Chapter 1

INTRODUCTION
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1.1. GENERAL INTRODUCTION

Independence of judiciary is one of the federal features of and is essential in a democracy. It is one of the basic features of the Constitution of India. Supreme Court of India is the guardian of the Constitution and the fundamental rights. The supremacy of the Constitution can be maintained only through an independent and impartial judiciary. The judiciary has the power of judicial review under the Constitution. The judiciary imposes limits on the power of the Centre and the State also. The Government has three organs namely: Legislature, Executive and judiciary. Legislature makes the law, executive implements the laws and judiciary has power to interpret the law. Justice is rendered through courts and judiciary is the prominent wing of the constitution system. The constitution framers made the judiciary from external political influences.

The independence of judiciary and the confidence of the public in the judiciary is of supreme importance for democracy to survive in India. This is because it is the very nature of things that in every society there are some

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disputes between the interests of the people and between the people and the State. Hence there has naturally to be a forum, which can adjudicate these disputes. If the grievances of the people are not resolved peacefully by an independent forum, they will be resolved violently. Hence the judiciary is a great safety regulator which is absolutely essential for maintaining peace and harmony in society. The majority has to be independent if it is to be respected by the public.

"The Supreme court in India has said that, the judiciary has a right under its inherent jurisdiction to look into the appeal against the decisions given in the privilege matters, in spite of the fact, that they are specifically debarred from looking into the regularity or irregularity of the procedure followed by the legislature, if the glaring patent mistakes are committed and if the mistakes are patent and quite obvious. Wherever, the theory of separation of powers is followed, there have been differences and conflicts between the wings by which powers are separately enjoyed. That has happened in many countries and in India also. The wisdom lies in understanding the essence of the principles and situations and acting in a manner that unnecessary controversies are not created, and justice is done, and facilities to function without obstruction are generated. By and large, fortunately the different wings of the State in India have functioned in that spirit, which has helped the State to function, as it should.

Whenever parliamentary privileges have been used as a shield the institutions have adopted a complementary role and protected it. But, wherever it has been used as a sword on the citizenry the complementary role has been played by the judiciary by testing the constitutionality of the action with reference to the right of the institution or individual and the privileges of
the House. The Constitution of India guarantees fundamental rights. Article 13 makes the fundamental rights enforceable in the courts.

Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal. The Chief Justice of India plays a vital role in the appointment of Judges. A Judge of the Supreme Court shall not be removed from his office except by an Order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the courts, shall be charged upon the consolidated Fund of India, and any fee or other moneys taken by the Court form part of that Fund. Thus the Supreme Court and the High Courts are kept outside the purview of political influence with regard to salaries. Under the provisions of the Constitution of India, the Supreme Court and the High Courts have been declared as Courts of Record. Article 129 empowers the Supreme Court and the High Courts with the power to punish for their contempt. Constitution of India confers the autonomy to the Supreme Court and High Courts respectively.

The Chief Justice of India is empowered to appoint officers and servants and he may prescribe the conditions of services by rules, subject to the law which

5 Under Article 224(4)
6 Article 124 (4)
7 Constitution of India, Indian Law Publisher, New Delhi, p.145.
8 Articles 129 and 215:
9 Article 148 and 229
10 Ibid
parliament may make under Article 50. The state shall take steps to separate
the judiciary from the executive in the public services of the State.

The judiciary thus wishes to bring about a silent revolution for the
purpose of securing socio-economic justice to all.\textsuperscript{11} In a democratic country
like India, the executive, the legislature and the judiciary constitute three
important organs of the state. The intention of the state behind the
constitution of the said three is to entrust the three important functions of the
state to the said organs, and each of the organs will represent the authority of
the state. The ministers legislate the law and the executives will apply the
laws. Thus, like the other two sovereign, functionaries the judiciary performs
the sovereign judicial functions of the state. Though all the constitutional
functionaries have their own duties, the role of one of the principal functionary
(judiciary) is incontrovertible, immeasurable and incalculable. The task
assigned to the judiciary is in way less then those other functionaries namely-
the executive and the legislature. One the other hand the responsibility of the
judiciary is of a higher degree.\textsuperscript{12}

An independent judiciary should not be conceived as a dogma of ritual.
To kept the judicial system pure and independent, the superior court has
been empowered with wide original, extra-ordinary appellate jurisdiction in
federal matters, in fundamental 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 of justice.\textsuperscript{13} While there can be no two
options 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 kept in view one important principal. The doctrine of

\textsuperscript{11} 37th Commonwealth Parliamentary Conference comparative Vol.V, p.35
\textsuperscript{12} Pandit Jawaharlal Nehru while speaking in a Seminar on Parliamentary Democracy on 6th
December, 1957.
\textsuperscript{13} AIYAR A.K, The Constitution and Fundamental Rights, Indian Law Publishers, New Delhi,
1955, p.255.
independence is not to be raised to the leave of a 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\(^{14}\) and the executive is depending for it proper
functioning upon the cooperation of the other two.\(^ {15}\)

The need for the independence of the judiciary is essentially inevitable.
In order to administer justice freely, fairly, fearlessly, and without favour, it is
imperative that their tenure is not depending upon the "pleasure of good
behaviour " so that there is no external or internal influence, and this is
secured by an express provision in the Indian constitution that judges of the
supreme court and of High Court shall not be removed except by an order of
the president passed after an address by each house of parliament supported
by a majority of not less than two third of the members of the House present
and voting has been presented to the president on the grounds of proved
misbehaviour or incapacity.\(^ {16}\)

Besides, the conduct of the justice of the superior courts cannot be
discussed or criticized in Parliament and / or in the Legislature of a State
except upon a motion for presenting an address to the president praying for
the removal of the Judge on proved misbehavior or incapacity.\(^ {17}\) His right to
remuneration such as salary allowance, leave, pension shall be determined
by the law of the parliament or according to schedule II of the construction
and shall not be varied or altered or affected adversely to his disadvantage,
after his appointment Independence of the Judiciary requires that justice of
the superior Courts must be free from executive influence in coming to a
decision in the rendition of justice as they have to administer the law and not
the will of the executive: they must have the assurance that their decisions will

\(^ {14}\) The Judiciary as much of the Legislature.
\(^ {15}\) Constitutional Assembly Debates XI,9,83
\(^ {16}\) Article 124 and 127 of the Constitution of India.
\(^ {17}\) Article 121 and 211 of the Constitution of India
be carried out by the executive; they must act according to their reason and conscience and not according to the desire or design or devise or convenience of the executive; they must also pronounce of definitive or binding judgment and not wavering judgment on the same issue on different occasions.\textsuperscript{18}

It is a well known fact that the public interest litigation jurisdiction of the Indian Judiciary is very important for those who find it very difficult to have access to justice because of poverty, technicalities of law, rule of locus standi or for some other reason. However, enough attention has not been paid to the ever changing main concerns of public interest litigation jurisdiction and its causes and consequence. It is proposed to show in this paper that the main concern, in the earlier years, of public interest litigation, the concern for the problem of the poor, has in later period changed into development concerns which essentially are concerns for he upper and middle classes. However, concern for the developmental problems and the problems of the upper and middle classes have invariably expressed as concern for the environment, sustainable development, corruption in public life, public morals, public health and education etc., though it cannot be denied that marginally benefit the poor. The change in judicial attitude has coincided with the change in socio-economic conditions and political ideologies, that is, the change in judicial attitude has been conditioned by social and political priorities.

The overall development of the country also had an impact on constitutional doctrine of separation of powers. Increasingly, many of the traditional functions of executive and legislature are being performed by judiciary. When governments, specially central government become politically weak, judiciary tend to become stronger. The process of judicial activism

which began with Golaknath\textsuperscript{19} and Kesavanand Bharti\textsuperscript{20} helped judiciary in diluting the idea of separation of powers. Can it also be said that in some politically sensitive areas, where governmental action would be inconvenient, judiciary, without any protest from the government, is allowed to perform legislative and executive functions. Relocating industries, and disciplining, polluting industries and transport units, but for judicial intervention, would have been difficult for any government. What cannot be done directly may be done indirectly.\textsuperscript{21}

As Nani Palkhiwala observed once, the progress of a civil suit in our courts of law is the closest thing to eternity we can experience! Our laws and their interpretation and adjudication led to enormous misery for the litigants and forced people to look for extra-legal alternatives. Any one, who is even remotely exposed to the problem of land grabbing in our cities, or a house owner who finds it virtually impossible to evict a tenant after due notice even for self-occupation, can easily understand how the justice system failed.

In the process, a whole new industry of administering rough and ready justice by using strong-arm tactics to achieve the desired goals has been set up by local hoodlums in almost all of our cities and towns, and increasingly in recent years in rural areas. The clout and money these hoodlums acquire makes sure that they are the ones who later enter political parties, and eventually acquire state power. There are countless examples in almost every state in India of slum-lords, faction leaders, and hired hoodlums acquiring political legitimacy. Most of them started their careers attempting to fill the vacuum created by judicial failure through extra-legal, and often brutal methods. In addition, the courts have tended to condone delays and encourage litigation and a spate of appeals even on relatively trivial matters.

\textsuperscript{19} AIR, 1967, SC1846.
\textsuperscript{20} AIR 1973, SC 1461
The higher courts have taken on themselves too much, making it impossible for them to be able to render justice speedily and efficiently. The writ jurisdiction became pervasive and everything under the sun is somehow made a subject matter of the writ. For instance, the transfer of an employee in a public sector undertaking has become a matter of writ jurisdiction by very involved and dubious logic. Such absurdities undermined the authority of judiciary and caused enormous damage to public interest. To take another instance, the courts have time and again ruled that cooperatives are public institutions, and are creatures of state, whereas in fact cooperative theory and practice throughout the world clearly envisage that a cooperative is a collective private body, created to further the economic interests of the members in accordance with the principles of cooperation. This mind-set that state could intervene everywhere, and that such intervention by definition is good, ensured that the people's institutions could not flourish in an atmosphere of freedom, self-governance and autonomy. At the same time, state's power even to control its own employees and enforce discipline has been severely eroded. As a net result, the judicial process only helped to accelerate the decline in governance.

Right to life and liberty, the most vital freedoms guaranteed in the Constitution, could not be adequately safeguarded. Judiciary is over-burdened and rendered ineffective with unnecessary litigation, delayed procedures, obsessive concern with the livelihood of advocates at the cost of justice to litigant public and indiscriminate application of writ jurisdiction. Excessive case load meant that most orders emanating from courts would be by nature of granting stays instead of adjudication. The age-old village institutions for justice were allowed to wither away completely. Local people, who know all the facts, have neither the means nor access to go through complicated, incomprehensible court procedures. Touts flourished and justice suffered. As
a result, most citizens avoid courts except in the most extreme circumstances, when they have absolutely no other recourse available.

Essentially, the failure of the civil and criminal justice system is manifesting in abnormal delays in litigation and huge pendency in courts. While accurate statistics are not available, it is estimated that approximately 38 million cases are pending in various law courts all over the country. While 20 million cases are pending in district courts, High Courts and Supreme Court, about 18 million cases are said to be pending in lower courts. At the end of 1995 it was estimated that around 58 lakh criminal cases were pending trial, while 17.3 lakh cases have been disposed of during the year accounting for 23 percent. In 1994 for example, disposal of cases in our courts was around 17 percent. The conviction rate is abnormally low with only 6 percent cases resulting in conviction. Even in cases extremely grave offences with direct impact on public order and national security, there are abnormal delays. For instance, it took our criminal justice system more than seven years to convict the murderers of Rajiv Gandhi in Sriperumpudur in 1991. There are harrowing tales of innocent citizens accused of petty offences languishing in jails as under-trial prisoners for decades. Most often, the time spent in prison during trial exceeds the maximum punishment permissible under law even if the person is proved guilty!

The delays, the habitual use of English as language of discourse even in trial courts and the extreme complexity and the tortuous nature of our legal process made justice highly inaccessible to a vast majority of the people. It is estimated that India has only about 11 judges per million population, which is among the lowest ratios in the world. The cases pending exceed about 30 thousand per million populations. Obviously it is unrealistic to expect the law courts to deal with this abnormal case-load or to be accessible to people. The delays, the complexity and the unending appeals make litigation inordinately expensive in India. While astronomical fees are charged for legal consultation
by high-priced lawyers practicing in the higher courts, even in the lower courts cost of litigation is prohibitive and beyond the reach of most citizens.

The failure of the justice system has several disastrous implications in society. As Gladstone observed, the proper function of a government is to make it easy for the people to do good and difficult for them to do evil. The only sanction to ensure good conduct and to prevent bad behavior in society is swift punishment. In the absence of the state’s capacity to enforce law and to mete out justice, rule of law has all but collapsed. Even in civil matters, the sanctity of contracts and agreements has lost its relevance because of the courts incapacity to adjudicate in time. Equality before law, though constitutionally guaranteed, has remained a notional concept on paper. In reality the vast masses of the poor and illiterate people are relegated to the margins of society in the absence of a fair and effective justice system which is accessible to all. As a result, an extra-legal mechanism for redress of grievances and for providing rough and ready justice has sprung up all over the country. The foremost cause for increasing criminalisation of society and politics is the failure of the justice system.

The Election Commission estimates that more than 700 of the 4072 legislators in all the states have criminal records against them. Even if heroic and successful efforts are made to disqualify all these persons with criminal record from contesting, the problem will continue to grow unless justice administration improves dramatically. While a section of criminal gangs indulges in violent crime and graduates into politics using the money power so acquired, most organised crime in recent years is involved in informal adjudication of disputes backed by a threat of brute force and violence. As the courts have failed to deliver justice, there is a growing demand for such gangs which can enforce rough and ready justice.

In a large measure, the failure of justice system meant that no entrepreneur or businessman or even ordinary citizen could rely on law courts
to enforce contracts and agreements. The undermining of the sanctity of contracts and agreements has had a very debilitating impact on investment production and economic growth. The failure of the criminal justice system has led to the near break down of public order in many pockets of the country. This, coupled with the many inadequacies of functioning of the police have led to a crisis of governability in India. The arbitrary and unaccountable functioning of the police has led to complete alienation of many citizens from the state. Added to this, the complete politicization of the police force led to highly partisan crime investigation. Elected governments have been habitually abusing their powers to drop serious criminal charges against their supporters and to foist false cases against their opponents. The broad nexus between the politician, criminals and policemen has come to stay, vitiating the governance process and undermining social stability and harmony.

This alarming situation calls for speedy remedial matters. These measures should be practical and effective while they are in consonance with the basic features of the Constitution. The judicial reforms as envisaged should be capable of providing speedy and efficient justice accessible to the ordinary citizens. At the same time, they should respect and protect the independence of the judiciary. Equally important, measures should be taken to enforce accountability of the judiciary. Several Law Commission reports and Police Commission reports have eloquently made out a case for many specific and practical judicial reforms. However, no effort has been made to implement these recommendations. While a lot has been, and is being said about the failure of the justice system, precious little has been attempted to address this growing crisis. The following are some of the major reforms that need to be implemented without further delay. Rural Courts for Speedy Justice

Perhaps the most important practical reform would be constitution of rural courts for speedy justice. As already stated, the number of judges in our
society is slightly over 10 per million populations. This density is roughly ten percent of the density of judges (per unit population) in more advanced and law-abiding societies. Even this low number is highly skewed with pitiful shortages in subordinate judiciary and ridiculously large numbers in higher courts. The Supreme Court, which was originally designed to consist of a chief justice and not more than 7 other judges, has now been expanded to a total strength of 26. The high courts have even larger numbers of judges. The Andhra Pradesh High Court for instance has 39 judges! All these hundreds of high court judges in effect sit as constitutional courts every day with the power of interpreting the Constitution, and quashing laws on the ground that they are unconstitutional! In contrast the United States Supreme Court has only 9 judges and the Supreme Court alone sits as constitutional court, though other Federal Courts have limited powers to interpret the Constitution. Obviously what is needed is a substantial increase in the number of judges at the local level giving access to the ordinary people. In addition to the number and access, the

Procedures of these local courts should be simple and uncomplicated giving room for sufficient flexibility to render justice. These courts should use only the local language and they should be empowered to visit the villages and hear the cases and record evidence locally. Above all they should be duty bound to deliver the verdict within the specified time frame. There could be several models like the 'gram nyayalaya' advocated by the Law Commission in its 114th report. Essentially, there should be such rural courts with special magistrates with jurisdiction over a town, or a part of a city or a group of villages. These special magistrates should be appointed by District Judge for a term of 3 years. They should have exclusive civil and criminal jurisdiction of, say all civil disputes up to Rs one lakh in civil cases and up to an imprisonment of one year in criminal cases. In addition, certain civil disputes arising out of implementation of agrarian reforms and allied statutes, property
disputes, family disputes and other disputes as recommended by the Law Commission could be entrusted to these rural courts. In civil cases there should be only a provision for revision by the District Judge on grounds of improper application of law and on no other ground. In criminal cases where imprisonment is awarded, there could be a provision for appeal to the Sessions Judge. The procedures must be simplified and these courts should be duty bound to deliver a verdict within 90 days from the date of complaint.

1.1.1 Indian Judicial Service: In the subordinate courts there have been inordinate delays and varying levels of efficiency. It is high time that the IJS\(^{22}\) is created as an All India Service under article 312 of the constitution. All the offices of the District and Sessions Judges should be held by persons recruited to such a service after adequate training and exposure. Only such a meritocratic service with a competitive recruitment, high quality uniform training and assured standards of probity and efficiency would be able to ensure speedy and impartial justice. A fair proportion of the High Court Judges could be drawn from the Indian Judicial Service. Judicial procedures

The civil and criminal procedure codes and the laws of evidence have to be substantially revised to meet the requirements of modern judicial administration. While the principles underlying the procedural law are valid even to day, in actual practice several procedures have become cumbersome, dilatory, and often counter-productive. Simultaneously in all trial courts the local language should be the only language used. There should be time limits prescribed for adjudication. The stays, and endless adjournments should be firmly curbed. The right to get justice within one year in a criminal case and 2 years in a civil case should be constitutionally guaranteed. All the procedural laws should be suitably amended to ensure that such a constitutional right is enforced. There should be strict limitation of appeals and

\(^{22}\) Indian Judicial Service
only one appeal should be permitted in civil cases. The appeal should be heard and verdict delivered within 3 months in a criminal case and within 6 months in a civil case. All stays should be prohibited except in exceptional circumstance for reasons specifically recorded in writing and no stay should exceed 15 days. The time limits for adjudication should be strictly adhered to even in cases involving stay orders. Higher Courts

The number of judges in the higher courts should be substantially reduced and their appellate jurisdiction should be severely restricted. The Supreme Court jurisdiction should be limited only to matters involving interpretation of the Constitution or disputes between two States or Union and States. In effect, the Supreme Court should function only as a Constitutional Court and a Federal Court. The high courts should not have the power to interpret the Constitution except in matters involving the State legislation. The appellate powers of high courts should be severely restricted in order to reduce the case load and ensure the sanctity and authority of the high courts. The number of judges in high courts should be significantly reduced. Matters relating to taxation, disciplinary action against employees and labour disputes should be completely beyond the purview of ordinary law courts. They should be entrusted to the special tribunals with no provision for appeal to higher courts except on grounds of interpretation of the Constitution. The writ jurisdiction which has now become all-encompassing should be strictly focused on right to life, liberty and equality before law. The creative expansion of writ jurisdiction that has become the order of the day should be firmly curbed. Where the writ is applicable, the courts should have complete and unfettered powers to enforce their directives.

1.1.2 Judicial Commission: The present mechanism for appointment of judges of higher courts has become very dilatory and ineffective. The Supreme Court’s judgment arrogating to itself the complete power of
appointment of judges has made the remedy worse than the disease. It is absurd to assume that in a democratic society any organ of state should perpetuate itself without any degree of accountability to the people as the ultimate sovereigns. Nowhere in the democratic world have the executive and legislature been made so utterly impotent in matters relating to judicial appointments as in India. This incestuous practice of judiciary being managed entirely by itself is both self-serving and often counterproductive. Society has great stakes in judicial appointments, and judges, however exalted their position is, are mere mortals and servants of the public. Obviously, it is high time that a Judicial Commission of high standing is appointed with members drawn from the judiciary, the executive and the legislature and their recommendation is made binding on the President in all appointments to the higher judiciary. Similarly, the provision for removal of a judge of the Supreme Court or High Court under article 124 (clause 4) has become inoperative in practice. As Justice Ramaswamy's impeachment case has amply proved, the Indian Parliament has lost the capacity to act as a court in such impeachment trials. As a result, under the present dispensation a judge is appointed solely on the recommendation of the judiciary, and no judge can ever be removed in practice, no matter how horrendous his conduct is or how inefficient his functioning is. Such a situation can only lead to judicial terrorism and result in unmitigated disaster to the governance process and society. Therefore the Judicial Commission should be empowered to try an errant judge and upon the recommendations of the Judicial Commission the President should be empowered to remove the judge held guilty of high crimes and misdemeanors.

As can be seen, there is an extremely strong case for urgent and far reaching reforms in our judiciary. For about two decades after independence, most people reposed their faith in the political class to govern wisely and to ensure freedom and justice to all. Over the next two decades, as politicians
have become the objects of scorn and ridicule, the public relied heavily upon the higher civil services for ensuring probity, efficiency and impartiality in administration. As the bureaucracy also has lost the trust of the general public in a large measure, in recent years the people have come to recognise the judiciary as the last bulwark against the abuse of executive authority and for providing justice. However the judiciary is collapsing under the weight of the case load. Also there are serious questions about the efficacy, impartiality and integrity of judiciary at certain levels. There is an increasing unease and disquiet about the functioning of the judiciary and the character, competence and commitment to public service of several judges, particularly in the subordinate judiciary. If these challenges are not recognised immediately and if far reaching judicial reforms are not initiated with a great sense of urgency and devotion, the judiciary may also fall in public esteem endangering the whole civil society and adversely affecting the public good. The judiciary should recognise that it is an organ of state with the sole objective of serving the public in a fair, efficient and accountable manner. Its loyalty should only be for public good and speedy justice and not to the convenience of advocates or politicians or bureaucrats. We have been singularly fortunate that several outstanding judges over the decades have ensured that judiciary can function in an independent and fearless manner. The time has, now come when concerted efforts should be made to make judiciary efficient and effective without usurping the functions of the other organs of state.

The idea of separation of powers rests on the existence of three distinct functions of government and the conviction that the three needed to be kept separate in order to prevent a concentration of power. The doctrine also envisages a system of checks and balances whereby the branches of government restrain each other from overextending themselves. Justice Arijit Pasayat writes that in the Indian constitutional scheme, the role of the judiciary is to keep a vigilant watch over the functioning of the democracy in
accordance with the dictates of the Constitution. "In this sense, an independent judiciary is the sine qua non of democracy." In the Second Judges Case, the majority noted B.R. Ambedkar's statement to the effect that our judiciary ought to be independent of the Executive and competent in itself. Long before that, in 1802, the sentiment had been expressed with greater flourish on the floor of the House of Representatives by John Rudlege. "The Government may be administered with indiscretion and violence, offices may be bestowed exclusively upon those which have no merits than that of carrying votes at the elections, the commerce of our country may be depressed by nonsensical theories and public character may suffer from bad intentions, but so long as we may have an independent judiciary, the great interest of the people will be safe. Leave to the people an independent judiciary, and they will prove that man is capable of governing himself."

The judiciary in India interprets the Constitution and is its guardian; keeping all authorities — executive, legislative, administrative, judicial and quasi-judicial, within bounds. It is entitled to examine every governmental action to assess its conformity with the Constitution. The tradition that was built up in India, even through the Raj years, was that of a non-political judiciary: resulting in the constitutional scheme where the judicial office is one of the few that does not hold office at the pleasure of the President. Once appointed, they hold office until the age of superannuation. In fact, the dismissal of a judge would require enormous political will.

India did not see revolutionary struggles for judicial independence; the Constituent Assembly making several provisions that would guarantee it. The Constitution makes detailed provisions for the structure, composition, powers and jurisdiction of the Supreme Court, of which only a few can be touched by ordinary legislative processes — and that too, within constitutionally sanctioned

24 John Rudlege
limits. However, between 1973 and 1983, India witnessed the unseemly tussle between the ruling party and the judiciary. In 1973, three senior-most judges of the Supreme Court were superseded. The person appointed as the Chief Justice had held in favour of the Government in three important constitutional cases. Justice H.R. Khanna, who should have become the Chief Justice, had delivered a most courageous dissent during the Emergency and was ‘rewarded’ with supercession. During the emergency from 1975 to 1977, sixteen High Court judges were transferred; after having displayed remarkable independence. Simultaneously, Indira Gandhi was being criticised for publicly stating the need for a ‘committed judiciary’, which would promote the political goals of the government. The highly reviled case of S P Gupta, emerged from this scenario. Much has changed since then, in India and in Britain.

Clearly, the debate surrounding the process of appointment of judges in India has focused on who made the decision. To maintain judicial independence, it is necessary that the person/body/collegiums that makes the selection is free of political influence. However, what the debate ignores is that as long as the reasons behind a selection remain unknown, the process will be susceptible to unhealthy influence. From the beginning, there has been no transparency in selecting persons for elevation, and the manner in which judges were elevated was never democratic. The method of appointing judges is quite arbitrary and the power entrusted to a small clique.

The rights jurisprudence permits challenge on any administrative / quasi-judicial decision if the grounds for the same are not known. Part of the expanded fundamental rights jurisprudence, the idea is to ensure that justice is seen to be done. A constitutional guarantee of non-arbitrariness, to make

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25 The majority had held that a person who had been detained without trial need not approach either the Supreme Court or the High Court. He could be held in preventive custody and would have no remedy at all.

26 AIR 1993 SC 494
sense in the context of judicial appointments, needs to ensure that the process is transparent. A transparent process will go a long way in eliminating the consideration of all but the relevant factors. Any body that is empowered to make the selection must do it on a transparent basis, making a decision that can stand on its own. Under the current scheme, the scope for judicial review of an appointment decision is limited to grounds of non-consultation with a constitutional authority that needs to be consulted under the Third Judges Case. This limitation of judicial review smacks of arrogance, rooted in the idea that judges can do no wrong. Even though judicial ascendancy in India has largely been a force of good, it is still a very dangerous trend.

The Constitution seeks to ensure the independence of Supreme Court Judges in various ways. Judges are generally appointed on the basis of seniority and not on political preference. A Judge of the Supreme Court cannot be removed from office except by an order of the President passed after an address in 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 members present and voting, and presented to the President in the same Session for such removal on the ground of proved misbehaviour or incapacity. The salary and allowances of a judge of the Supreme Court cannot be reduced after appointment. A person who has been a Judge of the Supreme Court is debarred from practising in any court of law or before any other authority in India.

1.1.3 Powers to punish contempt: Under the Constitution the Supreme Court has been vested with power to punish anyone for contempt of any law court in India including itself. The Supreme Court performed an unprecedented action when it directed a sitting Minister of the state of Maharashtra, Swaroop Singh Naik, to be jailed for 1 month on a charge of

27 Articles 129 and 142
contempt of court on May 12 2006. This was the first time that a serving Minister was ever jailed.

After some of the courts overturned state laws redistributing land from zamindar (landlord) estates on the grounds that the laws violated the zamindars' fundamental rights, the Parliament of India passed the First Amendment to the Constitution in 1951 followed by the Fourth Amendment in 1955 to protect its authority to implement land redistribution. The Supreme Court countered these amendments in 1967 when it ruled in Golaknath v. State of Punjab that Parliament did not have the power to abrogate the fundamental rights, including the provisions on private property. Free Supreme Court Judgments Other laws deemed unconstitutional by the Supreme Court

On February 1, 1970, the Supreme Court invalidated the government-sponsored Bank Nationalization Bill that had been passed by Parliament in August 1969. The Supreme Court also rejected as unconstitutional a presidential order of September 7, 1970, that abolished the titles, privileges, and privy purses of the former rulers of India's old princely states. Response from the Parliament of India In reaction to the decisions of the Supreme Court, in 1971 the Parliament of India passed an amendment empowering itself to amend any provision of the constitution, including the fundamental rights. The Parliament of India passed the 25th amendment, making legislative decisions concerning proper land compensation non-justiciable. The Parliament of India passed an amendment to the Constitution of India, which added a constitutional article abolishing princely privileges and privy purses.

1.1.4 Counter-response from the Supreme Court: The Court ruled that the Basic Structure of the Constitution cannot be altered for convenience. On April 24, 1973, the Supreme Court responded to the parliamentary offensive by ruling in the Kesavananda Bharati v. The State of Kerala case that
although these amendments were constitutional, the court still reserved for itself the discretion to reject any constitutional amendments passed by Parliament by declaring that the amendments cannot change the constitution's "basic structure", a decision piloted through by Chief Justice Sikri.

1.1.5 Emergency and Government of India: The independence of judiciary was severely curtailed on account of powerful central government ruled by Indian National Congress[2]. This was during the Indian Emergency (1975-1977) of Indira Gandhi. The constitutional rights of imprisoned persons were restricted under Preventive detention laws passed by the parliament. In the case of Shiva Kant Shukla Additional District Magistrate of Jabalpur v. Shiv Kant Shukla, popularly known as the Habeas Corpus case, a bench of five senior most judges of Supreme court ruled in favour of state's right for unrestricted powers of detention during emergency. Justices A.N. Ray, P. N. Bhagwati, Y. V. Chandrachud, and M.H. Beg, stated in the majority decision under the declaration of emergency no person has any locus to move any writ petition under Art. 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention.

1.1.6 Corruption and Misconduct of Judges: The year 2008 has seen the Supreme Court in one controversy after another, from serious allegations of corruption at the highest level of the judiciary, expensive private holidays at the tax payers expense, refusal to divulge details of judges' assets to the public, secrecy in the appointments of judges', to even refusal to make information public under the Right to Information Act. The Chief Justice of India K.G.Balakrishnan invited a lot of criticism for his comments on his post not being that of a public servant, but that of a constitutional authority. He later went back on this stand. The judiciary has come in for serious criticisms from
both the current President of India Pratibha Patil and the former President APJ Abdul Kalam for failure in handling its duties. The Prime Minister, Dr. Manmohan Singh, has stated that corruption is one of the major challenges facing the judiciary, and suggested that there is an urgent need to eradicate this menace.

The Union Cabinet of the Indian Government has recently introduced the Bill\textsuperscript{28} in Parliament for setting up of a panel called the National Judicial Council, headed by the Chief Justice of India, that will probe into allegations of corruption and misconduct by High Court and Supreme Court judges. However, even this bill is allegedly a farce, just meant to silence and suppress the public. As per this Bill, a panel of judges themselves will be judging the judges, no inquiry can be initiated against the Chief Justice of India or against retired judges, which is against the principles of natural justice, and a citizen can be punished and fined for any complaint that the judges find "frivolous" or "vexatious", which would discourage genuine complaints against judges.

In a decision of this Court in Union of India & Ors. vs. Pratibha Bonnerjee & Anr\textsuperscript{29}. Ahmadi, C.J., observed: "Independence and impartiality are the two basic attributes essential for a proper discharge of judicial functions. A Judge of a High Court is, therefore, required to discharge his duties consistently with the conscience of the Constitution and the laws and according to the dictates of his own conscience and he is not expected to take orders from anyone. Since a substantial volume of litigation involves government interest, he is required to decide matters involving government interest day in and day out. He has to decide such cases independently and impartially without in any manner being influenced by the fact that the Government is a litigant before him. In order to preserve his independence his salary is specified in the Second Schedule, vide Article 221

\textsuperscript{28} The Judges Inquiry (Amendment) Bill 2008
\textsuperscript{29} (1995) 6 SCC 765
of the Constitution. He, therefore, belongs to the third organ of the State which is independent of the other two organs, the Executive and the Legislature. It is, therefore, plain that a person belonging to the judicial wing of the State can never be subordinate to the other two wings of the State. A Judge of the High Court, therefore, occupies a unique position under the Constitution. He would not be able to discharge his duty without fear or favour, affection or ill will, unless he is totally independent of the Executive, which he would not be if he is regarded as a government servant. He is clearly a holder of a constitutional office and is able to function independently and impartially because he is not a government servant and does not take orders from anyone."

In the decision rendered by a nine Judge Bench in Supreme Court Advocates-on-Record Association & Ors. vs. Union of India30, this Court reiterated the position that by various decisions of this Court, it has been made abundantly clear that the independence of judiciary is a part of the basic structure of the Constitution to secure the rule of law essential for the preservation of the democratic system. In an earlier decision rendered by this Court in S.P. Gupta vs. Union of India31 Pathak, J. (as he then was) observed in the following terms: "...While the administration of justice draws its legal sanction from the Constitution, its credibility rests in the faith of the people. Indispensable to that faith is the independence of the judiciary. Any independent and impartial judiciary supplies the reason for the judicial institution; it also gives character and content to the constitutional milieu. ....In the fashioning of the provisions relating to the judiciary, the greatest importance was attached to securing the independence of the Judges, and throughout the Constituent Assembly Debates the most vigorous emphasis was laid on that principle .... The

30 (1993) 4 SCC 441
31 1981 Supp. SCC 87,
Framers of the Constitution took great pains to ensure that an even better and more effective judicial structure was incorporated in the Constitution, one which would meet the highest expectations of judicial independence."

Hon. Bernard L. Shientag in his Benjamin N. Cardozo Memorial Lectures, said: "There can be no government of law without a fearless, independent judiciary. The independence of the judge is the chief of all the cardinal judicial virtues. He must be entirely free from all external influence and subservient only to his own conscience." There are ever so many Statutes enacted by the Parliament which provide for a sitting Judge of the High Court to be appointed either as the President, Chairman, or Vice Chairman of any Tribunal or Commission. Under the Consumer Protection Act, 1986, under Section 16A, a person who is or has been a Judge of a High Court is eligible for being appointed as the President or Member of the State Consumer Disputes Redressal Forum. The Administrative Tribunals Act, 1985; Railway Claims Tribunal Act, 1987; Special Courts (Trial of Offences relating to Transactions in Securities) Act, 1992; National Commission for Backward Class Act, 1993 are some of the enactments which contain similar provisions where the Chairman, Member or President shall be either a sitting or a retired Judge of a High Court. Therefore, it cannot be said that a sitting Judge of a High Court shall neither be appointed to any other post nor shall be assigned any other judicial or quasi-judicial work. But, invariably, in all cases, the Chief Justice of the concerned High Court would be consulted in case the appointment is sought of a sitting Judge. Normally, a Judge who is to retire from service shortly may be desirous of accepting any other assignment either as a Chairman, Vice Chairman or Member of any Commission or Tribunal. But if a sitting Judge is appointed to a regular post of Chairman, Vice Chairman or Member of a Tribunal and the decision of that authority is subjected to judicial review of the High Court, it may not be an ideal situation.
Under the Constitution of India, security of judicial tenure has been provided to the Judges of the superior courts and they could be removed only as per the proviso prescribed under Article 124(4) of the Constitution on account of proved misbehaviour or incapacity. Sometimes, the sitting Judge who is appointed to the post of Chairman, Vice Chairman of any Tribunal or Commission would be liable to be removed by the appointing authority. This also is not desirable in view of the Constitutional position being occupied by the Judge.

Quite often sitting Judges are appointed as Inquiry Commissions. Generally it may not create any difficulty, if the inquiry itself can be conducted without prejudice to other judicial work as a Judge of the superior court. However, the appointment of Judges to head or chair a commission of inquiry or to perform other non-judicial work would create unnecessary burden on the Judges and it would affect the administration of justice. The work of these commissions takes considerable time and there are several instances where the work of the commission continued for years. If sitting Judge is appointed, considerable time is lost and the Judge would not be in a position to attend to his regular judicial work. In view of the mounting arrears of cases in superior courts, it would be difficult to lend services of a Judge for such commission work. Moreover, the report of the Commission of Inquiry is often stated to have only recommendatory value and the opinions expressed therein are not binding on the Government. Quite often the reports of the Commission are ignored and no follow-up actions are being taken by the Govt. In some matters, when political issues are also involved, even impartiality and objectivity of the court may sometimes be questioned due to some extraneous and oblique motives. The public image and prestige of the Court as guardian of the Constitution and rule of law has to be maintained. It is desirable that the Judges are not subjected to unwanted criticism on account of appointment as the Inquiry Commission. The Image and the authority of the Court, which
is of utmost importance, has to be upheld. Justice Harlan F. Stone in a letter as far back as in 1953 wrote: "It has been a long tradition of our Court that its members do not serve on committees or perform other services not having a direct relationship to the work of the Court." Keeping in view all these aspects, the appointment of a sitting Judge as a commission of Inquiry has to be made only on rare occasions if it becomes necessary for the paramount national interest of the country.

1.2. SIGNIFICANCE OF THE PROBLEM: The most important component in the legal system of India is the Judiciary, which comprises the courts functioning at the Union and the State levels, as the Higher and the Subordinate Judiciaries. The importance of these institutions lies in the fact that they represent the most practical aspect of the administration of justice; in matters of criminal justice they determine finally the issue of the guilt of the accused involved in the cases brought before them.

Independence of the judiciary which is also known as judicial independence is the principle that the judiciary should be politically insulated from the legislative and the executive power. That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests.

Different nations deal with the idea of judicial independence through different means of judicial selection, or choosing judges. One way to promote judicial independence is by granting life tenure or long tenure for judges, which ideally frees them to decide cases and make rulings according to the rule of law and judicial discretion, even if those decisions are politically unpopular or opposed by powerful interests. But they may have conflicts with republicanism and they could support it.

32 Harvard Law Review (Vol. 87 1953-54)
In some countries, the ability of the judiciary to check the legislature is enhanced by the power of judicial review. This power can be used, for example, when the judiciary perceives that legislators are jeopardizing constitutional rights such as the rights of the accused. In view of the judiciary's vital and integral role in rather complex democratic political system of India, observations have been made in an attempt to highlight and try to solve the initial dilemma whether the judiciary has been playing an appropriate independent role in Indian democracy or is it transgressing its judico-constitutional limits by usurping the powers of other two organs of the government and thereby turning to an assertive judiciary.

The present research reflects an image of an impartial study undertaken to analyze this debate regarding independent judiciary in the changing Indian democratic polity. By taking the important and changing role of judiciary and its contribution to the development into consideration, the researcher has selected this topic for research work.

1.3. OBJECTIVES OF THE STUDY: The following are the major objectives of the study:

1. To analyse the role of judiciary in India and to find out whether Judiciary is independent in reality.
2. To assess whether the functioning of judiciary is based on the legal and constitutional principles
3. To evaluate the nature and functions of judiciary in the system of government under the constitution and its real independence.
4. To study comparatively various judicial independence in various countries.
5. To find out the lapses in the legislative, executive and judicial system in India
6. The analyze the role of Supreme Court in promoting the independence of judiciary
7. To study the role of judiciary in constitutional development
8. To suggest the changes that are required to strength the concept of independence of judiciary.

1.4. HYPOTHESES

1. The Constitutional framework has taken care to secure the independence of judiciary at all the three levels of this institution.
2. The controversies that have arisen in India in regard to the appointment of judges, the transfers and conditions of service the inference that may be drawn is that the safeguard guaranteed to the judges are not sufficient enough to preserve the independence of the judiciary.
3. The independent and separate nature of judiciary is helping the judiciary to function more effectively by than the legislative and executive and in the administration of justice.
4. Political interference, executive autocracy affects the independence of judiciary.
1.5. METHODOLOGY

The topic is selected with great interest to explain the concept of independence of Judiciary. In the legal research the most suitable method is hypothetic deductive method. The nature of the problem is being purely legal it is not possible to study it by purely experimental method. The study is primarily through doctrinal method. The relevant material is collected from primary and secondary sources. Material and Information are also collected by both vertical and horizontal sources that are from law books, Journals, Judgments of Supreme court and High Courts, periodicals, reports and relevant matters published in newspapers. The researcher also used Internet in collecting information from various relevant websites. For effective implementation of the analysis the material collected were analyzed in suitable model and placed in appropriate chapters.

1.6. REVIEW OF LITERATURE:

Literature in connection with the present problem, is reviewed from the earlier studies, published books, reports, periodicals journals, newspapers relating to the concept of independent judiciary in India and also in other countries.

Shiva Rao in his book Framing of India Constitution A Study (1968) covered related matters to the Drafting Constitution of India. This book is a substantial, stand-alone history of the drama and debate that went into the drafting and ratification of the Constitution. It offers an in-depth examination of the state of the new Indian nation after the Revolution; the fatal weaknesses in the Articles of Confederation; the growing clamor to draft a new plan of government; the impassioned debate between the big and small states; the
rocky road to compromise; and the ratification of our government's founding the document.

Jain MP in his book, *Indian Constitution* (1978) has devoted his energies to explain the legal interpretation of various provisions of the Indian constitution. It also helped the researcher to systematize the judicial decisions relating to right to work.

Rajiv Dhavan, *Justice on Trial*. The Supreme Court To-Day Publishing Concept Publishing House, New Delhi, (1980). It highlights the separation of powers Legislature, Executive, Judiciary. According to the author it has been well said by Lord Acton: "Power corrupts and absolute Power tends to corrupt absolutely". Conferment of power in a single body leads to absolutism. But, even after distinguishing the functions, when an authority wields public power, then providing absolute and sole discretion to the body in the matters regarding its sphere of influence may also cause abuse of such power. Therefore, the doctrine of separation of powers is a theoretical concept and is impracticable to follow it absolutely.

Prasad Anirudh in *Democracy Politics and Judiciary in India*, (1983). Deals with the Protection, Status and Salaries of Judges. The author has clear perception. Signifying the role of judiciary in upholding the rule of law and protecting the fundamental rights, he wrote "democracy" in India continued to exist because of the valuable contribution of the judiciary, including lawyers. In contrast to the short-lived democracies in neighbouring countries, which had to face totalitarian rule, dictatorship, guided elections that indicated the failure of democracies, lawyers in the legislature and executive played a significant role in not only sustaining democracy for 59 years, but also strengthening it.
Justice Krishna Iyer V.R. in his book entitled *Human Rights and the law* (1984) with refreshing fearlessness and passion for socio-legal betterment explores men and matters, issues and themes, displaying a deep commitment to working community. The author has rightly examined the interaction of law and social change in the context of Indian legal system. He has gone beyond and written with zeal and amazing originality on a panorama of subjects.

Aiyar A.K, devotes in the Constitution and Fundamental Rights (1988) the concept of fundamental rights under the Constitution of India. The author concluded that the fundamental rights were provided to the citizens primarily protect individuals from any arbitrary state actions, but some rights are enforceable against individuals. The Fundamental Rights can only be altered by a constitutional amendment. In addition to that during national and state emergency, the Fundamental Rights remain suspended. As the Fundamental rights are defined as the basic human rights, the Fundamental Duties are defined as the moral obligations of all citizens and have worked to develop unity in the nation.


Seervai H. M, Constitution of India (1990) It covers a detailed account of the fundamental rights, directive principles of state policy. It laid stress on the role of judiciary in protecting the rights guaranteed by the Constitution. The author
thoroughly analysed the judgments of the Supreme Court and various High Courts in India.

Mc Lalland M.H., in his article disciplining the Australian Judges, The Australian Law Journal, (1990) covers the organisations of the Judiciary of Australian and Analysis of the other Constitutional Judiciary. He further states that there is a fundamental difference between removal procedure and impeachment procedure and between the impact of the adoption of a motion for impeachment and the passing of a motion for presenting an address to the president seeking orders for the removal of a judge. The grounds for the impeachment of the president have to concern "violation of the Constitution" while an address for removal of a judge has to be on the ground of "misbehaviour or incapacity".

Umeshwar Prasad Varma's, Law Legislature and Judiciary, Mittal Publications, (1996), it devotes to aspects relating to Legislature, Executive and Judiciary. The author has analysed that in a democracy, the people are paramount, and it is the inherent duty of the executive, legislature and judiciary to perform meaningful roles in making the life of the common man better. In many instances, the Supreme Court has faced criticism for "usurping the power of the executive.

Bhajwa GS in his work Human rights in India, implementation and violations (1997) gave very detailed account of implementation and violations of human rights in India. This book objectively evaluates the constitutional measures adopted by India for implementation of human rights choosing the Universal Declaration of Human Rights and the international covenants in human rights as the principal yardstick of compliance. It also evaluates the role of judiciary for implementation of human rights in India.
Maithreyee Krishnaraj in her book entitled *A positive approach to human rights* (2000) wrote that human rights are the essential component of humanism. They are yet to be articulated in practice as positive entitlements that enable human life for a human person, that gives an opportunity to grow and develop to his or her fullest potential. This make us to understand the essence of humanism under the concept of human rights.

Pandey JN in his work *Constitutional law of India* (2000) throws light upon the institutional framework of the Indian government. It gives the legal interpretation of rights guaranteed in the *fundamental rights*. This book is helpful to understand judicial pronouncements regarding the fundamental rights.

Dwivedi V.S, Laws & Flows Monthly Magazine, (2002) it highlights the need for Independent Judiciary Free from Executive Control. The author emphasises that The decision of the Supreme Court judges to put their asset declarations on the Supreme Court website is a welcome first step towards transparency and accountability of judges in this country. It is also a tribute to the power of public opinion... However, this decision of the Supreme Court judges does not obviate the need for a law to make such public declarations compulsory. Indeed, the law must provide for an annual public declaration of assets and liabilities as well as income tax returns of all public servants, including judges.

Bidyut Chakrabarty, *Indian Politics and Society* (2008) in his article dealt the election system and public administration, shaping Indian politics and the importance of electoral system in India.

Surendra Munshi and Biju Paul Abraham in their article entitled *Good Governance, Democratic Societies and Globalisation* published in *Journal of Political Science*, (2008), had thrown focus on election system and good governance based on democratic values, drawing mainly from two major democratic regions in the world, India and the European Union.

1.7. SCHEME OF THE STUDY

The thesis is divided into five chapters.

Chapter I  Gives introduction, covering the area of the Research, Significance of the topic of research, the objectives of the study, methodology, hypotheses, review of literature and plan of the study.

Chapter II  Deals with Indian Judiciary: Structure, Composition and Functioning

Chapter III  Highlights the judicial Interpretation of Separation of Judiciary and Judicial Review.

Chapter IV  Contribution of Judiciary to the Constitutional Development

Chapter V  Highlights Conclusion and Suggestions