INDEPENDENT JUDICIARY: A STUDY IN INDIAN PERSPECTIVE

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Introduction

Science, technology and law share unique relation. Technological advancement has a tendency to alter human relations and social ethos, posing new challenges to the existing laws.

Liberty, democracy and rule of law are most important indices of a free and civilized society. They can well be described to be the three faces of Holy Trinity which presides over the destiny of all free societies. Each one of them gives strength and substance to the other. Destroy one of them and you can take it that the other two would not be able to survive for long. Rule of law in its turn depends upon the existence of independent courts. It is difficult to visualize a truly democratic state which does not provide for independence of judiciary for it. It is the presence of an independent judiciary which guarantees rule of law and ensures that the rights of minorities and those in opposition guaranteed by the constitution shall not be trampled upon by the majority and those in source of power. Independence of judiciary can well be described to be the very matrix of the system, the one indispensable conation for the continued existence and survival of liberal democratic institutions and state of rule of law. Without such independence the courts would not enjoy or deserve to enjoy the confidence and faith of the people. This is the concept of justice which succeeding generations of mankind have cherished and nourished in all civilized societies. Justice according to this concept should be administered by judges who are independent and not effected in any way by the personality of the litigants or other extraneous considerations. The expectation is that judges would see to it that the scales of justice are kept even, and not allowed to tilt or get loaded on one side or the other and that justice is administered without fear or favour.

The ultimate goal of any legal system has been to secure justice for its people. The quest for justice has been as challenging as the quest for ultimate truth. Though it has been difficult to define and determine the scope of justice, but it is a dynamic concept and being an ideal it provides legitimacy of law and judicial administration. It has been rightly said that justice is not something which can be

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captured in a formula once and for all. It is a process; a complex and shifting balance between many factors. According to Dias, the task of justice is the just allocation of advantages and disadvantages preventing the abuse of power, preventing the abuse of liberty, the just decision of dispute and adopting to change. Since these components of justice have become the pious objective of civilized nation that is why like other progressive constitutions of world, the Constitution of India also solemnly resolved to secure to all the citizens justice-social, economic and political along with liberty, equality and fraternity as enshrined in our Constitution. We have accepted democracy as our form of government. Democracy is not merely an external set up. In a democratic faith, power of word or speech has great importance. This fundamental faith is the foundation of the democracy. The capacity of a human soul cannot be measured on capacity-more or less-of the human being. All human beings are endowed with the same capacity. In democracy, therefore the power of word or speech has greater value than the power of army and money.

In democratic processes of which judicial process is one, it is necessary that issues or controversies should be decided by discussion and exchange of views and not by resorting to the use of police or the army. The elected bodies in a democracy adopt the process of debate or discussion on public issues of importance for making laws and solving problems of the people. This power of speech and discussion should be nurtured and continued unabated. To strengthen the democracy, we have to increase the power of words and speech. In other words, this requires increase in power of mutual trust. The judiciary is one organ in which we can find non-violent democratic process in action. Constitutional democracy is one where the constitution is supreme and no organ of the government-the legislature, the executive or the judiciary is above the constitution. All these organs have to function to achieve the aims of the constitution and in doing so not to infringe the constitutional rights of the people. When we say in constitutional democracy, the constitution is supreme; indirectly we are accepting the supremacy and sovereignty of the people who have taken part in framing the constitution and accepting the same as the highest law governing them. In a constitutional democracy, the judiciary is a touchstone to ascertain the genuineness and the truthfulness of the actions of other organs and authorities. The judiciary when approached confirms whether the action of the other wings of the government is in accordance with law and the constitution or not. The judiciary is a body of legal and constitutional experts. They are called upon to decide contentious issues between the parties strictly in accordance with law and the

constitution. It is a natural force between the government and the governed.

The judiciary has no other power except the power given to them by the people by reposing faith and trust in its independence and impartiality. The people have given the judiciary that responsibility because it is thought that exercise of power has to be controlled so that in the hands of any organ of the state, there should not be destruction of the very values which it intends to promote. The judiciary ensures that the executive is more loyal to the existing constitution and to the constitutional arrangements. The judiciary thus, is meant to uphold the constitutional values and protect the citizens against encroachment on their constitutional rights. Sometime a tension between the executive and judiciary comes to the surface but such tensions arising out of each being watchful if encroachment into the province of other is the best guarantee that the citizens can have against the abuse of power.

In this judicial process, in a constitutional democracy, the judges have a great responsibility and obligation towards the people. Being a judge is a difficult and responsible job making intellectual and moral demands unlike most others. The judges are unelected elite of professional experts. They exercise the authority of state in public, in issues of intense importance of the policies and to the community at large. They decide these issues according to law, it is not the same thing as their personal preferences on current public opinion. Indeed, they have to set public opinion aside and when the case requires, protect minorities against it. They do not and should not seek popularity. They do their work in a formal environment within a framework of procedure which is designed to secure justice. This sometimes makes the judges vulnerable to charges of being remote and out of touch. It goes with its territories. The judicial branch, therefore, does not represent any sections of the society as to do the legislature and the executive. There are great expectations of the common man from the courts. Judicial process which is a part of democratic process, therefore, is the struggle of the small man against the overpowering influence of the big, politically as well as financially. The people, therefore, expect from the courts disinterested application of law to the parties before them regardless of their station, occupation and financial or political power. In this judicial process, judges are the kind of men who do not seriously question the law and its effect because they have to serve the law and not its masters. The function of judiciary therefore is to derive its conclusions from issues before it in accordance with law and with impartiality. The function of judiciary as Jeffery puts it is the disinterested application of the known law. The judiciary, therefore,

has to act impartially, and impartiality means not merely an absence of personal bias or prejudice in the judging but even his own political or religious views. A judge in order to be true to his office cannot worship simultaneously at two shrines-shrine of justice and the shrine of his favourite political ideology and economic theory.

There is no agreed definition of law, but there is no disagreement as to its necessity and existence. Who makes or who should make law as well as what is the basis of obligation of law remains a moot point. The three main views as to the sources and criterion of validity of legal rules are:

1. Natural law doctrine
2. Historical jurisprudence, and
3. Legal positivism.

The proponents of these schools generally agree that the law is a coherent and complete body of rules and judicial process is essentially deductive application of existing rules of law. Under the sociological school, rule of law was compared to that of an architect and that of a lawyer as an engineer. The function of law is satisfaction of maximum of wants with minimum of friction. The left wing is occupied by the realists. They define law as a collection of decisions and not as a body of rules. In this approach, the role of judge becomes important. In the modern state, the law is created normally either by formal act of legislation or a decision of the court. In judicial process, we examine the role of the judge. Justice Holmes[1] of the Supreme Court of United States of America (U.S./U.S.A.) has termed law as the prophecies of what the courts will do in fact. Frank J.,[2] of the same court considers law as the verdict of the courts on particular facts. This approach, thus considers law as a process against particular commands. The U.S. Supreme Court has since 1787 functioned in such a manner that the doctrine of separation of powers entrenched in the Constitution has become questionable. The basic controversy veers round the role of the court. The very premise of the separation of power is that the courts do not create law but merely declare fresh applications of the ancient rule. It means that judiciary is only "a priest of law". Modern jurisprudence contradicts this and there is ample evidence to the effect that judiciary creates

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[1] THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. (Richard A. Posner ed., University of Chicago Press 1992).

[2] JEROME NEW FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (Princeton University Press 1949).

new rules of law albeit under the guise of declaring the law. Hart[3] observes that it is only the tradition that the judges declares and do not make law.[4]

The validity of judge made law has been accepted. Salmond[5] says that judicial decisions having the force of law are legally ultimate and underived. These ultimate principals are the ground norms or basic rules of recognition of legal system. Hart also accept this validity through his rule of recognition. That the judges make law is a fact, but how far they are free to make a rule is not clear. It is assumed that judicial law making must be according to established rules. But is the judge really free in the creation of a rule? Judicial process is not a one man show. Lawyers, litigants and their advisors play an important role in this process. Judicial process is a set of inter related procedures and roles for deciding disputes by an authoritative person or persons whose decisions are regularly obeyed. The disputes are to be decided according to a previously agreed upon set of procedures and in conformity with prescribed rules. As an incident, or consequence of their dispute deciding function, those who decide make authoritative statements of how the rules are to be applied, and these statements have a prospective generalized impact on the behaviour of many besides the immediate parties to the dispute. Hence the judicial process is both a means of resolving disputes between identifiable and specified persons and a process for making public policies.

For centuries hundreds of writers in thousands of articles and books have tried to determine what is the essence of judicial or adjudicatory process, what distinguishes it from legislative and administrative processes. For under the doctrine of separation of power it became improper for legislature to engage in the judicial process or for the judges to assume functions that are thought to be within the scope of legislative process. The classic doctrine of separation of powers divided the world of political activity into the three familiar divisions based both on what was thought to be the requirements for the maintenance of liberty. The judiciary was assigned the functions of applying the laws that the constitution makers and the legislatures

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[3] Herbert Lionel Adolphus Hart, *Uncertain Justice: Politics and America's Courts: The Reports of the Task Forces of Citizens for Independent Courts* (The Century Foundation Press 2000).

[4] Herbert Lionel Adolphus Hart, THE CONCEPT OF LAW 12 (2nd ed., Oxford University Press 1997).

[5] Report of Sir John Salmond, Delegate for the Dominion of New Zealand. Appendix to the Journals of the House of Representatives, 1922 Session I, A-05 at Conference on the Limitation of Armaments held at Washington from November 12, 1921 to February 6, 1922.

had created and that the administrators enforced. Today political analysts have abandoned these categories in favour of a continuum. At one pole is the legislative process for making law and at the other the administrative and judicial processes for administrative or applying the law. In order to appreciate the changes that have occurred in the nature of judicial process in our country, it would be helpful if a brief reference is made to the experiences of the British U.S., Swiss and German judiciaries in this regard.

Justice is the soul of the society which should be rendered without any fear or favour, and independence of the judiciary is the only possible remedy which makes it possible. A judge has to be fearless and unfettered, having the freedom to make a fair and impartial decision based solely on the facts presented and the applicable laws, without yielding to political pressure or intimidation. Judicial independence is critical to the functioning of any democracy and upholding the rule of law; it protects the weak from the powerful; the minority from the majority; the poor from the rich; even the citizens from excesses of government. The following paper is an attempt to deal at length with the notion of independence of judiciary, its meaning and its various facets, its existence in different nations with special reference to India, focusing on its significance and identifying the threats which tend to jeopardize the same so that effective steps could be initiated for safeguarding it, as without an independent, impartial, honest and upright judiciary social justice would remain a futile dream.

Position in Britain

In Britain, the governing rule for the nature of judicial process, for a long time, was, as expressed by Francis Bacon[6] in early 17th century: "Judges ought to remember that their office is to interpret law and not to make law". This judicial tradition, established by Jeremy Bentham[7] who had a deep distrust of judge-made law stated that it is undemocratic for the non-elect judiciary to act as law makers; this function should be the prerogative of the Queen's Ministers and elected members in Parliament.

Being steeped in this tradition, English judges developed an excessive liking for their constitutionally imposed chains. However, since the early sixties, a new generation of English judges,

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[6] THEODORE PLUNKETT, A CONCISE HISTORY OF THE COMMON LAW 158 (5th ed. 1956).

[7] Hellman, *Justice O'Connor and the Threat to Judicial Independence: The Cowgirl Who Cried Wolf?* 39 ARIZ. ST. L.J. 845 at 859 (2007).

spearheaded by that likes of Lord Reid, Lord Denning[8] and Lord Wilberforce[9], with their doctrine of purposive interpretation breathed new life into English administrative law, reviving and extending ancient principles of natural justice and fairness, applying them to public authorities and to private bodies that exercise public power and rejecting claims of unfettered administrative discretion. Lord Reid observed that when judges act as law makers they should have regard to common sense, legal principal and public policy in that order. They need "[t]o know how ordinary people think and live… You must have mixed with all kinds of people and got to know them… If we are to remain a democratic people those who try to be guided by public opinion must go to the grass roots." However in the absence of a written constitution and Bill of Rights, the scope of powers of judicial review of English courts remains limited.

U.S. Experience

The Supreme Court of U.S. is the oldest constitutional court in the world, having first assembled on February 1, 1790. At a very early stage of his existence in 1803, it bestowed upon itself the power of judicial review through the epoch-making decision delivered by it in case of *Marbury v. Madison*[10]. In what is now considered a classic exposition of law, Chief Justice Marshall[11] held:

> "It is emphatically the province and duty of judicial department to say what the law is. Those who apply the rule in particular cases, must of necessity expound and interpret that rule…… A law repugnant to the Constitution is void……, courts as well as other departments are bound by that instrument."

Judicial review has come to be defined as the power of a court to hold unconstitutional and hence unenforceable any law, official action based on a law, that it deems to be in conflict with the basic law, that is, the constitution. Several Jurists including former Chief Justice Warren Burger believe that without the power of judicial review and a Bill of Rights, the Constitution of U.S. could not have survived. It is the concept of judicial review that has contributed in a large measure to the dynamic attitude of American judges. Since its inception, charges have been leveled at the U.S. Supreme Court that

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8 ALFRED THOMPSON DENNING, *THE CLOSING CHAPTER* 54 (Butterworths, de Burgh, Hugo, ed. ISBN 0-406-17612-4).

9 LORD WILBERFORCE, GOVERNMENT AND JUDICIARY 247 (Cambridge University Press).

10 5 U.S. (1 Cranch) 137 (1803).

11 JOHN MARSHALL, CONSERVATIVE NATIONALIST IN THE AGE OF JACKSON 395 (ULS Press).

its judges continuously indulge in judicial legislation. In its classical text, *The Nature of the Judicial Process*, Benjamin Cardozo[12], who later served on the Supreme Court, accepted the fact that judges do make law. However he stated that:

> "He (the judge) legislates only between gaps. He fills the open spaces in the law. How far he may go without travelling beyond the walls of the interstices cannot be staked out for him on a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the performance of an art."

In practice, however, U.S. judges do far more than legislate intestinally. The U.S. Supreme Court has played a prominent role in shaping American society. At times it has not refrained from interpreting the provisions of the Constitution to lead governmental policy in a manner which was diametrically opposite to the majority public opinion of the time. In so upholding the Constitution, the court has withstood the stiffest of oppositions. An analysis will reveal that, in practice, the U.S. Supreme Court has oscillated between periods of judicial self-restraint and activism. However, in recent past, the decisions of U.S. Supreme Court have been characterized by the exercise of self restraint. Under the leadership of Chief Justice Rehnquist, the court has sought to impose limits on its wide jurisdiction and, in doing so; it has paid heed to Justice Frankfurter's wise counsel:

> "It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's strongly held view of what is wise in the conduct of affairs. But it is not the business of court to pronounce policy… That self restraint is of the essence in the observation of the judicial oath, for the Constitution has not authorized the justices to sit in judgment on the wisdom of what Congress and the executive branch do…"

In the language of present generation of commentators of the U.S. judicial process, judicial self restrain is the term of praise, and judicial activism a term of criticism.

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12 PETER H. RUSSELL & DAVID M. O'BRIEN, JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND (CONSTITUTIONALISM AND DEMOCRACY SERIES) 19 (University of Virginia Press 2001).

Swiss and German Experience

This view that the judges do not usurp the function of legislators is supported by Swiss experience. The Swiss Code (civil) explicitly authorizes the judge to decide according to the existing customary laws, and failing which according to the rules which he would lay down if he had himself act as legislator.[13] It is said that Swiss judges always prefer to develop a new rule by interpretation of well established legal norms and rarely assume the role of legislator. However the German experience is said to be different. There the judge has used the provision which give enormous scope for judicial participation.

The process of judicial law making is restricted by its very nature and hence cannot be parallel to legislative process. Even within its restricted arena the scope of judicial law making is subjected to two conditions:

1. Whether the courts are endeavouring consciously to develop law relatively freely to meet new social and economic condition, and
2. The judge may prefer to dwell in the existing domain of precisely enunciated principles of law.

This again will, to a large extend, depend upon the philosophy of the judge. The opinion of K. Subba Rao, C.J.,[14] on one hand and those of P.N. Bhagwati, C.J., and Krishna Iyer, J., on the other testify this.

Indian Position

The initial years of the Supreme Court of India saw the adoption of an approach characterized by caution and circumspection. Being steeped in British tradition of limited judicial review, the court generally adopted a pro-legislature stance. This is evident from its ruling in case of *A.K. Gopalan v. State of Madras*[15]. However the judges of apex court did not take long to make their presence felt, and began to actively pursue the function assigned to them by the Constitution, as perceived by them. This led to a series of decisions on the right to property where the apex court and the parliament were often at loggerheads. The nation was then witness to a series of events where a decision of the Supreme Court was followed by a legislation nullifying its effect, followed by another decision

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13 SWITZERLAND CONST. art. 1.

14 ANWARUL HAQUE HAQQI, INDIAN DEMOCRACY AT THE CROSSROADS (Mittal Publications, New Delhi 1986).

15 A.I.R. 1950 S.C. 27.

reaffirming its earlier position and so on. The struggle between the two wings continued on other issues such as power of amending the Constitution. During this era, the legislature sought to bring forth people-oriented socialist measures which when in conflict with fundamental rights were frustrated on the upholding of the fundamental rights of individuals by the Supreme Court. At the time, an effort was made to project the Supreme Court as being concerned only with the interest of propertied classes and being insensitive to the needs of the masses.

Between 1950 and 1975, the Supreme Court of India has held more than 100 union and state laws in whole or in part, to be unconstitutional. When contrasted with the U.S. Supreme Court, which had, between 1790 and 1985, held 135 federal and 970 state laws, in whole or in part, to be unconstitutional, it would seem that the apex court of India had made liberal use of power of judicial review.[16] The imposition of emergency in 1975 had a profound enduring effect on almost every aspect of Indian life. The apex court too was affected and was on the receiving end of brickbats for having delivered a series of judgments which were perceived by many as being violative of basic human rights of Indian citizens. In post emergency era, the apex court sensitized by the perpetration of large scale atrocities during the emergency donned an activist mantle. In a series of decisions starting with *Maneka Gandhi v. Union of India*[17], the court widened the ambit of constitutional provisions to enforce the human rights of citizens and sought to bring the Indian law in conformity with the global trends in human rights jurisprudence. Simultaneously, it introduced various innovations with a view to making itself more accessible to disadvantaged sections of society giving rise to phenomenon of social action litigation/public interest litigation (PIL). During the 80's and first half of 90's, the court has moved beyond being a mere legal institution; its decisions have tremendous social, political and economic ramifications. Time and again, it has sought to interpret constitutional provisions and the objectives sought to be achieved by it and directed the executive to comply with its orders.

The new role of the Supreme Court has been criticized in some quarters as being violative of the doctrine of separation of power; it is claimed that the apex court has, by formulating policies and issuing directions in various aspects of country's administration, transgressed into domain of executive and the legislature. The

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16 HENRY J. ABRAHAM, THE JUDICIAL PROCESS 291-93 (5th ed., Oxford University Press 1986).

17 (1978) 1 S.C.C. 248.

framers of our Constitution adopted the parliamentary form of government as it obtains in England. But the union parliament and state legislature unlike the English parliament owe their origin to the Constitution and derive their powers from its provision and therefore functions within limitations prescribed in the Constitution. This follows that the Constitution confers on the courts the power to scrutinize a law made by legislature and to declare void if it is found to be inconsistent with the provisions of the Constitution. Further the judiciary stands between the citizen and the state as a bulwark against executive excesses and misuse or abuse of power by the executive. For these reasons it is absolutely essential that the judiciary must be free from executive pressures or influence. In a state professing rule of law, the aim should be to provide for a system which secures to its citizens adequate procedure for the redress of the grievances against the state before forum which are to administer justice in an impartial manner without fear or favour.[18] In the said case opinions expressed by judges suggest that the concentration of executive legislative and judicial powers in the same hand was not intended by the Constitution.[19]

Meaning and Importance of Independence of Judiciary in the Indian Scenario

The dictionaries define "independence" as freedom from bias or influence, self direction, freedom in action or opinion. However "judicial independence" has not been specifically defined as such in the context of the judiciary. The concept has to be appreciated from the constitutional and social point of view. The Constitution of India has decreed the separation of the judiciary from the executive in the public services of the state (Article 50). The structure of the Constitution provides separately and distinctly for 3 limbs of the legislature, the executive and the judiciary (Part V). The preamble of the Constitution promises first justice-social, economic and political. On the foundation of 'justice' alone one builds true meaning into the consequential promises of liberty, equality and fraternity.

In the context of the Constitution of India "judicial independence" would mean complete and unrestrained freedom to do justice-social, economic and political which would guarantee to every citizen of India liberty, equality and fraternity is all their defined aspects. In the social context, judicial independence has been understood to mean freedom to decide matters in accordance with the judge's own

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[18] Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299.

[19] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 2654 (3rd ed., Universal Law Publishing Co. Pvt. Ltd., Delhi 1984).

appreciation of facts and understanding of the law without any improper inducement or influence.[20]

The classic statement as to what the layman understands as judicial independence is found in the judgment of Denning, L.J., in *Jones v. National Coal Board*[21] on the functions of an English trial judge:

> "The judge's part in all this is to hearken to the evidence.....to see that the advocates behave themselves seemly and keep to the rules laid by law to exclude irrelevances and discourage repetition; to make sure by wise interventions that he follows the points the advocates are making and can access their worth and at the end to make up his mind where the truth lies."

It means that every judge is free to decide matters before him in accordance with his own assessment of facts and his understanding of the law without any improper influences, inducements or pressures, direct or indirect from any quarter or for whatever reason. There is no doubt that independence of judiciary is a sine qua non to achieve a higher standard of justice in any legal system. That is why any progressive constitution ensures the independence of judiciary by several means. In this respect power and procedure of appointment of judges is considered to be one of most important factors which may affect the independence of judiciary. It is because if the selective bears a particular stamp for the purpose of changing or affecting the judicial attitude or decision than the independence of judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, condition of service and immunity.

The independence of judiciary necessarily implies that the judiciary has to remain non-political in character. In a democratic country members of political parties have the control of government and consequently their tendency will be to appoint members of the ruling party to the judiciary as far as possible. Therefore there always remains likelihood of superior courts being packed by party men which will be destructive of judicial independence. In many countries where the power of appointment of judges vests with the executive or legislature, the need for reform was felt and gradually suitable changes have been brought in these countries i.e., America, England, Australia and Canada exclusively by executive. The Constitution of India had adopted a middle course by providing for prior consultation

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[20] CIJL Bulletin no. 8 of Oct. 1981, International Commission of Jurists, Draft Principles of Independence of Judiciary art. 2 (Geneva 1981).

[21] (1957) 2 Q.B. 55.

with the judiciary before the President, that is, the executive makes the appointment to the Supreme Court or High Courts.

However the Supreme Court in *Supreme Court Advocates on Record Association v. UOI*[22] popularly known as the Second Judge case has held that no appointment of any judge to the Supreme Court or any High Court can be made unless it is in conformity with the opinion of chief justice of India (C.J.I.).

Again the Supreme Court in *Re Presidential Reference*[23] popularly known as the Third Judges case while upholding its decision in the Second Judges case has further added that the C.J.I. of India must make a recommendation to appoint a judge of the Supreme Court in consultation with the four senior most puisne judges of the Supreme Court. Thus, in the appointment of judges to the higher judiciary the opinion of the judiciary alone has to prevail over the opinion of executive. This position has been severely criticized from many quarters.

1. Brief History

History owes a debt of gratitude to Lord Chief Justice Coke, who set the tread asserting the independence of judiciary by refusing to succumb to the royal orders of King James I, not to proceed to judgment, until he has spoken with the King, in the famous case of Commendams in 1616. Parliament on the other hand, did not confine its efforts question and impeach judges who decided in favour of the Crown.

Much of the controversy regarding independence of the judiciary started with the debate between Coke and Bacon. Coke asserted that judges must impartially expound and apply the supreme law which governs the royal prerogatives, the parliamentary privilege and the rights of an individual. Bacon believed, on the other hand that a judge's function was not merely to declare the law but to support the government. According to Bacon:

> "It was a happy thing in the state when kings and states do consult with the judges, and again when judges do often consult with the judges and kings and state."

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[22] (1993) 4 S.C.C. 441.
[23] A.I.R. 1999 S.C. 1.

Thus according to Bacon:

> "[T]hough judges were lions, they were lions under the throne, being circumspect that they do not check or oppose any points of sovereignty."

Ultimately, the battle between the upholders of royal prerogative and the supporters of parliamentary privileges resolved into legislation. (E.g.: 2 Edward-III-c 8, I statutes at large 425). Though in passing such legislation, parliament was motivated not by commitment to judicial independence, but for political considerations of curbing the royal powers, such legislation brought in to existence, the concept of independence of judiciary.

2. Indian History

As distinguished from the accident of history in England, judicial independence in India was a conscious gift of the Constitution of India-which promised to the people of India, justice (social, economic and political), liberty, equality and fraternity. In the Constitution of India, Articles 121 and 211 prohibit any discussion in the parliament or state legislatures on the conduct of a judge of the Supreme Court or High Court in the discharge of their respective duties. The High Courts and the Supreme Court are courts of record and have power to punish for contempt. Under Article 144 of the Constitution of India, all authorities, civil and judicial, in the territory of India will act in the aid of Supreme Court. Judges are also immune under various laws like the Judges (Protection) Act, 1985 from civil or criminal action for their acts, speech etc., in the course of or while acting or purporting to act in the discharge of their official or judicial duties or functions.

However, judges have to abide by the oath they have taken namely; that they will bear true faith and allegiance to the Constitution of India as by law established.

3. Constituent Assembly Debates[24]

Prof. K.T. Shah[25] proposed that Draft Article 102-A be added to Draft Constitution:

> "Subject to this Constitution, the judiciary in India shall be completely separated from and wholly independent of the executive and legislature."

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[24] 8 CONSTITUENT ASSEMBLY DEBATES (July 28-29, 1947).

[25] *See* CONSTITUENT ASSEMBLY DEBATES (Nov. 29, 1948) *available at* indiakanoon.org.

However, there was difference of opinion as it was already included in the Directive Principles of State Policy. Dr. B.R. Ambedkar in his speech in the Constituent Assembly on June 7, 1949[26] observed as under:

> "I do not think there is any dispute that there should be separation between executive and judiciary and, in fact all the articles relating to High Courts as well as Supreme Court have prominently kept that object in mind."

Having regard to the importance of this concept of the framers of the Constitution of India having before them, the views of the Federal Court and of High Court, have said in a memorandum:

> "We have assumed that it is recognized on all hands that the independence and integrity of the judiciary in a democratic system of government is of highest importance and interest not only to the judges but to the citizens at large who may have to seek redress in the last resort in courts of law against any illegal acts or the high handed exercise of power by the executive. In making the following proposals and suggestions the paramount importance of securing the fearless functioning of an independent and efficient judiciary has been steadily kept in view."

Justice Krishna Iyer characterizes this concept as "constitutional religion". It is obvious that the concepts of justice and judicial independence both of which are parallel and synonymous-are at once both objective and subjective. They are objective, in the sense that justice and the freedom to do justice are not wholly unrestrained. It is justice according to law and freedom to do justice to the extent and in the manner permissible by law. The concepts are subjective in that justices what the judge understands from its own point of view, based upon his own assessment and appreciation of facts and the law and freedom to do justice is freedom to make his mind as to 'where the truth lies'.

According to Mr. P.B. Mukherjee[27]: "The independence of judiciary has become a corner stone in the theories of justice." An independent judiciary is the very heart of the republic. The foundation of democracy, the source of its perennial vitality, the condition for its growth and the hope for its welfare-all lie in that great institution, an

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[26] CONSTITUENT ASSEMBLY DEBATES (June 7, 1949).

[27] P.B. MUKHERJEE, THE NEW JURISPRUDENCE 421 (Culcutta Eastern Law House 1970).

independent judiciary.[28] The independence of judiciary is doubtless a basic structure of our Constitution but confined within the four corners of the Constitution and cannot go beyond the Constitution. P.N. Bhagwati, J., has observed:

> "The principle of independence of judiciary is not an abstract conception but it is living faith which must derive its inspiration from the constitutional character, and its nourishment and sustenance from the constitutional values…."

It is therefore absolutely essential that the judiciary must be totally free from executive pressure or influence and must be fiercely independent. Independence of course, is a quality which is a part of the very fabric of judge's existence, but even so, judges must not be exposed to executive threats, inducement or blandishments and must remain absolutely independent and fearless. It is for this reason that in almost all countries which have adopted democratic form of government great importance is attached to the independence of judiciary. It is comprised of two fundamental and indispensable elements viz.,

1. Independence of judges as an organ and as one of three functionaries of the state.
2. Independence of an individual judge.

I. Collective independence of judiciary

The United Nations (U.N.) Basic Principles on the Independence of the Judiciary and the Singhvi Declaration[29] outline several principles which provide for the collective independence of the judiciary. This includes the following principles:

i. **Concept of non-interference:** An important safeguard for judicial independence guaranteed by the Basic Principles in the requirement of constitutional guarantee of non interference with judicial proceedings. The Basic Principles stipulates that: "It is the duty of governmental and other institutions to respect and observe the independence of the judiciary (Article 1) and that there shall not be any inappropriate or unwarranted interference with the judicial process."
ii. **Jurisdictional monopoly:** Article 3 of the Basic Principles provides that the judiciary shall have jurisdiction over all issues of a judicial nature. In practice, however many countries creates

[28] Nani A. Palkiwala, *Aspects of Judges Case I*, THE INDIAN EXPRESS, Feb. 3, 1982.
[29] L.M. Singhvi, *UN Draft Declaration on Independence of Justice-Basic Principles,* INDEPENDENCE OF JUSTICE AND LEGAL PROFESSION (1989).

special tribunals to decide certain categories of cases which particularly interest the executive power. The most common of these are special tribunals empowered to deal with cases involving "security". The establishment of such exceptional courts or tribunals can undermine judicial independence and undercut judicial authority.

iii. **Transfer of jurisdiction:** This is a related matter which also jeopardizes judicial independence. It is normally exercised by transferring the jurisdiction of regular courts to specially created ad hoc tribunals. Responding to these problems, Article 5 of the Basic Principles states that: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duty established procedures of legal process shall not be created to displace the jurisdiction belonging to ordinary courts or judicial tribunals." The most advanced constitutions provide for unity and exclusivity of judiciary's jurisdiction. More common are provisions specifying that only the judiciary may decide disputes of a litigious nature or that only tribunals established by law may decide criminal or civil cases.

iv. **Control over judicial administration:** Judicial independence requires as well that the judiciary control its own administration. The Singhvi Declaration provides that the main responsibility for court administration including supervision and disciplinary control of administrative personnel and support staff should vest in the judiciary or in the body in which the judiciary is represented and has an effective role.

II. Personal independence

As regards personal independence, the Basic Principles provide generally that judges: "[S]hall decide matters…. impartially on the basis of facts and in accordance with the law, without any restriction, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter for any reasons." Mechanism to protest judges' personal independence should particularly include:

i. **Security of tenure**: The most important measure to protect the personal independence of judges is the guarantee of tenure in office. Tenure insulates judges from the need to worry about political reaction to their decisions. The Basic Principles provide that judges: "[S]hall have guaranteed tenure until a mandatory retirement age on the expiry of their office, where such exits."

ii. **Protection from arbitrary removal from office**: Article 18 of Basic Principles provides that judges shall be subject to

suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties: "Removal of a judge for one these causes is best entrusted to other members of the judiciary often in the form of an appellate court or council of magistrate."

iii. **Guarantee of adequate salaries:** Proper salaries reduce personal dependency and corruption and help attract those best professionally qualified to the bench. The Basic Principles provide that a judge's compensation is to be secured by law. (Art II-The Singhvi Declaration). The Singhvi Declaration further recommends that judge's salary should not be diminished during their term of office and that they should be periodically reviewed to remove, overcome or minimize the effort of inflation. In addition, judges should receive pensions after their retirement.

iv. **Impartial selection process**: The selection process is critical to ensure an independent judiciary. If selection is entrusted to the executive (or legislature) without adequate safeguards against abuse, the risk of appointment made on the basis of political or personal loyalty is high. The Basic Principles warn against "improper motives" and mandate a selection process based on the principles of meritocracy and non-discrimination. The same principles also apply to promotion of judges.

v. **Prohibition of punitive transfer of judges**: In many countries judges have been transferred from one location to a less desirable one in order to punish them. Since an involuntary transfer can be punitive and is often tantamount to an invitation to resign the lack of constraints on transfer can seriously compromise personal judicial independence. The Singhvi Declaration states in this regard that: "[N]o promotion shall be made from an improper motive and that except pursuant to a system regular rotation or promotion, judges shall not be transferred….without their consent."

While the gap still exists between the vision informing these standards, the need of the hour is that this acceptance must be put into practice through active commitment of those who are directly concerned, that is, judges as well as through solidarity of lawyers and the public awareness of the importance of an independent judiciary. It would be appropriate here to also discuss the international traditions on judicial independence and accountability and efforts of U.N. to get the respective national governments to respect them and account them into account within the framework of their national legislation and practice.

International Traditions on Judicial Independence

1. Seven Principles

As far back as 1959, the International Commission of Jurists (I.C.J.) described the conditions which must govern the existence of an independent and impartial judiciary. During January 5-10, 1959, I.C.J. sponsored the International Congress of Jurists in New Delhi. 185 jurists from 53 countries participated in Congress 4 Committees. Since then, it has continued to elaborate such norms at both the domestic and international levels. According to the definition drawn up by the International Court of Justice in 1981:

> "Independence of the judiciary means that every judge is free to decide matters before him in accordance with his assessments of the facts and his understanding of the law without any improper influences, inducements, or pressures direct or indirect of any quarter or for whatever reason."

This principle was incorporated into the Basic Principles of Independence of Judiciary which were adopted by U.N. in 1985.[30] The Basic Principles are contained in the resolution of the U.N. Assembly dated November 29, 1985. The U.N. General Assembly adopted the Basic Principles by consensus. As regards independence of the judiciary, the following "Seven Principles" were laid down:

1] The independence of judiciary will be guaranteed by the state and enshrined in the constitution or the laws of the country. It is the duty of all governmental and other institution to respect and observe the independence of judiciary.

2] The judiciary will decide matters before it impartially, on the basis of facts and in accordance with the law, without any restriction, improper influence, inducement, pressures, threats or interference, direct or indirect for any quarter or for any reason.

3] The judiciary will have jurisdiction over all issues of a judicial nature and will have exclusive authorities to decide whether an issue submitted for its decision is within its competence as defined by law.

4] There will not be any inappropriate or unwanted interference with the judicial process, nor will judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or communication by

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[30] CIJL BULLETIN §§ 25-26 (April-Oct. 1990).

competent authorities of sentences imposed by the judiciary, in accordance with the law.

5] Everyone will have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals which do not use the duly established procedures of legal process will not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6] The principle of independence of judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7] It is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions.

2. Siracusa Principles[31]

The Siracusa Principles contain standards necessary for the independence of judges and the judiciary. These principles also refer to the judicial independence, qualification, selection, posting, transfer, promotion etc.

3. I.B.A. Minimum Standards of Judicial Independence[32]

The International Bar Association (I.B.A.) laid down minimum standards of judicial independence. These were adopted by the 19th Biennial Conference held in October 1982 in New Delhi. They deal with judicial independence, the term and nature of judicial appointment. So far as the subject of discipline and removal of judges is concerned, these are contained in Paragraphs 27 to 32.

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[31] The Siracusa Principles were prepared by a committee of experts organized by the International Association of Penal Law, the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers, and hosted by the International Institute of Higher Studies in Criminal Sciences met at the Institute in Siracusa, Sicily, on 25-29 May 1981 to formulate draft principles on the Independence of the Judiciary. The participants comprised distinguished judges and other jurists representing different regions and legal systems. They came from Africa, Asia, America and Eastern and Western Europe. The main purpose of the meeting was to seek to exchange information and formulate principles which might be of assistance to Dr. L.M. Singhvi, Special Rapporteur on the Study on the Independence of the Judiciary of the UN Sub-Commission on the Protection of Minorities and the Prevention of Discrimination. Dr. Singhvi was present at the meeting, and submitted the Draft Principles to the Sub-Commission at its August 1981 meeting as an annex to his progress report (UN Doc. E/CN.4/Sub.2/48I/ Add/). *Available at* http://cristidanilet.ro/docs/Siracusa%20Principles.pdf.

[32] The Minimum Standards of Judicial Independence of the IBA had its origin in a decision by the Committee on Administration of Justice at the 18th Biennial Conference of the IBA in Berlin in 1980. Dr Shimon Shetreet had the position of General Rapporteur. The Minimum Standards were adopted at the 19th Biennial Conference of the IBA in New Delhi in 1982.

4. World Conference of Independence of Judiciary[33]

The resolution is related to the Universal Declaration on the Independence of Judges. After dealing with the independence and accountability of international judges, it dealt with the national judges separately. Paragraph 2 of Part II after referring to independence of the judiciary, Paragraph 3 refers to the qualifications, selection and training. Paragraph 4 relates to posting, promotion and transfer, and Paragraph 5 to the tenure. Paragraph 6 deals with immunities and privileges, and Paragraph 7 with disqualification. Paragraph 8 deals with discipline and removal.

5. Caracas Conference[34]

A conference on independence of judges and lawyers was organized at Caracas, Venezuela during January 16-18, 1999 by the I.C.J. The conference passed a plan of action upholding the principles of rule of law, independence of judiciary and human rights.

6. Bangalore Principles[35]

It after referring to the U.N. Basic Principles of Independence of the Judiciary the Bangalore conference set out earlier formulated various principles relating to the independence of judiciary.

Judicial Pronouncements

In India there was a tussle between the parliament and the judiciary to assert their supremacy. *Golaknath*[36] asserted that parliament had no power to amend the fundamental rights. Thus it affirmed the supremacy of the Constitution. But the 24th amendment abrogated this power by empowering parliament to abridge the fundamental rights. The validity of this amendment was questioned in *Keshvananda Bharathi*[37].

The parliament was given the power to amend the fundamental rights, but it was powerless to alter the "basic structure" of the

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[33] The Universal Declaration on the Independence of Justice was unanimously adopted in June 1983 by the First World Conference on the Independence of Justice held in Montreal, Canada. The purpose of the Montreal Declaration is to secure and guarantee to international judges, national judges, lawyers, jurors, and assessors judicial independence. It is divided into five parts; each dealing with the issue of independence with regard to the different categories of practitioners.

[34] *See* www.icj.org.

[35] *Commentary on the Bangalore Principles of Judicial Conduct,* www.unodc.org.

[36] A.I.R. 1967 S.C. 1643.

[37] A.I.R. 1973 S.C. 1461.

Constitution. One of the basic structures is judicial review. If the courts are given the power to review the enactment of legislature, this power may safeguard the independence of judiciary and unable the citizen to assert their liberty. The 42nd amendment again tried to nullify the power of judiciary, which was stuck down in *Minerva Mill*[38]. "Liberty" is the heart and "rule of law" is the brain of Indian democracy. The existence of an independent judiciary and an enlightened public opinion are imperative for the prevalence of rule of law. The finally balanced division of power among the legislature, the executive and the judiciary has been so far altered in favour of executive to make the original provisions of the Constitution unrecognizable. Regarding to the significance of this principle in *UOI v. Sankalchand Hiralalseth*[39] Chandrachud, C.J., said that the independence of judiciary is the "cardinal feature" and observed that the judiciary which is to act as a Bastion of rights and freedom of people is given certain constitutional guarantees to safeguard the independence of judiciary. In this case Justice Bhagwati who led the minority expressed the similar views by saying:

> "The Independence of judiciary is a fighting faith of our Constitution. Fearless justice is cardinal creed of our founding documents…."

In *Shamsher Singh v. State of Punjab*[40], the Supreme Court held that judiciary may be fearless and free only if institutional immunity and autonomy are guaranteed.

The concept of independence of judiciary was central issue in the First Judge case[41] (*S.P. Gupta v. UOI*) where this concept was elaborately dealt by the banned judges of the constitutional bench. In the case Justice Bhagwati explained the concept by saying:

> "The concept of independence of judges is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of rule of law and under the Constitution it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of law and thereby making the rule of law meaningful and effective…"

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[38] A.I.R. 1980 S.C. 635.
[39] A.I.R. 1977 S.C. 2328.
[40] A.I.R. 1974 S.C. 2192.
[41] A.I.R. 1982 S.C. 149.

Justice Fazal Ali, in his judgment in the same case however contained that:

> "….[I]ndependence of judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confined within the four corners of the Constitution and cannot go beyond the Constitution."

In *Subhas Sharma*[42] it has been rightly observed:

> "[F]or rule of law to prevail judicial independence is of prime necessity."

Checks and Balances

Justice Beg in *Indira Nehru Gandhi v. Raj Narain*[43] observed that will of people is represented through the organ of judiciary. No organ can exceed the limit assigned to it. Again in *Chandra Mohan v. State of U.P.*[44], importance was attached to judiciary's independence. Of late, however, our entire judicial system is under heavy strains and stresses and at times, it is not so much that the accused is on trial, as it is the judiciary which is on trial. Thus it requires an immediate life saving dose. If justice is what justice does, injustice is writ large in judicial proceedings. Several loose ends have to be tied to understand this malady and the time has emphatically come to understand this. The scenario has to be examined in the light of both "external" and "internal" threats to judicial independence.

1. External Threats-arise from factors open to view and discernible which tend to threaten or interfere with the doing of justice according to law. Selective judicial transfers, holding out prospects of promotions, some acts indicating lucrative inducements like after retirement appointments, if one conforms or falls in line etc., are instances of some external threats.

Such threats by their nature are less frequent and cause a public outcry. They do not need an honest or unmotivated press or local bar to be detected and exposed. Since they can be so identified at a relatively early stage, external threats are not quite as potent or menacing as the internal threats.

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42 (1991) A.I.R. S.C.W. 128.
43 A.I.R. 1975 S.C. 2299.
44 A.I.R. 1969 All. 230.

2. Internal Threats-are threats which arise from indiscernible or subtle factors and often their existence cannot be detected at the early stages. They emanate from within and pollute the very source of justice. Such threats arise from various forms of judicial misbehaviour; they are matters of daily occurrence. Such threats are more potent and far more menacing then the external threats because they come to be helplessly tolerated and silently borne for various reason hereinafter. Three distinguished judges of the Supreme Court (Khanna, Krishna Iyer and Gupta, JJ.) who shared a platform to discuss the topic of judicial independence described internal threats as more ominous than the external threats and one of them, Krishna Iyer, J., went so far as to call it "death wish among the judiciary" and warned his brother judges against the tendency to "commit suicide".

Various kinds of internal threats are as follows:

I. Appointments: Appointments are made from the bar and promotions and appointments to the highest judiciary are made from both bar and bench. As such judges are contemporary reflection of the society, bar and bench itself, the quality of justice necessarily varies with the quality of judges and the quality of judges varies with the methods of their appointment and standard employed by the appointing authorities by the process of their selection. Some aspects are:

i. **Quality of judges**: The functions of a judge are to adjudicate, i.e., to find the correct facts, appreciate and apply the law and thus determine on which side lays the truth. Since a great deal of personal qualities and discretion is involved in the process of adjudication, the judge himself goes to trial in each case. An ideal judge, it follows should be a good human being, a right thinking citizen, having a sturdy character, reasonable intellect and qualities of firmness, patience, temperance, resilience and rectitude.

ii. **Method of appointment**: Each legal system provides its own method of appointment. In England, the Queen appoints the judges on the advice of the Lord Chancellor and the latter by convention consults senior members of the bench before making the selection. In India, judges of the High Court and Supreme Court are appointed in the manner prescribed by Articles 217 and 124 of Constitution of India. In the case of appointment to the High Court there is required to be tripartite consultation between the C.J.I., chief justice of High Court concerned and the governor of the state. In the case of appointment to the

Supreme Court, there is required to be bipartite consultation between such of the judges of Supreme Court including the C.J.I. and the President. After *In Re Presidential Reference* (the Third Judge case) the collegiums' approval is necessary. It is therefore particularly important that the chief justice should consult all his colleagues and not a small section of them. Although, there is bound to be some confidentiality in the nature of the process of recommendation, selection and appointment, it must never be allowed to degenerate into an unfair and oppressive exercise, where any cowardly assault on the character of candidate unleashed by oral, one sided vengeful whispering campaigns, anonymous letters is allowed to succeed in secretiveness with safety.

II. Judicial misconduct: Judicial misconduct which has, of late, raised its ugly head though it is unheard of in the glorious part. Judicial misconduct is not provable because there are no eye witnesses to testify nor there is safe outlet provided by law against judicial misbehaviour but it threatens to erode the public faith and adversely affects the independence of judiciary.

III. Corruption: Corruption pollutes the very air that we breathe. In order to create public confidence in court the persons of the higher judiciary must come forward voluntarily to submit to investigation, at least in respect of act or acts under suspicion. Participation of judges in public reception and parties should be minimized and as such should not attend such parties. Corruption also works in more insidious way. Favouring the firm of lawyers which sends briefs to the judge's relatives, favouring the juniors or other associates of judge's kith and kin are equally damaging modes of corruption. Retired Supreme Court judges are doing chamber practice, drawing and settling pleadings, giving opinion and advice and accepting arbitration work. Though judges cannot be expected to live in isolation or ivory towers-aloofness is nonetheless a desirable social prescription of a judge.

IV. Contempt power: Similarly the judges should use the weapon of contempt of court cautiously and should not abuse it and it is no answer to justify criticism to the court.

V. Press and bar: Press is the reflection of society and it can play its role effectively, if it indulges liberally in selective criticism of the judges. It should not allow it to be captured by handful of motivated professionals, acting more out of reason of personal displeasure against a particular judge than bona fide criticism of his judgment. Bar is as important as press and it can play a vital role in improving

the administration of justice, inter alia, by watching the performance and conduct of judges and acting by indicating censure and disapproval through bar resolutions. If the bar and press are in clutches of a small group of self serving advocates, bar resolutions and the press comments on judicial misconduct are likely to be selective and trained by favouritism. To this extent the bar and the press become directly responsible for promoting judicial misconduct.

VI. Paucity of adequate fund: Paucity of adequate fund is one of the main impediments to resolving the crisis of administration of justice. The apex court in *All India Judge Association v. Union of India*[45] has observed that minimum service condition will have to be ensured irrespective of the capacity to fund them, because the judges who are in want cannot be free. Of what use is a judge if he fails to discharge his duties according to the law? The society is at stake in ensuring the judicial independence and no price is too heavy to secure it.

Suggestions of Law Commission[46]

In the context of independence of judiciary the appointment of judges of the Supreme Court merits special consideration. In view of special role which has been assigned to this court under scheme of the Constitution, it is essential that only persons of the highest caliber are appointed judges of the court and that no other factor except that of merit alone should weigh in the matter of appointment. Every effort should therefore be made to ensure that the cream of judicial talent is represented on the bench on the highest courts of the land. According to some Constitutional experts there is hardly any political question which does not ultimately resolve into a legal or constitutional question. Quite a number of cases coming up before the Supreme Court have political overtones.

As regard this and some other factors the suggestion of law commission is noteworthy:

1. Law commissions has suggested that no one should be appointed to the Supreme Court as a judge unless for a period of not less than 7 years he has snapped all affiliations with political parties and unless during the preceding period of 7 years he has distinguished himself for his independent and dispassionate approach and freedom from political prejudice, bias or learning.

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[45] A.I.R. 1993 S.C. 2493.

[46] The 18th Law Commission was constituted for a period of 3 yrs. from Sept. 1, 2006 by Order No. A.45012/1/2006 Admn.III (LA) dated the Oct. 16, 2006, issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi.

2. The appointment of chief justice of the Supreme Court has on occasion become the subject matter of considerable debate particularly when we have departed from convention of appointing senior most judges as chief justice of the Supreme Court. The Law Commission has expressed the opinion that the vesting of unbridled powers in the executive to depart from the principle of seniority in the matter of appointment of chief justice is liable to be abused and is likely to make inroads into the independence of judiciary and affect the approach of some of the judges. It has accordingly suggested that whenever the government considers it proper to depart from the principle of seniority for appointment to the post of chief justice, in such an event the matter should be referred to a panel consisting of all the sitting Supreme Court judges. This principle should be departed from, only if the above panel finds sufficient cause for such a course. The above suggestion deserves serious consideration at the hands of all concerned.

3. The Law Commission while recommending that one-third of judges in each High Court should be from outside the state has at the same time emphasized that it should normally be by initial appointment and not by transfer. As regards the transfer of judges, the Law Commission has recommended that normally a judge should continue in the High Court in which he is appointed except where he is appointed chief justice of another High Court. According to the Commission, no judge should be transferred without his consent from one High Court to another unless a panel consisting of C.J.I. and his four senior most colleagues find sufficient cause for such a course.

4. The efforts of the present government to set up National Judicial Commission and also the passing of the Judges (Inquiry) Bill, 2005 is also a right step to ensure accountability and also necessary to bring about transparency in the working of the higher judiciary. It will also be helpful to judges to work without fear and independently. However a great deal of caution is required in its implementation and it should not be allowed to become a tool for the politicians exercising control over the working of judiciary. Besides these suggestions some reforms in the area of process like curbing multiple appeals, limit to adjournments, proper training of judges, alternative dispute resolution (ADR) mechanisms and computerization of courts will also speed up judicial process as a whole and ensure better efficiency of judges.

Conclusion

In my opinion to successfully refute the change of undemocratic conduct and to uphold the legitimacy of judicial review the judiciary must strive to maintain the respect in commands against this masses for its independence and integrity. 'Justice must not only be done, it must also seem to be done' is more a truism than a legal adage. In a democracy, especially in one where the judiciary adopts an activist approach, the citizens have the right to examine the integrity of judicial process, I would like to stress that whatever may be norms we lay down for ensuring independence of judiciary whatever may be the safeguards we may provide therefore, and whatever may be the hazards to which individual judges may be exposed because of their independence, the devotions and adherence to the principle of independence and impartiality in the final analysis would depend upon the personality of individual judges.

In judicial process, the role of the judges is more important than the written words of a statute. Krishna Iyer, J., has rightly observed:[47]

> "A socially sensitized judge is better statutory armour against gender outrage than long clauses of a complex section with all protection writs into it."

The above discussion shows that "judging" has become an "act of will", and the judge has not only some degree of choice but unlimited power of creating law. Judicial activism is desirable but within defined limits. In a democracy judicial process by its very nature cannot supervene the legislative mandate or executive authority. Judicial process must function within the prevailing social, economic and political atmospheres. Judicial process can only give direction to the spirit of law. Basic reforms whether social or political do not fall within the jurisdiction of the courts.[48] Judicial process has emerged as an important part of the administration of justice. The concept of separation of power has lost its validity. The ancient question 'whether judges find or invent law' is no more the ruling deity of modern jurisprudence. The judges are neither deputies to legislators nor mere interpreters of law.

The history of constitutional amendments resulting from the decisions of the court starting from *Kameshwar Singh v. State of*

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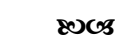
47 Krishna Lal v. State of Haryana, A.I.R. 1980 S.C. 1252.

48 LORD DENNING, JUDGES AND THE JUDICIAL POWER 1, 4 (Rajeev Dhawan, R. Sudarshan & Salman Khurshid eds., 1985).

Bihar[49] and culminating in Fundamental Rights case[50] testifies the emergence of the courts as the courts as "the capitals of laws umpire" and the judges as their "princes". The most disturbing feature of the judicial process however is the free for outlook of the judges of the superior courts in India. The emergence of PIL had made a good beginning but this issue has been quickly oversubscribed. It has also created a "tug of war" between the judiciary and the two other limbs of the state–legislature and executive. Thus the over activism of the courts in PIL[51] cases has reduced the effectiveness of its ruling. In the prevailing atmosphere of lawlessness in the executive and legislative constituencies, the judiciary should not follow the suit but it must maintain restraint as was recently observed by Justice Markandey Katju. To define the limits of judicial creativity is neither possible nor desirable but the difference between legislation and adjudication must be maintained. To conclude it is essential to consider the ailments of the system not because there is so much wrong with it but because there is so much that provides an opportunity to do wrong. It is wrong to misdirect one's attention external threats alone, when there is so much within that needs to be repaired. Since on the independence of the judiciary rests justice, liberty, equality and fraternity guaranteed to us by the Constitution. We alone can be the guard of our guardians.



[49] 1959 A.I.R. 1303, 1960 S.C.R. (1) 332.
[50] A.I.R. 1973 S.C. 1461.
[51] LAW AND POVERTY: CRITICAL ESSAYS 387 (Upendra Baxi ed. 1988).