

# INDEPENDENCE OF JUDICIARY & JUDICIAL ACCOUNTABILITY, PRESENT SCENARIO IN INDIA AND WAY FORWARD

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## Introduction

The basic purpose of law is the quest for justice which should be administered without fear and favour. Law is the ultimate authority which brings stability to the country and the society. Justice is a comprehensive terminology and its disbursement should be ensured by the judiciary which is mainly responsible for the administration of justice in all political systems. If the nation as a whole is to flourish and usher in an era of peace and prosperity the judiciary is of utmost significance because it is the dispute resolving mechanism. As justice C.E. Hughes Says, “The nation lives under the Constitution, but the Constitution is what the judges say it is.”<sup>1</sup> The Judiciary as K.S. Hegde says, “function as the balancing wheel”<sup>2</sup> of the Constitution. So the judiciary establishes the rule of law along with protecting the weak, the helpless, the indigent and the oppressed. So it is must that a strong, independent and potent judiciary is necessary for the growth and development of a young democracy like India.

## Independence of Judiciary

The concept of independence of judiciary came out in the 18th century. Before 1701, Judges held their office during the pleasure of the Crown and could be dismissed by the King at will. The judges were subservient to the Executive. This subservience naturally led the judges to favour the royal prerogative. The most typical example of such an attitude is to be found in the Hampden’s case<sup>3</sup> (the ship money case) in which 7 out of 12 judges gave an award

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<sup>1</sup> Quoted in Bakshish Singh, p.4.

<sup>2</sup> K.S. Hagde, *Crisis in Indian Judiciary* (1973), p.20.

<sup>3</sup> *Indian constitutional law*, 7th Edition, Lexis Hexis, M.P. Jain, p.292.

in favour of the Crown's prerogative to collect money without parliamentary approval. One of the judges ever propounded the view that "Rex is Lex". The judicial independence was secured by the Act of Settlement, 1701, which declared the judicial tenure to be during good behavior, and that upon the address of both the Houses of Parliament it would be lawful to remove a judge.

An independent judiciary is the states of vibrant democratic system. Only an impartial and independent judiciary can stand as a bulwark for the protection of the rights of the individual without fear and favour. For rule of law to prevail, judicial independence is of prime necessity

The regular judicial system had come into India with the passing of the Indian High Courts Act of 1861. The High courts were the ultimate authorities for all causes until 1935. Under the Government of India Act, 1935 the Federal Court of India was established which was the highest Court of India for matters involving the interpretation of any provisions for the Act of 1935. The Federal Court was established on the 6th of December 1937 and survive for only twelve years and fifty days. The Federal Court under the Act of 1935 became the Supreme Court under the Constitution of British India. The Federal Court achieved success in strengthening the laws in India and making it the authoritative court.

The makers of the Indian constitution wanted the Supreme Court to have a wide and appellate jurisdiction and to be an instrument of social justice. The Constituent Assembly debates revealed that the members were in favour of ensuring independence of the judiciary. Alladi Krishna Swami Aiyar while advocating for independence commented that "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. The doctrine of independence is not to be raised to the level of dogma so as to enable the judiciary to function as a kind of super legislature or super executive. The judiciary is there to interpret the Constitution or adjudicate upon the rights between the parties concerned."<sup>4</sup>

Judiciary has been given the power to correct omissions or commissions of the legislature and executive by the process of judicial review. The power of judicial review was

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<sup>4</sup> Alladi Krishna Swami Aiyar, CAD, Vol. XI, No. 9, 23 Nov. 1949, p.837.

not the creature of post-independence period but the Constituent Assembly wanted to give the judiciary the power of judicial review and thus to protect and uphold the Constitution. The Constitution makers felt that the ills of democracy could be modified and rectified by the judicial review and make the constitution a vibrant document fulfilling the needs of the people. Judicial review is the basic structure of the Constitution.

The Doctrine of Separation of Powers<sup>5</sup> is the keystone of the Democratic Arch. Montesquieu believed that application of the Doctrine would prevent the concentration of power in one particular organ of governance, as concentration of power posed a threat to political liberty. Separation of Power is basic structure of the Constitution.

Constitution of India provides for independence of judiciary in following provisions:

- a) **Separation of judiciary from the Executive:** The Directive Principles of State Policy in Art. 50 mandate that the state take steps to separate the judiciary from the executive.
- b) **Constitution of the Supreme Court and the High Courts:** Articles 124, 126, 127, 214, 216, 217 of the Constitution provide for the establishment of the Supreme Court of India and the High Courts in various States, their composition and the procedure for removal of judges.
- c) **Security of Tenure:** Security of tenure is provided to the judges of Supreme Court and High Courts.
- d) **Supreme Court Expenses are charged upon Consolidated Fund of India:** Means item is non-votable in the Parliament. So Parliament is not in a position to starve funds of the Court. Cases like Golaknath, Kesvananda Bharti may arise any time. Therefore making supply of money to Supreme Court independent of Parliamentary vote is a great step in ensuring the independence of judiciary.
- e) **Powers and Jurisdiction of Supreme Court:** Parliament can only add to the powers and jurisdiction of the Supreme Court but cannot curtail them.
- f) **No discussion on conduct of judge in State Legislature/Parliament:** Articles 121 and 211 applicable to Supreme Court and High Courts respectively with an

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<sup>5</sup> Doctrine of Separation of Powers, First Published in Montesquieu's, "The Spirit of Laws," 1748.

exception with respect to a motion for presenting and address to the President praying for the removal of the judge.

- g) **Power to punish for contempt:** Articles 129 and 215 Supreme Court and High Courts have power to punish for its contempt respectively.

### **Judicial Accountability**

Judicial independence and judicial accountability are complementary to each other with great power comes great responsibility and accountability.

- 1. Judicial Corruption:** Former Chief Justice of India J. S.P. Bharucha himself has stated and estimated that about 20 percent of the judges could be corrupt. J. K.G. Balakrishnan doubted whether such high percentage of corruption existed, but he admitted that there is corruption and particularly the judges of the superior courts are corrupt.<sup>6</sup>

The CBI's arrest of the ex-judge of Orissa High Court in connection with the alleged role of an Allahabad High Court judge in granting permission to private medical college to admit students despite a firm Supreme Court ban. On receipt of complaints from UP Advocate General Raghvendra Singh and one Dr. Abhay Krishna about the alleged impropriety of orders passed by a bench headed by J. Shri Narayan Shukla, Chief Justice of India had sought responses of the High Court judges concerned and the High Court Chief Justice Chief Justice of India set up a three-judge inquiry committee to find out the facts, the panel comprises Madras High Court's Chief Justice Indira Banerjee, Sikkim High Court's Chief Justice S.K. Agnihotri and Madhya Pradesh High Courts' Chief Justice P.K. Jaiswal. This in house inquiry panel found substance in the allegations.

- 2. Politicisation of Judiciary:** It is true that every judge pursues a definite political philosophy as an individual as he is also belongs to the same society. Some judges even follow the agenda of a particular political party. The first instance was when the sitting Chief Justice of India K. Subba Rao become the oppositions, presidential candidate against Dr. Jakir Hussain in May 1967. Further retired judges were offered membership

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<sup>6</sup> Interview with Keran Thapar, *The Devil's Advocate*, telecast on CNN - IBN on 4&5 February (2008).

to the Parliament, chairmanship of different commissions etc. In hope of getting such post-retirement benefits they would be bound to tilt towards government.

**3. Re-employment of Retired Judges of Supreme Court in Various Executive**

**Positions:** This is a danger to independence of judiciary, many a time they are appointed to pure and simple executive posts like Governor of States like Fatima Beevi and P. Sathasivam.

**4. Delay in commencement and conclusion of criminal trial:**

L.N. Mishra murder case of 1975. Sessions Court awarded life imprisonment to four convicts after 40 years, now the age of convicts is 73 years, 66 years, 75 years and 79 years, what is the justification of this conviction.

In another case, which has reached the apex court in 2009, a women had lodged a complaint against her brothers for grabbing her shop. The Supreme Court said 'sorry' for the 13 years delay in commencement of criminal trial due to two conflicting orders passed by a High Court Judge in a single day in two different but related cases, as one of the order restricted further probe in the case while in the other, it allowed the investigation to go on. The women litigant in this case Shyam Lata has passed away.

**5. Politics in appointment of judges and appointment of junior judges as Chief**

**Justice of India by to-passing the senior most judge:** Generally, the senior most judge of the Supreme Court was to be appointed as the Chief Justice of the said court. Till 1973, this convention was followed. But this practice was criticized on grounds of experience, merit and competence so these factors should be taken care of and not the seniority. But this convention was broken first time in 1973 when J. R.N. Ray was appointed the Chief Justice of India superseding three senior colleagues namely J. K.S. Hagde, J. M. Shelat and J. A.N. Grover. The reason was that J. A.N. Ray had sided with the government in Kesavananda Bharti case. But reason given by the government that President has followed his discretionary power. In 1976, the appointment of J. M.H. Beg as Chief Justice of India bypassing J. H.R. Khanna who was senior to him because J. Khanna alone dissented in A.D.M. Jabalpur case known as the habeas corpus case thereby saving many people from the misrule during the Emergency. What he said was that Article 21 is not something which is given to us by our Constitution but it existed even before that and so it cannot be taken away in the Emergency.

- 6. Appointment of Additional/Ad-hoc Judges:** Article 224(1) of the Constitution of India provides for the appointment of the Additional Judges for a period not exceeding two years to share the workloads. If there is a post of permanent judge then additional judges need not be appointed. After two years the additional judges are appointed as permanent judges, 1/3rd of the judges of the High Courts in India are additional judges.
- 7. Pendency of Cases:** It is a common saying that Indian courts move so slowly that the grandson ends up fighting the court case that his grandfather files. Over 3.15 crore cases pending across India (2015 figures) This suggests over 3 crore plaintiffs or petitioners, defendants could number around 9 crore assuming each legal case involves 3-5 defendants. That's 12 crore litigants. Assume each litigant has 3 family members, this makes 36 crore Indian citizens are directly or indirectly involved in litigation at any point of time. It means today every fourth person in our society is a litigant (directly or indirectly) and in another 20 years on so this number could swell to every second person, so we are creating a nation of litigants.

We have about 16,000 judges to deal with 66,000 pending cases in the apex court, 45 lakh cases in the 24 High Courts and 2.7 Crore cases across the district and subordinate courts.

Large pendency of cases in Indian courts and non-implementation of judicial reforms have been cited by the World Bank as one of the key reasons for India's low rank on the Bank's Index of "Ease of Doing Business".

- 8. Collegium system and its implementation:** The collegium system came in to being from a Supreme Court Judgment of 1993 and in 1998. Our judiciary is independent. The procedure of appointment under this collegium system is a secret. According to an assessment 80-90% of vacancies in High Courts and Supreme Court are filled from the judges families.

The 99th Amendment of the Constitution, establishing the National Judicial Appointment Commission to appoint Supreme Court and High Court Judges had set aside by the Supreme Court on the ground that it is violating the independence of judiciary on inclusion of the Law Minister and two eminent persons. Any decision which is rejecting the law made by the parliament will be called unconstitutional when it is not clarifying that this law is violating which provision of the Constitution? On

rejecting NJAC Supreme Court adopted the collegium system again is nowhere provided in the Constitution. Late Justice Krishna Iyer publicly described the collegium system as a Constitutionally irrelevant institution. Late Justice J.S. Verma, the main author of the 1993 judgment publicly commented himself: "My 1993 judgment, which holds the field, was very much misunderstood and misused". The constitution review commission Chairman J. Venkatchaliah, had recommended in 2002 the establishment of a Commission for appointing judges. Similar recommendations were made by the Administrative Reforms Commission 2007, the law commission of India (214th Report) 2008 and three Parliamentary Standing Committee Reports.

NJAC was unanimously passed in both Houses of Parliament. Thereafter it was passed by 20 State Legislatures without any opposition. The entire country spoke in one voice through their elected representatives to replace the collegium system. The larger issue of ignoring other aspects of the Constitution's basic structure- such as parliamentary democracy is quite relevant.

Dr. B.R. Ambedkar said in Constituent Assembly Debate. "I personally feel, no doubt, that the Chief Justice is a very imminent person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and to allow him practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vent in the president on the Government of the day. I therefore think that is also a dangerous proposition<sup>7</sup>. "Nowhere in the world, judges appoint judges. Does it mean no other country has an independent judiciary independent of a judge comes from his character and not from the source of appointment.

**9. Delay in appointment of Judges:** A definite timeframe, both for Judiciary to recommend names for appointment as judges and the Executive to effect the appointments, to "keep the hope and aspirations of litigants for speedy justice alive".

A supreme court bench of Justice A.K. Sikri and J. Ashok Bhusan said, "It is seen that once the names are forwarded, they remain pending at the executive level for an unduly long

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<sup>7</sup> Ravi Shankar Prasad, *What about Judicial Accountability?* T.O. INDIA, Oct. 23, 2015, at 12.

time, before they are sent with executive's inputs to the collegium of the Supreme Court for approval. Even after clearance of the names by the collegium, these remain pending at the level of the executives. Sometimes, it takes more than one year to complete the process from the date of forwarding the names till appointment".

In 1993, the Supreme Court had "categorically stated that the process of appointment must be initiated at least one month before the date of anticipated vacancy".

The confrontation between the Government and the Supreme Court collegium over finalisation of the Memorandum of Procedure (MoP) for appointment of Judges after setting aside the NJAC. Supreme Court's time frame for appointment in lower judiciary not being followed:<sup>8</sup>

**10. Recruitment of Civil Judges:** A two tier process should take -153 days. A three-tier examination process should take 273 days. On an average, over the last 10 years, one recruitment cycle for Civil Judges (Jr.) takes 326-27 days (Three tier process). J&K takes 742 days, Uttarakhand - 454 days, Assam - 447 days, Delhi - 798 days, Kerala- 459 days, Himachal Pradesh - 178 days, Gujarat - 158 days, Karnataka - 270 days, Odisha- 265 days, Andhra Pradesh - 256 days.

**Recruitment of District Judges:** Supreme Court says a two tier recruitment for District Judges should take 153 days and the average to complete the cycle in actual 196. 28 days, for three tier process it should take around 273 days and it take actually 335.9 days.

**Under two-tier process:** Kerala- 456 days, Andhra Pradesh - 192 days, Odisha- 160 days, Himachal Pradesh- 155 days, Tripura -144 days, Tamil Nadu- 96 days.

**Under three-tier process:** Uttar Pradesh- 349 days, Punjab- 324 days, Mizoram- 317 days, Nagaland- 267 days, Karnataka- 233 days.

The Supreme court agreed to constitute a committee of judges and a permanent secretariat in the Supreme Court and every High Court to vet applicants for 'Senior advocates' designation, ending its conflict with the government over MoP.

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<sup>8</sup> Radhyeshyam. Jadhav, *Sc's time frame for appointments in lower judiciary not being followed*, T.O. INDIA, Dec. 07, 2017, at 15.



**11. Judicial Discipline, Judicial propriety and Judicial Transparency:**

- a) A three judge bench on February 8, 2018 which had held that compensation not availed within a stipulated time of five year period would not be a ground for cancellation of land acquisition while a three -judge bench in 2014 had held that non payment of compensation would be a ground to cancel the land acquisition. A three-judge bench on Feb. 8, 2018 held that the 2014 judgment was per incuriam. On Feb. 13, 2018 a three judge bench headed by J. Madan B. Lokur referred to the Feb. 8 judgment and observed that if 'Judicial discipline' and propriety were not maintained, the institution will 'go forever'.
- b) Supreme Court had so many times criticized media trial but press conference by four senior most judges of Supreme Court is a serious matter. The best way to solve the problem was either Chief Justice of India had announced his resignation, on moral grounds as his four brother judges have lost confidence in him or contempt proceedings must be initiated against these four judges as contempt punishment was awarded to Justice Karan. Likewise if four judges wanted to come to the press should resign first.
- c) **A controversial collegium:** the unfortunate transfer of Justice Jayant Patel, just as he was on the verge of taking over as the Chief Justice of the Karnataka High Court. The local bar association demanded 'reasons' for this arbitrary transfer. As a famous U.S. Judge once noted, "The political branches of Government claim legitimacy by election, Judges by reason".<sup>9</sup>
- d) A Delhi High Court Judge publicly pronounced at a conference that judges need not give 'reasons' for issuing Intellectual Property (IP) injunctions, since they know best and decide with "conviction".<sup>10</sup>
- e) A former judge of the Rajasthan High Court had gone on record with his strong "conviction" that peacocks propagate their progeny not through sex, but through tears.
- f) **Legal legibility:** the quality of "judgment", i.e., how well the judge writes and reasons out its decision, legal clarity or legibility". Access to law means nothing if it takes specialized legal genius to determine the essence of a ruling.<sup>11</sup>

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<sup>9</sup> Shamad Basheer, Measuring Judicial Merit, THE HINDU, Oct. 11, 2017 at additional page.

<sup>10</sup> ibid

<sup>11</sup> ibid

For example the Ayodhya verdict ran into more than 1,000 pages, Justice Ruma Pal, a former judge of Supreme Court, once laminated: "Many judgments are infact mere compendia or digest of decisions on a particular issue with very little original reasoning in support of the conclusion".<sup>12</sup>

**12. Judiciary and Economic Development:** This year's "Economic Survey" which gives detail of previous year performance. This year's "Economic Survey" provided details of effects judiciary over economic development. The stay pronounced by different courts on different projects hold the Rs. 52,000 crore value projects. Approximately Rs. 7.5 lac crore amount is hold up in the court due to pendency of cases; which is 4.7 percent of GDP.

**Conclusion:**

- Judges do commit misdeeds which take the form of corruption, biases etc. So in order to have an independent judiciary such malice should be corrected, otherwise the independence would be at stake. But how to do it, it is of prime importance if Executive or Legislature will do it Judiciary will be under a constant pressure.
- An independent commission to investigate the charges and awarding punishment and to take appropriate measures as per 80th Report and 121st Report of Law Commission of India.
- Judicial independence depends upon the public acceptance of the judiciary being a fair, just and honest institution. Judicial accountability and good judicial conduct goes hand in hand towards the effective working of the judiciary and maintenance of rule of law.
- Employ more judges and create more courts to handle the problem of pendency of cases. The current judge to population ratio is just 10.5 to 10 Lakh. The Law Commission has recommended it should be 50 to 10 Lakh.
- Increase the number of working hours and working days for all courts, this single measure can dramatically reduce backlog.
- Incentivise judges to deliver quality judgements and a mutually agreed number of judgments in a certain period. Rewards were instituted for the best performers in UAE.

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<sup>12</sup> Supra

- Limit stay orders when assets remain frozen for 5-20 years they suffer loss of productivity and value and even encroachment. This is criminal wastage of scarce resources.
- Limit adjournments to a maximum one for the plaintiffs and two for the defendants.
- Modernise land revenues cases. Court fee for filing most revenue cases is absurd. A person can pay just Rs. 1 as court fee and start litigation on land valued at Rs. 100 crore. The extra revenue earned can be used to incentivise judges as well as provide better working facilities for court employees litigants and advocates. This will discourage frivolous cases.
- Courts must punished those providing false evidence and false testimony.
- Supreme Court's advice to limit lengthy arguments by advocates within agreed time limits should be followed. The goal must be "lean to the point, judgments delivered in quick time".
- The collegium needs to make public its methodology for measuring merit.