PART II
INDEPENDENCE OF JUDICIARY
CHAPTER-II

INDEPENDENCE OF JUDICIARY: AN OVERVIEW

Functions of the State are generally classified into three: legislative, executive and judicial.¹ Such a classification was in existence from very ancient times though the nomenclature used to denote those functions was different.² In the ancient and medieval models of administration, monarchy was the only recognized form of administration. As the king was believed to be the representative of God on earth,³ he was empowered to enact, execute and interpret the laws. The king was the wielder of all powers. Natural law theory, which held the sway during those days, emphasized that laws owed their origin to God and hence law was considered infallible.⁴ Due to such an axiomatic assertion of infallibility of law, justifiability of law was not a question. Judicial function—to interpret the laws—in that context was only of subordinate importance in

¹ "It is submitted that the three basic and essential functions in the administration of any independent state are legislative, executive and judicial." Yardly, Introduction to British Constitutional Law (1964), p. 64.
² See for instance, Ernest Barker (Ed.), The Politics of Aristotle (1958), Chapter XIV, pp. 188-200. He refers to those functions as deliberative (legislative), executive and judicial.
⁴ God is infallible. Hence, natural law, which is his product, should also be infallible for, "The Lex aeterna is divine reason, known only to God and 'the blessed who see God in his essence.' It is god's plan for the universe, a deliberate act of God and everything, not only man, is subject to it." Lord Lloyd and M.D.A. Freeman, Lloyd's Introduction to Jurisprudence (1985), p. 109.
comparison with the legislative and executive functions and it was carried out by the king himself or by his nominees.\(^5\)

Elapse of time brought in along with it corresponding changes in legal philosophy also. The idea of laws having divine support was reconsidered on rational and pragmatic grounds.\(^6\) Infallibility of law was questioned. It was clear that power had a tendency to corrupt and absolute power would cause undiluted corruption. Hence it was realized that unification of powers - legislation, execution and interpretation- in one authority has a tendency to nurture and promote arbitrariness. The outcome of such shift of law from supra terrestrial to mundane levels was the doctrine of separation of powers. As a consequence, questions regarding validity and justifiability of the laws began to be raised.

However, the same person or body used to exercise the three kinds of powers. The idea of separation of such functions reflected in the doctrine of separation of powers\(^7\) did not emerge till the eighteenth century. The theory of separation of powers propounded that the three basic functions of the State viz. legislative, executive and judicial should be vested in different and independent persons or bodies.\(^8\) These powers may be held by authorities that are co-ordinate

\(^5\) "The Monarch is the "fountain of justice", being technically present in all his courts of law, responsible for many judicial appointments, and exercising the prerogative of mercy in respect of persons convicted in the courts." Yardly, op. cit. at p 66.

\(^6\) Lloyd, op. cit. at p. 123.


\(^8\) Legislation is to be done by the legislature, implementation by the executive and interpretation of such laws and judging by the judiciary and such bodies should be independent of one another.
but independent in their respective fields. Constitutions framed subsequent to the emergence of the theory of separation of powers attempted to incorporate this concept into their Constitutions.⁹

An important consequence of the adoption of the doctrine of separation of powers was conferment of a prominent status to the judicial function. Judiciary had to be raised to a position of high significance on par with other organs of administration of the State.¹⁰ Judicial function was to be discharged by an authority, which was independent of the legislative and executive wings. In other words, the doctrine helped the judiciary to stand upon its own legs.¹¹

India also was no exception to the above-mentioned process. During the ancient and medieval periods, the King, the executive head, was a three-in-one constitution, who exercised legislative, executive and judicial functions. Though judicial function was recognized as a separate one, there was no separate organ for it.¹² The King was considered as the fountainhead of justice. With the arrival of the British, judiciary got an independent status of a separate institution. But, the concept of independence of judiciary began to flourish in our country only in the post independent era.

⁹ See for instance, the Constitutions of the U.S.A, France, Australia, Canada and India.
¹⁰ "...of the three powers above mentioned, the judiciary in some measure next to nothing." Montesquieu, op.cit. at pp. 71-72.
¹² However, the legislative power of the King was limited. See, Rama Jois, op.cit. at p.627.
¹³ For details, see, infra, n. 46.
1. INDEPENDENCE OF THE JUDICIARY: THE CONCEPT

In common parlance, 'independence' means 'not depending on authority or control; not depending on another thing for validity or on another person for one's opinion or livelihood and unwilling to be under obligations to others.' "In the most basic and usually the least important sense, independence would mean that the judge had not been bribed or was not in some other way a dependent of one of the parties." Independence of judiciary would certainly mean freedom of the institution from others. However, when the term 'independence' qualifies 'judiciary', it commands a wider connotation. It is wide enough to include independence not only from an outside authority but also from itself. In other words, the expression 'independence of the judiciary' encompasses freedom not only from its sister authorities like legislature and executive but also from the judicial hierarchy.

In English law, judicial independence consists of three motifs- rule of law, the functional specialization of the judiciary and the autonomy of the legal profession. It also implies that even when hierarchically established, each court, how-low-so-ever it is, would be the final authority over matters falling within its jurisdiction. Appellate and higher courts with administrative jurisdiction would not

16 Id. at p. 69.
have any control over their judicial functioning. The ultimate safeguard of judicial independence is to be sought in the judge himself and not outside for it is the inner strength of the judge which alone would save the judiciary. In short, it is clear that the phrase independence of judiciary has different meanings in different contexts. In relation to the higher judiciary, it indicates freedom from other branches of administration while with reference to the lower courts it is concerned also with independence from the higher courts.

The Traditional Concept

A study of the origin and development of the concept tells us that till the advent of the second half of the twentieth century, 'independence of the judiciary' was a very narrow one. Its traditional view covered only formal matters like appointment, tenure, salary, transferability and removal of judges and their status after retirement. The concept meant only independence from the other institutions wielding power namely, legislature and executive. Even the attempt to free judiciary from the other organs can be traced only to the beginning of eighteenth

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17 A hierarchical view of the institution of judiciary is in itself bad. In this sense, the expression, 'subordinate judiciary' is wrong as it smacks a sense of dependence on some other authority. See Upendra Baxi, Courage, Craft and Contention, the Supreme Court in the 80's (1985), p. 25.


19 It is observed that to the senior members of the Press, independence of the judiciary means independence of the appellate judiciary only. The social meaning of independence of judiciary is that no change in so far as the system suits the upper echelon of the Bar and resourceful activators of the court system. Id. at pp. 25, 35. For politicians, independence of judiciary would sound quite a different tone like approval of government policies. See generally, Mohan Kumaramangalam, Judicial Appointments (1973).
century. The first move towards this direction in Britain can be seen in the Act of Settlement, 1700.\textsuperscript{20} It tried to keep the British judiciary free from the executive. It was by this statute that tenure of judges on Majesty's pleasure was replaced with tenure of members of judiciary during their 'good behaviour' and for their removal upon address of both Houses of Parliament.\textsuperscript{21} In other words, it was by the Act of Settlement that tenure of judges was freed from executive control and left under the control of Judges themselves. The concept of independence of judiciary in this narrow sense was implemented in the U.S. also by its Constitution.\textsuperscript{22} Such a concept is found in Constitutions of different countries including that of India.\textsuperscript{23}

The Modern Version

However, the scope of the traditional concept of independence of judiciary ended there. Notwithstanding the acceptance of the concept, one is able to find a number of instances in which administrators tried to subdue the spirit of independence exhibited by judiciary. It is in such a context that the concept of judicial independence began to grow so as to reach its modern form. The modern concept of independence of judiciary, unlike the traditional one, is more dynamic. It has many facets. Apart from the procedural and technical aspects of the traditional concept, it contains some substantive elements of independence. The modern concept for instance, conceives internal and external independence of

\textsuperscript{20} 12 & 13 will c. 2. For the text, see Chitty's Statutes of Practical Utility Vol. III (1912), pp. 661 et seq.
\textsuperscript{21} Id. Sec. 3 (8). It was replaced by section 5 of Judicature Act, 1875, 38 &39 Vict. C. 77.
\textsuperscript{22} See, Constitution of the United States, Article III.
\textsuperscript{23} See, Constitution of India, Articles 124(2), (4) and (5), 125, 217(1) 218 and 233 to 236.
judges including their independence from colleagues and superiors as an essential ingredient of independence of judiciary. The modern idea of judicial independence implies that judiciary should be free not only from the legislature, executive and the public, but also from the prejudices of the judiciary itself. The concept thus includes internal, external, individual, (personal), collective, functional and substantive forms of independence. The expression therefore, implies avoidance of subjection of the will of a Judge to his colleagues or superiors in any way.

2. NECESSITY OF JUDICIAL INDEPENDENCE

The need for judicial independence can never be over emphasized. Judiciary is the institution where questions of law are analyzed threadbare and tested on the touchstone of axiomatic principles. Opinions and observations from such analysis bring about changes in the law, according to the requirements of the changing times. The role played by the judiciary, in other words, is that of a catalyst.


25 "...it is necessary to remind ourselves that the concept of independence of the judiciary is not limited to independence from executive pressures or influence but is a much wider concept which takes within its sweep independence from may other pressures and prejudices. It has many dimensions, namely, fearlessness of other power centres, economic or political and freedom from prejudices acquired and nourished by the class to which the judges belong." Per Justice Bhagawati in S.P. Gupta v. Union of India, 1981 Supp. S.C.C. 87 at p. 223.


27 Alfred Denning, Road to Justice (1955), p.11.
The power conferred on judiciary is to interpret and explain the law, including the Constitution. The primary aim of judiciary while interpreting law is to render justice. While thus interpreting the law, the Judge would make law in a manner of what is called 'interstitial legislation'. His expressions and usage in the judicial dialect, at times, would be more valuable than words used in statutes. This is particularly true of common law system. The common law system owes much of its strength, credibility and above all uniformity and unity to the system of precedents. Unlike the civil law system followed in Europe, in common law countries judiciary was and continues to be the main lawmaker. Even after the assumption of law-making function by the legislature, judiciary continued to play a vital role in the interpretation, application and in certain cases, creation of law.

Much of the English law and of the Indian law also is nothing but the views and opinions of judges well-versed in law. Many statutes are only the legislative versions of such judicial opinions. Such importance was given to the views of the judiciary and confidence was reposed on the opinions of Judges by all only because of the independence of the institution. It is rightly said,

"...much of the authority enjoyed by common law precedent has stemmed from the high status, independence and substantial salaries accorded to the judiciary in common law countries." |

There is an undeniable link between judicial independence and the authenticity of the law made by the judiciary. It is beyond comprehension as to what would happen if such an organ were derided of its absolute independence and

28 See, for instance, Marbury v. Madison, Cranch 137 U.S. (1803)
29 See, supra, chapter I n. 11.
made dependent on another authority or person. The least that can be stated of such a predicament is that if the views of judges are based upon extraneous considerations they would lack authenticity and may retain scant respect.

Independence of judiciary is important at least for four reasons. Firstly, it ensures that the Judges to whom the duty of defining and regulating the governmental functions are entrusted carry out such duty impartially. Secondly, it guarantees the liberties of the subject as against other persons and bodies. Thirdly, it creates a law-abiding habit in the nation. And fourthly, it grounds the authority of the State upon the rule of law. A judge can exercise his powers and discharge his duties effectively and honestly only if he is not susceptible to fear of any kind and pressures including those from other organs of the State. Hence, independence of judges is, and must always be the best security for the stability of State. Liberty, democracy and rule of law can be said to be the holy trinity for a secured life in the modern world. Destruction of one of them would cause crumbling down of others also. And the holy trinity of liberty, democracy and rule of law depends upon the independence of the judiciary. In the absence of judicial independence, there is a chance that fundamental rights enshrined in the Constitution could be easily abolished leading to destruction of life and liberty of


32 "It is axiomatic that the person who is to decide disputes can discharge his functions effectively only if he be not susceptible to pressure of the citizen, and what is much more important, of the State." Khanna, H.R., op. cit. at p. 16.

33 Id. at p. 20.

34 As happened, for instance, during the emergency in 1975-77.
the people. In short, it is necessary that judges should be free from all sorts of influences and pressures adversely affecting their independence, so that judicial decisions are rendered without fear, favour or ill-will and dispensation of justice is not hampered. Impartiality in the decision making process will be ensured only if such independence is secured. Independence of the judiciary should be there for the benefit of the litigant and not for providing place for arbitrariness of judges. It is not a homily to the Judge but the right of every litigant. Justice Frankfurter has rightly observed: “The most prized liberties themselves pre-suppose an independent judiciary through which these liberties may be, as they often have been vindicated.”

Independence of judiciary has an added significance in a federal state. In a state with federal Constitution, questions regarding the scope, extent and validity of the exercise of legislative power by various legislative authorities might arise. Similarly there may be questions relating to constitutional validity of laws. The power to determine such issues is vested with the judiciary. Judiciary may not be able to exercise these functions unless it is fully independent. As Lord Simmons observed, “in a federal system absolute independence of judiciary is the bulwark of the constitution against encroachment whether by legislature or by the executive.” Moreover, in a federal state, judiciary plays the role as an umpire in

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35 "It is to be instilled in every mind that where fear is, justice cannot be;..." Justice Khanna, H.R., "Need to Preserve Image of Judiciary", J J B C I. pp. 241-242.
36 See, Article 10 of Universal Declaration of Human Rights.
disputes between the federation and the states or in contentions between different units, which constitute the federation. In the modern world, disputes between the State and individuals are very common. The State is the biggest litigant. In such a context, it is imperative that the body, which settles disputes, should be independent of influences likely to be exerted by the State. The importance of judiciary in such a situation, and the role it may have to play in dispensing justice to one and all even against executive excesses cannot be over emphasized. And it may not be an exaggeration to state that the very existence of the federal Constitution depends upon the independent functioning of the judiciary. All these indicate the importance of judicial independence in India since its Constitution carries some federal features. Justice Bhagawati has rightly observed, "...the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document." Various comments made in the Constituent Assembly also suggest that the members were aware of the importance and need of judicial independence. Importance of the concept of independence of judiciary is emphasized by the Apex Court by its holding that it formed one of the ingredients of basic structure of the Constitution.

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60 See, Constitution of India, Article 131.
61 However, it is doubtful whether this aspect of judicial independence was properly perceived by Dr. Amberkar, the President of the Constituent Assembly when he observed that there was nothing wrong in appointing retired Judges in different posts and that the restrictions constitutionally envisaged on the members of the Public Service Commission for such appointments were not to be applied to retired Judges. C. A. D. Vol.VIII. pp. 678-679.
When decisions by independent judges posed some threats, there were attempts on the part of the organs of the State and others to malign the benign independence of judiciary. Such instances are not lacking in England, America and India. It became the bounden duty of the judiciary to check such inroads on its own existence. In such cases the major medium in its attempts to salvage judicial independence was its power to interpret the Constitution and statutes. The Indian judiciary has played a very constructive role towards this direction. In the wake of legislative and executive inroads on the judiciary, it will be interesting to know the role played by the judiciary in India to uphold its own independence. Two questions emerge in this context. Was the Supreme Court able to inculcate the modern, dynamic concept of independence of judiciary into the Indian legal system? By construing the provisions of the Constitution, was the Court able to hold out and sustain the judicially envisaged concept of judicial independence? For a satisfactory evaluation of the contribution of the Supreme Court in this respect the innovations made by it in nurturing the traditional concept of judicial independence are to be analyzed. It is to be examined how the Court treated and manured the concept of judicial independence and how far the Court was able to uphold the independence of an institution of which it is the head.

For examining the development of the concept of independence of judiciary through the contributions of the Supreme Court, it is very much

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45 Dismissal of the Chief Justice Edward Coke in England by King James I, the court packing plan by Theodore Roosevelt in the United States of America and supersession of Hedge, Shelat and Grover JJ. for appointing A.N.Ray and appointment of M.H.Beg overriding H.R.Khanna as the Chief Justice of India bear testimony to this trend.
necessary to have a look at the status accorded to judiciary in India from the ancient times.

3. STATUS OF JUDICIARY AND THE CONCEPT OF INDEPENDENCE OF JUDICIARY IN INDIA

(a) Ancient India

In India, during ancient times, there was no separation between the organs of administration though there was demarcation of the administrative functions. Judiciary was not given any separate status. The King himself was considered the fountainhead of justice and there was no appeal against his decisions.\(^46\) In short, in the ancient India, one may find references to the judicial function even though one may not be able to identify an institution called judiciary. However, as is evidenced from Dharmasastras utmost respect was given to laws and the administrators of those times tried to keep judiciary independent.\(^47\) In other words, seeds of modern concept of judicial independence were there even in ancient India.

(b) British Era

A study of the concept of judicial independence in India during the British regime calls for an understanding of the institution of judiciary during that period.


\(^{47}\) Justice A.M. Bhattacharjee, *Hindu Law and the Constitution* (1994), pp. 5-6. He compares the ancient British jurisprudence with that of the ancient Indian and observes
The era of British administration in India can be divided into four on the basis of formation and development of judiciary, namely (1) 1600-1726, during which period administration of justice in the three Presidency towns of Madras, Calcutta and Bombay was at a rudimentary stage and was totally dissimilar, \(^{48}\) (2) 1726-1774 during which period the judiciary had been organized under the Charter Act 1726 \(^{49}\) in the three Presidency towns; (3) 1774-1861 when for the first time Crown offered to create the Supreme Court, which would be manned by persons who were not accountable to the Company i.e. to the executive in any manner, \(^{50}\) and (4) 1861-1950 during which period one finds rather well organized judicial establishments at the higher level. \(^{51}\)

(a) Judiciary during the regime of the East India Company

Administration by the East India Company (1600-1857) was marked by the establishment and management of judiciary by the Company itself. Courts that while in Britain the King was above law in India the King could not deviate from the path chartered by law.

\(^{48}\) See, M.P. Jain, *Outlines of Indian Legal History* (1981), p.11 This stage can be further divided into three as follows: (a) The earliest stage marked by recognition of the rudimentary concepts of judiciary. (b) the second stage when the executive head viz., the Governor General in Council wielded the highest judicial function also and (c) when more subordinate courts were created and manned by the executive. This division is more true of Madras Presidency where the British established their factory at the earliest. The other two Presidency towns of Bombay and Calcutta, which became under the British control later, exhibited the features of second and third period even during the first period. Again, the hierarchy of courts, the jurisdiction of the courts, the modes of administration of justice and the like were different in the three Presidency towns during these stages.

\(^{49}\) For a discussion of the Act, see M.P. Jain, *op. cit.* at pp. 35-44.

\(^{50}\) The Regulating Act, 1773, Stal. 13 Geo. 3 C.63.

other than the Supreme Court were manned and financed by the Company through its nominees. Under this system certain functions like settlement of civil disputes and administration of criminal justice were assigned to nominees of the Company who were not even qualified to be appointed as Judges.

Since the judges were nominated by the Company, during this period, the total judicial administration of justice was fully under the control of the executive. Judges were appointed not on considerations of their legal qualifications or knowledge but of their pliability to the executive. The conditions of judicial service were also not desirable. Instances like non-payment of salary, suspension from service for assertion of independence treating it as insubordination were there. In Madras, in 1678, it was resolved that the Governor in Council would be the High Court of Judicature. In Calcutta, the judicial administration was in its rudimentary form with concentration of all of the powers in one and same officer. In short, “executive never relished the idea of judicial independence, it always wanted to keep the court under its thumb.”

The Charter Act, 1726 provided for the creation of the Mayor’s Court in all the three Presidency towns. It was in the same lines of the Charter Act 1687, established by the Regulating Act 1773.


Id at pp. 24-25. For instance, as the Company could not tolerate the independence exhibited by John St. John, a Judge of Recorder of the Mayor’s Court, he was removed from the office.

Id. at p. 14.

Id. at p. 34.

Id. at p. 27.
which introduced the Mayor’s Court in Madras. Mayor was to be chosen from among the members of the Mayor’s Court known as Aldermen. Aldermen were to hold the post for life. Vacancies were to be filled by selecting persons from the prominent inhabitants of the towns by Mayor and Aldermen and not by the Governor in Council. In other words, there was an attempt to bifurcate judiciary and executive. The same led to an impasse between the executive and the judiciary. There were two choices for the Company (a) to keep the judiciary as it was but to define the vague points by means of law and regulation or (b) to make the executive all the more predominant and weaken the judiciary. Lot fell for the latter option, it being easier, though at the cost of judicial independence. The result was the Charter Act, 1753. As a consequence, the judicial system tended to be a branch of the executive government.

However, some stray incidents of attempts to keep judiciary independent are discernible even when the Company was the administrator. Warren Hastings, the first Governor General, through his judicial plans introduced substantial changes into the judicial system in India. It was by the plan of 1772 that he laid down the foundation of the adalat system. In 1780 there was another plan by

58 Due to the importance of the Charter in the spheres of law and justice, it is called the ‘Judicial Charter’.
59 Supra, n. 48 at p. 22
60 Ibid.
61 It re-introduced the system of appointment and dismissal of Mayor and Aldermen by Governor in Council. (Id at p. 44.) It is criticized to be the creator of executive ridden judiciary. “Justice, therefore, was too much of a ‘political force’” (at p. 51).
62 By the integrated administrative and judicial plain of 1772, a well established adalat system was created under the Company with the Sadr Diwani Adalat and Sadr Fouzdari Adalat at the apex of the civil and criminal courts respectively. The former consisted of
him for mutually separating judicial and revenue functions (collection of revenue and deciding revenue disputes). Thus, there existed adalats - the company courts and the Supreme Court - the Crown Court — simultaneously with concurrent and conflicting jurisdictions. The benign target of Hastings was to separate judiciary from the executive. For that purpose he appointed Elijah Impey the then Chief Justice of the Supreme Court of Calcutta as the Judge of the Sadr Diwani Adalat to avoid involvement of the Governor in judicial matters. It may seem paradoxical that Impey was recalled by the Crown on the ground that he compromised his independence as a Judge by accepting the post as Judge of Adalat since that was an office at the sufferance the Company and the judge was removable by it.

Some changes in the status of judiciary as an independent institution were brought forth by the Regulation Act 1773. It created a Supreme Court with judges to be appointed and liable to be dismissed by the Crown. Thus, for the first time in the history of India a judiciary not only free from the executive but

the Governor and his council members while the latter consisted of the Judges appointed by Nawab on the advice of the Governor. M.P. Jain, op.cit. at pp. 61-62. See also Rama Jois, op.cit., pp. 144-145.

63 M.P.Jain, op.cit. at p. 65 There was another administrative plan in 1774 which is not of relevance here. Id at p. 118.
64 Id. at p. 118.
65 Id. at pp. 122-123. This gesture reveals that the Crown was well aware that the judicial officers under the Company never enjoyed the independence required for discharging judicial function properly.
66 13 Geo III C 63. It was to have civil, criminal, admiralty and ecclesiastical jurisdictions.
67 It was to have civil, criminal, admiralty and ecclesiastical jurisdictions. See Regulation Act 1773 sections 13,15 and 16.
68 Id. Section 13.
which could control and supervise the executive came into existence. Unlike the English East India Company, the Crown, who appointed the Judges, did not have any direct interest in matters relating to administration of India. Judges could take decisions against the Company personnel without fear or favour. Hence, that scheme of administration of justice was in some way conducive to independence of the judiciary and it enabled Judges to take decisions without fear or favour in respect of the matters before them whoever be the parties.

After the term of Hastings, the merger of revenue and judicial functions was advocated to lessen the expenses of the administration and the same was effected in 1786. It resulted in destruction of independence of judiciary. During the term of Lord Cornwallis (1786-1796) by Regulation II of 1793, India again experienced the much-desired bifurcation of judicial function from the revenue and executive functions. This Regulation provided for the judicial scrutiny of members of the executive also. The reforms were however, limited to the lower levels of administration. Yet it could be stated that separation of judiciary from the executive, one of the pre-conditions for judicial independence, got materialized to some extent under the regime of Lord Cornwallis.

This trend got further impetus during the term of Lord Wellesly. It was decided during his term that the Governor General or his council members should not sit as Sadr Diwani Adalat. Thus it was provided by Regulation II of 1801 that

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69 Id. at pp. 139-140.
70 Id. at p. 164.
Supreme judges should be appointed for Sadr Diwani and Sadr Nizamat Adalat. It appears that the reasons for such separation were other than the pious wish to secure independence of judiciary. In short, the system was vacillating between the separation and unification of the judiciary with the executive for some times. 

(b) Changes during Crown Administration

Substantial changes were brought into effect by the take over of administration by the Crown in 1857. In 1861 the Crown enacted the High Courts Act. It abolished the Sadr Courts and the Supreme Courts and thereby terminated the existing conflict of jurisdictions. It authorized the Crown to establish High Courts in their place. Further, it prescribed the qualifications for judges who were to be appointed by the Crown. In short, in matters of jurisdiction, status and position, High Courts under the 1861 Act can be considered as the forerunner of High Courts under the Constitution of India. But security of tenure of judges which is an essential ingredient of independence of judiciary became a

71 Id. at pp. 164-165. Therefore, the judges were continued to be appointed by the Governor General in council and council members as well as civil servants had a vital role in dispensing justice.

72 Till 1814, there were no qualifications prescribed for Judges of the Sadr Adalat. By Regulation XXV of 1893, it was stipulated that only persons who had previous experience in discharging judicial functions be appointed judges of Sadr Courts. This system was in vogue till the establishment of High Courts in 1892. In the criminal side also there was no separation of the judiciary from the executive. Therefore, there was no guarantee against the misuse of functions by the executive authorities. (Id. at p. 166)

73 An interesting feature of the stages up to 1861 was that the concept of judicial independence was limited to the Presidency towns of Bombay, Calcutta and Madras. They were ruled according to separate codes of regulations. Hence these were called Regulation Provinces. In the Non-Regulation Provinces, no mature and well-advanced judicial system was prevalent. Nor were there any attempts to improve the status of the judiciary. There, all the powers concentrated in the hands of the executive.

74 24 & 25 Vict. c. 104.
only with the enactment of the Government of India Act, 1935 which provided that judges could be removed only on the grounds of misbehaviour or infirmity of mind or body. Till then, judges were removable at the will of the Crown.

Analysis of the judicial institutions of the British Raj reveals that India passed through stages with the following characteristics successively namely, (i) the judiciary and the executive were in a state of merger, (ii) judiciary was manned by persons who were appointed and controlled by the executive and (iii) judiciary was conferred with some independence due to the mode of appointment and conditions of service though not with the substantive independence.

(c) Post-Independent Scenario

As against the above background one may find that the post-independent scenario offers some progress in this respect. A perusal of the debate in the Constituent Assembly reveals that the members of the Assembly were very much concerned with judicial independence. The provisions relating to the judiciary were incorporated in the Constitution with a view to provide utmost freedom and sense of security to judges and independence to the institution of judiciary. The

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73. S. 220(2).
74. For a treatment of judicial administration from 1781-1861, see Anil Chandra Banarjee,
76. Supra, n. 43.
Constitution was to contain provisions relating to appointment of judges to the Supreme Court of India, High Court of various States, and general guidelines relating to appointment of judges to the subordinate courts. From the experience during the pre-independent stage, the members of the Constituent Assembly were eager to make the power to appoint Judges outside the free will and control of the executive. Thus, the power to appoint Judges to the Apex Court and the various High Courts was not vested solely with the executive head namely, the President. Unlike the Constitution of other countries, our Constitution provides for a novel method of appointing Judges to these Courts by the head of the Executive after consultation with the Chief Justice and other judges. Similarly, judges of the lower judiciary are to be appointed by the State Executive only after consulting the High Court concerned. The Constitution of India has brought out the conditions of service of the judicial members of both the higher and lower judiciary outside the purview and control of the executive. It has substituted the concept of 'service during pleasure' of the executive with service during 'good behaviour' of the Judge. Moreover, in every matter relating to the service of judges of the higher judiciary, the President has to take decision only after consulting the Chief Justice of India, the head of the judicial family. Similarly, in matters relating to service conditions of subordinate judiciary also the State executive has no full and final control. Over and above these, total separation of the judiciary from the executive

78 Article 124(2).
79 Article 217(1).
80 Article 233(1) and Article 234.
has been made a desideratum. In short, the Constitution brought with it the tradition concept of judicial independence. However, there is neither specific mention anywhere in the Constitution that independence of judiciary has to be maintained nor do we get any clue from the constitutional provisions as to how it is to be maintained. The Constitution of India was enacted during a period when the concept of judicial independence was the traditional one. That may be the reason that the provisions in the Constitution do not provide for judicial independence as understood in the modern sense. In such a context, it would be worthwhile to look into the views of the Apex Court as to the concept of independence of judiciary under the Constitution. It would be meaningful to enquire whether the Court was able to figure out a sensible concept of judicial independence fitting to the requirements of the modern era from the constitutional provisions.

4. INDEPENDENCE OF JUDICIARY: JUDICIAL VERSION

The earliest case in which the concept was seriously dealt with by the Supreme Court was Union of India v. Sankalchand Seth. The Court held that the concept of judicial independence was an integral part of our Constitution, which

81 See, Constitution of India, Article 50. It reads, "The State shall take steps to separate the judiciary from the executive in the public services of the State."


83 Chief Justice Chandrachud agreed with the holding of Justice Krishna Iyer in Samsher Singh that independence of judiciary was the fighting faith of our Constitution. And observed that the provisions dealing with judiciary in our Constitution protect it (id. at pp. 2338-2339). Justice Bhagawati also agreed with it and added that fearless justice was a cardinal faith creed of our founding document, which was part of our tradition (at p.2355).
meant that it was indestructible. The concept of judicial independence, not specifically mentioned in the Constitution, was thus given an important place. In the Judges Case, the Court developed the concept further. Characterizing the concept as an institutional one, the Court raised it as a shield for protecting the interests of individual judges from the assaults of the executive. A careful perusal of the judgements in that case reveals that the Judges set judicial independence as a desideratum to be achieved by the Constitution. The individual dimensions of the concept was given shape in Subhash Sharma v. Union of India. While reconsidering the validity of the Judges Case, the Supreme Court opined that the concept of judicial independence included the personal freedom of judges. The Court held, "For the availability of an appropriate atmosphere where a Judge would be free to act according to his conscience it is necessary, therefore, that he should not be overburdened with pressure of work which he finds it physically impossible to undertake." In Sree Kumar Padma Prasad v. State of Assam it was observed that the prime motive behind incorporation of the provisions dealing with judiciary in the Constitution was judicial independence. The Court therefore held that the concept formed a feature of the basic structure of the Constitution of

Justice Krishna Iyer observed that the creed of judicial independence was our constitutional 'religion'. (at p. 2369).


1 Id. per Bhagawati J. (at p.221); Gupta J. (at p.345); Fazal Ali J. (at pp. 411-412) and Pathak J. (at p. 705).

2 Bhagawati, J. (at p 221); Fazal Ali J. (at p. 408) and Tulzapurkar J. (at p. 527) observed that the importance of the concept is such that it was to be treated as an ingredient of the basic structure of the Constitution.


4 Id. at p. 636.

India. It implied that the Constitution could not be amended in any manner detrimentally affecting independence of the judiciary. This was confirmed later in *S.C. Advocates v. Union of India*. The concept got a further dimension when the Court developed it as a norm for interpreting the constitutional provisions dealing with appointment and conditions of service of judges.

The view that judicial independence means independence of the judiciary from the executive alone belongs to the past. The modern concept of independence of judiciary encompasses within it freedom from pressures from any quarters. Unlike the traditional concept, which gives importance to independence of the institution, the modern concept emphasises the individual aspect also. This aspect was stressed in *Ravichandra Iyyar v. Justice A.M.Bhattachrjee* by the Supreme Court when it was held that the concept of judicial independence was not limited to independence from the executive. It is a wider concept including within its sweep independence from any other pressures and prejudices. The Court noted that the heart of judicial independence was "judicial individualism." Therefore, the Court observed that the only constitutionally envisaged procedure for removal of judges was that contained in Article 124 and that no body other than Parliament could initiate the procedure for their removal.

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92 Id. at p 469. The Court observed thus, "It has many dimensions, viz., fearlessness of other power centres, economic or political, and freedom from prejudice acquired and nourished by the class to which the judges belong.
93 Ibid.
The Apex Court had opportunity to give life to the idea that the concept of judicial independence encompassed within it the concept freedom of a judge from his colleagues. In *State of Rajasthan v. Prakash Chand*, while determining an unusual set of issues, the Court held that aspersions and intemperate language on judges from his colleagues would cast a slur on judicial independence. This view was reiterated by the Court in *Chetak Constructions Ltd. v. Om Prakash*. The Court observed that judges should not be browbeaten or maligned by lawyers or clients as that may affect performance of their duties in a free and fair manner.

A look at the development of the concept of independence of judiciary by the Supreme Court, in the background of the pre-independent scenario, reveals that judicial independence according to the modern and international standards has been tailored into the Indian legal system. While dealing with various aspects of the Constitution affecting judiciary, the Supreme Court relied upon the concept

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95 A Judge of the High Court of Rajasthan while deciding cases made some damaging statements on judges including the Chief Justice of the High Court and the then Chief Justice of India. He further issued a notice to the High Court Chief Justice to show cause why contempt action should not be taken as he allotted some cases partly heard by the judge to another judge. It is in such a context that the matter was taken in appeal before the Supreme Court.

96 *Id.* at p. 25. The Court observed, "Besides when made recklessly...it [intemperate language] amounts to interference with the judicial process. The foundation of our system which is based on the independence and impartiality of those who man it, will be shaken if disparaging and derogatory remarks are permitted to be made against Brother Judges with impunity. It is high time that we realize that the much cherished judicial independence has to be protected not only from outside forces but also from those who are in integral part of the system. Dangers from within have a much large and greater potential for harm than dangers from outside."

97 A.I.R. 1998 S.C. 1855. It arose out of a suit for injunction. It was alleged that there was some connection between the Judge of the High Court who heard the matter and one of the respondents. Hence the matter was referred to the Supreme Court.
thus judicially developed. By a penetrating analysis of the concept the Court was able to give it dynamic contents so as to satisfy the requirements of the modern era. Earlier, the Court explained the concept as one bound within the parameters of constitutional provisions. However, later the Court began to interpret the provisions in the Constitution in the light of and in accordance with the concept.

The modern concept of judicial independence reflects a fundamental change in the approach of the courts. This approach of the Court in construing the constitutional provisions in the light of the concept of judicial independence, and of developing the concept in that process requires a closer look to assess the extent of judicial creativity.98

98 Such analysis is attempted in the following chapters of this part.