
INTRODUCTION

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From a functional perspective judiciary is popularly considered the guardian of constitutional processes, the ultimate repository of legal wisdom, and the final arbiter of legal disputes. In any organized society irrespective of its political structuring, conflicts and disputes are bound to arise between individuals or groups and between individuals or groups and the organized power and authority. History shows that in order to decide these disputes societies invented and developed various and varied instrumentalities from time to time depending on the need, level of growth and expectations of the society at a particular point of time. Such an instrumentality in the ancient state was the whole citizenry, in medieval state the monarch and in the modern state the law court. Today, the forums of deciding disputes varies according to the subject of dispute but they all constitute the part of the judicial system of a state.

In any Rule of Law society judiciary is an essential part of the life of a nation like the legislature and the executive. Legislature passes laws which govern the society by creating rights and liabilities, executive enforces these laws and conducts the affairs of the state, and the disputes which arise in the process of enforcement of laws are decided by the judiciary. No Rule of Law society can ever exist

without an independent and accountable system of dispute-resolution mechanism. Therefore, independence and accountability which are mutually exclusive indicators remain the sine qua non of any good system of justicing. Absence of these factors negates the very existence of the judicial system itself in any democratic society.

Independence of the judiciary is in fact the independence of the individuals manning it which in turn depends on various personal and institutional factors. Therefore, the concept of independence of judiciary is concept that leads to an exercise in enquiry into those factors which churn judicial inputs into judicial outputs. Judicial independence is not the same thing as impartiality of the judges or an equi-distance from the government. Concept of judicial independence is something that goes beyond it and touches upon the freedom of a judge not only from various social, economic, political and personal interests but committment to the constitution also. Though the independence of the judiciary is required daily but the real test of independent judiciary is not when times are normal and it would hold the scale even in the ordinary run of cases between obscure citizens. The real test of independence arises when times are abnormal, when the atmosphere is surcharged with emotions and passions, when there is a brooding sense of fear, when important

personalities are involved and when important class interests clash. At such time it is not so much the accused or defendant who is on trial but it is the judiciary which is on trial. History shows that the Indian judiciary caved in during the 1975 Emergency, however, it may be considered only as an aberration and not the failure of the judicial system.

Accountability is a natural consequence of independence. Without any accountability, the concept and claim of independence becomes merely a hollow concept. Judiciary as a watchman is also to be watched because the basic concept of any democratic system is check and balance. One can take consolation in the fact that there are many restrictions on courts other than judicial self-restraint to make the judiciary accountable for its independence. Independence of the judiciary is directly related to the realization of goals and objectives which a society has carved for itself. Therefore, the exercise of judicial power must help achieve those objectives and goals. This dimension of the exercise of judicial power makes accountability an essential adjunct of any judicial system. Judges take oath to abide by and uphold the Constitution, therefore, they must be accountable for the breach of that oath. Judges cannot play the role of opposition or an indifferent umpire while deciding disputes arising out of the laws passed by the

legislature and enforced by the executive who have taken similar oaths. A judiciary which does not help society to move in the direction set by the society soon goes to disrepute and sows the seeds of its own destruction and the destruction of the Rule of Law also. While interpreting the constitution, judges cannot avoid policy choices and there is no way that a nation can avoid consequences of such choices which may sometimes be beneficial and sometimes harmful. Therefore, it is, natural that judges must remain accountable for such choices. Hence, the concepts of judicial independence and accountability are not selectively exclusive but mutually exclusive.

However, the mechanisms of conferring independence and enforcing accountability differ from jurisdiction to jurisdiction depending on the socio-economic and political structuration of that jurisdiction and the role expectations from the judiciary. In a common law jurisdiction, judicial role expectation is that the judiciary will creatively interpret law, whereas in civil or socialist system a judge is only expected to act in an mechanical manner and is not expected either to approve or disapprove any legislative action. Therefore, in common law jurisdictions independence and accountability of the judiciary assumes special significance.

India became independent in 1947 and adopted a constitution for free India in 1950. The Constitution provided for parliamentary democracy with a quasi-federal structure for the governance of the country. The essence of parliamentary form of government is that the executive is responsible to the legislature, which works on the principles of collective responsibility. In federal system there is a distribution of powers between the central and the State governments. Each is independent in its own sphere demarcated by the Constitution. Constitution further provides for a Bill of Rights. Besides, these basic rights, the constitution also contains some socio-economic objectives and special minority rights. The Preamble of the Constitution which reflects the aims and aspirations of the people talks of justice, liberty and equality. To maintain a balance and harmony between the basic rights and socio-economic objectives is the final responsibility of the judiciary. To accomplish these constitutional objectives the Constitutional powers of the state have been divided into three different branches of government--the executive, the legislature and the judiciary. They have been assigned different roles demarcated by the constitution. In order to perform these functions certain powers are granted to each organ of the state and these powers can not be abrogated or invaded by any organ of the state. The legislature makes the law, the executive implements and judiciary interprets law and

administers justice. Besides this the judiciary has to see that the two organs of government conforms to the constitution and the law of the nation i.e., Constitution. The validity of the legislative and executive actions is decided by the judiciary on the anvil of the Constitution.

It is no denying the fact that an independent judiciary is important to uphold the rule of law in a democracy. The judicial intervention curbs the arbitrariness of the executive and the legislatures. Since our constitution has established a federal system, the Indian judiciary has to mediate between the central and the state governments. The conflict between various levels of government is to be resolved by the judicial intervention and interpretation. In a federal setup the constitution lays down the limits beyond which the central and state governments cannot travel. But in actual practice there are maximum chance of conflict and one may interfere with the powers of others and encroach upon the each other's territory. Therefore, it was felt by the wise founding-fathers of the constitution that to resolve such disputes there is a need of strong, impartial, forthright and independent judiciary. Therefore, the constitution-makers provided this august institution with wide powers for resolving the constitutional controversies between the centre and the states and state interse. In this way the strong and independent judiciary is a sine-qua-non for constitutional

democracy. It provides sanctity to the rule of law, which is the life blood of democracy.

Furthermore, it is the guardian of the rights of the people. With the emergence of the philosophy of welfare state the role of the judiciary has become arduous. It is, therefore, of the utmost importance that the judiciary should always command a reputation for integrity, impartiality and independence of the highest order. It bodes ill for the future of any democracy when doubts are expressed about the independence and accountability of the judiciary. Such doubts bring the entire judiciary into disrepute and tend to shake the people's confidence in the country's judicial set up. The confidence of the people in the judiciary is as important as independence itself. If judiciary lacks independence and accountability then it can be a real threat to the democratic system itself. Thus the judiciary must be independent but at the same time it must be accountable to the people for its action. At a time when all the organs of the government are in disarray, it is only the judiciary which is moving forward slowly even though at times bruised and mutilated by the government.

However, it is unfortunate that today, doubts are being expressed about the independence of the judges. Indian judiciary which was once considered to be the finest institution is showing signs of decay and people are fast

losing confidence in it. There may be various reasons responsible for this state of affair, however, one single biggest reason is the absence of quality appointments to the judiciary. The executive packs the judiciary with pliant persons, who are easily amenable to influence and corruption. The executive has never realized this fact that the loss of people's faith and confidence in the integrity of the judiciary, which is the guardian of the rights and liberties of the people, if weakened then the very foundation of the just and lawful society is undermined and it becomes a national catastrophe. In such a situation people seek justice on the streets and an extra-legal private system of justice develops which negates all democratic values. Unfortunately such a system has started raising its ugly head in India. Absence of quality appointments coupled with the lack of effective machinery to check the aberrant judges from deviating the straight and narrow path of judicial integrity and honesty has led to the growth of all these problems. The only way to remove judges from their offices is an impeachment. Under constitutional scheme the Chief Justice has not been provided with any mechanism to investigate charges against his colleagues. Therefore, when the appointment mechanism of the judges is lax and the accountability mechanism is difficult, the result is the steep fall in judicial behaviour and role performance. Today the Indian judiciary has become an enigma. It has become an

institution which generates hope and despair at the same time. It is this enigma which impelled me to undertake this research work so that the problems of independence and accountability of the judiciary are clearly identified, demarcated and deconstructed in order to find relevant and workable solutions necessary to save our constitutional democracy from sudden crash.

The objectives of the present study includes:

1. How to make judiciary accountable to the people, who are the real masters in a democracy?
2. What measures should be taken to attract the people with high integrity and honesty to join the judiciary?
3. What are the limits of the executive power over the judiciary in matters of appointments and transfers of judges?
4. What can be the other measures short of impeachment to discipline the errant judges for minor judicial misconduct?
5. How to check the phenomenon of 'kin syndrome' in judiciary and how it has affected the image of this august institution?
6. To study the various institutional and non-institutional problems of judiciary which affects the judges while dispensing justice. How these problems

are tarnishing the image of the judiciary and how to check or kill the bug of ambition among judges for the post-retirement benefits?

7. How to restore people's faith and confidence in the judiciary to its original glory.

Thus these problems in judicial system are the main reasons for undertaking this topic for the research. Efforts have been made in this work to search out some watchdog mechanism for the judiciary to make it accountable like any other democratic institutions which is necessary if it is to regain the lost image in the public eye.

The scope and ambit of this study is to examine the relevant constitutional provisions, the attitude of the judiciary and role performed by it to uphold the oath and affirmation towards the constitution of India. In the recent past there had been a serious controversy regarding a judge of the higher judiciary who remained unpunished even after proved charges. Thus in this study an attempt would be made to suggest a way out so that corrupt judges may not go unpunished. Fact remains that in India it is the law which is supreme and not any organ of the government. Thus judges are subject to law and are not above the law. If they do some wrong which goes against judicial ethics then they must be punished according to the law. Today judiciary is facing serious problems of allegations of partiality and dishonesty

against judges. The corruption and favouritism which is eating into the vitals of our judicial system is the main cause for the declining health of the judiciary. From fear of being charged with contempt of court, no one dared to bring such charges openly. So far, apart from impeachment, an impractical procedure, there is no way of getting rid of a corrupt judge, and there is also no forum in which a judge was open to examination. So that attempts would be made to suggest a suitable mechanism as a solution for the above mentioned problems, so that the credibility of judiciary could be maintained. An attempt would also be made to examine alternative procedure to make judiciary accountable to the people also like other two organs of the government. Furthermore, attempt would also be made to suggest a code of conduct for judges which may be helpful for the proper growth of not only of the judiciary but of infant or nascent democracy also.

The thrust of this study is to understand the frame work of our constitutional system and explain the fundamentals of the constitution and to highlight the importance of judiciary under the written constitution. To assess the role of supreme Court as the sole arbiter of the constitutional issues and to analyse the constitutional provisions regarding appointments and transfers of judges. To examine the constitutional provisions which ensure the

independence of the judiciary and to make a critical assessment of the provisions regarding removal of judges. An attempt has been made to study whether the existing provisions regarding appointments and removal of judges are sufficient or require some changes. After thrashing out all these constitutional provisions the endeavour has been made to include a few suggestion in the shape of an institution like National Judicial commission, the special court of complaints or ombudsman for judges to make judges responsible towards people, so that the institution can get respect from all sections of the society which is sine qua-non for strengthening the judiciary.

To fulfil the purpose of this study and to achieve the objectives, the relevant constitutional provisions have been dealt with jurisprudential angle. Further the entire case law, particularly, the controversial decisions (like Ramaswamy controversy, and the judges transfer case) of the Apex Court have been analysed on the anvil of the constitution. Efforts have also been made to take interviews of some eminent legal personalities. An attempt has been made to analyse the position of judiciary in other leading democratic countries, particularly, the methods of appointments and removal of judges of higher judiciary to give analysis of the problems a required depth. Thus to complete this work and to achieve the above objectives, the present study has been divided into the

following chapters:

Chapter I attempts to set forth the introduction of the subject and amplifies the scope and purpose of the study.

Chapter II is devoted to the organisation of judicial system in India. In this chapter an attempt has been made to trace out the origin of judicial system, its further growth before or after independence. Apart from this, the hierarchy of judicial system in the pre-independence era has been discussed.

Chapter III deals with the organisation of judicial system in the post-constitutional era. In this chapter Draft of the Constitution, the Constituent Assembly Debates and constitutional provisions regarding judicial set-up have been discussed.

Chapter IV is devoted to the constitutional response to the independence of judiciary. In this chapter the concept of independence of judiciary, the appointment of judges, their qualifications, conditions of service, and removal procedure have been discussed in detail in constitutional perspective.

Chapter V deals with judicial response pertaining to independence of judiciary. In this Chapter the entire case law regarding appointments, transfer, conditions of service

and removal of judges have been dealt in details.

In Chapter VI an attempt has been made to discuss the independence of judiciary in the context of institutional and non-institutional problems and issues. These issues and problems have been discussed in constitutional and socio-politico-economic perspective in a comparative manner.

Chapter VII deals with accountability of judiciary. In this chapter the concept of accountability and the constitutional response have been discussed in great details. An attempt has also been made to discuss that how these responses can help in making the judges of higher judiciary accountable.

In the last chapter an endeavour has been made to set forth conclusion of this study. On the basis of this conclusion certain suggestions have been put forward which if operationalized by the legislature and the executive, then the basic concepts of judicial independence and accountability can be reconciled. This reconciliation of independence with accountability is necessary if the dictatorship of the judges is to be avoided and the Rule of Law is to be strengthened in India. Fact remains that if judiciary discharges its functions properly it will provide both the opportunity and the stimulus for other public institutions to play their indispensable role fairly in the society.