CHAPTER I

INTRODUCTION

The Judiciary plays a vital part in the development of the society. Although interpretation is not mainly concerned with making of the laws by means of this technique, the Judiciary is in a position to give new orientation to the existing laws and bring about the necessary changes in the society. An Independent Judiciary is the soul of Parliamentary democratic dispensation of governance. An independent judiciary shoulders a crucial responsibility in a parliamentary democracy.

It is trite saying that all power tends to corruption. The unity into the Sovereign of all the three faculties legislative, executive and judicial, culminated into despotism. The mediaeval monarchy had accordingly to confront with the up spring of the popular will. The English and the French monarchies had not only to witness but to succumb to public revolutions which succeeded in regarding the sovereignty to the people with the additional vigil that a separation rather than a unity of the legislative, executive and judicial functions of the State was thought desirable. The making, the administration and the dispensation of laws were desired and devised to dwell into three separate and independent institutions. The will of the State, the wielding of it and viewing of the true character of the first and the propriety of the second became the domains of three independent constituent parts of the same State. The representative government and the functional distribution of its power are therefore, the dominant features of the theory leading to the evolution of democracy. The modern concept of Statecraft therefore, requires the work of the

government, in the words of Henry Sidgewich[1] to be "distributed under three main heads as Legislature Executive and Judicial each division being allotted to a separately constituted organ".

The judicial power is vested in one integrated system of a hierarchy of judicial tribunals and this hierarchy is composed of four cadres; the Supreme Court, the High Courts; the District Courts; and the other original courts subordinate to the District Court. The separation of the judicial organ and its independence is secured by clear constitutional provisions and the position cannot be altered unless by the different process of amendment of the Constitution. Neither an action of the Executive nor an act of Legislature is competent to alter the exalted position occupied by this organ. Although the State Legislature is empowered under Entry 3 of the State List to regulate the administration of justice, constitution and organization of all courts except the Supreme Court and the High Court's; but the power extends only up the creation of the forum, the setting up of the judicial tribunals and defining of the jurisdiction pecuniary, territorial or as respects subject-matter. It does not extend to the appointment, tenure and conditions of service of the judges presiding over them.

The judiciary alone checks and balances the independence and functions of any of the organs of the Government. The independence of the Higher Judiciary is secured that its members are appointed by the Union Executive, but can only be impeached by the Parliament. The independence of the Subordinate Judiciary is also secured, as its members are appointed by the State Executive but their control is vested in the High Court. It is the

[1] Henry Sedgwich (31st May 1838 – 28 August 1900) was an English Utilitarian philosopher and Economist

judiciary alone which keeps the respective organs within their legitimate spheres. Even with the fusion of the legislative and executive organs and the judicial organ is entirely independent and specifically separate by the very provisions of the Constitution. Art.50 of the Constitution enjoins upon the State to take steps to separate the judiciary from the Executive in the public service of the State. This directive has significance in relation to the position of the Subordinate Judiciary which in respect of the tenure of its office falls short of the ideal of absolute independence.

The Indian Constitution though it does not accept the strict doctrine of separation of powers vouches for an independent judiciary both at the national level and in the States. It is astonishing that whereas the Constitution took precautions to protect the respective heads of the Executive and the Legislature and its members with clear enactment of provisions conferring immunities and privileges upon them and of safeguarding their dignity and honor in due proportions it took no similar steps to protect the members of judiciary and to vouchsafe the status and dignity of their but seemingly obvious. It is a constitutional paradox to aspire, to secure justice, social, economic and political, to the citizens without securing the infallibility of the dispensers of justice.

Independence of the judiciary is a subject which is discussed in almost all treatises on law and constitution and the judges have developed it as a doctrine by the method of interpretation which is their forte. H.R.Khanna. J.[2] speaks of independence of judiciary as the necessary corollary of the functions of the judiciary.

[2] Judiciary in India and Judicial Function; 1985

According to him, the role of the judiciary has passed from the initial one of "setting disputes between private citizens" to that "as the arbiter of disputes between the State and citizens. In his opinion "the liberties of the individuals face real danger in insidious encroachments" by the men who govern and that "there is always a danger of abuse of powers of government in the modern society" which in his view "should be cushioned the safeguards for an individual's rights for which therefore, Jurisdiction has consequently to be vested in some authority to ensure the protection of those rights"; and to see that "the powers which re possessed by the State are not abused and that those armed with such powers exercise them in accordance with laws enacted for the purpose". In his opinion "such jurisdiction is exercised by courts according to the scheme of our Constitution" and it follows as a necessary corollary that: "Since persons who are to decode such disputes be not susceptible to pressures of the citizens and of the State independence of the judges has come to be accepted as an essential trait of the democratic society".

It is submitted that in our Constitution there is no provisions of independence of judges. That the framers of our Constitution were against the idea is borne by the speech of Dr B.R. Ambedkar in the Constituent Assembly during debates and he said: "I do not agree how five or six gentlemen sitting in the federal or Supreme Court examining laws made by the legislature and by dint of their own individual conscience or their bias or prejudices by trusted to determine which law is good and which law is bad:[3] in **A.K. *Roy v. Union of India*** [4]

[3] *A.K. Roy v. Union of India* AIR 1982 SC 710 (1982) 1 SCC 272

[4] AIR 1982 SC 710 (1982) 1 SCC 272

The framers of our Constitution thus in no uncertain terms rejected the role of the judiciary to "determine the legislative competence" of legislatures and for that matter "what law is good and which law is bad". It is also submitted that it is the people who elect their representatives to the legislatures and it is from them that the people who govern are selected. According to Khanna, J., it can be stated that "liberties of citizens face real danger in insidious encroachments by men of government for the men who govern are the representatives of the people whereas the judges who form the judiciary are not". To say that "there is always the danger of abuse of powers" by the men who govern is tantamount to voicing no confidence against the government in a democratic process which makes such government possible through popular election. Also his concept that without independence of judiciary "the first casualty would necessarily be the supremacy of the Constitution", because the Human Rights and the fundamental rights "would be reduced to the level of no more than ornamental show-pieces in the Constitution unless they can be enforced by the courts" is wholly untenable as it would be seen that in France there is no such power of the ordinary courts but the rights, human and fundamental, have not become mere constitutional show-pieces.

1.1 SIGNIFICANCE OF THE STUDY

Independence of judiciary is a cardinal principle of our Constitution. It is, therefore, absolutely essential that the judiciary must be free from executive pressure or influence which has been secured by making elaborate provisions in the constitution with details, the independence of judiciary is not limited only to the independence from the executive pressure or

influence it is a wider concept which takes within its sweep independence from any other pressure and prejudices. It has many dimensions, viz., fearlessness of other power centers, economic and political and freedom from prejudices acquired and nourished by the class to which judges belong. The independence of judiciary and the stream of public justice must remain pure and unsullied.

The arch of the Constitution of India pregnant from its Preamble, Chapter III-Fundamental Rights and Chapter IV-Directive Principles is to establish an egalitarian social, economic and political – to every citizen through rule of law. Existing social inequalities need to be removed and equality in fact is accorded to all people irrespective of caste, creed, sex, religion or region subject to protective discrimination only through rule of law. The judge cannot retain his earlier passive judicial role when he administers the law under the constitution to give effect to the constitutional ideals. The extraordinary complexity of modern litigation requires him not merely to declare the rights to citizens but also to model the relief warranted under given facts and circumstance and often command the executive and other agencies to enforce and give effect to the order, writ or direction or prohibit them to do unconstitutional acts. In this ongoing complex of adjudicatory process the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the constitution meaningful and a reality". Therefore the Judge is required to take judicial notice of the social and economic ramifications consistent with the theory of law. Thereby, the society demands active judicial roles which formerly were considered exceptional but now a routine. The judge must act independently if he is to perform the functions as expected of him

and he must feel secure that such action of his will not lead to his own downfall.

The independence is not assured for the judge but to the judged. Independence to the judge therefore would be both essential and proper. Considered judgment of the court would guarantee the constitutional liberation which would thrive by in an atmosphere of judicial independence. Every endeavor should be made to preserve independent judiciary as a citadel of public security to fulfill the constitutional role assigned to the judges.

It is denied that there is any automatic nexus of the so called basic rights with the independence of the judiciary. At least France is one country which repudiates such connection. The basic rights abide in this land of Liberty, Equality and Fraternity of Rousseau but the courts in that country settle disputes by reference to the statures as they are. All laws have to conform to the basic rights but the responsibility to see that they do so conform is not that of the judiciary but that of the Council of the Constitution, a non-judicial body. The council scrutinizes the laws in their bill stage and no bill can become law unless cleared by the Council. Laws in France thus presume constitutionality and courts simply have to apply the same as they come out of the anvil of the council of the constitution.

The basic freedoms neither become "ornamental show-pieces" in France nor "mere teasing illusion" of Bhagwati J.[5] The framers of our constitution also debated whether "the judiciary should be given the additional power to question the law on the

[5] *Minerva Mills Ltd. V. Union of India*, AIR 1980 SC 1789

ground that they violate certain fundamental principles" [6] but they did not think it prudent as Dr. Ambedkar pointed out that "I do not see how five or six gentlemen sitting in the Federal or Supreme Court be trusted to determine which law is good and which law is bad".[7] The role of judiciary in relation to Fundamental Rights as expressed in ***State of Madras v. V.G. Row***[8] it is submitted that we have progressed a long way from 1952 when such a view accepted as correct and now the concept of fundamental rights has to conform to the socio-economic needs of the society so that now the Directive principles are being gradually absorbed as the reasonable restrictions of fundamental rights as adumbrated by Bhagwati, J. in ***Minerva Mills Ltd v Union of India***[9] and ***Waman Rao v. Union of India.***[10] The sentimental duty of the judiciary has become relaxed. Thus, the claim that without independence of judiciary Fundamental and Human Rights will be reduced to ornamental pieces is denied because there are countries where such rights plentifully exist without the judiciary having to play the role of umpire.

In India the judiciary is committed under Art.12 read with Art.37 to effectuate Directive Principles which have now become more or less the reasonable restrictions of fundamental rights and role of the judiciary has changed from that of a "sentinel of the qui vive" to that of finding the genuineness of the nexus between the impugned law and the Directive Principles it seeks to incorporate. The doctrinaire approach emanating from Art.13 (2) as regards the role of judiciary has thus become mush diluted in view of the new political approach towards Directive Principles so

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[6] *A.K Roy V. Union of India* AIR 1982 SC 710
[7] *A.K Roy V. Union of India* AIR 1982 SC 710 at p. 727
[8] AIR 1952 SC 196
[9] AIR 1980 SC 196
[10] AIR 1981 SC 27

necessary for the establishment of the egalitarian society in India. Also the fact that the court-packing threat was not carried out by President Roosevelt did not prove the independence of the American judiciary and on the contrary the President had his way without packing the court because his threat worked and ever since the judiciary has consistently kept aloof from economic laws and regulatory measures.

It is submitted that the judiciary has sought to make out a special place for itself by means of its own interpretation a place which the Constitution has not given it. The many privileges claimed above under various articles of the Constitution by and for the judiciary are by no means unique to clothe the judges with special status because they belong to the Comptroller and Auditor General and the Chief and other Election Commissioner as well. The right of the Indian Judiciary to judicial review is also not a constitutional right but a power imported into the Indian Constitution by the Indian Judiciary thorough the medium of interpretation. Similarly the doctrine of separation of powers is extraneous to the Indian Constitution but has been introduced into it by judicial interpretation.

The concept of "Judicial Independence" is a wider concept taking within its sweep independence from any pressure or prejudice. Independent judiciary therefore, is most essential to protect the liberty of citizens. In terms of grave danger it is the constitutional duty of the judiciary to poise the scales of justice unmoved by the powers actual or perceived, undisturbed by the clamor of the multitude. The heart of the judicial independence is judicial individualism. The judiciary is not a disembodied

abstraction. It is compared of individual persons who work primarily of their own.

The recruitment, appointment and other service conditions of the judicial officers are regulated under the statutory rules made under *provisio* to Art.309 of the constitution. Their tenure is ensured by Art.311 of the Constitution subject to the pleasure of the President or the Governor as the case may be under Art.310 of the Constitution. The judicial officers are thereby insulated from any pressure of whatsoever nature to adjudicate disputes between the citizens and the state without any fear or favor, prejudice or predilection.

Independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law is a dynamic concept and delivery of social justice to the vulnerable sections of community. Thus there is a great need to preserve the independence of judiciary in India.

1.2 STATEMENT OF THE PROBLEM

Of late, out of the three organs in the State Judiciary is regarded as of utmost importance. There is enormous criticism regarding the functioning of Legislature and Executive. There are innumerable reports regarding high level of corruption that is prevailing in the above mentioned organs. It is only Judiciary which is regarded as most efficient body. The common man generally looks to the judiciary for his relief and amelioration of the weaker sections of the community. In fact the judiciary had played a vital role in developing the jurisprudence in various

fields of law. The public interest litigation is a unique contribution of the judiciary. Through the technique of PIL, we were able to develop the environmental, human rights, juvenile justice etc. This would be possible only when the judiciary is totally independent and separate. The judicial appointments should be transparent and only the best candidates should be selected and appointed as judges. In as much as there are a number of criticisms and controversies in regard to appointment of judicial officers and corruption in judiciary the subject assumes great importance and the problem requires in depth analysis and study.

1.3 OBJECTIVES OF THE STUDY

The object of this study is to critically analyze and examine whether the interference of the legislature and executive in the matter of appointments of judges affects the independence of judiciary.

1. To examine the historical evolution of judicial system and the Constitutional provisions relating to independence of judiciary.

2. To make a comparison of various provisions available for the appointment of judges in other countries.

3. To critically analyze the role of Supreme Court towards the need for the independence of judiciary with regard to appointment of judges.

4. To suggest any improvements on the basis of findings and observations of the research scholar.

1.4 HYPOTHESIS

The Indian system of judicial independence is based partly upon the experience of the foreign legal systems and partly on the exigencies of our own system. But the concept of independence of judiciary has not been maintained in its fullest form in our system of justice. As observed from the constitutional provisions, the statutory enactments and judicial decisions, the state action is mostly responsible to maintain the concept of independence of judiciary. Based on the preliminary examination the initial hypothesis is formulated as follows:

(i) The concept of Independence of Judiciary has not been maintained in its fullest spirit and courage of Indian Constitution.

(ii) The excessive intrusion of executive and legislature is impairing and completely overlapping the basic concept of independence of judiciary.

(iii) The independence of judiciary emerged as the basic structure towards achieving equality and justice, but it failed to achieve its object in its true spirit.

1.5 METHODOLOGY

In the preparation of the thesis an analytical-cum-historical approach has been applied. The historical approach is applied to trace out the institutions in the ancient times. The analytical method is applied to critically evaluate the organization and functioning of the institutions existing at the present day. In addition, the research scholar had also employed comparative-cum-critical method in order to test the hypothesis by taking into account the provisions prevailing in the analogous constitutions in other countries.

1.6 SOURCES OF INFORMATION

The information for the thesis can be collected by following any of the two approaches – doctrinal approach and non-doctrinal approach. Doctrinal approach is also known as fundamental approach. It is also described as textual in nature. It consists of 2 kinds of sources – Primary and Secondary. The primary sources are concerned with legislation and case law. The secondary sources are concerned with articles published in leading journals,

law reviews, text books etc. The non-doctrinal approach is known as functional or contextual. It deals with social values, constitutional interrelations, principles of justice, good conscience etc. In the preparation of the present thesis mainly the doctrinal approach has been adopted and the necessary material equity has been drawn from both primary and secondary sources.

1.8 PLAN OF STUDY

The entire study has been divided into seven chapters.

Chapter I focuses on significance of study and framing of hypothesis. It also lays down the methodology followed for the study.

The historical evolution of the Indian Judicial System is described briefly and the concept of emergence of independence of judiciary is explained in **Chapter II.**

Chapter III examines the various Constitutional provisions that are available for the method of appointment of Judges towards establishing an impartial and independent judiciary.

Chapter IV analyses the status of judicial independence of judiciary in other countries thorough a comparative description of the procedure relating to appointment of judges.

The contributions of the Higher Judiciary in highlighting the vital and paramount importance of independence of judiciary by its decisions are discussed in **V Chapter.**

Chapter VI discusses the various recommendations of the Law Commission of India relating to appointment of Judges.

Chapter VII deals with conclusions and suggestions.