



“INDEPENDENCE OF JUDICIARY-THE SOUL OF JUSTICE: AN INDIAN PERSPECTIVE”

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DECLARATION

I declare that the dissertation entitled **“Independence of Judiciary-The Soul of Justice: An Indian Perspective”** is the outcome of my own work conducted under the supervision of **Prof. L.N.Mathur** at Amity University Uttar Pradesh, Amity Law School Lucknow campus.

I further declare that to the best of my knowledge the dissertation does not contain any part of work, which has been submitted for the award of any degree either in this University or in any other University / Deemed University without proper citation.

Pranjal Srivastava

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INTRODUCTION

Our country India is a democratic country, means that the government has to be `by the people, for the people and of the people`. It guarantees to its citizens various rights through its Constitution. In order for the smooth working and ensuring rights to everyone the Supreme Court and the High Courts have been given special powers to safeguard these rights. A mere submitting of a letter addressed to a judge after violation of a fundamental right, either by the victim or another person is enough to move courts.

Violation of Fundamental Right may have been done even by state. Now a dilemma arises that should judiciary take sides with the state or with the victim? If the Judiciary is independent, then of course it would help the victim, if judiciary is under state control then justice would be forgotten and the state would not hesitate again to violate a fundamental right again.

During the last few years, the question of independence of judiciary has been hotly debated in India. This question has agitated the minds of jurists, politicians and the lay men. The supporters and the opponents have both given very effective and sound arguments.

Those who believe in the absolute independence of judiciary say that democracy cannot be possible in the absence of an independent judiciary. They say that rule of law can only be upheld by a supreme judiciary. And this rule of law is very essential for the successful working of democracy.

On the other hand its opponents want to uphold the supremacy of the Parliament. They want to limit the powers of the judiciary. They say that it should not stand in the path of economic and social reforms in the country for the establishment of a socialistic society.

The famous French philosopher Montesquieu had first of all given the idea of the independence of judiciary. He believed in the theory of separation of powers of the three Branches of the government- Legislature, Executive and Judiciary. Inspired by his theory the father of the American Constitution established an independent judiciary in their country. The American people have a great confidence in the independence of judiciary. They feel that their rights and liberties will be endangered if the judiciary is weakened in anyway.

There is no doubt that a fearless and impartial judicial system is a must for any civilized nation. It is also the essential condition for a federal type of government as in India.

If the judges of the higher courts are fearless, impartial and independent, only then it can be expected that they can protect the fundamental rights of the citizens. On the other hand, if the judges themselves are weak and fearful they cannot uphold the rights of the citizens.

In our country also the constitution has established a separate and independent judiciary. It has remained impartial and independent all these years. There is no doubt that the Indian Supreme Court has always shown its independence and impartiality since its inception. On many occasions it pronounced several historical judgments fearlessly, which sometimes even went against the government.

This dissertation is divided in five chapters. In first chapter I'm trying to unpack the concept of "Judicial Independence". The second chapter deal with the relationship between the three organ of a democratic state. In third chapter the international phenomenon over "Independence of Judiciary" has been discussed. Finally before concluding in chapter five, the fourth chapter will deal with Indian perspectives over "Independence of Judiciary"

RESEARCH METHODOLOGY

AIMS & OBJECTIVES: The project is an attempt to study the need of "Independence of Judiciary" in a democratic state especially in Indian perspective. As a part of this, not only the constitutional provisions, but the various international norms, whether they are sufficient or not. Study on actual position of "Judicial independence" outlined and compared with the same in the Indian system.

LIMITATIONS OF THE STUDY: The scope of the project is not merely to study the area and the issues evolved therein from a constitutional point of view but as means and ways of improving the judicial system and the efficiency of the legal community. The limitation of the work lies in the fact that there is a plurality of views in this regard and it is a difficult proposition to choose between the various perspectives.

NATURE OF THE STUDY: The project is descriptive to the extent that it has outlined the various constitutional provisions relating to the area under study. It has also outlined the position stated in various judicial pronouncements. It is also analytical as the researcher has tried to compare the various viewpoints regarding the area under the study and has tried to give his own views in this regard. The researcher has also analysed the efficacy of the present system as outlined under the Constitution. An attempt has also been made to

draw a comparative analysis of the nature and extent of analogous provisions in various jurisdictions.

SOURCES OF DATA: Secondary sources have been mainly referred to for the purposes of the research. Secondary sources includes a literature review of books, journal articles and reports from nongovernmental organisations and other sources, as well as a survey of relevant newspaper and magazine. The researcher also gained an overview on the topic by going through the Lectures and speeches of various judges all across the globe and discussions with experts in the concerned area.

LIBRARIES CONSULTED: Various libraries have been consulted for reviewing different literatures related to the researches so far done in the similar area. The libraries referred are:-

- Departmental Library, Amity Law School, Amity University.
- Departmental Library, Faculty of Law, Banaras Hindu University.
- Central Library, Banaras Hindu University.
- Library of High Court of Allahabad Lucknow Bench.

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ABBREVIATION

AC	Appeal Cases
ACHPR	African Commission on Human and Peoples Rights
AIC	All India Cases
AIR	All India Reporter
ALJ	Allahabad Law Journal
All ER	All England Law Report
CIJL	Centre for Independence of Judges and Lawyers
EHRR	Essex Human Rights Review
GAOR	General Assembly Official Records (United Nations)
SCC	Supreme Court Cases
SCR	Supreme Court Reports
ST. LOUIS U. L.J	Saint Louis University Law Journal
WLR	The Weekly Law Reports

Chapter 1

UNPACKING INDEPENDENCE OF JUDICIARY

1.1 The Concept of Judicial Independence

Understanding the concept of judicial independence requires defining from whom judges are to be independent. While judicial independence is a dynamic concept that may be defined in different ways, it is generally referred to as shorthand for the judiciary's independence from the executive and legislative branches of government. This is the Supreme Court's essential understanding of the phrase. At a minimum, it means that judges cannot be punished physically or economically for the content of the decisions they reach. Consequently, judges need not fear deciding cases on their merits, even when contrary to the interests or desires of the other branches of government. Thus, other branches of government have no power over case outcomes. Judicial independence thereby frees judges to apply the rule of law and do justice in individual cases. Judicial independence is an instrumental means to an end, not an end in itself. The concept is not attractive because it makes judges happy, but because it protects against other branches forcing unfair judicial outcomes, grounded in self-interest or ideological fervor. Justice Brayer has thus noted that the "question of judicial independence revolves around the theme of how to assure that judges decide according to law, rather than according to their own whims or to the will of the political branches of government."¹ Freed from threats from the other branches, judges may be better able to render dispassionate judgments and apply the law fairly to the facts. They are to be principled decision makers impartially deciding cases according to the rule of law. It is against this standard that judicial independence must be measured, and there is no intrinsic guarantee that independence will further the standard.

The concept of the independence of the judiciary has been thus explained by a distinguished writer:

"The rendering of an honest unbiased opinion based on the law and the facts is far from it is one of the most difficult tasks which can be imposed on fallible man. It demands wisdom as well as knowledge,, conscience as well as insight, a sense of balance and proportion, and if not absolute freedom from bias and prejudice at least

¹ Stephen G. Breyer, Judicial Independence in the United States, 40 ST. LOUIS U. L.J. 989, 989 (1996).

the ability to detect and discount such failings, so that they do not becloud the fairness of the judgment, it is evident that the ordinary political environment is unable to provide the proper incentives which will call for these qualities, nor will it permit these qualities to be exercised without a large measure of interference which will deprive them of the great part of their value. The Judiciary in short, must be given a special sphere clearly separated from that of the legislative and executive. They to accomplish this separation, be given privileges which are not vouchsafed to other branches of the Government and they must be protected against political, economic and other influence which would disturb that detachment and impartiality which are indispensable pre-requisites for the proper performance of their function. It is these unusual factors which create the condition known as independence of the Judiciary." ¹

The concept of "independence of the judiciary" was also discussed in the 19th biennial conference of the International Bar Association held in New Delhi in October 1982. In that conference, the "Draft Minimum Standards of Judicial Independence" contained in Dr. Shimon Shetreet's paper were finally adopted as the "Delhi Minimum Standards" of judicial independence.

Dr. Shetreet stated that the modern concept of judicial independence cannot be confined to individual judges and to their substantive and personal independence but must also include the collective independence of the judiciary as an institution.

Thus, conceptually, as well as from the point of view of practical reality, the independence of the judiciary comprises two basic postulates, viz., "independence of the judiciary as an institutionalized organ" and "independence of the individual judges," and no judiciary can be said to be independent unless these two essentials are present.

¹ The Government of Canada by R. Mac-Gregor Da'xson revised by Norman Ward. University of Toronto Press. 1964 p. 345 cited by M.C.Setalvad "An Independent Judiciary and A Democratic State" p 2

1.2 The Principle Of Independence Of The Judiciary

This principle has been imported into India from England, where it had been asserted by COKE C.J. in his struggle against an absolute monarch and was later confirmed by Parliament by enacting the Act of Settlement, 1700.

The members of the Constituent Assembly envisaged the judiciary as a bastion of rights and of justice. The question was how to render the fortress impregnable to sapping by private interests. The assembly had been careful to keep the judiciary out of politics. How was politics to be kept out of the courts? The assembly's answer was to strengthening the walls of the fortress with constitutional provisions. At first glance, the assembly's debates on the judicial provision seem to have been disproportionately concerned with the administrative aspects of the judicial system, with the tenure, salaries allowances and retirement age of judges, with the question of law detailed the judicial provisions of the Constitution should be, and more pertinently with the mechanism for choosing judges. A closer look, however, shows that the member's interest in me, apparently routine matters—which did at times become tedious—was prompted is the desire to insulate the courts from attempted coercion by forces within or outside the government."

The judiciary is, in effect, part of the public service of the Crown. Hut a judge is not "employed" in the sense that a civil servant is employed. lie fills a public office, which is by means the same thing; and part of his independence consists in the fact that no one can give him orders as to the manner in which he is to perform his work. Like the more fortunate practitioners in some profession, "he owns no man master". The only subordination which he knows in his official capacity is that which he owes to the existing body of legal doctrine, enunciated by his brethren, past and present, on the bench and the legislative enactments of the King in Parliament.¹

"The independence of the judiciary lends prestige to the office of the Judge and inspires confidence in the general public. It acts as a safeguard not merely against the

¹ Justice and Administration Law by William A. Romson, 3rd Edn. At pp. 49-44 cited by Dr.D.D.Basu in Commentary on Constitution Vol. V page 5539

manipulation of the law for political purposes at the highest of the government in power, but also against the corruption of the judicial organs of the State by the bribery and intimidation of powerful outside interest which threaten the impartial administration of justice from time-to-time.

The psychological fact behind the principle of independence is not the immediate reaction of feeling in a man whose impulses are obstructed, but the permanent result in his conduct of the obstruction of some impulses and the encouragement of others. We make a Judge "independent" not in order to spare him personal humiliation, but in order that certain motives shall not and certain other motives shall direct his official conduct.

The independence of the Judge is, we may conclude, of essential importance in so far as it enables the Judge to adopt a particular attitude of mind towards the questions which come before him for decision. He can, in short, determine the case before him without fear that adverse results or material reward will accrue to him according to whether the decision does or does not meet with the approval of other persons.

The judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own. Judicial individualism is perhaps one of the last citadels of jealously preserved individualism.

Justice Douglas in his dissenting opinion in *Stephens v. Chandler*, 350 U.S. 191 (1956), stated: "No matter how strong an individual judge's spine, the threat of punishment — the greatest peril to judicial independence — would project a dark shadow whether cast by political strangers or by judicial colleagues..... Neither one alone nor any member banded together can act as censor and place sanction on him. It is vital to reserve the opportunities for judicial individualism." He further said: "An independent judiciary is one of the Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But, neither one alone nor any member banded together can act as a censor and place sanctions on him. Under the Constitution, the only leverage that can be asserted against

him is impeachment, where pursuant to a resolution passed by the House, he is tried by the Senate, sitting as a Jury. Our tradition even bars political impeachment as evidenced by highly partisan, but unsuccessful, effort to oust Justice Samuel Chase of this court in 1805"..... There is no power under our Constitution for one group of federal Judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his lo act as a judge.

It is lime that an end to put lo these efforts of federal judges to ride herd on the other federal judges. This is a form of "having" having no place under the Constitution Federal judges are entitled, like other people, to full freedom of the First Amendment. If they break the law, they can be prosecuted. If they become corrupt or sit in eases in which they have a personal or family stake, they can be impeached by the Congress Hut I search the Constitution in vain for any power of surveillance which other federal judges have over those observations. Some of the idiosyncrasies may be displeasing if those who walk in more measured conservative steps. But those idiosyncrasies can be of no possible constitutional concern to other federal Judges. It is time we put an end to the monstrous practices that seem about to overtake us....."

In India, the need for judicial independence is enhanced by the fact that India has a written Constitution with a Bill of Rights and Judicial Review and a federal structure as a result of which the Union of India and the Governments of the States figure as the largest single litigants before the Supreme Court and the High Courts.¹ Appreciating the significance of this change in the constitutional set-up, the makers of our Constitution provided for greater safeguards to ensure judicial independence than under the Government of India Act, 1935"²

Some of the Judges of our Supreme Court have gone further to assert that "independence of the judiciary is a basic structure of the Constitution."³ It would mean

¹ Shamsheer Singh v. State of Punjab, AIR 1974 SC 2192 (2230), Union of India v. Sankalchand Himatlal Seth. AIR 1977 SC 2328

² Union of India v. Sankalchand Himatlal Sheth, AIR 1977 SC 2328

³ Gupta v. President of India, AIR 1982 SC 149

that if the Constitution itself is amended so as to encroach upon this independent e. the Constitution Amendment Act will be adjudged void by the Judiciary.¹

The independence of the judiciary from the executive and the legislature as well as independence of each and every judge within the Judiciary is considered as a necessary condition for a free society and a Constitutional democracy. It ensures the rule of law; and realization of human rights and also the prosperity and stability of a society. Therefore, the Constitution provides for the independence not only of the Supreme Court, hut also the High Courts and the subordinate courts. Independence of judiciary being a basic feature of the Constitution, any attempt to curtail it directly or indirectly even by an amendment of the Constitution would he invalid²

The right to an independent and impartial tribunal is separately mentioned in the International Covenant and European Convention and some national Constitution. It has been held to be included in a wider guarantee of "fair hearing".³ A person cannot **be** assured of a fair hearing if: (a) the judge or Tribunal is removable during the term of. his office except for misconduct; (b) the judge can be controlled or influenced by any authority in the performance of his duties as a judge; (c) even a law which deprives court of its judicial discretion or seeks to exercise judicial power would offend "Due Process" or a constitutional guarantee of separation of powers;"⁴ (d) another requirement is immunity from any legal liability for acts done within jurisdiction.⁵ "Independence" thus means "independence from the executive or the legislature and independence from either party"⁶,

Independent judiciary is necessary for maintaining rule of law and fain judicial administration in the country. Independent judiciary plays an important role in controlling the arbitrary act of the administration. If the arbitrary act of the administration causes injury to any person, it provides Relief to them. Often independent judiciary-is made

¹ Vide C6, Vol.(), pp. 197 IT.

² Supreme Court Advocates-on-Record Association v. Union of India, AIR 1 994 SC 268, L. Chandra Kumar v. Union of India, AIR 1 997 SC 1 1 25

³ Golden v. U.K., (1970) 1 EHRR 524).

⁴ Liyanag v. R, (1966) I All ER 650; Stefaneli v. San Marino, (2001) 33 EHRR 16.

⁵ In re,Mc.,(1985)AC528(IIL).

⁶ Mungaroo v. The Queen, (1991)1 WLR 1351; Lokabail (VK) v. Bayfield Properties Ltd., (2002) 2 WLR 870.

guardian of the Constitution and enforces the rule of law. Every person whether rich or poor is considered equal before law and any person who violates law is punished by the Court. For this purpose the judiciary is required to be independent because if it is not independent and is in the control of the executive, it cannot punish the executive in case the executive violates the law. Besides, it is the rule, of fair justice that justice not only be done but it should appear to the people that justice has been done. If the disputes are decided by the independent judiciary, people are satisfied that justice has been done with them and consequently no dissatisfaction would prevail among the people.

Legitimacy of judicial decisions depends on a shared perception that they are independent and non-political. By “non-political” we mean that the judges are not committed to any political party or any ideology canvassed by one or more of the political parties. The word “non-political” must be distinguished from the word “apolitical.” The view that judges must be apolitical contradicts views expressed by the judges themselves. Justice Patanjali Sastry said, as early as 1952, that while deciding the reasonableness of restrictions on fundamental rights, the social philosophy of a judge was bound to be reflected in his decisions.¹ A judge cannot be “apolitical” because, like any other citizen, he is bound to have political preferences and ideologies. However, a judge can be non-political in the sense that his decisions are based not on considerations of power, but rather on principles. The phrase “being political” is understood in a pejorative sense as being shrewd enough to understand the mechanics of power and adjusting one’s decisions to considerations of acquiring power.

A judge need not be apolitical, but he must be independent, fearless, and impartial. Independence means freedom from any influence whether political, social, or economic. Fearless means a judge should not fear the consequences of his decisions. A judge should be neither susceptible to temptation nor subjected to intimidation. To an extent, judges acquire these qualities as a result of their upbringing and education. But they must also be people of character and integrity. There are, however, external factors that may adversely affect the character or integrity of a judge.

¹ State of Madras v. V.G. Row, A.I.R. 1952 S.C. 196, 200. 100 Journal of Law & Policy

Chief Justice Michael Wolff of Missouri, in his 2006 State of the Judiciary address, elaborated eloquently:

“Independence,” quite frankly, is both overused and misunderstood. It should not be interpreted, either by the public or by any judge, to mean that a judge is free to do as he or she sees fit. Such behavior runs counter to our oaths to uphold the law, and any attempt to put personal beliefs ahead of the law undercuts the effectiveness of the Judiciary as a whole. Better stated, “Independence” refers to the need for courts that are fair and impartial when reviewing cases and rendering decisions. By necessity, it also requires freedom from outside influence or political intimidation, both in considering cases and in seeking the office of judge. Courts are not established to follow opinion polls or to try to discern the will of the people at any given time but rather are to uphold the law. The people rely on courts to protect their access to justice and to protect their legal rights. For the sake of the people, then, judicial independence must always be coupled with the second stated measure – accountability.”¹

Simply stated independence of judiciary means that

- The other organs of the government like the executive and legislature must not restrain the functioning of the judiciary in such a way that it is unable to do justice.
- The other organs of the government should not interfere with the decision of the judiciary.
- Judges must be able to perform their functions without fear or favour.

Independence of the judiciary does not imply arbitrariness or absence of accountability. Judiciary is a part of the democratic political structure of the country. It is therefore accountable to the Constitution, to the democratic traditions and to the people of the country.

¹ The Missouri Bar, Vol. 62, No. 2, March-April 2006.

1.3 Defining Judicial Independence

The definition of "independence of the judiciary" evolved by the International Commission of Jurists in 1981 and formulated in Article 2 of the Siracusa Draft principles contains some of the essentials of the concept:

"Independence of the judiciary means . . . (1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducements or pressures, direct or indirect, from any quarter or for any reason. . . ." ¹

Much of the debate on judicial independence is confused by how various discussants define the term "judicial independence." However, most agree that as a general concept, judicial independence has two components: institutional independence and decisional independence. When discussing institutional independence, the focus of the discussion is the judiciary's ability to stand up to other branches of government. Institutional independence is sometimes referred to as "external" independence."

When discussing the decisional component of judicial independence, the focus is on the individual decision making of each judge or of each collegial court." The ability of each judge or court to make independent legal determinations also may be referred to as "internal" judicial independence. Both broad concepts are significant to the legitimacy of the judicial branch of government, and both concepts of judicial independence are applicable to state as well as federal courts.

The component of institutional independence is essential to our tripartite system of government. It requires the courts' independence from the legislative and executive branches. Institutional independence is most often associated with the separation of powers doctrine, though in reality both decisional and institutional independence have separation of powers qualities. Institutional independence cannot be accorded the judicial branch without the respect of the executive and legislative branches for judicial decisions. At least one writer has noted,

¹ CIJL Bulletin 8 (1981)

"An independent judiciary requires also that its decisions, once given, would not be altered or ignored by the government [responsible for enforcing them]."

However, as part of the system of checks and balances created in our tripartite system of government, there are occasions when it may be appropriate for the legislature to regulate a matter in an area of constitutionally shared powers or to overrule the courts in an area of exclusive legislative authority.

In the primitive era family Head would be dispensing justice by resolving conflicts within the family. However, there would be possibilities of element of bias in the Head who may show favour to one member because of his personal liking, or personal interest resulting from proximity. As the time progressed and social relations became complex, the need for independent i.e. unrelated adjudicator of disputes arose. Independence of judges should therefore be viewed not as a privilege of an individual judge but as a social arrangement, which ensures that there is no likelihood of bias due to proximity, relationship, personal acquaintances and other influencing causes. Thus, the principle of natural justice that no one will be a judge in his own cause, (which means he should have no direct or indirect interest involved in the outcome of the proceedings) is a child of the necessity to render unbiased and fair decisions.

1.3.1 Independence of judiciary is therefore not a private right of judges but the very foundation of judicial impartiality – and a constitutional right of the people of India to be governed by the rule of law that shuns all arbitrariness. Judicial independence characterizes a state of mind, which is concerned with the judge's impartiality in fact and reality, and a set of institutional and operational arrangements, which define the relationships between judiciary and others, particularly the other branches of the government so as to assure both, the reality and appearance of independence and impartiality. Individual independence of a judge is reflected in such matters as security of tenure, while; the institutional independence of the court over which the judge presides is reflected in its institutional or administrative relationships to the executive and legislative branches of the State. The Judges are undoubtedly servants of the public but they are not public servants whose essential obligation is, consistently with law, to give effect to the policy of the government of the day. The duty of a judge, on the other hand,

is to administer justice according to law, without fear or favour, and without regard to the wishes or policy of the Executive.¹

1.3.2 Judicial independence, however, is not only a matter of appropriate external and operational arrangement, but it is also a matter of independent and impartial decision making by each and every judge. The judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not. This is the cornerstone of the rule of law. Judges individually and collectively should protect, encourage and defend judicial independence.²

1.3.3 The right to be tried by an independent and impartial tribunal is an integral part of the principles of fundamental justice. The test of impartiality is whether an informed person, viewing the matter realistically and practically – and having thought the matter through, would apprehend a lack of impartiality in the decision maker. A reasonable perception that a judge lacks impartiality is damaging to the judge, the judiciary as a whole, and the good administration of justice. Judges should, therefore, avoid deliberate use of words or conduct, in and out of court, that could reasonably give rise to a perception of an absence of impartiality.³ The judges should not deal with case concerning which the judge actually has a conflict of interest. The judge should avoid circumstances in which a reasonable, fair minded and informed person would have a reasonable suspicion that the judge is not impartial. However, the judge should not recuse unnecessarily, because, to do so will add to the burden of his or her colleagues and contribute to delay in the courts.

1.3.4 In a constitutional democracy independence of judiciary facilitates maintenance of rule of law, ensures that unconstitutional statutes are declared void and ineffective, and valid laws are duly implemented. Such judicial independence will have the effect of disciplining the holders of economic or political power for collective good. The Judiciaries should never be allowed to be used as instruments to advance the interests

¹ The Hon'ble Gleeson Murray AC, Chief Justice of Australia in his speech – “The Role Of The Judge And Becoming A Judge”, National Judicial Orientation Programme, Sydney 16th August, 1998

² Ethical Principles for Judges, adopted by the Canadian Judicial Council

³ Commentary to Canon 3B, ABA, Model Code of Judicial Conduct (1990)

of the ruling elite, rather than as mechanisms to protect individual rights and freedoms and promote access to justice

1.3.5 The integrity and independence of judges depend in turn upon their acting without fear or favour. Although judges should be independent, they should comply with the law, as well as provisions of the accepted code of conduct. Public confidence in the impartiality of judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of the code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

1.3.6 Judges also must keep up the appearance of the impartiality of the judicial process. For example, a judge should not be friendly, shake hands, and have an intimate conversation with one of the lawyers in front of the adversary party just before the trial begins, even if the judge and the lawyer used to be classmates. The opposing party who has seen such gesture of personal acquaintance will not accept an unfavourable decision, suspecting that the judge was biased. These things are evident, and the violations of these rules diminish the prestige and authority of the court. One rule, said Alfred the Great, applied everywhere: “Judge not one judgment for the rich and another for the poor”.

CHAPTER 2

INDEPENDENCE OF JUDICIARY AND DEMOCRATIC STATE

2.1 Rule of Law in a Democratic State

A free society recognizes the craving for justice in man. It attempts, as far as possible, to meet the desire of its citizens for solution of their disputes with fellow citizens of the State by unbiased and trustworthy men. Thus arose the institution of an impartial and independent judiciary capable of serving the needs of the society and its craving for justice. Such an institution dealing with an even hand with the administration of justice creates confidence and contentment among the members of the society. The unique function which members of the judiciary perform in a State makes it imperative that they should be segregated from the other of the State. The judicial structure and the adjudicatory process have to be so designed as to insulate the judges from influences of all kinds except those needed for reaching a correct and impartial decision of the disputes that come before them. Any suspicion of interference or domination over the judicial mind in the determination of disputes coming before them would in a great measure destroy the essential functions of the judiciary in a free society.

Judicial independence is an aspect of the rule of law in its own right. It overlaps with but goes beyond the separation of powers. Separation of powers concerns the independence of the judicial system from other branches of government. Judicial independence requires the independence of individual judges from any pressures that threaten not only the actual impartiality, but also the appearance of impartiality. Art. 6 of the European Convention on Human Rights includes both elements by requiring a "fair and public hearing..... by an independent and impartial tribunal established by law". In *Millar v. Dickson*¹ the Privy Council found a violation of Art. 6, where the prosecuting authority, the Scottish Lord Advocate, was also responsible for renewing the appointment of a temporary judge, even though there was no complaint about actual impartiality of the judge in question. It was observed: "Central to the rule of law in a modern democratic society is the principle that judiciary must be and must be seen to be independent of the executive".

¹ *Millar v. Dickson*, (2002) 3 All ER 1041.

The International Commission of Jurists, dealing with the independence of the Judiciary under the Rule of Law in a free society, in a report says;

"In a free society, whether it has a written constitution or not and whether or not this constitution is subject to the review of a judicial body, the position of judiciary and of the individual judges is of special importance. The inevitability of human error, especially when self interest (which includes the exercise of power as an end in itself) comes into conflict with the claims of others, requires that the law, and the assumptions which underlie it should be interpreted by a judiciary which is as far as possible independent of the Executive and the Legislative.

"The conception of independence as applied to the Judiciary needs however further elaboration. It does not mean that independence should be absolute entitling a judge to act in an entirely arbitrary manner. The judge's duty is to observe the law and the assumptions which underlie it, in the light of his own conscience to the best of his abilities.

"To assert the independence of the judiciary, within the restricted conception of independence given above, is even in free societies to state an ideal rather than a fully realised condition of fact. The Individual judge, the judicial collegiums and the highest court are not exempt from human imperfection or impervious to the influence of sectional 'interest.- It is therefore, important to have regard to the independence not only of: the judge but also of the judiciary as an institution. The latter may provide traditions and a sense of corporate responsibility which are a stronger guarantee of independence than the private conscience of the individual judge.

"The significance of the qualifying phrase 'as far as possible' in relation to judicial independence is seen most clearly as far as its independence of the -Legislative and Executive is concerned. There must be machinery for the selection, promotion and in case of extreme necessity removal of judges. This may involve the participation of the 'Executive, the Legislative, the Judiciary itself, other institutions {such as the Bar}, the people through the electorate- or a combination' of two or more of these bodies. What is 'essential to a free society under the Rule of Law is that such machinery and perhaps more

important, the traditions which govern its exercise, should themselves express the spirit of the law and its underlying assumptions,"¹

The importance of the Rule of Law, the results in a democracy of its application and the great importance of justice as an end in itself, to democracy and humanity is thus pointed out by C.K. Allen:

"Far above and beyond the practical applications of the Rule of Law there is a principle of the utmost moment not only to democracy, but to the whole of humanity - namely that justice is an end of itself and must be pursued unflinchingly, whatever the inconvenience to individuals or to Governments. The contrary principle which is established in all totalitarian societies is that justice is an instrument of policy. To any true democrat, this is the ultimate and unpardonable heresy, the sin against the light. Law thus interpreted, is power ; and the whole meaning of the Rule of law is that it is restraint on power. In the Law Quarterly Review for April 1943 there appears a remarkable article by an anonymous writer apparently of German nationality. I cannot do better than quote his eloquent word; "The Rule of Law puts political power at a discount. It checks the ambitious politician in his fight for power and in his use of power. The more unscrupulous and adventurous he is, the more noticeable is the check. The Rule of Law not only bars some ways, of obtaining, power; it limits access to it to, certain more or less strictly defined avenues of approach. By prescribing conditions, forms, terms and limits of its use, the holding of power in general. No quick success remedies the fault by which the success has been obtained.

Only time may remedy them. Law balances the various social forces in a nation which are fighting for supremacy. Their fight is a natural not an obnoxious thing. It is an expression of life and vigour. The Rules of Law does not prevent the fight or at least a good one does not attempt to do so. It only provides rules of conduct and regulations for defining the winner. It prevents the fight from becoming continuous and protects the defeated party from being crushed. It tries to distribute the spoils of victory in a fair way

¹ The rule of Law in a free society. The Judiciary and the legal profession under the law.

and to maintain the unity of the State and Nation in spite of the conflicting aims of different groups."¹

Thus, the application of the Rule of Law is itself inseparable from an Independent judiciary. Indeed the two are inextricable so that no state which does not have the Institution providing for an independent and impartial judiciary can be governed by the Rule of Law.

M.C. Setalvad in his speech delivered in New Delhi on the occasion of International Commission of Jurists in 1959 says that "But it would be an error to imagine that the enforcement of the Rule of law needs no vigilance in countries functioning under really representative institutions.

Modern governments with their manifold functions have so largely encroached upon the manner of life and the liberty of the individual that a constant watchfulness is necessary on the part of those concerned with the administration of the law to guard the rights of the individual against the State. Several truly democratic constitutions contain limitations on the legislative power. The law making functions may not be so discharged as to affect the fundamental rights of the individual or the citizen. The Constitution may provide, as the Indian does, for a judicial review of legislation alleged to contravene the rights of the subject. But an independent judiciary and an equally independent and a public spirited legal profession become necessary even where such constitutional provision exist for safeguarding the Rule of Law, Delegated legislation so extensively resorted to by all modern government, also requires a continuous watchfulness on the part of the legislators, the judiciary, the lawyer and the public so that it may be kept within the bounds of the Constitution and the laws under which it is enacted.

More constant and more irksome to the citizen are perhaps the encroachments of the executive on the rights of the citizen. Not an often under the guise of administrative rules and procedure, the official engages in the furtherance of that policy. Here again the remedy lies in the insistence upon a system which would enable the validity of an executive act to be tested by a mind free from executive bias. These aspects

¹ Democracy and the Individual by C. K. Allen (Oxford University Press, 1952) PP 65-66.

of the enforcement 'of the Rule of Law, even in States functioning under truly representative institutions emphasis the need of an independent and fearless judiciary and a legal profession prepared to stand against the Executive and assert the rights of the individual against administrative interference. It needs to be remembered that, even in the advanced systems -of democracy which we have so far been able to develop, power lies in the majority of the people and in practice and substance these democratic governments tend to be run by leaders of the majority group. The views and the policies of the party in power have not an often a tendency to affect the judiciary and even the profession of law. Such situations are more noticeable in infant democracies where the ruling parties are overwhelmingly strong, opposition parties have not gathered strength and public opinion does not make itself felt. It is therefore, appropriate that a body like the Commission should repeatedly emphasis the importance of a judiciary who would perform their functions without fear or favour and resist any encroachments by Governments or political parties on their independence and that it should call upon the legal profession to maintain an attitude which would enable it to effectively an assert the rights of individual against the State." ¹

We in India have a federal system of government. It therefore becomes necessary to emphasise the need for the support of the Rule of Law by an efficient and independent judiciary in a country with a written Constitution of a federal nature. As we know the federal system of government predicates parallel governments with limited powers operating in the same manner in different fields, the respective fields of power are demarcated by the Constitution. The functioning of parallel governments with limited powers makes it imperative that there should exist a competent and impartial authority to adjudicate on the limits their respective powers whenever conflicts arise between the general government and the units or as between the units themselves, The only department of the state which could be entrusted with such a power is the judicial department. As was said by Chief Justice Marshal, "It is emphatically the province and duty of the judicial department to say what the law is." ²

¹ The Rule of Law in a Free Society, A Report on the International commission of judges, 1959, PP. 22-32

² William Macbury v. James 5 U.S. (1 Cranch) 137 (1803)

The importance of a judiciary possessing unimpeachable independence has to be particularly emphasized for states like India and the 'United States which have constitutionally enacted Bills of Rights. In such states a supreme tribunal interpreting the Constitution as between the State legislature and Executive and the citizen or individual assumes a greater importance. The citizen or individual on whom the Constitution has conferred inalienable rights needs a tribunal which he can readily approach in order to obtain a quick vindication of his rights. An alleged invasion of these rights invariably demands an interpretation of one or other of the provisions of the Constitution. Naturally therefore controversies in regard to the infringement of these rights become appropriate subjects of inquiry by tribunals entrusted with the interpretation of the Constitution. It is essential that adjudication of these controversies should be entrusted to persons possessing a deep knowledge of the Constitution and of acknowledged independence.

Having thus, postulated an impartial and independent judiciary as an indispensable requirement of a free democratic society governed by the Rule of Law we may examine briefly how our Constitution has taken measures towards the creation of such a judiciary.

Ordinarily in a federation the courts established by the general government interpret and enforce the laws made by the general government whereas the courts established by the States interpret and enforce the laws of the respective States. Such a dual system of courts prevails in the United States. The federal courts enforcing federal laws begin with the district courts and lead up to the Supreme Court of the United States. The system of State Courts enforcing State laws end up with the State Supreme Courts,

2.2 Doctrine Of Separation Of Power

In every State there are three organs; the legislature, the executive and the judiciary, functioning in relation to each other at the same time functioning independently of each other. The doctrine of separation of powers propounded by Montesquieu says that if the power is vested with one authority it will lead to a situation of no liberty and there would be an end of everything, where the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of exacting laws, that of

executing the public resolutions and of trying the causes of the individuals.¹ Thus, the doctrine of separation of powers idealizes situation wherein one person or a single authority is not wheeling the whole power.

The origin of separation of powers is found in the American Constitution. The framers believed that vesting of power in one authority would lead to tyranny. The legislative power is vested with the Congress under Article 1, executive power with the President under Article II and the judicial power with the Supreme Court under Article III. Thus the Constitution of America provides for an express separation of powers.

Moreover, there are other provisions which provides for a check and balance mechanism. *Marbury v. Madison*² first case in which the power of judiciary to review legislative actions was laid down. At the very same time the system of government in United Kingdom, under whom India was a colony and later adopted governmental system there, does not flow the separation of powers.

While the US Constitution lays down a rigid separation of powers, but the Indian constitution does not provide for an express separation of powers. Separations of powers is clearly derivable from the Constitution of India as the provisions relating to executive, legislature and the judiciary are dealt with in separate chapters in Part V and Part VI of the Constitution. The provisions relating to legislature, executive, judiciary are given in different parts in our constitution, thus providing for an implied separation of powers.³ The only provision expressly providing for the separation of judiciary from the executive is not enforceable through the Courts as it is laid down under the Directive Principles of State Policy.⁴ Apart from this the constitutional scheme does not embody the separation of power in its strict and clear sense. This implied separation of powers has been recognized as part of the basic structure of the Constitution through various judicial interpretations.⁵ The legislature performs the law making function, the executive the function of implementing law and the judiciary functions as a means of censor of both

¹ Administrative Law, I P Massey, Eastern Book Company, edn. 6, 2005, p.34

² (1803) 1 Cranch 137

³ Delhi Laws : In Re 1951 SCR 747

⁴ Article 50 of the Constitution of India

⁵ *Kesavananda Bharathi v. State of Kerala*, (1973) 4 SCC 225

legislature and executive, subject to restrictions. The Hon'ble Supreme court has laid down that we follow a separation of functions and not powers and hence it is not rigid.¹[6] But it is essential to say that the every organ in certain circumstances discharges the functions of the other and others functions are monitored by each organ. Thus this doctrine in the Indian scenario also functions as a doctrine of check and balance.

2.2.1 Montesquieu's Doctrine

“To become truly great, one has to stand with people, not above them.”

The separation of powers is a model for the governance of both democratic and federative states. The model was first developed in ancient Greece and came into widespread use by the Roman Republic as part of the uncodified Constitution of the Roman Republic. The doctrine of separation of powers has emerged in several forms at different periods. Its origin is traceable to Plato and Aristotle. In the 16th and 17th centuries, French philosopher John Bodin and British politician Locke expressed their views about the theory of separation of powers. But it was Montesquieu who for the first time formulated this doctrine systematically, scientifically and clearly in his book ‘*Esprit des Lois*’ (The Spirit of the Laws), published in the year 1748.

Contribution of Montesquieu in the development of the Concept of Separation of Power Meaning of Separation of Power Understanding that a government's role is to protect individual rights, but acknowledging that governments have historically been the major violators of these rights, a number of measures have been derived to reduce this likelihood. The concept of Separation of Powers is one such measure. The premise behind the Separation of Powers is that when a single person or group has a large amount of power, they can become dangerous to citizens. The Separation of Power is a method of removing the amount of power in any group's hands, making it more difficult to abuse. It is generally accepted that there are three main categories of governmental functions-a) legislative b) executive, and c) judicial. Likewise, there are three main organs of the Government in a State-a) Legislature, b) Executive and c) Judiciary. According to the theory of separation of powers, these three powers and functions of the Government

¹ Ram Jawaya Kapur v. State of Punjab AIR 1955 SC 549

must, in a free democracy, always be kept separate and be exercised by three separate organs of the Government. Thus, legislature cannot exercise legislative or judicial power; the Executive cannot exercise legislative or judicial and the Judiciary cannot exercise legislative or executive power of the Government.

Though the doctrine of Separation of Power is traceable to Aristotle but the writings of Locke and Montesquieu gave it a base on which modern attempts to distinguish between legislative, executive and judicial power is grounded. Locke distinguished between what he called:

- i) Discontinuous legislative power;
- ii) Continuous executive power;
- iii) Federative power.

He included within ‘discontinuous legislative power’ the general rule making power called into action from time to time and not continuously. ‘Continuous executive power’ included all those powers which we now call executive and judicial. By ‘federative power’ he meant the power of conducting foreign affairs.

Montesquieu, a French scholar, found that concentration of power in one person or a group of persons results in tyranny. And therefore for decentralization of power to check arbitrariness, he felt the need for vesting the governmental power in three different organs, the legislature, the executive, and the judiciary. The principle implies that each organ should be independent of the other and that no organ should perform functions that belong to the other.

Montesquieu in the following words stated the Doctrine of Separation of Powers “There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”

This theory has had different application in France, U.S.A., England and India. In France, it resulted in the rejection of the power of courts to review the acts of the

legislature or the executive. The doctrine was never accepted in its strict sense in England. About U.S.A and India it will be further dealt in brief.

2.2.2 Importance Of The Doctrine

The doctrine of separation of power in its true sense is very rigid and this is one of the reasons of why it is not accepted by a large number of countries in the world. The main object as per Montesquieu in the Doctrine of separation of power is that there should be government of law rather than having will and whims of the official. Also another most important feature of the above said doctrine is that there should be independence of judiciary i.e. it should be free from the other organs of the state and if it is so then justice would be delivered properly. The judiciary is the scale through which one can measure the actual development of the state if the judiciary is not independent then it is the first step towards a tyrannical form of government i.e. power is concentrated in a single hand and if it is so then there is a cent percent chance of misuse of power. Hence the Doctrine of separation of power do plays a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as there is independence of judiciary. Also the importance of the above said doctrine can be traced back to as early as 1789 where the constituent Assembly of France in 1789 was of the view that “there would be nothing like constitution in the country where the doctrine of separation of power is not accepted”.

2.3 Doctrine Of Separation Of Powers In Indian Perspective

The constitution of India lays down a functional separation of the organs of the State. Article 50 lays down that State shall take steps to separate the judiciary from the executive. This is for the purpose of ensuring the independence of judiciary. Article 122 and 212 provides validity of proceedings in Parliament and the legislatures cannot be called into question in any Court. This ensures the separation and immunity of the legislatures from judicial intervention on the allegation of procedural irregularity.¹ Judicial conduct of a judge of the Supreme Court and the High Court's cannot be

¹ Pandit M S M Sharma v. Sri Krishna Sinha AIR 1960 SC 1186, Powers, Privileges and Immunities of State Legislatures, Re, AIR 1965 SC 745

discussed in the Parliament and the State Legislature, according to Article 121 and 211 of the Constitution. Articles 53 and 154 respectively, provide that the executive power of the Union and the State shall be vested with the President and the Governor and they enjoy immunity from civil and criminal liability.

2.3.1 Functional Overlap

The legislature besides exercising law making powers exercises judicial powers in cases of breach of its privilege, impeachment of the President and the removal of the judges. The executive may further affect the functioning of the judiciary by making appointments to the office of Chief Justice and other judges. Legislature exercising judicial powers in the case of amending a law declared ultra vires by the Court and revalidating it.¹ While discharging the function of disqualifying its members and impeachment of the judges, the legislature discharges the functions of the judiciary. Legislature can impose punishment for exceeding freedom of speech in the Parliament; this comes under the powers and privileges of the parliament. But while exercising such power it is always necessary that it should be in conformity with due process.² The heads of each governmental ministry is a member of the legislature, thus making the executive an integral part of the legislature. The council of ministers on whose advise the President and the Governor acts are elected members of the legislature. Legislative power that is being vested with the legislature in certain circumstances can be exercised by the executive.³ If the President or the Governor, when the legislature or is not in session and is satisfied that circumstances exist that necessitate immediate action may promulgate ordinance which has the same force of the an act made by the Parliament or the State legislature. The Constitution permits, through Article 118 and Article 208, the Legislature at the Centre and in the States respectively, the authority to make rules for regulating their respective procedure and conduct of business subject to the provisions of this Constitution. The executive also exercises law making power under delegated legislation. The tribunals and other quasi-judicial bodies, which are part of the executive

¹ L Chandra Kumar v. Union of India, (1995) 1 SCC 400.

² Keshav Singh v. Speaker, Legislative Assembly (1965) 1 SCR 413

³ Article 123, 213 of the Constitution of India

discharges judicial functions. Administrative tribunals which are part of the executive discharge judicial functions.¹ Higher administrative tribunals should always have a member of the judiciary.² The higher judiciary is conferred with the power of supervising the functioning of subordinate courts³. It also acts as a legislature while making laws regulating its conduct and rules regarding disposal of cases.

2.3.2 Means Of Check And Measure

The organs of the State while being separated also discharges each other's function. The powers and functions of each organ is subject to restrictions which would be the function of another organ. The laws made by the parliament and State legislatures are subject to judicial review. Any law that is contravention to Part III ; Fundamental Rights, would be declared ultra vires by the Supreme Court and High Courts in exercise of power of judicial review, as laid down in article 13 of the Constitution.

The supreme court has the power to declare void the laws passed by the legislature and the actions taken by the executive if they violate any provision of the constitution or the law passed by the legislature in case of executive actions. Even the power to amend the constitution by the parliament is subject to the scrutiny of the court. The court can declare any law void if it affects the basic structure of the Constitution.⁴

The constitution has invested the constitutional courts with the power to invalidate laws made by the Parliament and State Legislature transgressing constitutional limitations. Where an Act made by the legislature is invalidated by the courts on the ground of legislative incompetence, the legislature cannot enact a law declaring that the judgment of the Court shall not operate; it cannot overrule or annul the decision of the Court. But this does not mean that the legislature which is competent to legislate that law cannot re enact it. It is open to the legislature to alter the basis of the judgment. The new law or the amendment law so made can be challenged on other grounds but not on the ground that it seeks to in effectuate or circumvent the decision of the court. It necessary

¹ Shiv Kumar Chadha v. MCD, 1993 (3) SCC 161

² S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 125. Brahm Dutt v. Union of India, 2002 (5) SCC 431.

³ Article 235 of the Indian Constitution.

⁴ Keshavanada Bharati v. State of Kerala (1973) 4 SCC 225

that each organ functions within its well settled limits of authority. The check and balance mechanism would make sure that the actions of the each organ is within its well defined limits. The doctrine of ultra vires lies down that any law that is in contravention of Part III of the constitution is void and hence ultra vires.

The judicial review power of the higher judiciary under Article 32 and 226 empowers the Courts to check the constitutionality of every law made by the Parliament and the Legislatures. This is a check on the legislative act. Judicial review is also applicable to executive actions. The grounds on which a legislative or executive action can be challenged is the golden trilogy of Article 14, 19 and 21. Judicial review in India is based on the assumption that the Constitution is the supreme law of the land, and all governmental organs, which owe their origin to the Constitution and derive their powers from its provisions, must function within the frame work of the Constitution.¹

It is also necessary to state that the legislative power of the Parliament and the State legislature are laid down in Article 245. Article 254, along with VII Schedule any law which is repugnant to VII schedule will be void to that extent. The control of the executive is ensured by making it, accountable to the Parliament. The legislative power of the executive under ordinance is limited. There can be judicial review of President satisfaction of the necessity to promulgate an ordinance.² The supremacy in appointment of judges to the higher judiciary is with the Executive with the consultation of the Chief Justice, this is while ensuring the independence of judiciary.

“In our country, the “Constitution is supreme lex, the paramount law of the land and there is no authority, no department or branch of the State, which is above or beyond the Constitution or has powers unfettered and unrestricted by the Constitution. The Constitution has devised a structure of power relationship with checks and balances and limits are placed on the powers of every authority or instrumentality under the Constitution. Every organ of the State, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of

¹ V N Shukla, Constitution of India, Eastern Book Company, edn.10, p. A-52

² R C Cooper v. Union of India (1970) 1 SCC 248, A K Roy v. Union of India (1982) 1 SCC 271

such authority. Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution”¹

2.3.4 The Practice

The Constitutional provisions relating to separation of powers, as discussed above has in the actual practice been made flexible to benefit the supremacy of each organ, leading to a situation where in each organ has infringed into the functional sphere of the other. The judicial interference in the power of executive and the legislature in exercise of judicial review should always necessarily be with the constitutional bounds.²

The dispute regarding the election of the Prime Minister, the Court held that the when a constituent body declared that the election is not void, it was discharging a judicial function, is the first instance in which the position of doctrine separation of power was challenged and clarified. . The adjudication of a specific dispute is a judicial function, which cannot be exercised by the Parliament even by using the amending powers.³ Separation of power is a method of avoiding concentration of power in a group’s hand, making it difficult to abuse.

The appointment of the judges to the Supreme Court, according to Article 124(2), is to be made by the President in consultation with such of the judges of the Supreme Court and the High Court as the President may deem fit. The consultation with Chief Justice of India is mandatory in case of appointment of a judge other than the Chief Justice. This had created a balance of power in appointment of judges to the higher judiciary The Hon’ble Supreme Court has through a series of judicial interpretations have shifted the supremacy from the President to itself. The Hon’ble Court has created an extra- constitutional body called collegiums⁴, and vested with the power of appointment of judges. The Court has held that the word ‘consultation’ means concurrence and the opinion of the collegiums is binding on the President and the consultation is by the Chief

¹ Minerva Mills Ltd v. Union of India, (1980) 3 SCC 625

² M. P. Oil Extraction v State of M. P. AIR 1998 SC 145

³ Indira Gandhi Nehru v. Raj Narain AIR 1975 SC 2299

⁴ S P Gupta v. Union of India AIR 1982 SC 149

justice with other judges¹. It is also noteworthy that the provision for consultation with the judges of the High Courts has been conveniently ignored. As the position stands currently a collegiums consisting of the Chief Justice of India and four senior most judges of the Supreme Court and their opinion is binding on the President. In the recent issue of appointment of Judges the President had returned the opinion rendered by the collegiums for reconsideration, which was send back without any change being made. The appointment was made according to the 'concurrent opinion' of the collegiums.

The interference of judiciary in legislative matters was legislature is also seen in the issue of disqualification of members of Parliament on account of taking money for raising questions in the question hour and the subsequent intervention of the supreme court in the matter². The Court in the instant case held that legislature cannot claim immunity from judicial scrutiny in their internal proceedings, raising the question of the existence of Article 121 and 211 in the constitution, thus the Court has assumed the power of over viewing legislature as it is managed by the legislators. The Constitution permits, through Article 118 and Article 208, the Legislature at the Centre and in the States respectively, the authority to make rules for regulating their respective procedure and conduct of business "subject to the provisions of this Constitution". As the acts of the legislature was not in accordance with the provisions of the Constitution it can be subject to judicial review, was the stand taken by the Hon'ble Court in the instant case.

The Article 212 and 222 makes the legislatures supreme in its own sphere and any interference by the judiciary would be clear defiance of the separation of powers. The Supreme Court in the Jharkhand Assembly issue ordered the protem speaker to conduct a floor test and submit a video copy of the same. This case is different from the Meghalaya issue wherein the Court has made it clear that it is not over viewing the proceedings of the legislature, no officer of the legislature is subject to the jurisdiction of the Court. The order of the Court was not enforced because of the subsequent resignation of Shibu Soren. This also raises the question as who would be held liable for contempt of court; is it the speaker or the members of the legislature.

¹ Supreme Court Advocates on Record v. , In Re Presidential Reference, 1998

² Raja Ram Pal v. Hon'ble Speaker, Lok Sabha , (2007) 3 S.C.C. 184.

The Bihar Assembly was dissolved by a notification dated 24 May 2005, even before its first meeting on the ground that attempts are being made to cobble a majority by illegal means and lay claim to form the Government in the State and if these attempts continue, it would amount to tampering with constitutional provisions. This is an instance of the executive acting on the interests of the ruling political party. Article 356(1) empowers the President to assume charges of the State Government on grounds of failure of constitutional machinery and dissolve the Assembly. But this cannot be presumed to include the ground of dissolution on the ground of mal administration. The court in appropriate cases will not only be justified in preventing the holding of fresh elections but would be duty-bound to do so by granting suitable interim relief to make effective the constitutional remedy of judicial review and to prevent the overshadowing of the Constitution¹. The power under Article 256 is not to preserve the interest political party in power nor a weapon to strike at the political opponent. In the Bihar Assembly dissolution case the Supreme Court has held that the order for dissolution was unconstitutional.²

The Article 31B of the Constitution provides that any Act or regulation placed in IXth schedule shall be deemed to be void or ever to become void on the ground that it is inconsistent with the fundamental rights and any judgment, regulation or order of any Court shall have no effect, it only the power of the competent legislature to repeal or amend it and till then it shall continue in force. It is a constitutional device to place certain specific statutes beyond the attack on the ground that they infringe Part III of the Constitution.³ The decision of the Supreme Court in *I R Coelho's case*⁴ has laid down that all those Acts inserted in IX Schedule after 24 April 1973 would be subject to judicial review. The decision of the apex court is in the light of increasing number of repressive legislations being protected under this provision. But this judgment is an encroachment on the power of the legislature to repeal, amend the laws placed under the IX schedule.

In the matter of reservation to private educational institutions the Supreme Court through its judgment has laid down that the private educational institutions has

¹ S.R. Bommai v. Union of India (1994) 3 SCC 1

² Rameshwar Prasad v. Union of India AIR 2006 SC 980

³ Attorney General For India v. Amratlal Prajivandas (1994) 5 SCC 54

⁴ I. R. Coelho v. State of Tamil Nadu 2007 (2) SCC 1

been guarded against the reservation policy of the State. The Parliament brought out the ninety third constitutional amendments, 2005 and inserted clause (5) to Article 15 of the Constitution reservation would be available to socially and educationally backward class, scheduled caste and scheduled tribes in matters to admission to educational institutions including the private educational institutions. The minority educational institutions have been spared. The action of the legislature even though legitimate, raised certain eyebrows as to on whose interested they have acted. The Supreme Court has asked the government to provide with the data relating to the actual population of OBC's, so that their reservation quota may be fixed. In this regard it is to be asked as to whose functions the Hon'ble Supreme Court is trying to discharge.

Another incident of judicial over-activism is seen in setting aside of a remission granted by the then Andhra Pradesh Governor Sushil Kumar Shinde, to a convict belonging to the Congress party and whose wife happened to be a sitting MLA. The power to grant pardon under Article 72 and the 161 are at the absolute discretion of the executive head of the Union and the State in relation to any matter in which the executive power of the Union and the State respectively extends. The Hon'ble Supreme Court in its recent judgment has held that the Executive heads ought to give reasons for granting such pardons. The Governor has made his attempt to hold the Constitutional position clear by stating that it is the power of the executive to grant pardon. The Court has held that the power to grant pardon can no longer be said that prerogative power is ipso facto immune from judicial review. An undue exercise of this power is to be deplored.¹ Thus the judiciary has brought the power to grant pardon under judicial review. In this instant case of judicial interference on the executive power, the public at large can be satisfied that a decision of the executive head merely on narrow political grounds rather than on rule of law has been overturned.

¹ Epuru Sudhakar and Ors. v Government of Andhra Pradesh and Ors AIR 2006 SC 3385

CHAPTER 3

INTERNATIONAL PHENOMENA

3.1 International Law And The Independence And Impartiality Of The Judiciary

Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 .

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia , their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation, Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

3.1.1 Applicable International Law

All general universal and regional human rights instruments guarantee the right to a fair hearing in civil and criminal proceedings before an independent and impartial court or tribunal, and the purpose of this section is to analyze the meaning of the terms "independent" and "impartial" in the light of the case-law of the competent international monitoring organs. While these treaties as interpreted do not solve all the problems arising with particular regard to the notion of independence of the Judiciary,

They do provide a number of essential clarifications.

Of the most important treaties, the International Covenant on Civil and Political Rights states in its article 14(1) that "all persons shall be equal before the courts and tribunals" and further, that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" The Human Rights

Committee has unambiguously held that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception".¹ It is thus a right that is applicable in all circumstances and to all courts, whether ordinary or special.

Second, article 7(1) of the African Charter on Human and Peoples' Rights provides that "every individual shall have the right to have his cause heard", a right that comprises, in particular, "(b) the right to be presumed innocent until proved guilty by a competent court or tribunal", as well as "(d) the right to be tried within a reasonable time by an impartial court or tribunal".

Furthermore, according to article 26 of the Charter, the States parties "shall have the duty to guarantee the independence of the Courts". It is the view of the African Commission on Human and Peoples' Rights that article 7 "should be considered non derogable " since it provides "minimum protection to citizens".²

Third, article 8(1) of the American Convention on Human Rights provides that "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".

Lastly, article 6(1) of the European Convention on Human Rights specifies that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (emphasis added).

Although some countries may not yet have ratified or acceded to any of these human rights treaties, they are still bound by customary rules of international law, as well as by general principles of law, of which the principle of an independent and impartial judiciary is generally considered to form part. They are thus also bound by the fundamental

¹ Communication No. 263/1987, M. Gonzalez del Río v. Peru (Views adopted on 28 October 1992), in UN doc. GAOR, A/48/40 (Vol. II), p. 20, Para. 5.2;

² ACHPR, Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April - 7 May 2001, p. 3 of the text published on <http://www1.umn.edu/humanrts/africa/comcases/218-98.html>;

principles laid down in the Universal Declaration of Human Rights, which provides in its article 10 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".

3.2 Basic Principles on the Independence of the Judiciary, 1985

In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, which were subsequently unanimously endorsed by the General Assembly.¹ These principles can therefore be described as being declaratory of universally accepted views on this matter by the States Members of the United Nations, and they have become an important yardstick in assessing the independence of the Judiciary in the work of international monitoring organs and non-governmental organizations (NGOs).

These principles deal with the following subjects:

- (i) independence of the Judiciary;
- (ii) freedom of expression and association;
- (iii) qualifications, selection and training;
- (iv) conditions of service and tenure;
- (v) professional secrecy and immunity; and
- (vi) Discipline, suspension and removal. Without seeking to be in any sense exhaustive, the present chapter will deal with some of the significant issues relating to the independence and impartiality of the judiciary.

3.3 The Notions of Independence and Impartiality: Links and Basic Differences

The notions of "independence" and "impartiality" are closely linked, and in some instances the international control organs have dealt with them jointly. Yet each has its

¹ General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

specific meaning and requirements, which will be further explained in more detail below. Suffice it to indicate at this juncture that the concept of "independence" is an expression of the constitutional value of judicial independence and, as stated by the Canadian Supreme Court in the case of *Valiente v. The Queen*, in a passage that conveys well the general understanding of the notion of independence of the Judiciary not only under Canadian constitutional law but also under international human rights law, this notion "connotes not only a state of mind but also a status or relationship to others - particularly to the executive branch of government - that rests on objective conditions or guarantees".¹ This status or relationship of independence of the Judiciary "involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government".²

By contrast, the Supreme Court of Canada described the concept of judicial "impartiality" as referring to "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case".³ This view has also been confirmed at the international level, where, for instance, the Human Rights Committee has held that the notion of "impartiality" in article 14(1) "implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties".⁴ As to the European Court of Human Rights, it considers that the notion of impartiality contains both a subjective and an objective element: not only must the tribunal be impartial, in that "no member of the tribunal should hold any personal prejudice or bias", but it must also "be impartial from an objective viewpoint", in that "it must offer guarantees to exclude any legitimate doubt in this respect".⁵ The European Court thus adds to the more subjective mental element of bias the important aspect of availability of

¹ (1985) 2 S.C.R. 673, *Valiente v. The Queen*, to be found at http://www.lexum.umontreal.ca/csc-scc/en/pub/1985/vol2/html/1985scr2_0673.html.

² *Ibid.*,

³ *Ibid.*,

⁴ Communication No. 387/1989, *Arvo O. Karttunen v. Finland* (Views adopted on 23 October 1992), in UN doc. GAOR, A/48/40 (Vol. II), p. 120, para. 7.2.

⁵ Eur. Court HR, *Case of Dakaras v. Lithuania*, judgment of 10 October 2000, para. 30; for the text see the Court's web site: <http://echr.coe.int>.

guarantees.

3.4 The Notion of Institutional Independence

The notion of institutional independence means that the Judiciary has to be independent of the other branches of government, namely the Executive and Parliament. According to Principle 1 of the Basic Principles on the Independence of the Judiciary:

"The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."

Furthermore, according to Principle 7 of the Basic Principles,

"It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions."

In order to secure true independence of the Judiciary from the other two branches of government, it is necessary for this independence to be guaranteed, preferably by the Constitution; or, failing this, by other legal provisions.

3.4.1 Independence As To Administrative Matters

Although international law does not provide details as to how this institutional independence is to be realized in practice, it is clear that, as a minimum, the Judiciary must be able to handle its own administration and matters that concern its operation in general. This includes "the assignment of cases to judges within the court to which they belong", a matter which, as stated in Principle 14 of the Basic Principles, "is an internal matter of judicial administration".

3.4.2 Independence as to financial matters

As supported by Principle 7 of the Basic Principles, the Judiciary must further be granted sufficient funds to properly perform its functions. Without adequate funds, the

Judiciary will not only be unable to perform its functions efficiently, but may also become vulnerable to undue outside pressures and corruption. Moreover, there must logically be some kind of judicial involvement in the preparation of court budgets. However, when it comes to administrative and financial issues, independence may not always be total, given that the three branches of government, although in principle independent of each other, are also by nature in some respects dependent on each other, for instance with respect to the appropriation of resources. While this inherent tension is probably inevitable in a system based on the separation of powers, it is essential that in situations where, for instance, Parliament controls the budget of the Judiciary, this power is not used to undermine the efficient working of the latter.¹

3.4.3 Independence as to decision-making

Next, as follows from Principle 1 of the Basic Principles, the other branches of government, including "other institutions", have the duty "to respect and observe the independence of the judiciary". This means, more importantly, that the Executive, the Legislature, as well as other authorities, such as the police, prison, social and educational authorities, must respect and abide by the judgments and decisions of the Judiciary, even when they do not agree with them. Such respect for the judicial authority is indispensable for the maintenance of the rule of law, including respect for human rights standards, and all branches of Government and all State institutions have a duty to prevent any erosion of this independent decision-making authority of the Judiciary.

The condition of the Judiciary's independence as to decision-making is further supported by Principle 4 of the Basic Principles, according to which:

"There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in

¹ An Independent Judiciary, Report of the American Bar Association Commission on Separation of Powers and Judicial Independence, published on: <http://www.abanet.org/govaffairs/judiciary/report.html>.

accordance with the law."¹

It is not clear whether executive amnesties and pardons would be contrary to Principle 4, but Governments must in any event always exercise considerable care in resorting to such measures, so that any measures of clemency do not subvert the independent decision-making power of the Judiciary, thereby undermining the rule of law and true respect for human rights standards.

3.4.4 Jurisdictional Competence

According to Principle 3 of the Basic Principles, the independent decision-making power of the Judiciary also comprises "jurisdiction over all issues of a judicial nature and ... exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law".²

This rule of judicial autonomy in the determination of questions of competence is in fact well established at both national and international levels and can also be found, for instance, in article 36(6) of the Statute of the International Court of Justice, and, as regards the European Court of Human Rights, in article 32(2) of the European Convention on Human Rights.

3.5 The notion of individual independence

It is not only the Judiciary per se, as a branch of government, that must be independent of the Executive and Parliament; the individual judges, too, have a right to enjoy independence in carrying out their professional duties. This independence does not mean, of course, that the judges can decide cases on the basis of their own whims or preferences: it means, as will be shown below, that they have both a right and a duty to decide the cases before them according to the law, free from fear of personal criticism or reprisals of any

¹ Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges provides that "decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law" (Principle I.2.a.i.), and that "with the exception of decisions on amnesty, pardon or similar, the Government or the administration should not be able to take any decision which invalidates judicial decisions retroactively" (Principle I.2.a.iv.)

² Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe provides that "no organ other than the courts themselves should decide on its own competence, as defined by law" (Principle I.2.a.iii)

kind, even in situations where they are obliged to render judgments in difficult and sensitive cases. Unfortunately, judges are not always allowed to carry out their work in this spirit of true independence, but in many countries have to suffer undue pressure ranging from inappropriate personal criticism and transfer or dismissal to violent and even fatal attacks on their person.

The independence of the individual judge must be secured in a number of ways, the most important of which will be described below.

3.5.1 Appointment

International law does not provide any details as to how judges should be appointed, and the Basic Principles are neutral with regard to the appointment or election of judges. However, according to Principle 10 of the Basic Principles:

"Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory."

This principle means that, irrespective of the method of selection of judges, candidates' professional qualifications and their personal integrity must constitute the sole criteria for selection. Consequently, judges cannot lawfully be appointed or elected because of the political views they hold or because, for instance, they profess certain religious beliefs. Such appointments would seriously undermine the independence both of the individual judge and of the Judiciary as such, thereby also undermining public confidence in the administration of justice.

The Human Rights Committee has expressed concern "that in appearance as well as in fact" the Judiciary in the Sudan was "not truly independent, ... that judges can be subject

to pressure through the supervisory authority dominated by the Government, and that very few non-Muslims or women occupy judicial positions at all levels". It therefore recommended that "measures should be taken to improve the independence and technical competence of the judiciary, including the appointment of qualified judges from among women and members of minorities".¹ The Human Rights Committee has also recommended to Bolivia that "the nomination of judges be based on their competence and not their political affiliation".²

With regard to Zambia, the Human Rights Committee has expressed concern about "the proposals made by the Constitutional Review Committee in regard to the appointment of judges of the Supreme Court by the President after their retirement and the removal of Supreme Court judges by the President, subject only to ratification by the National Assembly without any safeguard or inquiry by an independent judicial tribunal". It concluded that such proposals were "incompatible with the independence of the judiciary and run counter to article 14 of the Covenant".³

Consequently, article 14 of the Covenant has not been complied with in cases where judges are appointed or dismissed by the President without these decisions having been taken in consultation with some independent legal authority, even where the President's decisions must be ratified by Parliament.

Likewise, as regards Slovakia the Committee has noted with concern that the rules in force "governing the appointment of judges by the Government with approval of Parliament could have a negative effect on the independence of the judiciary"; it recommended that "specific measures be adopted as a matter of priority guaranteeing the independence of the judiciary and protecting judges from any form of political influence, through the adoption of laws regulating the appointment, remuneration, tenure, dismissal and disciplining of members of the judiciary".⁴

With regard to the Republic of the Congo, the Committee expressed its

¹ UN doc. GAOR, A/53/40 (vol. I), para. 132.

² UN doc. GAOR, A/52/40 (vol. I), para. 224.

³ UN doc. GAOR, A/51/40, para. 202.

⁴ UN doc. GAOR, A/52/40 (vol. II), para. 379

"concern at the attacks on the independence of the judiciary in violation of" article 14(1), and drew attention to the fact that such independence was "limited owing to the lack of any independent mechanism responsible for the recruitment and discipline of judges, and to the many pressures and influences, including those of the executive branch, to which the judges [were] subjected".¹ It therefore recommended to the State party that it should "take the appropriate steps to ensure the independence of the judiciary, in particular by amending the rules concerning the composition and operation of the Supreme Council of Justice and its effective establishment".²

Appointments of judges must, in other words, in themselves constitute a strong factor for independence and cannot be left to the exclusive discretion of the Executive and Legislature.

3.5.2 Security of Tenure

As indicated above, unless judges have some long-term security of tenure, there is a serious risk that their independence will be compromised, since they may be more vulnerable to inappropriate influence in their decision-making. Principle 11 of the Basic Principles therefore provides that:

"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."

Principle 12 further specifies that

"Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."³

It would consequently be contrary to Principles 11 and 12 to appoint or elect judges with no guarantee of tenure at all or only a brief period of guaranteed term of office.⁴ It is by providing judges with a permanent mandate that their independence will

¹ .UN doc. GAOR, A/55/40 (vol. I), para. 279

² Ibid. para. 280.

³ Recommendation I.3 of Council of Europe Recommendation No. R (94) 12 is identical to principle 12.

⁴ The Special Reporter on the independence of judges and lawyers has held that while "fixed-term contracts may not be objectionable and not inconsistent with the principle of judicial independence, (to be

be maximized, as will public confidence in the Judiciary.

It follows that, in the view of the Human Rights Committee, the practice of executive recertification or review of judges is contrary to article 14(1) of the International Covenant on Civil and Political Rights.

3.5.3 Financial security

The international and regional treaties do not expressly deal with the question of financial security for the Judiciary and individual judges, but Principle 11 of the Basic Principles quoted above provides that judges shall have adequate remuneration and also pensions.

The question of fair and adequate remuneration is important since it may help attract qualified persons to the bench and may also make judges less likely to yield to the temptation of corruption and political or other undue influences. In some countries judges' salaries are protected against decreases, although pay increases may depend on the Executive and Legislature. Where the Executive and Legislature control the budgets of the Judiciary, there may be a potential threat to the latter's independence.

In the case of *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, the Canadian Supreme Court had to decide "whether and how the guarantee of judicial independence in s. 11(d) of the Canadian Charter of Rights and Freedoms restricts the manner by and extent to which provincial governments and legislatures can reduce the salaries of provincial court judges".¹ As part of its budget deficit reduction plan, the Province had enacted the Public Sector Pay Reduction Act whereby it reduced the salaries of Provincial Court judges and others paid from the public purse in the province. Following these pay reductions, numerous accused persons challenged the constitutionality of their proceedings in the Provincial Court, alleging that, as a result of the salary reductions, the court had lost its status as an independent and impartial tribunal.

continued) a (continued) term of five years is too short for security of tenure". In his view "a reasonable term would be 10 years"; UN doc. E/CN.4/2000/61/Add.1, Report on the Mission to Guatemala, para. 169(c).

¹(1997) 3 S.C.R. *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Judges)* at http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol3/html/1997scr3_0003.html

The Supreme Court concluded that the salary reductions "as part of an overall public economic measure were consistent with s. 11(d) of the Charter", as there was "no evidence that the reductions were introduced in order to influence or manipulate the judiciary".¹ What constituted a violation of judicial independence was, however, the refusal of the Manitoba Government to sign a joint recommendation to the Judicial Compensation Committee, "Unless the judges agreed to forgo their legal challenge "of the law whereby the salary reduction was imposed. The Court considered that the Government had thereby "placed economic pressure on the judges so that they would concede the constitutionality of the planned salary changes".² In its view, "the financial security component of judicial independence must include protection of judges' ability to challenge legislation implicating their own independence free from the reasonable perception that the government might penalize them financially for doing so".³

3.5.4 Promotion

Principle 13 of the Basic Principles provides that "promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience". Improper factors not linked to the professional merits of the judges concerned are thus not to be considered for purposes of promotion. Principle I.2.c. emphasizes that "all decisions concerning the selection and career of judges should be based on objective criteria" and that not only the selection of judges but also their career "should be based on merit, having regard to qualifications, integrity, ability and efficiency"; moreover, decisions regarding the career of judges should be independent of both the Government and the administration.⁴ Such improper factors might, for instance, include attitudes of discrimination based on gender, race or ethnicity.

It would thus appear clear that the Human Rights Committee considers that the term "independent" in article 14(1) of the Covenant requires that unethical professional behaviour be dealt with by an organ fully independent of government influence.

¹ Ibid.,

² Ibid.,

³ Ibid

⁴ Council of Europe Recommendation No. R (94) 12

3.5.5 Suspension and removal

The matter of discipline, suspension and removal of judges is also dealt with in Principles 17-20 of the United Nations Basic Principles, which read as follows:

“17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to decisions of the highest court and those of the legislature in impeachment or similar proceedings.”

It is noteworthy, however, that Principle 17 speaks only of "an appropriate procedure" and that Principle 20 recommends that decisions in disciplinary and other procedures "should be subject to an independent review" (emphasis added). It would thus appear that the interpretation of article 14(1) of the International Covenant on Civil and Political Rights by the Human Rights Committee goes further than the Basic Principles in this respect.

The notion of independence of the Judiciary also means that

- Individual judges must enjoy independence in the performance of their professional duties; individual judges have a right and a duty to decide cases before them according to law, free from outside interference including the threat of reprisals and personal criticism;

- Individual judges must be appointed or elected exclusively on the basis of their professional qualifications and personal integrity;
- Individual judges must enjoy long-term security of tenure;
- Individual judges must be adequately remunerated;
- The promotion of individual judges must be based on objective factors;
- The question of accountability of individual judges for unethical professional behavior must be dealt with by a fully independent and impartial organ ensuring due process of law.

Summing up the international Principles on Independence of judiciary

(i) The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

(ii) The judiciary shall decide matters before them 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.

(iii) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

(iv) There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

(v) Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established

procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

(vi) 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.

(vii) It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

(viii) In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, 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.

(ix) Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

(x) Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

(xi) The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

(xii) Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

(xiii) Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

(xiv) The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

(xv) The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

(xvi) Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

(xvii) A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

(xviii) Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

(xix) All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

(xx) Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

CHAPTER 4

INDEPENDENCE OF JUDICIARY: An INDIAN PERERSPECTIVE

4.1 Historical Background

4.1.1 Before Independence

During British period, especially during the East India Company's rule in India, the judiciary was subservient to the executive. The Company gave lesser importance to the judicial independence, fair justice and rule of law. It was interested in the expansion of its trade and territorial possession and it was in favour of protecting its interest even at the cost of justice. If at any time a separate judicial body was established that was put under the thumb of the executive. The voice of the judicial independence was suppressed without least hesitation.

4.1.2 Position of Judiciary in the Settlements of the Company before 1726:

Before 1726 the administration of justice in the settlements of the East India Company was executive and judiciary. The executive had power to appoint and remove judges. In short, the judiciary was under the control of the executive. The Agent or Governor-in-Council of a factor of the East India Company had both executive and judicial powers.¹

In Madras also the whole judicial administration was under the complete control of the executive

An attempt to separate the judiciary from the executive was made in 1686, when the Court of Admiralty was established in Madras under the Charter of 1683. An expert in civil law was to be the Judge-Advocate (i.e., the Chief Judge) of this Court. Under the Charter of 1683 the Court of Admiralty was to decide only mercantile and maritime cases but in practice it used to decide civil and criminal cases also. Thus, for the first time the executive gave up its judicial function and an expert in law was associated to the judicial body.

The condition 'of the judicial administration in Bombay was' not much improved. Aungier made serious attempt to raise the status of the judiciary. However, the separation between the executive and the judiciary could not be maintained. So long as

¹ See the Charters of 1600 and 1661

Aungier was Governor, the judiciary was paid much respect but after him the later Governors could not follow the same tradition and considered the judiciary subservient to the executive.

The judicial administration in Calcutta was also executive ridden. The Collector cases of the native inhabitants of the Company's Zamindari. The Collector was used to be a member of the Governor's Council. The death sentence awarded by the Collector was to be confirmed by the Governor and Council. The Governor and Council were to hear appeals from the Collectors Court. The serious civil and criminal cases of the Englishmen were to be decided by the Governor and Council. Thus, the Collector and Governor-in-Council were to exercise all judicial and executive powers.

Thus, the judicial administration in the Company's settlements before 1726 was not of high order. The Company gave lesser importance to judicial independence, fair justice and rule of law. There was no separation between the executive and judiciary. If at any time a separate judicial body was established that was put under the thumb of the executive. The voice of the judicial independence was suppressed without least hesitation. Whenever an attempt was made to establish an independent court, it was frustrated by the united efforts of the Governor-in-Council and the other authorities of the Company.

4.1.3 Position of Judiciary after 1726

The Charter of 1726 made a provision for the establishment of a Mayor's Court in each Presidency Town. The Mayor and Alderman of the Corporation of the Presidency Town were to constitute, the Mayor's Court established at that town. The Mayor or Senior Alderman with two other Aldermen was to constitute quorum of the Court. The Mayor's Court was to be the Court of Records. It was empowered to hear and try all civil suit pertaining to the persons living in the Presidency Town and working in the Company's subordinate factories. Thus, the Charter of 1726 conferred on the Mayor's Court jurisdiction with regard to civil matters arising within the Presidency Town, and in subordinate factories. Thus, the Charter of 1726 conferred on the Mayor's Court

jurisdiction -with regard to civil matters arising with the Presidency Town and its subordinate factories.

The Mayor's Court was also given testamentary jurisdiction. It was empowered to issue letters of the administration to the legal heir of the deceased person, failing him, to his principal creditor and failing him, to any other person deemed proper by the Mayor's Court for this purpose. It was also empowered to grant probates of wills of the deceased persons. The Court was given- power to punish persons found guilty of its contempt.

Under the Charter of 1726 the Governor and five senior members of the Council were to be Justice of the Peace and they were also to exercise the criminal jurisdiction. They had power to arrest and punish persons for petty criminal offences.

Before 1726 there was no uniform judicial system for Company's settlement in India. The Charter of 1726, for the first time, made provision for the introduction of a uniform judicial system in all the three Presidency Towns, Bombay, Calcutta and Madras. The Charter, for the first time, introduced royal Courts in India. The Mayor's Courts to be established under the Charter were to derive their authority from the British Crown and not from the East India Company and thus they were to be Brief Crown's Courts and not the Company's Courts. Thus, the Charter intended to introduce such Courts in India as having status equivalent to that of the Court in England.

Under this Charter an attempt was made to make the judiciary (i.e., the Mayor's Courts) independent of the executive control. The judges of the Mayor's Courts were not to be appointed by the Governor and Council. The Governor and Council could dismiss an Alderman on reasonable cause being shown against him, but the dismissal order could be challenged by the dismissed Alderman in the Privy Council in England.

The Charter failed to maintain complete separation between the executive and the judiciary. The executive (the Governor-in-Council) was fully competent to remove any Alderman (a judge of the Mayor's Court) on reasonable cause being shown against him. No doubt, the dismissal order could be challenged by the dismissed Alderman in the Privy Council England but in practice this limitation on the

dismissal powers of the Governor-in-Council was nominal. Besides, the executive (i.e., the Governor-in-Council) was given wide judicial powers. The Governor and five senior J members of the Council were to constitute Justice of the Peace 'i and they were to exercise the criminal jurisdiction. Thus, the executive was still predominant.

The conflict between the Mayor's Courts and Governor, and Council created much confusion and chaos in the settlement. On account of it the Company requested the British Crown to issue a new Charter so as to introduce suitable amendment in the Charter of 1726. In 1753, a Charter known as the Charter of 1753 was issued by British Crown.

In short, under the Charter of 1726 the appointment of the Mayor and Aldermen was not in the hands the Government and Council (the executive government of the place) but under the Charter of 1753 the power of appointment the Mayor and Aldermen was given to the Governor and Council. The power of removal of the Alderman was already vested in the Governor and Council. As a result, the Charter of 1753 made the judiciary subservient to the executive. Bolt appears to be right in his statement that so long as the Mayor's Court had the powers of electing their own members to fill up all vacancies, it was a great degree independent, but when the right of electing Aldermen was transferred from their own body to the Governor and Council who thereby had unconstitutional powers of making and unmaking of the judges, the Court lost its independence.¹ The Mayor's Courts became the branches of the Company's executive government. In short, so far as the judicial independence is concerned the Charter of 1753 was much inferior to that of 1726.² The Governor and Council were to hear appeals from the Mayor's Courts and they were to decide criminal cases also.

However, the establishment of these court should be appreciated for making a good beginning of the establishment of a uniform judicial system in the (Company's settlements on the basis of English Law and procedure and thereby laying the foundation for the establishment of the improved courts in future.³ In 1770, Bolt made a significant attempt to make the Mayor's Courts independent. He suggested that the Company's

¹ Love, Vestiges of Old Madaras, Vol III, p. 440

² Cf. Dr. M.P. Jain, Indian Legal History, p. 68

³ Fawcett. Op, cit. p. 217

powers of obstructing or interfering with the due course of justice should be taken away and the Mayor's Court should be independent of the Governor and the Council and a Court of Appeals should be established therefore and this Court of Appeals must be independent of the Governor and the Council or any other powers in India.¹

In 1774 the Calcutta Mayor's Courts was replaced by the Supreme Court. In 1798 the Mayor's Court of Bombay and Madras were replaced by the Recorder's Courts. The Regulating Act empowered the British Crown to establish a Supreme Court at Calcutta by issuing a Charter. The British Crown issued a Charter in 1774 establishing the Supreme Court of Judicature at Calcutta. The Charter of 1774 superseded the provisions of the Charter of 1753 and resulted in the abolition of the Mayor's Court at Calcutta.

The Charter of 1774 made provisions for the appointment and removal of the judges as well as for the jurisdiction, powers and functions of the Court on the basis of and in accordance with the Regulating Act, 1773. The Supreme Court established under the Charter of 1774 consisted a Chief Justice and three Puisne Judges. Only those persons who were barristers of not less than 5 years standing could be appointed by the British Crown and they were to hold office during the pleasure of the Crown. The Supreme Court was a Court of record. It was conferred on civil, criminal, admiralty and ecclesiastical jurisdiction.

The Court of Collector, Quarter Sessions, Court of Requests, Sheriffs, etc. were put under its control and supervision and for this purpose it was also authorised to issue writs of Certiorari, mandamus, error or procedendo to these Courts.

However, it is to be noted that the Supreme Court was not empowered to try the Governor-General and members of the Council for any offence except treason or felony.

The conflict between the Supreme Council and the Supreme Court reached to a very serious stage. The British Parliament appointed a Parliamentary Committee to make inquiries in the matter and prepare a report. The Committee presented report on the

¹ Bolt. Op. cit. p. 224

conflict between the Supreme Councils and the Supreme Court in 1781. On the basis of this report the British Parliament passed an Act' in 1781. This Act is known as the Act of Settlement, 1781.

The analysis of the provisions of the Act makes it clear that the Act was substantially in favour of the Governor-General and Council and against the Supreme Court. The Governor-General-in-Council was made supreme and arbitrary. The Britishers were more interested in the acquisition of territories in India and therefore they made the executive (i.e the Governor-General-in-Council) strong and supreme and did not allow the Supreme Court to introduce rule of law and independent judiciary in India. The idea of the judicial control of the executive was thus frustrated and the executive was sent beyond the judicial control.

4.1.4 Indian High Courts Act, 1861

In 1861 the Indian High Courts Act was passed by the British Parliament. The main object of the Act was to abolish the Supreme Courts and the Sadar Adalats (i.e., Sadar Diwani Adalat and Sadar Nizamat Adalat) and in their place to establish High Courts in the Presidency Towns Calcutta, Bombay and Madras. The Act empowered the British Crown to establish one High Court, in each Presidency Town. Thus, the Act did not by itself establish the High Courts, but only authorised the British Crown to establish the High Courts. The jurisdiction of the Supreme Courts and the Sadar Adalats were vested to the High Court. The dual system of the Courts was abolished and a unified judicial system was established. This step was necessary in order to avoid the conflict between the Supreme Court and the Sadar Adalats. The judges of the High Courts were to hold their office during the pleasure of Her Majesty.

It was provided in the Act that each High Court would exercise all such Civil, Criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction (original and appellate) and all such powers and authority in relation to the administration of justice in the Presidency for which it was; established, as the British Crown might grant and direct by such Letters Patent. It was made clear that by Letters Patent the; British Crown could impose direction and limitations as to the exercise

of original, Civil and Criminal jurisdiction, beyond the limits of the Presidency Towns. Each High Court was to exercise the appellate jurisdiction of the Sadar Adalats and original jurisdiction of the Supreme Courts.

The High Courts were to consist of both these types of Judges and thus the Act made it possible to unite the judges having thorough knowledge of the English Law with the non-lawyers judges having thorough knowledge of the native laws and customs. This arrangement was more suitable to the Indian conditions.¹

The High Court was more effective appellate Court and also enjoyed powers of superintendence over the lower courts and I therefore the judicial administration was improved to a greater extent by the establishment of the High Court.

4.1.5 The Government Of India Act, 1915 And The Government Of India Act, 1935.

The Government of India Act, 1915 repealed all the existing High Courts. It introduced several changes in the constitution, jurisdiction and the law to be applied by these Courts.

The Government of India Act, 1915 was repealed by the Government of India Act, 1935. Under the Act of 1935 every High Court was to be a Court of Record. It was to consist of a Chief Justice and such other judges as were appointed by His Majesty from time to time, however the number of the judges so appointed together with any additional judges appointed by the Governor-General was not to exceed such maximum number as His Majesty-in-Council might fix in relation to that Court. Every judge of the High Court was to be appointed by His Majesty and was to hold office until the attainment of the age of sixty however; a judge might resign or might be removed from his office by His Majesty on the ground of misbehaviour or infirmity of mind or body on the recommendations of the Privy Council.

¹ Keith Constitutional History of India, pp. 203-204 cited by Kailsh Rai History of Courts Legislature and Legal Profession in India pp199

Under the Act it was made clear that salaries and pensions. of the judges of the High Courts would be fixed by His Majesty on their appointment, but after appointment being made they cannot be changed to the disadvantage of any of such judge.

The Government of India Act, 1935 made provision for the establishment of a Federal Court.¹

Judges were to be appointed by the British Crown. They were to hold office up to the age of sixty-five years. A judge could be removed from the office on the ground of misbehavior or of mental or bodily infirmity in case the Privy Council, on reference by the British Crown, so recommended. The Federal Court was given exclusive original jurisdiction in the case of dispute between any two or more of the following parties:— The Federation, any of the provinces or any of the

Federated States if the dispute involved any question of law or' fact on which the existence or extent of a legal right depended.

The appeals from the High Courts in the Federated States were also allowed to the Federal Court.

The Governor-General was empowered to refer any point of law to the Federal Court for its opinion. The Federal Court was to pronounce it's on such in open Court.

4.2 Judicial Independence And The Constitution-Making

The Superior Courts like the other branches of the government belong to the Indian people; they are the repository of the confidence of the Indian people. "An independent judiciary need not be a mysterious area of government or appear to be an occult priesthood or remain a remote, austere marble temple housing ... seldom seen jurists who periodically issue pronouncements on the law of the land".² Be that as it may, there is an unhappily wide consensus that excellent judges are not in long supply, and as

¹ Section 200

² Vide Chief Justice U.S. Supreme Court Justice Warren E. Burger as quoted in Frank M. Coffin, View from the Bench, 1987, p. 27

such we fail too regularly to people the bench ideally. However, the ideal is not itself very uncertain. The judge ought to be neutral, detached, kindly benign, reasonably learned in law, firm but fair, wise, knowledgeable about human behaviour, and somewhat super human. The qualities in the terms of personality of the judge may be succinctly stated as his eight virtues (because none would like to see the reverse of it in a judge): independence, courtesy and patience, dignity (but not excluding humour), open mindedness, impartiality, thoroughness, and decisiveness (as indecisiveness causes unpleasantness). However, there may be variations, but, a central core of agreed standards defines the judge as the neutral, impartial, calm, non-contentious umpire standing between the adversary game. The bedrock premise is that the adversary contest is the ideal way to achieve truth and a just result rested upon the truth. It may be submitted that the judge has a more robust part. The essence of the judicial role is impartiality and detachment, both felt and exhibited.

In the backdrop of this, Sardar Vallabhbhai Patel while explaining the manner of appointing the superior judges a *multo fortiori* stated "the judiciary should be above suspicion and should be above party influence"¹ so that none may have the complaint to say that "higher courts are right because they are superior, not superior because they are right".² The subject of the independence of the judiciary was close to the minds of the members of the Constituent Assembly inasmuch as the issues of the powers of the superior courts and the judicial review. They further believed that the independence of the superior courts was essential in free India with a federal Constitution and it should not be endangered. In answer to a question concerning the independence of the superior courts, they expressed that the judiciary must be above reproach, free from coercion external as well as internal, and free from political influences "if the beacon of the judiciary was to remain bright".³

An independent judiciary should not be conceived as a dogma or ritual. To keep the judicial system pure and independent, the superior court has been empowered with wide original, extra-ordinary appellate jurisdiction in federal matters, in fundamental

¹ C.A.D. VI. 2 579.

² Frank M. Coffio, *op cit*

³ Granville Austin, *The Indian Constitution: The Cornerstone of a Nation*, 1966. Pp. 164.65

rights cases, in civil and criminal cases, thus making it interpreter and guardian of the Constitution, supreme guarantor of the Rights as well as a bastion of rights and of justice.¹ Ayyar J believed:

While there can be no two opinions on the need for the maintenance of judicial independence, both for the safeguarding of individual liberty and the proper working of the Constitution, it is also necessary to keep in view one important principle. The doctrine of independence is not to be raised to the level of a dogma so as to enable the Judiciary to function as a kind of super-Legislative or super Executive. The Judiciary is there to interpret the Constitution or adjudicate, upon rights between the parties concerned. The Judiciary as much as the Legislature and the Executive, is depending for its proper functioning upon the co-operation of the other two.²

An independent judiciary is inevitable and "the State shall take steps to separate the Judiciary from the Executive in the public services of the State".³ It seems that the members of the Constituent Assembly have been careful to keep the politics out of the corridors of the courts as well as to keep the Judiciary out of politics. A closer look at the constitutional provisions shows that the Constitution-makers were conscientious of this aspect and as such provided non-political mechanism for choosing the judges for the superior courts. In this context, it seems that the Constituent Assembly must have been influenced by the findings of the Sapru Committee Report which appeared to have been prompted by the desire to insulate the courts from attempted coercion by forces within or outside the government.⁴ The Sapru Committee Report suggested: "The justices of the Supreme Court and the High Courts should be appointed by the head of the State in consultation with the Chief Justice of the Supreme Court and, in the case of High Court Judges, in consultation additionally with the High Court Chief Justice and, the head of the Unit concerned. The justices of all courts could be removed on grounds of misbehaviour or infirmity of mind by the head of the State, with the concurrence of the Supreme Court in the case of High Court justices".⁵ Besides, Constituent Assembly's Ad Hoc Committee

¹ Ibid. Pp. 169,173,175

² C.A.D. XI, 9,837

³ Article 50 of the Constitution of India

⁴ Supra Note 134 at p.176

⁵ Sapru Committee Report Clause 13. Pp. xi-xii and Ibid.

in its Report favoured the system of a Judicial Commission in the matter of choosing justices -for the superior courts and recommended accordingly that it would not "be expedient to leave the appointment of Supreme Court judges to the unfettered discretion of the President of the Union . . . The President should nominate judges with the concurrence of the Chief Justice of India, and this nomination would then be subject to confirmation by a panel composed of High Court Chief Justices, some members of both Houses of Central legislature, and the law officers of the Union. The panel should submit three names to the President who would choose one of them with the concurrence of the Chief Justice of India".¹ This shows that Constituent Assembly's Ad Hoc Committee was in favour of the functioning of the institutions of the government in a federal polity under the federal Constitution. It is; however, pertinent to note that the Constitution Draft Committee did not weigh the suggestions of the Ad Hoc Committee rather it accepted the method of selection and appointment of justices of superior courts as presented by Sapru Committee, viz., Justices be appointed by the President of India in consultation with the Chief Justice of India and such other Supreme Court justices as might be necessary.

However, there was a reaction to this judicial provision of the Draft Constitution from Chief Justice H.J. Kania who confined his reaction to the independence of the judiciary and, thus, suggested: The Draft Constitution should cover the relationship of the Executive with the Judiciary so that the courts would be free from suspicion of Executive control. When recommending to the President a person for a judgeship on a High Court, the Governor and the High Court Chief Justice should be in direct contact so that the State Home Ministry not be an intermediary in the proceedings, otherwise, local politics might affect the selection of judges.²

A closer overview of the deliberations at different level shows that there was no basic difference between the Draft Constitution and the opinion of the Chief Justice as well as those of the Sapru Committee Report and the Ad Hoc Committee Report on the issue of judicial independence. The fundamental difference seemed to be concerning the modalities in the selection and appointment of justices of the superior courts. For instance, the Ad Hoc Committee Report suggested for a Judicial Commission. Be that as

¹ Ad Hoc Committee Report, paras 14,15,16, pp, 65-66

² Chief Justice Kania's letter to the Prime Minister of India Pandit Jawaharlal Nehru

it may, the Constituent Assembly approved the judicial provisions of the Draft Constitution which have been mentioned earlier with the aim to have "just ends by just means"¹ necessary to have "a first-rate Judiciary in India" "preserving the independence of the Judiciary".

4.3 The Constitution Of India And Independence Of Judiciary

In our Constitution there is no express vesting of Judicial Power in Courts, such as one finds for example in the case of the United States of America or Australia. In the two instances there were no Federal Courts apart from the Constitution. Unless such Courts were created and invested with power by the Constitution they had no existence or power.

In our country the position was different. The change of sovereignty did not in itself produce any apparent change in the Constitution or the functions of the Judicature. So far as the Courts were concerned their work continued unaffected by the Indian Constitution. The Judicial System had been established if not earlier, by the Indian High Courts Act. 1861, by the Letters Patent creating the High Courts, and by other enactments dealing with subordinate Courts

The Indian Constitution specifically deals with the judicial system under Article 225 of the Constitution. Subject to the provisions of the Constitution and to the provisions of any law of the appropriate legislature made by virtue of power conferred on that legislature, by the Constitution, the jurisdiction of, and the law administered in any existing High Court and the respective power of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of the Court and to regulate the sittings of the Court and of members thereof sitting alone or in a Division Courts, shall be the same as immediately before the commencement of the Constitution²

¹ K.L.Bhatia, *Judicial Review and judicial Activism: A Comparative Study Between India and Germany from an Indian Perspective*, 1997, pp. 139, 172.

² Constitutions of India, Article 215

The Supreme Court is established by the Constitution and its powers and jurisdiction have been clearly defined.¹

The importance of securing the independence of Judges and of maintaining the dividing line between the judiciary and the executive were clearly appreciated by those who framed the Constitution. These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution, which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the Legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining where it had been for about a century, in the hands of the judicature. It is not consistent with any intention that hence forth it should pass to or be shared by, the executive or the legislature.²

Independence of the judiciary cannot be secured by vesting the power of appointment of superior judges in the Executive. The independence of judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the higher judiciary. 'Independence of Judiciary' is the basic feature of our Constitution. The framers of the Constitution could have never intended to give this power to the Executive. Even otherwise the Government—Central or the State—are parties before the Courts in large number of cases. The Union Executive has vital interests in various important matters which come for adjudication before the Apex Court. The Executive—in one form or the other—is the largest single litigant before the Courts. In this view of the matter, the judiciary being the mediator between the people and the Executive, the framers of the Constitution could not have left the final authority to appoint the Judges of the Supreme Court and of the High Courts in the hands of the Executive.³

The Constitution of India which we have given to ourselves is the fundamental law of the land. The judiciary, under the Constitution, is designed to be an intermediary

¹ Constitution of India, Article 32.

² *Liyang v. Reginnm*, (1966) 1 All ER 650 (658).

³ *Supreme Court Advocates-on-Record Association v. Union of India*, AIR 1994 SC 268 (400)

body between the people on the one side and the Executive on the other. It belongs to the judiciary to ascertain the meaning of the constitutional provisions and the laws enacted by the Legislature. In order to keep the Executive/Legislature within the limits assigned to their authority under the Constitution, the interpretation of laws is the proper and peculiar province of the judiciary. Constitution is the "will" of the people whereas the statutory laws are the creation of the legislators who are the elected representatives of the people. Where the will of the legislators declared in the statutes stands in opposition to that of the people declared in the Constitution the will of the people must prevail. The Constitution of India provides for an elected President. House of People is elected. The State Legislators are elected. Supreme Court Judges are not elected, they are appointed under the Constitution. So are other High Court Judges. Yet the Constitution gives unelected Judges a power called judicial review under which they may nullify unconstitutional acts of the Executive and of the elected representatives of the people assembled in the Parliament and the State Legislatures. This conclusion does not suppose that the judiciary is superior to the Legislature. It only supposes that the power of the people embodied in the Constitution is superior to both.

The role of the judiciary under the Constitution is a pious trust reposed by the people. The Constitution and the democratic polity there under shall not survive, the day judiciary fails to justify the said trust. If the judiciary fails, the Constitution fails and the people might opt, for some other alternative.

In view of the role of the judiciary in the context of the Constitution it is fallacious to say that the Legislators alone are answerable to the people regarding the functioning of the judiciary. It is rather the judiciary which screens the functioning of the Executive and the Legislatures through the process of judicial review. This Court, therefore, was not justified when, in S.I³. Gupta's ' case it gave primacy to the Executive on the ground that the Executive through the Legislators was answerable to the people regarding the functioning of the judiciary.

Independence of judiciary is the sine qua non of democracy. So long as the judiciary remains truly distinct from both the Legislature and the Executive, the general power of the people can never be endangered from any quarter. Montesquieu in his book

Spirit of Laws observed "there is no liberty, if the power of judging be not separated from the legislative and the Executive powers". The framers of the Constitution made it known in an emphatic voice that separation of judiciary from Executive, which is the life line of 'independent judiciary'¹, is a basic feature of the Constitution. Dr. B.R. Ambedkar in his speech in the Constituent Assembly on June 7, 1949 observed as under:

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

4.3.1 Relationship between Supreme Court and the High Courts

Under the Constitutional Scheme as framed for the Judiciary, the Supreme Court and the High Courts, both are Courts of Record. The High Court is not a court "subordinate" to the Supreme Court. In a way the canvas of judicial powers vesting in the High Court is wider inasmuch as it has jurisdiction to issue all prerogative writs conferred by Art. 226 of the Constitution and "for any other purpose". While the original jurisdiction of the Supreme Court to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with some other matters such as Presidential election or inter-state disputes which the Constitution does not envisage being heard and determined by High Courts. The High Court exercises power of superintendence under Art. 227 of the Constitution over all subordinate courts and tribunals; the Supreme Court has not been conferred with any power of superintendence. If the Supreme Court and High Courts both were to be thought of as brothers in the administration of justice, the High Court has larger jurisdiction, but the Supreme Court still remains the elder brother. In a unified hierarchical judicial system which India has accepted under its Constitution, vertically the Supreme Court is placed over the High Courts.

The Union Judiciary and State Judiciary are undoubtedly independent of each other except in a law areas such as the appellate jurisdiction conferred on the Supreme Court in all civil, and criminal matters as the ultimate court of appeal. It is the final

¹ S. P. Gupta v. President of India, AIR 1982 SC 149.

interpretation of law. To the extent of the exercise of appellate jurisdiction, certain Supreme Court exercises a superior jurisdiction and hence a superior court than the High Court, though both the courts are Courts of Record. Under Art. 139-A, the Supreme Court may transfer any case pending before one High Court to another High Court or may withdraw the case to itself. Under Art. 141, the law declared by the Supreme Court shall be binding on all courts including the High Courts within the territory of India. Under Art. 144, all authorities, civil and judicial, in the territory of India which include the High Courts as well, shall act in aid of the Supreme Court.¹

The Supreme Court has neither administrative control over the High Court nor power on the judicial side to enquire into the misbehaviour of a Chief Justice or a Judge of High Court. But the Chief Justice of India being the head of judiciary in India has a big role to play, his opinion having primacy and importance. In the case of any prosecution under the Prevention of Corruption Act even against a retired Chief Justice of a High Court, sanction has to be obtained from the President, who has to act after consultation with the Chief Justice of India.² It is the prerogative of the Chief Justices of the High Court to constitute a Bench of his choice and Supreme Court will not interfere with the prerogative and it is an administrative function performed by the Chief Justice of the High Court.³

Normally the Supreme Court will not issue any direction to the High Court in regard to judicial administration. But when the High Court is facing a crisis in judicial administration virtually coming to a grinding halt, Supreme Court gave direction while emphasizing that it is not having any supervisory control over the administration of the High Court.⁴

Hence, it is necessary to examine in detail, the ingredients and limitations of this doctrine as embodied in the Indian Constitution.

¹ Tirupali Ittaji Developers (P.) Ltd. v. State of B.U. Cir. AIR 2004 SC 2351

² K. Veerasami v. Union of India, (1991) 3 SCC 655.

³ Rajiv Ranjan Singh (Lalan) v. Union of India, (2005) 11 SCC 312.

⁴ Hon'ble Chief Justice of High Court, M.P. v. Mohan Kumar, 199-1 (Supp-2) SCC (.02).

Unlike the US Constitution, the Constitution of India does not expressly vest the judicial power in the Supreme Court and other courts division of the three main functions of government recognized by the Constitution. Judicial power in the sense of the judicial power of the State vests in the judiciary.¹ It is now well accepted constitutional proposition that even though the Constitution does not provide for a clear cut separation of powers as is done in US Constitution, the judicial power cannot be passed over to or shared with the executive and the legislature.²

4.3.2 Immunity from outside influence

It is a general principle of the highest importance to the proper administration of justice that Judges of Courts of superior or general jurisdiction are not liable to civil action's for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.³

As slated at the outset, the first ingredient of judicial independence is that a Judge should be free to arrive at his judicial decision objectively, and without any⁴ interference, pressure or influence from any outside agency.

Few doctrines are more solidly established than the immunity of Judges from liability for damages for acts committed within their judicial jurisdiction. This immunity applies even when the Judge is accused of acting malicious and corruptly, and "it is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences. It is a general principle of the highest importance, to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own conviction, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the Judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which

¹ L Chandra Kumar v. Union of India, AIR 1997 SC II 25

² A.K. Roy v. Union of India, AIR 1982 SC 710

³ Bradley v. Fisher, 20 Led 646 (650).

⁴ R. v. Beciurexiird, (1987) LRC (Const) 180 (188 IT.) Can (SC).

no judiciary can be either respectable or useful.¹ The Court of Appeals correctly recognised that the necessary inquiry in determining whether a defendant Judge i.e. immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him. Because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction,"² The scope of Judges Jurisdiction must be construed broadly where the issue is the immunity of the Judge. A Judge will not be deprived of immunity because the action he took was in error, was done maliciously or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdictions'.³

Under the Indian Constitution, it means, in short, that the judge must be allowed to work under a condition which enables him to keep his oath of office (Forms IV and VIII of the Third Schedule to the Constitution)—"to uphold the Constitution and the laws" "without fear or favour". How many people realise that this is not a mere homily addressed to a judge but constitutes a corresponding right of every litigant that his judge must be independent and impartial⁴ independence and impartiality, in fact, are intertwined and it is futile to expect an impartial judgment from a judge who is not immune from extraneous influences of any kind whatever. "Impartiality", as one of America's best Judges once observed: "is not a technical conception. It is a state of mind."⁵

"I have always thought from my earliest youth till now", said the great Chief Justice Marshall "that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant a corrupt or a dependent judiciary." ⁶

In a democratic country, all government officials, high or low, are public servants, which they more often than not forget; but judges are public servants par

¹ Bradley v. Fisher, 20 Led 646 (649).

² Ibid.

³ Ibid

⁴ An. 10 of the universal Declaration of Human Rights emphasises the right of everyone to a fair and public hearing by 'an independent and impartial tribunal'.

⁵ U.S. v. HW, (1936) 299 US 123 (145), Illiims, C.J.

⁶ Cited by Justice VAN DEVANTER in Evans v. Gore, 64 L Ed 887.

excellence.¹ The reason I shall explain, by quoting from the Constitution adopted by the State of Massachusetts in the year 1780:

"It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independents as the lot of humanity will, admit. "²

In fact, this principle was borrowed by the Americans from the guarantee in Cl. 40 of the Magna Caria (1215) that "to none will we sell, to none will we deny, to none will we delay right or justice".

Such a condition does not postulate merely an absence of interference from any external agency, but a subjective feeling by a judge that he is there to administer the law, including the fundamental law, and "not the will of the Executive"³ If a judge comes into such frequent contacts with members of the Executive as gives the least justification to a wrong-headed critic to use the slang 'hobnobbing', it is likely to produce what LORD ATKIN lamented of, in his memorable dissent in *Liversidge's case*⁴ namely, Judge who is "more executive minded than the executive".

Is it possible COY such a judge to say, like Lord Coke, citing *Bracton*,⁵ in the face of an absolute monarch that "the King is under God and the laws"⁶ ; to say like Lord Camden that "the King has no power to declare when the law ought to be violated for reason of State"⁷; to say like Viscount Finlay, that the plea of 'act of State' is not available against a subject or to say, like Lord Greene

¹ But in India, the word 'government servant' is used in the leehnieal sense and it has been held that Judges of the Supreme Court and a High Court hold 'constitutional office' and are not 'government servants' in the technical sense. *K. Veeraswami v. Union of India*, (1991) 3 SCC 655 (para. 9); *Union of India v. Sankalchand Himmatlal Seth* AIR 1977 SC 232H : (197X)

² In the U.S.A. this is constitutionally ensured by the 'Due Process' Clause *Tumey v. Ohio*, (1927) 273 US 510; *In re Murkisein*, (1955) 349 US 133].

³ Cf. Denning *The Road to Justice* 1955, p. 11.

⁴ *Liversidge v. Anderson* (1942) AC 206, per Lord Atkin

⁵ *Bracton. Dr. Litmus* (Swiss Edn., 1854), 5b.

⁶ *Prohibitions Del Roy*, (1607) 12 Co. Rep. 63; see the dialogue between Coke C.J. and King James quoted at para. 1052 of *Gupta v. President of India* AIR 1982 SC 149

⁷ *Entick v. Carrington* (1765) 19 St Tr 1030.

"I do not..... think that fear of embarrassing the executive is a very attractive ground on which to build a rule of common law."¹

An independent Judge would be a person whom "nothing could daunt and nothing could bribe" to use the words by which Learned Hand described his predecessors in office.²

There is a deep historical significance in the line of Shakespeare's "Henry the Eighth" where the wretched Queen Katherine passionately declares: "Heaven is above all yet: there sits a Judge that no King can corrupt". Whether or not the decision of a judge bring satisfaction or anger to the Prime Minister and his colleagues, or to the Lord Chancellor, he cannot be dismissed at will. His tenure is for life or until retirement subject only to good behavior. [There are now statutory retiring ages (except the Lord Chancellor)). His salary is fixed and paid out of the Consolidated fund in order that it may not be subjected to the running fire of criticism of Parliament to which all the ordinary items of budgetary expenditure are liable. His conduct cannot even be discussed in Parliament save on a substantive motion for an address for removal from office; an extreme step to be taken only in the event of impropriety of the gravest kind.....The independence of the Judge is of essential importance in so far as it enables the Judge to adopt a particular attitude of mind towards the questions which came before him for decision. He can, in short, determine the case before him without fear that adverse results or material reward will accrue to him according to whether the decision does or does not meet the approval of other persons.³ Impartiality or independence of (the Judge required both an open mind and freedom from the influence, real or apparent of departments concerned with the subject-matter of their decision.⁴ But it is stated that the idea that "by taking the oath of office as a Judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine, is doubtless beyond achievement".⁵

¹ Kawasaki v. Bentham S.S. Co., (1930) 2 KB 544 (JJ2).

² Learned Hand, Bill of Rights, 195K, p. 77.

³ Justice and Administration LAW by William Romson 3rd Edn. at pp. 43,4X.

⁴ R.V. Sussex Justices Exp. McCarthy (1924) 1 KB 256.

⁵ See in: Smttilon Judicial Review, 2007 Edn., pp. 499-500

It is for the benefit of public whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. It is a Judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on Judges would contribute not to principled and fearless decision making but to intimidation.¹

The Supreme Court in *Jaswant Singh v. Virender Singh*² observed:

"It is most unbefitting for an Advocate to make imputations against the Judge only because he does not get the expected result, which according to him is the fair and reasonable result available to him. Judges cannot be intimidated to seek favourable orders. Only because a lawyer appears as a party in person, he does not get a licence thereby to commit contempt of the Court by intimidating the Judge or scandalising the Courts. He cannot use language, either in the pleadings or during arguments, which is either intemperate or unparliamentarily. These safeguards are not for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the Courts and for touching to fair and reasonable criticism of their judgments. Fair comments, even if outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith in proper language, do not attract any punishment for contempt of Court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of the judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute, the Courts must bestir themselves to uphold their dignity and the majesty of law. The appellant has, undoubtedly, committed contempt of Court by the use of Objectionable and intemperate language. No system of justice can tolerate such unbridled licence on the part of a person, be he a lawyer, to permit himself the liberty of scandalising a Court by casting unwarranted, uncalled for

¹ *Pictson v. Ray*, 155 F.2d 288; *Stump v. Sparkman*, 353 U.S. 333 (346).

² AIR 1995 SC 520: referred in *Chetak Construction Ltd. (M/s.) v. Om Prakashi*, AIR 1998 SC 1855 (1859)

and unjustified aspersions on the integrity, ability, impartiality or fairness of a Judge in the discharge of his judicial functions as it amounts to an interference with the due course of administration of justice."

An objective determination requires that a Judge must be free from outside influence. And that any attempt to influence a Judge in his judicial function or to obstruct or interfere with the administration of justice must be prevented. In the English system the protection of the courts from such influence, whether from the Government,¹ the Press or From an individual, is secured by penalizing an act of such interference with the smooth course of justice as a 'contempt of court', which will be further dealt with under Art. 129,

The need for independence of the judiciary under any system of Constitutional Government can best be explained in the words of JUSTICE FRANKFURTER in *Cooper v. Aaron*²

"The most prized liberties themselves presuppose an independent judiciary through which these liberties may be, as they often have been, vindicated. When in a real controversy such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy."⁴

Where the Judges are appointed by the Executive, independence of a Judge from external influence would primarily mean freedom from pressure of influence from the Executive,³ in the exercise of his adjudicator function. Independence of the Judges not only refers to security of tenure but also the freedom of the judges to act according to their reason and conscience, apart from the desire or convenience of the Executive. Judges have to administer the law and not the will of the Executive⁴ and the Executive should have no opportunity of influencing their judgment either directly or indirectly. There was a time in England when Judges were subservient to the Crown, but the Act of

¹ *Wilson's Case*, 1943, referred to in ALLEN, LAW AND ORDERS, 4th Edn., 448

² *Cooper v. Aaron*, (1958) 357 US 1.

³ *Gupta v. President of India*. AIR 1982 SC 149.

⁴ C f. DENNING, *The ROAD TO JUSTICE*, 1955, p. 11. Cited by Dr. D.D. Basu in *Commentary on Constitution* vol V pp 5543

Settlement, 1707, which guaranteed security of tenure to the Judges closed that chapter of English constitutional history and there has since been no question as to the fidelity of an English Judge to the oath he takes on his appointment, that he "will do right to all manner of people without fear or favour, affection or will. "That the same result is intended by the makers of our Constitution is evident from the fact that the form of oath prescribed for the Judges of our Supreme Court and the High Courts¹ reproduce a similar expression as in England. In *High Court of Judicature of Bombay v. Shirish Kumar R. Patil*² it was held: "In a democracy governed by rule of law, under a written Constitution, Judiciary is the 'sentinel on the qui vive' to protect fundamental rights and posed to keep even the scales of justice between the citizens and the State or the States inter se. Rule of law and judicial review are basic features of the Constitution. As its integral constitutional structure, independence of judiciary is an essential attribute of rule of law. Judiciary must, therefore, be free from pressure or influence from any quarter. The Constitution has secured to them the independence". A Judge is not holding an office under Government of India as to hold so will militate against the concept of independence of judiciary. A Judge holds a Constitutional Office. In *Union of India v. Sankalchand Himatlal Seth*,³ it was held: "Judges of the High Court owe their appointment to Constitution and hold a position of privilege under it..... They, the Judges of High Court, are not government servants in the ordinary signification of that expression..... In fact, a High Court Judge has no employer; he occupies a high constitutional office which is in co-ordination with the executive and the legislature. The independence of judiciary is a fighting faith of our Constitution."⁴ When sitting Judges are appointed as head Tribunals or Commissions, to preserve the independence of High Court Judges, the Supreme Court has laid down guidelines for appointment of these Judges to Tribunals, Commissions, etc.⁵

It has also been emphasized by our Supreme Court that in view of the provisions of the Preamble and the Directive Principles of The Constitution, which are

¹ Third Schedule, Forms IV and VIII, Vol. p, pp. 219, 220.

² *High Court of Judicature of Bombay v. Shirish Kumar R. Patil* AIR 1997 SC 2631

³ *Union of India v. Sankalchand Himatlal Seth*, AIR 1977 SC 2328

⁴ Also see *All Kerala Poor Aid Legal Association, Trivandrum v. Chief Justice of Kerala*, MR 1990 Kcr241; *Supreme & our Advocates-on-Record Association v. Union of India*, MR. 199-4 SC 268 : (1993) 4 SCC 441; *Union of India v. Pratibha Bounerjee*, AIR 1996 SC 693

⁵ *T. Fenn Waller v. Union of India*, AIR 2002 SC 2679

binding on every limb of the State including The Judiciary, it is a duty of the Judiciary to ensure social and economic justice and, therefore, in India, independence of the Judiciary means not only independence from the Executive but also independence or freedom from pressure from any non-governmental force or vested interests which operate as menaces in the discharge of the function of the Judiciary to ensure social justice .¹

4.3.3 Appointment of Judges.

It has been pointed out that, provided the foregoing conditions for securing judicial independence are ensured, there are certain limits to the doctrine of independence, because the Judiciary, being only one of the limbs of the State, cannot claim to act in isolation.²

Hence, the following provisions of the Constitution have been held not to violate the principle of independence of the Judiciary:

(a) **Arts. 124(2) and 217(1): Appointment by the Executive.** Judges of the Supreme Court and the High Courts are appointed by the President, who has to act on the advice of his Council of Ministers.⁴⁸ Of course, there is a check upon this executive power in so far as the Constitution provides for consultation with other dignitaries, e.g., the Chief Justice of India [Art. 124(1), 1st Proviso; 217(1)].³ Appointments are made "in consultation" with the Chief Justice of India and the opinion of Chief Justice of India in the process of consultation must be given primacy. Consultation must be to achieve a constitutional purpose and should not be rendered sterile by a literal interpretation. The process of consultation is to discharge a "constitutional trust" and the consultation envisaged in the first proviso to Art. 124(2) and Art. 217(1) (in respect of High Court Judges) in respect of judicial officers is a reservation or limitation on the power of the President to appoint Judges of the superior court and is not an empty formality nor a futile exercise or a mere casual one attached with no sanctity. It is mandatory in character.

¹ Gnpta v. President of India, AIR 1982 SC 149 :

² . Ibid

³ Ibid. (paras. 1016, 1025, VLNKATAKAMIAII, J.).

Appointment by the Executive, of itself would not impair judicial independence, provided, after such appointment, the Executive has no scope to interfere with the work of a Judge.¹

In India, even though appointed by the Government, Judges of the Supreme Court or of the High Courts are not 'government servants' in the ordinary signification of that expression because the following features distinguish these Judges from other government servants:

(i) Government has no power to direct what work or the manner in which a Judge shall discharge his judicial duties.²

(ii) Their tenure of service, salary and other conditions of service are guaranteed by the Constitution.³

In this context, the observations of the Supreme Court on this point recall what the Author had said as early as 1972 in his Tagore Law Lectures:

In this context, it should also be pointed out that the mere fact that the Judges of the superior courts even are appointed by the Executive should not stand in the way of their independence. If they are to be appointed, such appointment must ultimately come from the Executive who exercise the power to appoint all holders of offices in the body politic, but that need not convert Judges into 'government servants' in the same way as other civil servants are. Neither in the United Kingdom nor in the United States are Judges of the superior courts, at least, regarded as civil servants. In this connection, it must be pointed out that the very Preamble of our Constitution which promises to the people 'liberty of thought, expression, belief, faith and worship', and 'equality of status and of opportunity' would be turned into an idle profession if the provisions in Arts. 16, 19 and the like are not enforced against the State itself by Judges whom "nothing can daunt nor bribe." This is a task which cannot be performed by civil servants or anybody having like mentality.⁴

¹ Ibid. (paras. 1016, 1025, VLKATAKAMIAH, J.).

² Union of India vs. Sankalchand Himmat Lal Sheth AIR 1977SC 2328

³ Ibid

⁴ D D Basu's T.L.L. ON LIMITED GOVERNMENT AND JUDICIAL REVIEW (1972), p. 28.

The Judges of the Supreme Court and the High Court hold a co-ordinate status under the Constitution and are not subordinate either to the Executive or the Legislature.¹

The principle of appointment of Judges by the Executive does not impair judicial independence, so long as the Executive makes no attempt to select committed Judges in order to get judgments favourable to the party in power,² and, if need be, 'to pack the court by such new appointments..

A suggestion has been made by some Judges in Gupta's case³ that a Judge must take an 'activist' role to further the socio-economic goals aimed at by our Constitution and that, accordingly, "while appointing each individual the constitutional philosophy of each individual ought to be a vital consideration". The Author regrets his inability to subscribe to this view, however alluring it may be. In the Author's opinion, the Supreme Court and the High Courts being the highest courts of law, learning in law should be the only criterion for selection amongst rival candidates for these highest judicial posts. If the candidate has learnt the law well, and his learning is not jaundiced by affiliation to any particular political ideology, there cannot be any apprehension that his judgments will be contrary to the tenor of the Directive Principles or the like. Secondly, how is the Council of Ministers to test the 'constitutional philosophy' of each candidate? The interpretation of the constitutional goals by a Council of Ministers must obviously be the interpretation of a particular party which is in power for the time being, and a successor party may entertain just the contrary view (as has been demonstrated by the Congress and the Janata Governments, from 1976-78). The views of neither party can claim finality. It is to make a proper adjudication as between such rival political ideologies that Judges are appointed to a final court of law. It is a travesty of all principles of justice to assert the contrary that it is the Judges who should decide according to the political manifesto of the party in power. If this policy is pursued at the time of each appointment, it would import the American 'spoils system' into the Indian Judiciary, with eyes open as to the patent vices

¹ Gupta v. President of India, AIR 1982 SC 149

² Vide PALKHIVIA, Our Constitution DEECED AND DEFIELD pp. 99-103.

³ Gupta v. President of India, AIR 1982 SC 149

of the 'spoils system' which prevailed in the matter of recruitment to the American Civil Service prior to the creation of the Civil Service Commissions.¹

It is curious that DESAI, J. in Gupta's case² advocated selection according to 'constitutional philosophy',³ overlooking his own reference to Jackson's observation⁴ that "political considerations have hardly entered the process of judicial selection since 1907". As another English Author points out,⁵ though appointments to the superior courts are made by the Crown on the advice of the Prime Minister, in giving his advice, the Prime Minister has to consult the head of the Judiciary, i.e., the Lord Chancellor, whose recommendation is departed from by the Prime Minister 'only in the most exceptional case'.

In practice, appointments to the superior courts are made only from successful legal practitioners and the average experience of those appointed is well above the legal minimum. The Lord Chancellor reports that he is committed to "ensure that the best candidates are appointed to judicial office, regardless of gender ethnic origin, marital status, sexual orientation, political affiliation, religion or disability" except in the last case where "the disability prevents the fulfillment of the physical requirements of the office". It has been said that the Lord Chancellor "seeks to appoint candidates of the highest integrity and judicial quality, look in particular for the good judgment once described by Lord Devlin as the first quality of a good judge⁶ (But the authority of Lord Chancellor is being replaced under Constitutional Reforms Act, 2005, where separate procedure is provided for appointment of Judges of Superior Courts.)

In Subhash Sharma v. Union of India,⁷ court emphasised that an independent, non-political judiciary was crucial to sustain the democratic political system adopted in India. It was observed that the opinion of Chief Justice of India has crucial importance in the appointment of Judges, both of Supreme Court and High Courts. It was observed: "In

¹ Cf. Osgood and Roy, ESSENTIALS OF AMERICAN GOVERNMENT (1965). pp. 286-87

² Gupta v. President of India, AIR 1982 SC 149

³ CHASE, Federal judges, cited in EDWARDS, AMERICAN POLITICAL EXPERIENCE (1978), p. 297

⁴ JACKSON, MACHINERY IN ENGLAND, quoted at para. 706 in Gupta's case AIR 1982 SC 149

⁵ Griffiths Politics of The Judiciary, pp. 17-18.

⁶ CONSTITUTIONAL AND ADMINISTRATION LAW by A.W. BAKERLY & K.D. EVING, 13th Edn. (2003) at p. 368.

⁷ Subhash Sharma v. Union of India, AIR 1991 SC 631 : 1991 (Supp-1) SCC 574.

India, however, the judicial institutions, by tradition have avowed a political commitment and the assurance of a non-political complexion of the judiciary cannot be divorced from the process of appointments. Constitutional phraseology of "consultation" has; to be understood and explained consistent with and to promote this constitutional spirit. ... The appointment is rather the result of collective constitutional process. It is a participatory constitutional function. It is, perhaps inappropriate to refer to any "power" or "right" to appoint Judges. It is essentially a discharge of constitutional trust of which certain constitutional functionaries are collectively repositories....."

In *Supreme Court Advocates-on-Record Association v. Union of India*,¹ it was held by the majority that in the choice of a candidate suitable for appointment, the opinion of Chief Justice of India should have the greatest weight as he is best suited to know the worth of the appointee; the selection should be made as a result of a participatory consultative process in which the executive has the power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. The court also explained what is meant by "primacy of the opinion of the Chief Justice of India". In effect, "the primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion". It was emphasised that this process would achieve constitutional purpose "of selecting the best available" for the composition of the Supreme Court and the High Court, which is so essential to ensure the independence of judiciary and to preserve democracy. The greatest advantage of the above decision is that it "minimised political influence" in the appointment of High Court Judges since the Executive cannot appoint any person by passing the opinion of the Chief Justice of India. The above view was further explained in *Special Reference No. 1 of 1998*.² In that case, the Supreme Court held that merit is a predominant consideration for the appointment to the Supreme Court and where there is outstanding merit, the possessee thereof deserves to be appointed regardless of the fact he may not stand high in the all India seniority list

¹ *Supreme Court Advocates-on-Record Association v. Union of India*, AIR 1994 SC 268

² *Special Reference No. 1 of 1998*, (1998) 7 SCC 739 : AIR 1999 SC 1

or in his own High Court. All that then need to be recorded when recommending him for appointment is that he has outstanding merit.

If the American system be to the contrary, that would not be covetable in India, when we have adopted the British system of justice which is characterised by certainty, predictability, and impartial decision. It is also to be noted that the evils of partisan appointments by the President has led the American Bar Association to set up a Committee on the Federal Judiciary to assess the legal qualifications of the nominees of the President to make it "difficult for a President to appoint political hacks who are officially rated incompetent by the lawyers who would be practising law before them."¹

4.3.3.1 Consultation whether mandatory

So far as appointment of a Supreme Court Judge is concerned, it is not consultation with the Chief Justice of India alone that is provided in Clause (2) of Article 124. Undoubtedly, consultation with the Chief Justice of India is a mandatory requirement but in addition "such of the Judges of the Supreme Court and of the High Court's" as the Central Government may deem necessary are also required to be consulted.

This clause clearly provides for consultation as a mandatory exercise the only matter which is left to the discretion of the Central Government choice of the Judge of the Supreme Court and the High Courts who consulted. The words "as the President may deem necessary" qualify preceding words "such of the Judges of the Supreme Court and of I Courts in the States". Which of the Judges of the Supreme Court at High Courts should be consulted is left to the discretion of the Government but consultation there must be with one or more of the Jud Supreme Court and of the High Courts. The Central Government must least one Judge out of the Judges of the Supreme Court and of the Hi; before exercising the power of appointment conferred by Clause (2) 124.

The question in Sankalchand Seth's case related to the s meaning of consultation in Clause (1) of Article 222, but it was common between the parties that

¹ CHASI FEDERAL JUDGES, cited in EDWARDS, AMERICAN POLITICAL EXPERIENCE (1978), p. 297

'consultation' for the purpose of Clause (2) 124 and Clause (1) of Article 217 has the same meaning and t 'consultation' in Clause (1) of Article 222. Chandrachud, J., quoted approval the¹ following passage from the judgment given by Justice i when he was a Judge of the Madras High Court in R. Pushpam Madras,² "the word 'consult' implies a conference of two or more person impact of two or more minds in respect of a topic in order to enable them to evolve a correct or at least a satisfactory solution" and added "in on two minds may be able to confer and produce a mutual impact, it that each must have for its consideration full and identical facts w once constitute both the source and foundation of the final Krishna lyer, J., speaking on behalf of himself and Fazal AU, J., also pointed out that "all the materials in the possession of one who consults must be unreservedly placed before the consultee" and further a reasonable opportunity information taking other steps and getting prepared for tendering a meaningful advice must be given to him" and "the consultant in the matter seriously since the subject is of grave importance. The President must communicate to the Chief Justice all the material he has and the course he proposes. The Chief Justice, in turn, must collect necessary informs responsible channels or directly, acquaint himself with the re deliberate on the information he possesses and proceed in the in administration of justice to give the President such counsel of thinks will further the public interest, especially the cause c system". Each of the constitutional functionaries required to be consulted under these two articles must have for his consideration full and ii bearing upon appointment or non-appointment of the person concerned and the opinion of .each of them taken on identical material must by the Central Government before it takes a decision whether or the person concerned as a judge But, while giving the fullest effect to consultation, it must be born in mind that it is only consultation which is provided by way of fetter upon the power of appointment vested in the Central Government and the consultation cannot be equated with concurrence. We agree with what Krishna lyer; J. said in Sankalchand Sheth³ case that "consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur". It would therefore be open to the Central Government to override the opinion given by the constitutional functionaries required to

¹ Union of India v Sankalchand Himutlal Seth, AIR 1977 SC 2328

² Ibid

³ Ibid

be consulted and to arrive at its own decision in regard to the appointment of a Judge in the High Court or the Supreme Court, so long as such decision is based on relevant considerations and is not otherwise mala fide. Even if the opinion given by all the constitutional functionaries consulted by it is identical, the Central Government is not bound to act in accordance with such opinion, though being a unanimous opinion of all the three constitutional functionaries, it would have great weight and if an appointment, is made by the Central Government in defiance of such unanimous opinion, it may become vulnerable to attack on the ground that it is mala fide or based on irrelevant grounds. Ordinarily the Central Government would make an appointment of a Judge in a High Court if all the three constitutional functionaries have expressed an opinion against it. On a proper interpretation of Clause (2) of Article 124 and Clause (1) of Article 217, it is open to the Central Government to take its own decision in regard to appointment or non-appointment of a Judge in a High Court and a Judge in the Supreme Court after taking into account and giving due weight to the opinions expressed by the constitutional functionaries required to be consulted under these two Articles and the only grounds on which such decision can be assailed is that it is mala fide or based on irrelevant considerations. Where there is a difference of opinion amongst the constitutional functionaries who are consulted, it is for the Central Government to decide whose opinion should be accepted and whether appointment should be made or not. It was contended on behalf of the petitioners that where there is difference of opinion amongst the constitutional functionaries required to be consulted; the opinion of the Chief Justice of India should have primacy, since he is the head of the Indian Judiciary and paterfamilias of the judicial fraternity. "We find ourselves" said Bhagwati, J. ".....unable to accept this contention. It is difficult to see on what principle primacy can be given to the opinion of one constitutional functionary, when Clause (1) Article 217 places all the three constitutional functionaries on the same pedestal so far as the process of consultation is concerned and does not make any distinction between one constitutional functionary and another. Each of the three constitutional functionaries occupies a high constitutional office and Clause (1) of Article 217 provides that the appointment of a High Court Judge shall be made after consultation, with all the three constitutional functionaries without assigning superiority to the opinion of one over that of another. It is true that the Chief Justice of India is the head of the Indian judiciary and may be figuratively described as

patter families of the brotherhood of Judges but the Chief Justice of a High Court is also an equally important constitutional functionaries and it is .not possible to say that so far as the consultative process is concerned, he is in any way less important than the Chief Justice of India. In fact, under the constitutional scheme, the Chief Justice of a High Court is not subject to the administrative superintendence of the Chief Justice of India nor is he under the control or supervision of the Chief Justice of India. It is only the power of hearing appeals against the decision of the Chief Justice of a High Court that is possessed by the Chief Justice of India and there, his superiority over the Chief Justice of the, High Court ends. If we look at the raison detre of the provision for consultation enacted in Clause (1) of Article 217, it will be obvious that the opinion given by the Chief Justice of the High Court must have at least equal weight as the opinion of the Chief Justice of India, because ordinarily the Chief Justice of the High Court would be in a better position to know about the competence, character and integrity of the person recommended for appointment as a Judge in the High Court. The opinion of the Governor of the State, which means the State Government would also be entitled to equal weight, not in regard to the technical competence of the person recommended and his knowledge and perception of law on which the Chief Justice of the-High Court would be the proper person to express an opinion, but in regard to the character and integrity of such person, his antecedents and his social philosophy and value system. So also the opinion of the Chief Justice of India would be valuable because he would not be affected by caste, communal or other parochial considerations and standing outside the turmoil of local passions and prejudices; he would be able to look objectively at the problem of appointment. There is, therefore, a valid and intelligible purpose for which the opinion of each of the three constitutional functionaries is- incited before the Centr.il Government can take a decision whether or not to appoint a particular person as a Judge in a High Court. The opinion of each of the three constitutional functionaries is entitled to equal weight and it is not possible to say that the opinion of the Chief Justice of India must have primacy over the opinions of the other two constitutional functionaries. If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance, amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept, his opinion. But as pointed

out earlier, it is only consultation and not concurrence of the Chief Justice of India that is provided in Clause (1) of Article 217. When, in the course of debates in the Constituent Assembly an amendment was moved that the appointment of a Judge of a High Court or the Supreme Court should be made with the concurrence of the Chief Justice of India, Dr. B.R. Ambedkar made the following comment which is very significant:

"It is therefore, clear that where there is difference of opinion amongst the constitutional functionaries in regard to appointment of a Judge in a High Court' the opinion of none of the constitutional functionaries is entitled to primacy but after considering the opinion of each of the constitutional, functionaries, and giving it due weight, the Central Government is entitled to Come to its own decision as to which opinion it should accept in deciding whether or not to appoint the particular person as a Judge. So also where a Judge of the Supreme Court is to be appointed, the Chief Justice of India is required to be consulted, but again it is not concurrence but only consultation and the Central Government is not bound to act in accordance with the opinion of the Chief Justice of India. The ultimate power of appointment rests with the Central Government and that is in accord with the "constitutional practice prevailing in all democratic countries. Even in the United Kingdom a country from which we have inherited our system of administration of justice and to which many of our anglophiles turn with reverence for inspiration and guidance, the appointment of High Court Judges is made by or on the advice of the Lord Chancellor, who is a member of the Cabinet while appointments to the Court of appeal and the House of Lords and to the offices of Lord Chief Justice Master of the Rolls and the President of the Family Division are made on the advice of the Prime Minister after consultation with the Lord Chancellor. Thus the appointment of a Judge belonging to the higher echelons of judicial service is wholly in the hands of the Executive. So also in the commonwealth countries like Canada, Australia and New Zealand, the appointment of High Court and Supreme Court Judges is made by the Executive."

Another issue relevant in this context is of the appointment of judges in the Supreme Court and the High Courts. Chief Justice of India, K.G.Balakrishnan asserts that the collegium headed by him is strictly following the decision in the Second Judges case

by which they are bound. The general perception voiced eloquently by the executive is that the executive has no part in making these appointments for which the judicial collegiums alone is responsible and answerable. In this manner the judiciary is held responsible for the aberrations in these appointments in the recent years. It is true that the veto power granted to the executive by the First Judge's case,¹ is taken away by the Second Judge's case,² but it is not correct that the executive has been denuded of all power in adjudging the suitability of the candidates for appointment. However, greater responsibility does lie in the judicial collegiums because of its role under the existing system. A brief reference to the Second Judge's case is necessary.

The significance of every single appointment to the Supreme Court or a High Court was emphasized in the majority opinion in K.Veeraswami case. It said:

“A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system...a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof”.

The collective wisdom of the constitutional functionaries involved in the process of appointing a superior judge is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices and no doubtful person gains entry...even if sometime a good appointment does not go through. This is not difficult to achieve.

A brief reference to the Second Judge's case³ is apposite. The majority opinion held:

“The process of appointment of judges of the Supreme Court and the High Court's is an integrated ‘participatory consultative process’ for selecting the best and most suitable persons available for appointment...There may be a certain area, relating to suitability of the candidate, such as his antecedents and personal character, which, at

¹ AIR 1982 SC 149

² AIR 1994 SC 268

³ AIR 1994 SC 268

times, consultees, other than the Chief Justice of India, may be in a better position to know. In that area, the opinion of the other consultees is entitled to due weight, and permits non-appointment of the candidate recommended by the Chief Justice of India...If the non-appointment in a rare case, on this ground, turns out to be a mistake, that mistake in the ultimate public interest is less harmful than a wrong appointment...non-appointment for reasons of doubtful antecedents relating to personal character and conduct, would also be permissible”.

The clear language of the decision leaves no room for any doubt that the executive has a participatory role in these appointments; the opinion of the executive is weightier in the area of antecedents and personal character and conduct of the candidate; the power of non-appointment on this ground is expressly with the executive, notwithstanding the recommendation of the CJI; and that doubtful antecedents etc. are alone sufficient for non-appointment by the executive. The decision also holds that the opinion of the judicial collegiums, if not unanimous does not bind the executive to make the appointment.

Some reported instances in the recent past of the executive failing to perform its duty by exercise of this power even when the recommendation of the judicial collegiums was not unanimous and the then President of India had returned it for reconsideration, are not only inexplicable but also a misapplication of the decision, which the CJI, Balakrishnan rightly says is binding during its validity. Such instances only prove the prophecy of Dr. Rajendra Prasad that the Constitution will be as good as the people who work it. Have any system you like, it's worth and efficacy will depend on the worth of the people who work it! It is, therefore, the working of the system that must be monitored to ensure transparency and accountability.

The Second Judge's case affirmed by the Third Judge's case in the Presidential Reference, merely formalizes the procedure developed and followed till executive supremacy in the matter of appointments was given by the First Judge's case (1982); and that practiced even later by Chief Justices who did not succumb to executive pressure. A few earlier observations to this effect are significant to prove the point. Granville Austin in his book—‘Working A Democratic Constitution: The Indian Experience’ (1999), has

dealt with the issue of judicial independence. Some portions therein summarise the experience of the first fifty years. He says: "The CJI during the Nehru period had virtually a veto over appointment decisions, a result of the conventions and practices of the time and the Chief Justice's strength of character". He quotes Mahajan, C.J. saying "Nehru has always acted in accordance with the advice of the CJI", except in rare circumstances, despite efforts by State politicians with 'considerable pull' to influence him. The Law Commission chaired by M.C.Setalvad in its 14th report recommended that appointments to the Supreme Court and the High Court's be made solely on the basis of merit sans any other consideration; and on the recommendation of the Chief Justice of the High Court with concurrence of the CJI.

4.3.4 Security Of Tenure

The need for this independence becomes most important in cases where the State itself is one of the parties in the controversy. In such cases, in order that the Judges may administer justice freely, that is, without 'fear or favour', it is essential that their tenure should not depend upon the mere pleasure of the Government, but upon what is called 'good behavior'.¹ "The security of tenure which the Judge enjoys is at bottom the most essential fact underlying the principle of independence. It results in recognition by the general public that the Judge has nothing to lose by doing what is right and nothing to gain by doing what is wrong. It is founded on the belief that a man cannot be relied upon an act rightly regardless of the personal consequences."² As long as the tenure of judicial office dependent on royal pleasure, there was risk of the subservience of Judges to the Crown. To ensure that English Judges should not hold office at the pleasure of the Crown, the Act of Settlement, 1700 provided that they should hold office "quamdiu se bene gesserint" (during good behavior), but subject to a power of removal upon an address from both Houses of parliament. The misconduct for which he may be removed, by a solemn parliamentary process is rare and improbable; and no responsible person has suggested that a Judge should be removed because he was thorn in the side of government."³ The protection afforded Judges of Tribunals deriving their jurisdiction

¹ Act of Settlement, 1701, sec under An. 124(2) Past DENNING, ROAD TO JUSTICE, 1955, pp. 14-15.

² JUSTICE AND ADMINISTRATION. LAW by WILLIAM. ROUSON, 3rd edn. At pp. 47.

³ LAW AND ORDER by CHARLTON KEMP ALLIN 4TH Edn., at p. 4.

from Art. III (Constitution of USA) includes life tenure with removability only for misconduct in office and the guarantee that judicial salaries may not be diminished during tenure in office.¹ This is secured by the express provision in **our** Constitution that Judges of the Supreme Court [Art. 124(4)] or of a High Court Art. 217(1), Proviso (b)] shall not be removable except by an address by both Houses of Parliament to the President, passed by a special majority, and on the ground of 'proved misbehavior or incapacity' (see post). Apart from this procedure of 'joint address' which is a difficult one, a Judge of the superior Courts, in India, is guaranteed absolute security of tenure.

4.3.5 Transfers

The power to Transfer of a Judge from one High Court to another² is to be exercised to sub serve the public interest and not by way of punishing a Judge who has fallen from the grace of the executive, or for inconvenient decisions.³

The question of transfer of Judges has been considered in Supreme Court Advocates-on-Record Association v. Union of India⁴ wherein it was reiterated that there is no requirement of prior consent of the Judge before his transfer under Art 222, hut the opinion of the Chief Justice of India has been given "not mere primacy" but determinative character in the transfer process and the process of transfer should be initiated by the Chief Justice of India alone. It was reiterated that the power of transfer could be exercised only "in public interest" and not to be "punitive" in nature. It was observed that any transfer in accordance with the recommendation^!' the Chief Justice of India cannot be treated as punitive or as an erosion in the independence of Judiciary. The court also elaborately gave how to express the opinion of the Chief Justice. The procedure to obtain the opinion of the Chief Justice of India was further explained in Special Reference No. 1 of 1998.⁵ It is now settled that the Chief Justice of India will recommend a transfer only "in public interest", i.e., for promoting better administration of justice throughout the country or at the request of the concerned Judge.

¹ Constitutional Interpretation BY CRAR R. DUCAT, 8th Edn. p. 38. Cited by Dr.D.D.Basu in Comentary on Constitution vol V

² Union of India v. Sankalchand Himatlal Seth ,(1978) 1 S.C.R 423

³ Gupta v. President of India, AIR 1982 SC 149

⁴ AIR 1994 SC 268 :

⁵ (1998) 7 SCC 739

An order of transfer of a Judge of High Court can be challenged only by the Judge who is affected by the transfer and by no other person. Judicial review is entertained against the order of transfer only on limited grounds, i.e., transfer being made without the recommendation of Chief Justice of India.¹

Since this Provision raised a great storm leading to the voluminous judgments in case, a discussion of this topic will be postponed [ii] A.I. 222,

In the formation of his opinion, the Chief Justice of India, "in the case of transfer of a Judge other than the Chief Justice is expected to take into account the "views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief Justice of India. The personal factors relating to the concerned Judge, and his response to the proposal, including his preference of places of transfer, should be taken into account by the Chief Justice of India before forming his final opinion objectively, on the available material, in the public interest for better administration of justice.

The continuing practice of having Acting Chief Justices for long periods; transferring permanent Chief Justices and replacing them with out of turn Acting Chief Justices for long periods; appointing more than one Chief Justice from the same High Court resulting in frustration of the legitimate expectation of Judges of some other High Courts commensurate with their seniority to be appointed Chief Justice in their turn, except in an extraordinary situation must be deprecated and avoided. Application of the policy has been quite often selective and it is essential to make it uniform to prevent any injustice.

It may be desirable to transfer in, advance the senior-most Judge due for appointment as Chief Justice to the High Court where he is likely to be appointed Chief Justice, to enable him to take over as Chief Justice as soon as the vacancy arises and, in the meantime, acquaint himself with the new High Court. This would ensure a smooth

¹ Supreme Court Advocates-on-Record Association v. Union of India, MR 1994 SC 268

transition without any gap in filling the “office of Chief Justice. In transfer of puisne Judges, parity in proportion of transferred Judges must be maintained between the High Courts, as far as possible.

The recommendations in the Report of the Arrears Committee (1989-90) mention certain factors to be kept in view while making transfers to avoid any hardship to the transferred Judges. These must be taken into account.

4.3.6 Conditions of Service

Apart from security of tenure and independence of the administrative authorities, it is also essential that so long as they remain in office, the conduct of the Judges should not be subject to interference even by Parliament. In the case of the Judges of the superior courts, this is secured in India—

a. By fixing the salaries of the Judges of the Supreme Court and High Courts by the Constitution and providing that though the allowances, leave and pension may be determined by law made by Parliament, these shall not be varied to the disadvantage of a Judge during his term of office. In other words, his right to remuneration will not be affected adversely by any changes made by law since his appointment.¹ Arts. 125(2) and 221

But it will be competent for the President to override this guarantee, under a Proclamation of 'Financial Emergency'. (Art. 360(4) (b))

b. By providing that the administrative expenses of the Supreme Court and the High Courts, the salaries and allowances etc. of the Judges as well as of the staff of these courts shall be 'charged upon the revenues of India' i.e., shall not be subject to vote in Parliament. (Arts. 146(3) and 202(3)(d))²

Hence as in England, the salaries etc. of the Judges are not dependent upon the annual vote of Parliament, and the judicial administration cannot be debated in Parliament.

¹ A principle established in England by the Act of Settlement, 1701, and guaranteed in the U.S.A. Art. III, Sec. 1 of the Constitution.

² Cf. *Kins v. Speyer*, (1910) 1 KB 596; *Eastern Trust Co. v. McKenzie*, (1915) AC 750.

c. By providing that even individually, the conduct of a Judge cannot be criticized in Parliament, except upon a substantive motion for presenting an address to the President for the removal of Judge. In order to protect a Judge in the fearless discharge of his judicial duties from criticism in legislative proceedings, it has been provided that the conduct of a Judge shall be immune from any discussion in the Legislature, except in proceedings for his removal. [Arts. 121 and 211]

4.3.7 Oath of office

As stated earlier, the very oath of office which a Judge of the superior courts has to subscribe, under Arts. 124(6) and 219 and Sch. III (IV, VIII), requires that he must perform his judicial duties without fear of any pressure from the Executive and without expecting any favour from the Government which commands a large patronage¹ By judicial oath, they promise "to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will".

4.3.8 Judicial Decisions Binding On The Executive

Independence of the judiciary not only requires that a Judge must be free from executive influence in coming to his decision but must also have the assurance that his decision will be carried out by the Executive. It was held by the House of Lords that ministers and civil servants were subject to the contempt jurisdiction of the courts, and the Home Secretary was in contempt when he disobeyed a Judge's order to return to London a Zairian teacher who had sought asylum in England.² It was observed therein that the dangers of exempting ministers of the Crown from the coercive jurisdiction of the courts, and said of the argument that there was no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity that it would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition that would reverse the result of the Civil War. It was held in another case: "The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province,

¹ Cf. *Kawasaki v. Hurlingham*, (1939) 2KB 544 (1952).

² . *M v. Home Office*, 1,(1994) 1 AC 377.

and the executive will respect all decisions of the courts as to what its lawful province is".¹

In a government of laws not of men, the executive branch of the government beats a grave responsibility for upholding and obeying judicial order.² If the orders courts are not obeyed, the person against whom the order is made can be found guilty without offending the rule of Crown immunity. The court awarded an exemplary sentence of one month's imprisonment to the two individuals.³

The Constitution has entrusted the task of interpreting the law to the Judiciary whose view on the subject is made legally final and binding on all till it is changed by a higher court or by a permissible legislative measure. Those living and functioning under Constitution have to accept and submit to this obligation of respecting the constitutional authority of courts. Under a constitutional government, such final authority has to be vested in some institution. Otherwise, there will be chaos. The court's verdict has to be respected not necessarily by the authority of its reason, but always by reason of its authority. Any conduct designed to or suggestive of challenging this crucial balance of power devised by the Constitution is an attempt to subvert the rule of law and an invasion to anarchy.⁴

The leading decisions on the subject.⁵ A Judge should not, accordingly, depart from the application of law on the ground that the Executive would be 'embarrassed',⁶ even where Foreign Affairs are involved (provided, of course, the question is justifiable).⁷ Nor conversely, should the Government intercept a petition to the court, in a Judicial matter, on any ground.⁸

4.3.9 Power To Punish For Its Own Contempt

¹ M v. Home Office, (1992) QB 270

² Mohd. Aslam v. Union of India, AIR 1995 SC 548

³ Codavannan Tirumulpad v. Ashok Khot, (2006) 5 SCC 1.

⁴ Sanjay Dutta Dy. Secretary Ministry of Information and Broadcasting, In re., (1995) 3 SCC 619

⁵ Cl. King v. Speyer, (1910) 1 KB 596; Eastern Trust Co, v. McKenzie, (1915) AC 750.

⁶ Cf. Kawasaki v. Bantham, (1939) 2 KB 544 (552).

⁷ Re, C. (an Infant), (1939) Cb 363.

⁸ Wilson's case, (1943), referred to in ALLIN, LAW AND ORDERS, 2nd Edn., p. 423.

The Supreme Court (Art. 29) and a High Court (Art. 215) have been given the power to punish any person for contempt of itself and thus to protect itself against interference in the course of administration of justice, from whatever source it may come.¹

4.3.9.1 Criticism of Judges

Some of the Court's strongest Justices have stressed the value of a vigilant and attentive public interest in its work. Consider this from Mr. Justice Brewer:

"It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. There is no time in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."²

There is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. While fair and temperate criticism of the Court, even if strong, may not be actionable, but attributing improper motives or tending to bring the Judges or the Courts into hatred and contempt or obstructing directly or indirectly with the functioning of the Courts is a serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgment of the Court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of Courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril.³

¹ Union of India v. Sankalchand Himatlal Seth, MR 977 SC Gupta v. President of India. AIR 1982 SC 149

² IS Nat Corp. Rep. S49 (1898).

³ Surya Prakash Khatri v. Smt. Madhu Trachan, 2001 Cri L.J 3476 (3482) (Del):

The freedom of expression to any person cannot extend to scandalise the judiciary as a whole or the members of the judiciary who have not issued order favourable to the accused, in particular. No such freedom of expression is recognised and the accused cannot claim such a right to scandalise and hurl abuses against the Judges who do not issue orders in his favour.¹

Bona fide criticism of any system or institution including judiciary is aimed at inducing the administration of the system or institution to look inward and improve its public image. Courts, the instrumentalities of the State, are subject to the Constitution and the laws and are not above criticism. Healthy and constructive criticism is tools to augment its forensic tools for improving its functions. A harmonious blend and balanced existence of free speech and fearless justice counsel that law ought to be astute to criticism. Constructive public criticism even if it slightly oversteps its limits thus has fruitful play in preserving health of public institutions. Section 5 of the Contempt of Courts Act, 1971, accords protection to such fair criticism and saves from of the court. The best way to sustain the dignity and respect for the office of Judge is to deserve respect from the public at large by fearlessness and objectivity of the approach to the issues arising for decision, quality of the judgment, restraint, dignity and decorum a Judge observes in judicial conduct off and on the Bench and rectitude.²

Where a provision in the law relating to contempt imposes reasonable restrictions, no citizen can take the liberty of scandalising the authority of the institution of judiciary. Freedom of speech and expression, so far as they do not contravene the statutory limits as contained in the Contempt of Courts Act, 1971, is to prevail without any hindrance. However, it must be remembered that the maintenance of dignity of the Courts is one of the cardinal principles of rule of law in a democratic set up and any criticism of the judicial institution couched in a language that apparently appears to be a

¹ High Court of Karnataka v. P.N. Shetty, 1996 Cri LJ 1747 (1751, 1752) (Kant)

² O.C. Saxena v. Hon'ble the Chief Justice of India, AIR 1996 SC 2481 (2493); P.N. Dube v. P. Shiv
Slumker, AIR 1988 SC 1208; Baradakantn Mishra v. The Registrar of Orissa High Court, AIR 1974 SC
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mere criticism but ultimately results in undermining the dignity of the Courts cannot be permitted when found having crossed the limits and has to be punished.¹

The notion of a Judge being 'impartial' needs more thought than it is commonly given. Lord Justice Scrutton, in discussing the need for 'impartiality', said:

"This is rather difficult to attain in any system. I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish."

In *D.C. Saxena v. Hon'ble the Chief justice of India*,² the Supreme Court observed:

"Advocacy touches and asserts the primary value of freedom of expression. It is a practical manifestation, of the principle of freedom of speech. Freedom of expression in arguments encourages the development of judicial dignity, forensic skills of advocacy and enables protection of fraternity, equality and justice. It plays its part in helping to secure the protection of other fundamental human rights. Freedom of expression, therefore, is one of the basic conditions for the progress of advocacy and for the development of every man including legal fraternity practising the profession of law. Freedom of expression, therefore, is vital to the maintenance of free society. It is essential to the rule of law and liberty of the citizens. The advocate or the party appearing in person, therefore, is given liberty of expression. But they equally owe countervailing duty to maintain dignity, decorum and order in the Court proceedings or judicial process. The liberty of free expression is not to be confounded or confused with licence to make unfounded allegations against any institution, much less the judiciary..... In other words, imputing partiality, corruption, bias, improper motives to a Judge is scandalisation of the Court and would be contempt of the Court. Even imputation of lack of impartiality fairness to a judge in the discharge of his official duties amounts to contempt gravamen of the offence is that of lowering his dignity or authority or an affront to the majesty of

¹ Arundhati Roy, In re, AIR 2002 SC 1375 (1380)

² AIR 1996 SC 2481

justice. When the condemner challenges the authority of the Court, he interferes with the performance of duties of Judge's office or judicial process or administration of justice or generation or production of tendency bringing the Judge or judiciary into contempt."

It is fundamental that if rule of law is to have any meaning and content, the authority of the Court or a statutory authority and the confidence of the public in them should not be allowed to be shaken, diluted or undermined- The Courts of justice and all Tribunals exercising judicial functions from the highest to the lowest are by their constitution entrusted with functions directly connected with the administration of justice. Maintenance of dignity of the Court/judicial officer or quasi-judicial authority is, therefore, one of the cardinal principles of law embedded in judicial review. Any uncalled for statement or allegation against the judicial officer/statutory authorities, casting aspersions on Court's integrity or corruption would justify initiation of appropriate action for scandalising the Court or Tribunal or vindication of authority or majesty of the Court/Tribunal. The accusation of the judicial officer or authority or arbitrary and corrupt conduct undermines their authority and rudely shakes them and public confidence in proper dispensation of justice. It is of necessity to protect the dignity or authority of the judicial officer to maintain the stream of justice, pure and unobstructed. The judicial officer/authority needs protection personally. Therefore, making wild allegations of corruption against the presiding officer amounts to scandalising the Court/statutory authority. Imputation of motives of corruption to the judicial officer/authority by any person or group of persons is a serious inroad into the efficacy of the judicial process and a threat to judicial independence and needs to be dealt with strong arm of law.¹

Fair criticism of the conduct of a Judge, the institution of the judiciary and its functioning may not amount to contempt if it is made in good faith and in public interest. To ascertain the good faith and the public interest, the Courts have to see all the surrounding circumstances including the person responsible for the comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. All citizens cannot be permitted to comment upon the conduct of

¹ U.P. Sales Tax Association v. Taxation Bar Association, Agra, AIR 1996 SC 98 (101) Brahma prakash Sharma v. State of Uttar Pradesh, AIR 1954 SC 10 :

the Courts in the name of fair criticism which, if not checked, would destroy the institution itself. A litigant losing in the Court would be the first to impute motives to the Judges and the institution in the name of fair criticism which cannot be allowed for preserving the public faith in an important pillar of democratic set up, i.e. the judiciary.¹

If the authority of the Court is undermined or impeded by acts or publications, the fountain of justice would get sullied creating distrust and disbelief in the minds of the litigant public and the right thinking public at large. Indeed everybody is entitled to express his honest opinion about the correctness or legality of a judgment or sentence or an order of a Court. Objective criticism is permissible provided it is made with detachment in a dignified language and respectful tone. The liberty of expression cannot be treated as a licence to scandalise the Court and instead of criticising the judgment to criticise the Judge who delivered it.²

4.3.10 Removal of a Judge

A Judge of the Supreme Court may be removed from his office but he shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting, has been presented to the President in the same session for such removal.

The removal of a Judge is a matter of the greatest seriousness. It affects not only the Judge personally but also, in a larger sense, affects the general reputation of the judiciary. Consequently, the Constitution, by Clauses (4) and (5) of Article 124 and by the Judges (Inquiry) Act, 1968 has made the removal subject to a constitutional and statutory process consisting of several stages at each of which the action for removal is screened.

Article 124(4) of Indian Constitution provides for removal of High Court and Supreme Court Judges. The Article says: "A judge of Supreme Court shall not be

¹ Arundhati Roy, Re, AIR 20Q2 SC 1375 (1394) , D.C. Saxena v. Hon'ble the Chief Justice of India. AIR 1996 SC

² Ajay Kumar Pandey, In re, AIR 1998 SC 3299 (3305) , SC 2176 Lalit Mohan Das v. Advocate General. Orissa, AIR 1957 SC 250

removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total number of membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity."There is no separate provision for removal of High Court judges and Article 217 (1) (b) provides for this and says, "A judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a judge of the Supreme Court."The processes of removal of High Court and Supreme Court judges are the same. The above Article of the Constitution provides for impeachment, whereas; Judges (Inquiry) Act, 1968 determines the process of impeachment.

Under our system, impeachment is the only disciplinary method against Judges. This procedure has been made difficult because of our desire to have an independent judiciary. An independent judiciary has been the great rock in storming seas, men of conscience trained in the law are not easily tethered when given the sovereignty of judicial power.

4.4 Judicial Response to “Independence of Judiciary”

In the backdrop of the above analysis, it is expedient to analyze judicial response to judicial independence and selection as well as appointment of justices of superior courts in order to understand the supremacy—bureaucratic or juristocratic bureaucracy!

*Union of India v. Sankalchand*¹ was the first case concerning the transfer of Judges from one High Court by invoking Article 222 as the Central Government seemed to initiate the steps on the recommendation of the Law Commission of 1958 in mid-seventies. Whether the government had intended to transfer Judges of High Courts for the purposes of justice or for political reasons is for anyone to guess. Article 222 stipulates that the President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court. A plain reading of the language of this

¹ A.I.R. 1977 S.C. 2328

Article tells that notwithstanding the legal position that a Judge can be transferred without his consent; there is-ua- element- of discretion in the matter of transfer of judges; there may Be proximity of extraneous as well as political influences in the matter of transfer of a judge. In order to belittle the possibility of political influence the Supreme Court suggested that Article 222 cannot be construed to mean that for transfer of a Judge to •another High Court, it is necessary to obtain his consent as a matter of constitutional obligation. Though the language of the Article does not say so, however, by healthy constitutional convention normally the consent of the Judge concerned should be taken, not so much as a constitutional necessity, but as a matter of courtesy . . . Where the Judge does not consent and public interest compels, the power under Article 222 can, be exercised; the Chief Justice of India owes a corresponding duty to the President and that he shall consider every relevant fact, and, indeed, as a matter of constitutional duty, to elicit and ascertain facts either directly from the Judge concerned or from other reliable sources.¹

In *S.P. Gupta v. Union of India*² the Supreme Court was grappled with two questions, namely, the transfer of Judges including the Chief Justice of High Courts, and, appointment of Justices to the superior courts. As regards the question of transfer of Judges, the principle of "Constitutional convention of courtesy" evolved in *Sankalchand's* case³ was affirmed by a larger Bench in this case. And, as regards the question of appointment of justices to the superior courts, the Supreme Court opined: The Central Government is bound to consult at least one Judge out of the Judges of the Supreme Court and of the High Courts besides the Chief Justice of India. The practice, however, has been to consult the Chief Justice of India only. This is not a very satisfactory mode of appointment, because wisdom and experience demand that no power should be vested in a single individual howsoever high and great he may be and howsoever honest and well meaning ... It is not concurrence but only consultation and the Central Government is not bound to act in accordance with the opinion of Chief Justice of India though it is entitled to great weight as being the opinion of the Indian Judiciary.⁴ In concurrence possibility of

¹ Ibid.

² A.I.R. 1982 S.C. 149

³ A.I.R.1977 SC 238

⁴ A.I.R. 1982 S.C. 149

political or other influences is inasmuch as maximised as in consultative process, since in consultative process lies the maximum element of discretion. Therefore, in order to jettison the external influences in the selection of justices, the Supreme Court suggested a collegium to make recommendation to the President in regard to appointment of justices of superior courts. The collegium should be more broad-based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may fit for appointment it would go a long way towards securing the right kind of persons as justices for higher judiciary, who would be truly independent and who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity.¹ The Supreme Court, however, felt that the President does not have the discretion not to consult anyone in the judicial branch. As regards the question of appointment of Chief Justice of India, the Supreme Court significantly *a proprio vigore* exerted that in order to discharge his function of selecting the best suitable person to be the Chief justice of India, the President must choose such fair sprinkling of Supreme Court and High Court Judges as would enable him to gather enough and relevant material which would help him in decision-making process . . . When the 'primacy of judicial opinion' doctrine fails in the case of the appointments of the Chief Justice' of India, it would not be appropriate to hold that it prevails in the case of appointments of other Judges of the Supreme Court and the Judges of the High Courts.²

Supreme Court Advocates-on-Record v. Union of India³ has had the occasion to examine the issues like: (1) The Primacy of the opinion of the Chief Justice of India in regard to the appointments of Judges to the Supreme Court and the High Courts and in regard to the transfers of High Court judges/ Chief Justices; (2) Justiciability of these matters, including the matter of fixation of the Judge-strength in the High Courts; and (3) The correctness of the majority view in S.P Gupta's case. From it, it discerns that there has been a shift from "political influence" to "judicial primacy in the opinion of the Chief Justice of India" in judicial approach/mind/attitude to the primacy question of judicial independence and judicial appointments. The Supreme Court in its majority opinion

¹ Ibid.

² Ibid.

³ A.I.R. 1994 S.C. 268

in the Second Judges Case has emphasised that the Chief Justice of India has primacy in the matter of appointments of justices to the Supreme Court and the High Courts. The Supreme Court explained its opinion in regard to the principle of-primacy of Judicial Primacy of Chief Justice of India thus: "The opinion of the Chief Justice of India is reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation and formed after taking into account the view of some other Judges who are traditionally associated with this function; the opinion so given has primacy in the matter of all appointments and an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in the matter of appointments to the Supreme Court and the High Courts and the Government is not obliged to act thereon; the collegium should consist of the Chief Justice of India and the four senior most puisne Judges of the Supreme Court; one of the four senior most puisne Judge of the Supreme Court would succeed the Chief Justice of India; merit is the predominant consideration for the purposes of appointment to the higher judiciary". The collegium consists of "Plurality of Judges" not only in the matter of appointments but also in the matter of transfer of High Court Judges, because the "Plurality of Judges in the formation of the opinion of the Chief Justice of India is (an) in-built check against the likelihood of arbitrariness or bias as well as any erosion of independence of the judiciary . . . The judicial element being decisive in transfers, the need for further judicial review, as in other executive actions, is eliminated". However, in *K. Ashoka Reddy v. Government of India*,¹ the Supreme Court of India stated that judicial review is necessary in regard to transfer of judges to check arbitrariness and bias.

In re Presidential Reference² the Supreme Court was to give its judicial opinion in regard to three broad aspects of the questions raised in the President reference of July 23, 1998, namely,

1. Consultation between the Chief Justice of India and his brothers Judges in the matter of appointments of Supreme Court and High Court Judges and transfers of the latter;

¹ A.I.R. 1994 S.C. 1202

² A.I.R. 1990 S.C. 1

2. Judicial review of transfers of Judges of High Courts; and
3. The relevance of seniority in making appointments to the Supreme Court

As stated earlier, the constitutional provisions indicate that in the choice of a candidate suitable for appointment to the-superior courts, the opinion of the Chief justice of India should have the greatest weight; the selection should be made as a result of participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose, namely, men of calibre committed to judicial independence. The underscoring objective in these constitutional provisions is that the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. By using the word "consultation" instead of "concurrence" the Constitution-makers have desired not to give absolute discretion to any one, not even to the Chief Justice of India as individual, much less to the Executive Head of the State in order to have an independent judicial institution; there is an element—of-opposition between discretion and the Rule of Law, and as such in these constitutional provisions there seems to be an in-built check on the exercise of discretion both by the Executive Head as well as the Head of the Judicial institution. It may also be seen in the majority, besides the constitutional objectives, that no question of primacy would arise when decision is reached in "participatory consultative process" without any difference of opinion; the opinion of the judiciary symbolised by the view of the Chief Justice of India, is to be obtained by consultation with the Chief Justice of India, and it is this opinion which has primacy". In the "third Judges case" the Supreme Court's nine Judge Bench opined the Judicial Supremacy of the Chief Justice of India on referential question as follows:

1. "The expression consultation with the Chief Justice of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute consultation within the meaning of the constitutional provisions.
2. The transfer of puisne Judges is judicially reviewable only to this extent that the recommendation that has been made by the Chief Justice of India has not been made in consultation with the four senior most puisne Judges of the Supreme Court

and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.

3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four senior most puisne Judges of the-Supreme_Court. Insofar as an appointment to the High Court is concerned, the -recommendation must be made in consultation with the two senior most puisne Judges of the Supreme Court.

4. The Chief justice of Indi.i is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment.

5. The requirement of consultation by the Chief Justice of India with his colleagues . . . does not refer only to those Judges who have the High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.

6. "Strong cogent reasons" do not have to be recorded, but what has to be recorded is the positive reason for the recommendation.

7. The views of other Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of his opinion.

8. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultative process.

9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultative process are not binding upon the Government of India".

Chapter V

Conclusion

Independent judicial power is implicit in the 'basic concept of separation of powers' among a plurality of agencies and the tripartite scheme of checks and balances. This concept is the very 'heart of the constitutional scheme' .

On the one hand, law is necessary to legitimize authority and the existing political order, and authority is indispensable for the enforcement of the law and the prevailing legal or judicial system. On the other hand, law is essential in dictating the limits and rules with which power will be exercised legally, and power is imperative for revitalizing the confines and precepts of the rule of law and modern Constitutionalism". There exists a conflict of opinion between the legislature and the judiciary with respect to the fact? Whether power supersedes justice or vice versa. Law and power must match each other to form a complimentary pair, since law without power is impotent, while power without law is unfair and illegitimate.

Hence, rule of law emerges as the best strategy for imposing limits as well as curtailing the exercise of power, and, within it, the establishment of a Constitution is that which regulates both, the legitimacy and legality of political power. Perhaps this is the reason why rule of law is a sacrosanct feature of our Constitution because it is law that brings forth justice. Law is at the apex as far as hierarchy of our justice delivery system goes because law will be futile if it is not guided with the sole aim of achieving justice.

Judiciary got its Constitutional strength in terms of its special power of judicial review. The judiciary also managed to establish its Constitutional ascendancy in terms of possessing its sole discretionary right in progressive interpretations of law. As a result one can witness the changing role of judiciary in Indian polity since independence. The Supreme Court thus perceives the Indian judiciary as both the protector of individual liberties against political branch aggression and the ultimate arbiter of the Constitution's meaning.

Further adding it also can be said our Constitution includes almost every principles of independence of judiciary which was adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary in 1985 although it was made 35 years back.

Learned Judges of Sup.Court were of very much clear view about the “Independence of judiciary” from very beginning.

The judiciary stands between the citizen and the State as a bulwark against executive pressure, excesses and misuse of power by the executive.

It's the judiciary (with that I mean the judges as well as the advocates) who have made law an instrument of social change. The primary role of a judge is to apply law with a view to provide justice to the parties before him. Justice has many dimensions which is what the critics fail to comprehend. The law may not keep pace with the dynamics of local change. The role of the judge is to bridge the gap between law and society by way of interpretation in the light of changing circumstances. Power is thus needed to enforce the mandate of law, the writ of the State and execution of a verdict delivered.

In India the Supreme Court will stand firm and aloof from party politics and it is unconcerned with the changes in the government. The court stands for administration of law, for the time being in force and thus has sympathy for all, but allied to none.

Our Supreme Court has very zealously been protecting the fundamental rights of the citizens. Thus it has been acting as a protector and guardian of the Indian Constitution as well as the rights of the citizens. But in the modern age the independence of the judiciary doesn't mean that it should not keep in mind the social and economic deals and aspirations of the people, while delivering its judgments. Rather the judiciary should actively participate in the sacred task of building a welfare society in the country and the regeneration of the nation. Similarly the executive or the Parliament should not do anything to undermine the independence of judiciary.

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