

INTERNATIONAL MEASURES ON INDEPENDENCE AND APPOINTMENT OF JUDGES

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Abstract

Independence of the judiciary is essential condition for success of Indian democracy. Judicial independence in fact is one of the central components of our democracy. The importance of independence of judiciary is recognized in India since it is the key factor to maintain rule of law and back constitutional mandate. All developed and underdeveloped countries has realized and accepted the importance of independence of the judiciary A neutral mind judges can contribute immensely in pro-citizen and need based interpretation of constitutional and legislative provisions. Judicial independence is required to preserve basic values on which our legal system is based. The fundamental values such as rule of law, universal brotherhood, socialism, democratic republic, sovereignty and integrity of India, all can be defended and preserved via judicial independence. In addition, the impartial judiciary is accountable for the protection of fundamental human rights of all, irrespective of any distinction of race, religion, caste, sex and place of birth, etc. Without independent judiciary, citizens won't be able to enjoy their basic rights for which they are entitled.

The main aim of the research paper to know more about the appointment of judges at international level, international conventions, declarations, procedures, principles, treaties and laws are replete with provisions requiring independence of the judiciary for the dispensation of justice. United Nations from its very inception has emphasized on the need of impartial and neutral judiciary. The international concern for fair and neutral tribunal found expression in several provisions of general international and regional human rights instruments.

Keywords: Judiciary, Appointment, International, Independence, Importance

I. INTRODUCTION

The concern for judicial independence has been universal. All developed and underdeveloped countries have shown concern for judicial independence in their Constitutions and separately enacted laws to guard and promote judges' personal independence and the institutional independence of the judiciary. Several key areas such as the constitution of the judiciary, appointment and transfer of judges, tenure, remuneration and salary of judges have been well addressed at international level. There are several general international and regional instruments that seek to uphold the judicial independence. They are instructive in area of independence and appointment of judges. Most of the international instruments have now been ratified by member states. The ratification of international standards means that governments across the globe are bound to bring their domestic laws in tune with best international measures ensuring independence of judiciary. The United Nations has endorsed the importance of independent judiciary and has drafted plethora of Conventions, declarations, principles and treaties relevant in context of independent judiciary. In addition, regional instruments that proclaim independence of judiciary impose obligations on ratifying countries to endorse best principles in their domestic laws. Since India is a party to most of the international human rights instruments on independence of judiciary; hence obliged to give effect to human rights instruments' provisions and safeguard independence of judiciary. The following are some of the major general international and regional standards relevant in context of independence and appointments of judges.

II. INTERNATIONAL MEASURES

There are several international conventions, declarations, treaties, procedures and principles under which independence of judiciary has been accorded significant place. All international instruments guarantee the right to a fair hearing in judicial proceedings (criminal, civil, disciplinary and administrative matters) before an independent and impartial court or tribunal. The major international norms/standards developed and emerged out in the field of independence of judiciary are as follows.

2.1. Universal Declaration of Human Rights 1948

The significance of independence of judiciary has increased manifold since right to be governed by impartial tribunal has been viewed as tool to ensure good governance. Besides, judicial independence is required to realize basic human rights such as right to live in pollution free environment, right to life and personal liberty, right to live with human dignity and right to work, *etc.* These rights can be secured and protected through unprejudiced judiciary. Universal Declaration of Human Right, 1948 (in short UDHR) is one of the most significant human right instruments drafted by UN. It prescribes several human rights which can be protect only via neutral judges. It is non-binding instrument nevertheless furnish substantive guidelines to ensure fair trial by impartial courts. The UDHR affirms that "everyone is entitled in full equality to a fair and public hearing by an

independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.¹ The Declaration states that ‘everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’² The Declaration further states that ‘everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him’.³ This provision of the Declaration obligates member states to provide equal opportunity to access impartial tribunal to enjoy and determine rights. It is needless to point out here that since the drafting of UDHR, several countries have ratified it and enacted specific laws to guard basic rights of individual through neutral Judiciary. The Declaration introduces set of standards and rules that all countries can apply in order to strengthen judicial independence. The countries i.e. developed and underdeveloped both are trying their level best to bring their laws in line with provisions of this declaration.⁴

2.2. International Covenant on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights, 1966⁵ (ICCPR) is another significant human right instrument adopted by UN General Assembly. The ICCPR states that ‘all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’.⁶ The Covenant further affirms that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.⁷ The states parties to the Covenant are legally bound by its provisions. This Convention binds member states to ensure independence of judiciary in their respective countries.

2.3. UN Convention on the Rights of the Child 1989

This Convention is adopted by General Assembly Resolution on 20th of November 1989. The Convention emphasises on protection of inherent dignity and inalienable rights of all children living in any nation of the World. These rights are the foundation of freedom, justice and peace in the world. According to this Convention ‘every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.’⁸

2.4. International Convention on the Protection of the Rights of All Migrant Workers and Members of their families, 1990

This Convention is adopted by General Assembly.⁹ It has a provision concerning migrant’s right of fair hearing. According to the Convention, the migrant workers and members of their families shall have a right to equality with nationals of the state concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligation in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹⁰

2.5. European Union, Charter of Fundamental Rights 2000

According to this EU charter ‘everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions lay down in this charter’.¹¹ Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.¹²

2.6. European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950¹³ is a major regional human right instrument. The Convention has a provision for fair public hearing which is not possible without independence of judiciary. It provides that in the determination of civil rights and obligations or of any criminal charge against an individual, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.¹⁴ The independence of the judiciary is required for the fair determination of rights of a person involved in any crime. The member states of this Convention therefore should design appropriate institutional structures that uphold the independence, impartiality and integrity of the judiciary

¹ The UDHR, art 11.

² *Id.*, art. 8.

³ *Id.*, art.10.

⁴ For details see, S.K. Kapoor, *International Law & Human Rights* 815 (Central Law Agency, 18th edn., 2011); J.S Verma, *The New Universe of Human Rights* 73 (Universal Law Publishing Co. Pvt. Ltd, reprint 2011); H.O. Agarwal, *International Law and Human Rights* 794 (Central Law Publications, 19th edn., 2013).

⁵ The Covenant was adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI) on 16 December 1966.

⁶ *Id.*, art. 14(1).

⁷ *Id.*, art. 14 (2).

⁸ *Id.*, art. 37(d).

⁹ The Convention is adopted by the General Assembly resolution 45/158 of 18 December 1990.

¹⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of their families. art. 18(1).

¹¹ Art. 47.

¹² *Ibid.* See also H.O. Agarwal, *Supra* note 4.

¹³ This Convention was adopted on 4 November 1950 (E.T.S. No.5) entered into force 3 September 1953. This Convention is an international treaty to protect human rights and fundamental freedoms in Europe. All Council of Europe member states are party to the convention.

¹⁴ See, art. 6.

2.7. Bangalore Draft Code of Judicial Conduct, 2001

The Bangalore Principles of Judicial Conduct, 2001 revised in 2002 is a detailed global standard that speaks about judicial independence, impartiality, integrity and judges' conduct etc.¹ According to this Draft Code judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial.² A judge shall exercise the judicial function independently³ and promote high standards of judicial conduct.⁴ A judge shall perform his or her judicial duties without favour, bias or prejudice.⁵ Besides, the Code emphasizes on 'ensuring equality of treatment to all before the courts'.⁶ According to the Code the 'competence and diligence'⁷ is also considered prerequisites for the due performance of judicial office.⁸ These principles are instructive and hence state parties should take appropriate steps to improve judicial independence in their respective countries by bringing domestic laws in line with these principles. The ethical conduct of judges can also be improved by inserting these aforesaid principles in domestic laws of member countries.

2.8. United Nations Convention against Corruption 2003

Corruption acts as a barrier to ensure rule of law and good governance. At international level, there is commitment to reduce corruption. A convention against corruption was adopted by the General Assembly in 2003.⁹ The opening part of the Convention clearly says that it has to promote and strengthen measures to prevent and combat corruption more efficiently and effectively, to promote, facilitate and support international support and technical assistance in the prevention of and fight against corruption and to promote integrity, accountability and proper management in the Judicial system.

The Convention imposes obligations upon the member State parties to take appropriate steps to combat corruption in accordance with the fundamental principles of its domestic law.¹⁰ The Convention aims to ensure transparency and introduces set standards to prevent and criminalize corruption in judicial system. The Convention obligates state parties to take measures to prevent corruption in judiciary and prosecution services without compromising the independence of the judiciary.¹¹ The Convention also imposes duty upon State parties to cooperate in civil, criminal and administrative matters relating to corruption.

2.9. International Convention for the Protection of All Persons from Enforced Disappearance, 2006

Disappearance is an international human rights instrument of the United Nations and intended to prevent forced disappearance defined in international law, crimes against humanity. The text was adopted by the United Nations General Assembly on 20 December 2006 and opened for signature on 6 February 2007.¹² Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.¹³

In addition to aforesaid standards on the independence of judges, there are some other notable specific international instruments that guarantee independence of judiciary. One such international instrument is 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1999'. The right of public hearing before an independent, impartial and competent judicial or other authority is well reflected in this declaration or resolution of the General Assembly.¹⁴ Similarly, another major international standard which calls upon all governments to respect and uphold the independence of judges is the Commission on Human Rights Resolution of 2004.¹⁵ Earlier, the Commission on Human Rights in its resolution of 2003 had focused on integrity of the judicial system and stressed on fair and public hearing by a competent, independent and impartial tribunal.

REGIONAL MEASURES

In addition to above mentioned international human rights instruments, there have been some regional human rights instruments and treaties which obligated member states to ensure good governance in their respective countries by providing independence of judiciary. The focus on appointment and independence of judiciary can be found in the following regional instruments.

2.10. European Convention on Human Rights and Fundamental Freedoms, 1950

This Convention states that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law'.¹⁶

¹ The Bangalore Principles of Judicial Conduct 2001, value 1 principles 1.1-1.6, value2 principles 2.1-2.5 and value 3 principles 3.1-3.2 etc.

² *Id.*, value 1.

³ *Id.*, value 1 principle 1.1.

⁴ *Id.*, value 1 principle 1.6.

⁵ *Id.*, value 2 principle 2.1.

⁶ *Id.*, value 5 principles 5.1-5.5.

⁷ *Id.*, value 6 principles 6.1-6.7.

⁸ See, Principles 4&5.

⁹ See General Assembly Resolution 58/4 adopted on 31st October, 2003.

¹⁰ United Nations convention against corruption, 2003 art. 10. Also see Suresh Mishra, "Public Accountability and Administrative Efficiency Through Right to Information; - Opportunities and Challenges," *LV Indian Journal of Public Administration* 530(2009).

¹¹ *Id.*, arts. 11 and 11(1).

¹² International Convention for the Protection of All Persons from Enforced Disappearance, 2006.

¹³ *Id.*, art. 11(3).

¹⁴ See, art. 9(2).

¹⁵ Commission on Human Rights Resolution 2004, has been adopted on 19th of April, 2004.

¹⁶ See, art. 6(1).

2.11. The American Convention on Human Rights 1969

The American Convention on Human Rights is another major regional human rights instrument that focuses on individual's right of fair hearing.¹ The State parties to this Convention shall undertake adequate steps to guard and ensure fair hearing which is not possible without independent judges. According to the Convention 'every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.'² Thus the signatory states of this convention have to ensure that judges are appointed in transparent manner and independent in discharge of their judicial functions to protect the rights of varied nature as mentioned in this Convention itself.

2.12. African Charter on Human and Peoples' Rights 1981

The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is an international human rights instrument. It intends to promote and protect human rights and basic freedoms in the African continent. The African States members have agreed that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status'.³ It guarantees equality before the law and equal protection of the law.⁴ It imposes a direct obligation on state parties to guarantee the independence of the courts.⁵ The Charter further proscribes that 'every individual shall have the right his cause heard'.⁶ It is worthy to mention here that only unbiased judges can protect the basic rights of individuals. A person has right to be tried within a reasonable time by an impartial court or tribunal. Thus the provisions of the charter accept the need and importance of impartial judiciary to protect the right to an individual to be heard.

2.13. Inter-American Convention against Corruption 1996

This Convention was adopted in 1996. The Convention of 1996 in its preamble acknowledges that corruption undermines the legitimacy of public institutions and strikes at society. One of the objectives of the Convention was to promote and strengthen mechanism necessary to detect, punish and eradicate corruption.⁷ The Convention obligates states parties to take steps to obliterate corruption and preventive measures in this direction.⁸ It is important to emphasize that some of the provisions of the Convention are compulsory to follow for all state parties⁹ which means that ratifying countries have to take steps to wipe out corruption and ensure good governance in their respective countries. The Convention furnishes adequate guidelines to root out corruption. It is needless to mention here that judiciary is not untouched from corruption. There are several factors which furnish ample basis to conclude that judiciary in various countries being inaccessible for poor and downtrodden segments have become a sold ground for oiling the wheels of the system. The cases of involvement of judges in taking bribe are reported from different parts of the World. Under such circumstances, the aforesaid Convention has crucial role to play. Its guidelines can be adhered to and implement in municipal laws of various countries.

2.14. African Union Convention on Preventing and Combating Corruption 2003

This Convention was adopted in 2003. It has also been ratified by several regional countries. The preamble of the Convention binds the member states of the African union to promote and protect human and peoples' rights. One of the objectives of the Convention was to establish the necessary conditions to foster transparency and accountability in the management of public affairs.¹⁰ The Convention binds the African States parties to respect for democratic principles and institutions, popular participation, the rule of law and good governance,¹¹ to respect for human and peoples' rights in accordance with the African Charter on Human and Peoples Rights and other relevant human rights instruments.¹² It also directs state parties to take legislative and other measures to deal with corruption.¹³ It further provides that the civil society and the media should be enabled to participate in monitoring process of public bodies¹⁴ and they should be given access to information in cases of corruption and related offences on condition that the dissemination of such information does not adversely affect the investigation process and the right to a fair trial.¹⁵ Thus this Convention has necessitated independence judiciary to protect basic rights mentioned in it as well it relevant to tackle corruption prevalent in many countries in all limbs of the State including judiciary.

¹ The Convention was adopted at San Jose, Costa Rica on 22 November 1969.

² *Id.*, art. 8(1). See H.O. Agarwal, *Supra* Note 4 S.K. Kapoor, *Supra* Note 4.

³ The African Charter on Human and Peoples' Rights, art. 2.

⁴ *Id.*, art. 3.

⁵ *Id.*, art. 26.

⁶ *Id.*, art. 7(1).

⁷ Inter-American Convention against Corruption, 1996 art. II.

⁸ *Id.*, art. III.

⁹ The compulsory provisions include provisions that define certain terms (art. 1) establish the purposes of the convention (art. II) Specify its scope and jurisdiction (art. IV and V), determine the effects on state property (art. XII) and the nature of the act of corruption (art. XVII). for details see a paper presented by Edmundo Vargas Carreno in Inter-American Development Bank conference on "Transparency and Development in Latin America and the Caribbean, held on 2000.

¹⁰ African Union Convention on Preventing and Combating Corruption, 2003, art., 2(5).

¹¹ *Id.*, art. 3(1).

¹² *Id.*, 3(2).

¹³ *Id.*, art. 5.

¹⁴ *Id.*, art. 12(3).

¹⁵ *Id.*, art. 12(4).

2.15. Magna Carta of Judges 2010

The Consultative Council of European Judges has framed Magna Carta which has several fundamental principles to guarantee judicial independence. The Magna Carta of Judges adopted by the Council of Europe Consultative Council of European Judges, in 2010. The Magna Carta accepts that the judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.¹ According to the Consultative Council of European Judges or Magna Carta 'judicial independence and impartiality are essential prerequisites for the operation of justice'.² Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.³

The Consultative Council of European Judges further laid emphasis upon guaranteeing judicial independence. It provides that judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irrevocability, training, judicial immunity, discipline, remuneration and financing of the judiciary.⁴ Furthermore, the decisions on selection, nomination and career shall be based on objective criteria and taken by the body in charge of guaranteeing independence.⁵ Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court.⁶ The document further affirms that following consultation with the judiciary, the State shall ensure the human, material and financial resources necessary to the proper operation of the justice system. In order to avoid undue influence, judges shall receive appropriate remuneration and be provided with an adequate pension scheme, to be established by law.⁷

The Magna Carta further provides that the initial and in-service training is a right and a duty for judges. It shall be organized under the supervision of the judiciary. Training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system.⁸ Furthermore, the judiciary shall be involved in all decisions which affect the practice of judicial functions (organization of courts, procedures, and other legislation).⁹ Again, in the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law.¹⁰ Judges shall ensure equality of arms between prosecution and defence. An independent status for prosecutors is a fundamental requirement of the Rule of Law.¹¹ Judges have the right to be members of national or international associations of judges, entrusted with the defence of the mission of the judiciary in the society.¹² Likewise, to ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions.¹³

In order to ensure transparent justice the Magna Carta of Judges accept that justice shall be transparent and information shall be published on the operation of the judicial system.¹⁴ Judges shall take steps to ensure access to swift, efficient and affordable dispute resolution;¹⁵ they shall contribute to the promotion of alternative dispute resolution methods. Court documents and judicial decisions shall be drafted in an accessible, simple and clear language. Judges shall issue reasoned decisions, pronounced in public within a reasonable time, based on fair and public hearing. Judges shall use appropriate case management methods.¹⁶ The enforcement of court orders is an essential component of the right to a fair trial and also a guarantee of the efficiency of justice.¹⁷

2.16. LAWASIA's Principles on Judicial Independence

Law Association for Asia and the Pacific (in short LAWASIA) is a professional association. It consists of representatives of bar councils, law associations, individual lawyers, law firms and corporations principally from the Asia Pacific region. LAWASIA adopted two major sets of principles on judicial independence, *viz.* (1) The Tokyo Principles on Judicial Independence in 1982 and the Beijing Statement on Principles of the Independence of the Judiciary in 1995.

The Beijing Principles recognised judiciary as an institution of the highest value.¹⁸ The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a

¹ Consultative Council of European Judges or Magna Carta Judges, 2010, principle 1.

² *Id.*, principle 2.

³ *Id.*, principle 3.

⁴ *Id.*, principle 4.

⁵ *Id.*, principle 5.

⁶ *Id.*, principle 6.

⁷ *Id.*, principle 7.

⁸ *Id.*, principle 8.

⁹ *Id.*, principle 9.

¹⁰ *Id.*, principle 10.

¹¹ *Id.*, principle 11.

¹² *Id.*, principle 12.

¹³ *Id.*, principle 13.

¹⁴ *Id.*, principle 14.

¹⁵ *Id.*, principle 15.

¹⁶ *Id.*, art. 16.

¹⁷ *Id.*, art.17.

¹⁸ Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1995), art.1.

free society observing the rule of law. Independence be guaranteed by the State and enshrined in the Constitution or the law.¹ It is the duty of the judiciary to respect and observe the proper objectives and functions of the other institutions of government and observe the proper objectives and functions of the judiciary.² In the decision-making process, any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgement in accordance with Article 3 (a). The judiciary, on its part, individually and collectively, shall exercise its functions in accordance with the Constitution and the law.³ Judges shall uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their activities.⁴ To the extent consistent with their duties as members of the judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.⁵ Judges shall be free, subject to any applicable law, to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.⁶

The Tokyo Principles also focused on appointments and independence of judiciary. Concerning the appointments, it is affirmed that 'there is no single model of appointment of judges which is essential to their proper appointment'.⁷ The Tokyo Principles further acknowledge that salary, working facilities and relationship with the executive, is potential threats to independence of judges.

2.17. **IAJ the Universal Charter of the Judge, 1999**

The Universal Charter of the Judge has been drafted with the help of judges from around the world. This Charter has been approved by the member associations of the International Association of Judges (IAJ) as general minimal norms.⁸

According to this Charter the judges shall in all their work ensure the rights of everyone to a fair trial.⁹ They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.¹⁰ The independence of the judge is indispensable to impartial justice under the law. It is indivisible.¹¹ All institutions and authorities, whether national or international, must respect, protect and defend that independence.¹² The Charter further prescribes that judicial independence must be ensured by law¹³ and the judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.¹⁴ In the performance of the judicial duties the judge is subject only to the law and must consider only the law.¹⁵ In the performance of the judicial duties the judge must be impartial and must so be seen. The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved. The judge must diligently and efficiently perform his or her duties without any undue delays.¹⁶

2.18. **Draft Universal Declaration on the Independence of Justice (Singhvi Declaration)**

The UN Economic and Social Council authorized the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to entrust Mr. L.M. Singhvi (India) to prepare a report on the independence and impartiality of the judiciary. Singhvi prepared a Draft Universal Declaration on the Independence of Justice (popularly known as Singhvi Declaration). In his draft Declaration, he emphasized on the Independence and Impartiality of the Judiciary. According to his report or draft the objectives and functions of the judiciary is to administer the law impartially irrespective of parties, promote human rights and to ensure that all peoples are able to live securely under the rule of law.¹⁷

Singhvi stressed on individual independence of judges. According to his declaration, the Judges individually shall be free, and it shall be their duty, to decide matters before them impartially in accordance with their assessment of the facts and their understanding of law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.¹⁸ Singhvi also recognized and focused on internal independence of judges. He said that in the decision-making process, judges shall be independent *vis à-vis* their judicial colleagues and superiors.¹⁹ Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of the judge to pronounce his judgment freely.²⁰ Draft Declaration further provides that the Judiciary shall be independent of the Executive and Legislature.²¹ The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature,

¹ *Id.*, art. 4.

² *Id.*, art. 5.

³ *Id.*, art. 6.

⁴ *Id.*, art. 7.

⁵ *Id.*, art. 8.

⁶ *Id.*, art. 9.

⁷ The Tokyo Principles, sec.10.a.

⁸ The Universal Charter of the Judge 1999, preamble.

⁹ *Id.*, art. 1.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Id.*, art. 2.

¹⁴ *Ibid.*

¹⁵ *Id.*, art. 3.

¹⁶ *Id.*, art. 6.

¹⁷ Singhvi Declaration, 1980, art. 1.

¹⁸ *Id.*, art. 2.

¹⁹ *Id.*, art. 3.

²⁰ *Ibid.*

²¹ *Id.*, art. 4.

including issues of its own jurisdiction and competence.¹ Thus the draft declaration favours judiciary's autonomy in matter of deciding its own jurisdiction.

The judges can impart justice without any fear and favour, the Singhvi declaration further requires that the executive shall not have control over the judicial functions of the courts in the administration of justice.² Similarly, the Executive shall have no power to close down or suspend the operation of the courts.³ The Executive shall refrain from any act or omission which preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision.⁴ No legislation or executive decree shall attempt retroactively to reverse specific court decisions or to change the composition of the court to affect its decision making.⁵ Judges shall be entitled to take collective action to protect their judicial independence.⁶ Judges shall always conduct themselves in such a manner as to preserve the dignity and responsibilities of their office and the impartiality and independence of the judiciary.⁷ The judges shall be entitled to freedom of thought, belief, speech, expression, professional association, assembly and movement.⁸ The declaration talks about qualifications, selection and training of candidates chosen for judicial office,⁹ posting, promotion and transfer of judges¹⁰ and the term of office of the judges.¹¹ All provisions of the Singhvi's Declaration ensure and very well recognise judicial independence. The declaration sets out several standards and rules for member states to ensure judicial independence in their respective nations. Thus the declaration is comprehensive in its nature and scope and furnishes sufficient guidelines for state parties to follow them in letter and spirit.

2.19. Universal Declaration on the Independence of Justice (Montreal Declaration) 1983

The Montreal Declaration of 1983 in its preamble prescribes that the justice constitutes one of the essential pillars of liberty and the free exercise of fundamental human rights as well as peace between nations.¹² In this declaration, issues such as independence of judges, their qualifications, selections an training, tenure, disqualifications and removal has been comprehensively mentioned. According to the Declaration, participation by the executive or legislature in appointment process might be acceptable if 'the appointment is made in consultation with members of the Judiciary and the legal profession or by a body in which members of the judiciary and the legal professional participate.'¹³ The Declaration further states that the "Judges and courts shall be free in the performance of their duties to ensure that the Rule of Law is observed, and shall not admit influence from any government or any other authority external to their statutes and the interests of international justice".¹⁴ Judges shall enjoy freedom of thought and, in the exercise of their duties, shall avoid being influenced by any considerations other than those of international justice.¹⁵ Judges shall promote the principle of the due process of law as being an integral part of the independence of judiciary.¹⁶

Besides above mentioned regional standards, there are Guidelines of the Committee of Minister of the Council of Europe on Human Rights and the Fight against Terrorism 2002 which showed concern for independent, impartial tribunal to confer right to a fair hearing to a person accused of terrorist activities. The judicial independence is equally important whether to interpret laws or to confer right of fair hearing to terrorist.

III. UN SPECIAL RAPPORTEURS ON INDEPENDENCE OF JUDICIARY

In addition to above mention international and regional standard ensuring independence and impartiality of judiciary, some individual Rapporteur also furnish adequate guidelines for various governments across the world to incorporate best provisions of Rapporteur in their domestic legislations. The following are some of the Rapporteur relevant in the context of judicial independence.

3.1. United Nations Basic Principles on the Independence of the Judiciary, 1985

United Nations Basic Principle on Independence of Judiciary has been adopted in 1985.¹⁷ The basic principles have been formulated to assist Member States in their task of securing and promoting the independence of the judiciary. This UN document or set of standards obligates states parties to take into account and respect judicial independence within the framework of their national legislation.¹⁸ According to the UN Basic Principles each member states are obligated to guarantee the independence of its judiciary in its Constitution or the laws of the country.¹⁹ It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.²⁰ The judiciary shall decide matters before them

¹ *Id.*, art 5(a).

² *Id.*, art. 5(h).

³ *Id.*, art. 5(i).

⁴ *Id.*, art. 5(j).

⁵ *Id.*, art. 6.

⁶ *Id.*, art. 7.

⁷ *Id.*, art. 8.

⁸ *Ibid.*

⁹ *Id.*, art. 9.

¹⁰ *Id.*, arts. 13, 14 and 15.

¹¹ *Id.*, art. 16.

¹² Montreal Declaration Universal Declaration on the Independence of Justice, (1983).

¹³ *Id.*, sec. 2.14.b.

¹⁴ *Id.*, sec.1.03.

¹⁵ *Id.*, sec.1.05.

¹⁶ *Id.*, sec.1.08.

¹⁷ Specific standards on the independence of judges, lawyers and prosecutors, (1985) has been adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26th of August to 6th of September 1985. These basic principles have been endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

¹⁸ United Nations Basic Principles on the Independence of the Judiciary, 1985, preamble.

¹⁹ *Id.*, art. 1.

²⁰ *Ibid.*

impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.¹

UN Principles recognise that inappropriate or unwarranted interference impairs judicial process.² The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.³ It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.⁴

The Principles mentioned in this document also emphasis on conditions of service and tenure of judges. According to this document the term of office of judges, their independence, security, adequate remuneration, and conditions of service, pensions and the age of retirement shall be adequately secured by law to ensure judicial independence.⁵ It further states that judges, whether appointed or elected shall have guaranteed tenure.⁶ The document considers the promotion of judges significant and prescribes that it should be based on ability, integrity and experience.⁷ The document emphasis on personal immunity of judges from civil suits in the exercise of their judicial functions,⁸ and said that judges shall have the right to a fair hearing in case of a charge or complaint made against them.⁹ The judges can be removed only for reasons of incapacity or behavior that renders them unfit to discharge their duties.¹⁰ The government cannot remove them arbitrarily. UN being a global organization, therefore, its recommendations would be possibly adapted by all member states.

Having inspired from the aforesaid Basic Principles on Independence of Judiciary 1985, the Economic and Social Council of the UN adopted the Procedures for the Effective Implementation of the Basic Principles on Independence of the Judiciary in 1989.¹¹ The procedure put obligations on all States to adopt and implement in their justice system the Basic Principles on the Independence of the Judiciary in accordance with their Constitutional process and domestic practice.¹² The procedures further require member states that the Basic Principles are widely publicised in at least in the main official languages or languages of the respective country.¹³

3.2. UN Special Rapporteur on the Independence of Judges and Lawyers

The UN Special Rapporteur on the Independence of Judges and Lawyers is instructive and issued a more extreme opinion, that bodies for judicial accountability should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable, No political representation should be permitted. The report of the Special Rapporteur on the Independence of Judges and Lawyers clarifies the notion of judicial accountability and highlights its importance in the light of the fundamental principle of judicial independence. The main goal of the report is to demonstrate that judicial accountability and judicial independence are two essential elements of an independent, impartial and efficient justice system, and that, as a consequence, States should undertake efforts to develop and adopt international standards for judicial accountability to guide the enactment of domestic legislation establishing a comprehensive system of judicial accountability which is effective, objective, transparent and respects judicial independence. Independence and accountability are essential elements of an efficient judiciary. They must therefore operate in conjunction with each other. The central question is then how to approach demands for more judicial accountability while safeguarding the fundamental principle of judicial independence. Calls for accountability can often be mistakenly interpreted as a threat to judicial independence, but in democratic systems the approach has to be less absolute and more nuanced and leave room for the development of accountability mechanisms for the justice system. The requirement of independence and impartiality does not exist for the benefit of the judges and prosecutors themselves, but rather for court users as a part of their inalienable right to a fair trial. Thus, if guarantees of independence and impartiality are privileges granted to judges and prosecutors in order to benefit the public, it is logical that mechanisms should be put in place to verify that those privileges are used properly and that their purpose is not perverted.¹⁴

At the international level, the focus until now has been primarily on defining and developing safeguards that States have to put in place to ensure the independence of their judiciaries. Specific and detailed references to judicial accountability have yet to appear in international human rights instruments.¹⁵ The Basic Principles on the Independence of the Judiciary establish that “judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary” (principle 8). Principle 18 further states that judges should be suspended or removed only for reasons of incapacity or behavior that renders them unfit to discharge their duties.¹⁶

¹ *Id.*, art. 2.

² *Id.*, art. 4.

³ *Id.*, art. 6.

⁴ *Id.*, art. 7.

⁵ *Id.*, art. 11.

⁶ *Id.*, art. 12.

⁷ *Id.*, art. 13.

⁸ *Id.*, art. 15.

⁹ *Id.*, art. 17.

¹⁰ *Id.*, art. 18.

¹¹ Procedures for the Effective Implementation of the Basic Principles on the Independence of the judiciary have been adopted by the Economic and Social Council in Resolution 1989/60 and endorsed by the General Assembly in Resolution 44/162 of 15 of December 1989.

¹² The Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary 1989, procedure 1.

¹³ *Id.*, procedure 4.

¹⁴ Gabriela Knaul, Report of the Special Rapporteur on the independence of judges and lawyers, sec 23.

¹⁵ *Id.*, sec. 25.

¹⁶ *Id.*, sec. 29.

IV. SUM UP

The discussion reveals that independence of judiciary has been very well recognized in international standards. The impartial judiciary is required to realize several basic human rights mentioned in international human rights documents. The international laws and human right instruments offer binding and non-binding rules for judicial independence. Various countries in the world have also been laid emphasis on independent and impartial judiciary in their constitution and other laws. An evaluation of the laws of various countries shows that the executive has been given supremacy in matter of appointment of judges to higher judiciary. However, in India collegium appoints judges and in matter of appointment of judges the primacy of judiciary prevails over the opinions of the executive. The international Conventions, treaties, principles and guidelines have been formulated as framework models for how a country's municipal laws can better protect the independence of the judiciary. Most of the international standards are binding on member states while there are some non-binding standards which are instructive for various governments' across the globe. It becomes responsibility of member states to implement international instructions on independence of judiciary in their domestic laws. The countries which have not signed a particular international and regional standard can also amend their own laws to secure judicial independence.