least some Judges against the opinion of the Chief Justice of India. The decision of the *Judges Case* was could never have been intended by the framers of the Constitution as they always set the task of keeping the judiciary free from the executive and making it self-competent.

Judicial independence has to be seen with the changing dimension of society. Judicial Accountability and Judicial Independence have to work hand in hand to ensure the real purpose of setting up the institution of the judiciary.

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