CHAPTER - II
JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY: A THEORETICAL AND CONCEPTUAL ANALYSIS

2.1 Introduction

The rule of law is the only guarantee for the maintenance of justice between man and man and man and State and the only security for a disciplined and ordered liberty.\(^1\) Rule of law seems to be synonymous with the maintenance of civilized existence. The preservation of the rule of law becomes an essential task in these transitional regimes.\(^2\) The proper exercise of governmental authority is an essential aspect of the rule of law\(^3\) - restriction or limitation on the authority of the government is the soul of constitutional democracy\(^4\) and if there is to be a rule of law, there should be independent judges to administer the law.\(^5\)

Administration of justice is a core function of any sovereign State, developed precisely in order to prevent violence or the exercise of any form of coercion by the strong, the powerful or the wealthy against the less powerful, less well-off and less well-organized.\(^6\) Courts play a predominant role in the administration of both civil and criminal justice.\(^7\) A satisfactory forum for resolving the dispute is, therefore imperative for any society.\(^8\) In fulfilling this role, the courts become powerful actors in maintaining the submission of the State to law.\(^9\) As Alexander Hamilton pointed out:

“...limitations on government can be preserved in practice no other way than through the medium of courts of justice... without this, all the reservations of particular rights or privileges would amount to nothing.”\(^{10}\)

---

The judiciary is a significant social institution, and like other branches of government, contributes to shaping the life of the community. Expansion of the sphere of judicial review is another reason for the increase in importance of the role of the judiciary. One of the most significant aspects of the role of the judiciary in society is its independence and impartiality. The existence of an independent judiciary is one of the core elements of modern constitutionalism and a cornerstone of democracy and good governance.

Rule of law ensures that all government officials are held accountable for their authority. Accountability is the *sine qua non* of democracy. The concept of accountability is recognised as an important value of a democratic society. Transparency facilitates accountability. No public institution or public functionary is exempt from accountability. The judiciary, an essential wing of the state and its members being paid from the public exchequer, are accountable to the people and has the responsibility of performing the functions for which it has been created. Judicial accountability, however is not on the same plane as the accountability of the executive or the legislature or any other public institution.

Judicial independence does not mean the absence of accountability. Today, the judiciary cannot escape close scrutiny of its performance and the conduct of its members; it thus ensures transparency. Judicial accountability, as a concept, is much debated since it is very difficult to define it in precise words. As Lord Hailsham said, in his *Lionel Cohen Lecture*, “…there is a continuous tension between judicial independence and public accountability of judges in a democracy. This tension should be reconciled by the

---

16 Dr. Sairam Bhat, “Right to Information Vs. Independence of the judiciary: A Relook,” *IBR* 39(4)2012, p.188.
exercise of wisdom and good judgment, so that the proper balance between these very important principles is maintained.\textsuperscript{20}

The study of judicial independence and judicial accountability are important in national legal systems as they are an essential guarantee for democracy and liberty. The increasing role which the judiciary has assumed warrants examination of the conceptual framework and theoretical rationale which define its position to the other branches of the government.\textsuperscript{21}

This chapter begins with understanding of the concepts of judicial independence and accountability and analyses the broader spectrum of the core values of the judicial system - procedural fairness, public confidence in the courts, efficiency, access to justice, constitutional guarantees and judicial independence. Subsequently this chapter deals with the doctrine of the ‘Separation of Powers’, its contribution to the concept of judicial independence, meaning, definition, importance, elements of judicial independence and analyses the concept of judicial accountability and its relationship to judicial independence, which are the main aspects of this thesis. It presents a background to the argument of the thesis developed in the following chapters.

\textbf{2.2 The Fundamental Values of the Judicial System}

The administration of justice is one of the prerogatives of the sovereign state.\textsuperscript{22} Proper administration of justice is dependent upon adherence to certain fundamental values which lie at the foundation of most judicial systems. These values include procedural fairness, efficiency, accessibility, public confidence in the courts and judicial independence and the value of constitutionality, in the sense of the constitutional protection of the judiciary. Each of these values allows the courts to fulfill their main function, namely, the resolution of disputes.\textsuperscript{23} A proper legal system is one which advances each of these values on its own, and achieves a suitable balance between them whenever they conflict with one another.\textsuperscript{24}

\textsuperscript{20} Shimon Shetreet, \textit{supra} note 13, p.9.
\textsuperscript{21} \textit{Ibid}, p.3.
\textsuperscript{23} Shimon Shetreet, \textit{supra} note 13, p.4.
\textsuperscript{24} \textit{Ibid}. 
2.2.1 Procedural Fairness

Evidence and procedural law are central to the judicial process.\textsuperscript{25} In order to ensure justice, special procedural rules have been established to govern the method and manner in which such disputes are resolved by the courts. The rules of procedure are the mere mechanics of justice.\textsuperscript{26} An elaborate and complex body of laws and rules govern court procedures which regulate the method of evaluating and weighing the facts and evidence submitted to the courts. The purpose of these rules and laws is to attain justice and to ensure a fair trial by subjecting the conflicting claims to a vigorous and thorough investigation in order to ascertain the truth. It must be mentioned though, that a strict application of the procedural fairness value, however important, may affect the efficiency of trials or the disclosure of the truth, and this may eventually affect public confidence in the courts. As mentioned above, a suitable balance must be achieved between the conflicting values.\textsuperscript{27}

2.2.2 Efficiency

Society expects the courts to ensure not only procedural fairness, but it also expects them to be efficient. The courts are the machinery for enforcing laws and regulations.\textsuperscript{28} The legal system might have very good laws which provide for the grant of substantive rights to citizens in relation to their fellow citizens and the government, but these laws are of little value if the legal system does not provide an accessible, convenient and efficient method for enforcing laws and obtaining redress for violation of rights- hence, the demand for efficient court procedure, for a judicial process which is not unreasonably slow and for judicial services which can be obtained at a reasonable cost.\textsuperscript{29}

2.2.3 Accessibility

The importance of the need for an accessible judicial system should not be underestimated. The significance of accessibility is to be found first and foremost in the

\begin{footnotesize}
\bibitem{27} Shimon Shetreet, \textit{supra} note 13, p.5.
\bibitem{29} Shimon Shetreet, \textit{supra} note 13, p.5.
\end{footnotesize}
opening up of the doors of the courts to the public.\textsuperscript{30} The enforcement of the rule of law
by the judges could be wholly frustrated by refusal to appoint judges, to provide
courtrooms for them to sit in or staff to service those courts.

The integrity of the legal system does not depend solely on the integrity of each
individual judge. It also depends on the ability of the citizen to come before the
independent judge and receive his judgement.\textsuperscript{31} As Jerome Frank said, “…in a democracy
the courts belong not to the lawyers and judges but to the citizens.” The direction of court
reform must therefore be, to make it more accessible and effective for the people whose
rights have to be protected.\textsuperscript{32} Accessibility includes the provisions of judicial services to
the public at a reasonable cost, provision of the means to go to court (legal aid) for those
unable to pay the cost, as well as increasing the awareness of the community so that
citizens within the community appreciate that they are entitled to turn to the courts in
order to defend their rights and obtain redress for wrongs.\textsuperscript{33} For the survival of
democracy, not only judges have to be independent but administration of justice should
be effective, expeditious and cheap.\textsuperscript{34}

2.2.4 Public Confidence

The courts can perform their function as an institution to resolve disputes in
society only if they enjoy public confidence.\textsuperscript{35} Barak J. has held that “Public confidence
in the judiciary is the most valuable asset that this branch possesses.”\textsuperscript{36} The courts can
enjoy such confidence only if they are seen as independent and unbiased, \textsuperscript{37} and the
process of resolving the dispute is fair, efficient, expedient and accessible.\textsuperscript{38} Public
confidence in the judiciary is its real strength that converted the judiciary’s image from
the ‘least dangerous branch’ without ‘the purse or the sword’ to a strong arm of the

\textsuperscript{30} Ibid.
\textsuperscript{33} Shimon Shetreet, \textit{supra} note 13, p.6.
\textsuperscript{34} Sir Thomas Legg KCB, \textit{supra} note 14, p.63.
\textsuperscript{35} Dr. Justice David Anoussami, “What ails the Judiciary?,” (1994)6 \textit{NJSJ} 100, pp.110-120; Elizabeth
\textsuperscript{36} HC 732/84 \textit{Tzaban v. Minister of Religious Affairs} (1986) 40(4) PD 141 at 148.
\textsuperscript{38} Shimon Shetreet, \textit{supra} note 13, p.6.
State. In fact, public confidence in the judiciary can be maintained by satisfying certain conditions related to important aspects of the judiciary. In order to gain this public confidence, judges need to be appointed on the basis of explicit and publicly known criteria, and through a transparent mechanism. The tenure of judges and the terms and conditions of their service should be secure to ensure that they may exercise judicial functions without ‘fear or favour, affection or ill-will.’ Judicial impartiality is perhaps the most substantial factor in maintaining public confidence in the judiciary. Judicial impartiality means not merely an absence of personal bias or prejudice in the judge but also the exclusion of ‘irrelevant’ considerations such as his [or her] political or religious views. In order to maintain judicial impartiality judges should conduct themselves in a manner that assures the disputing parties that their case will be disposed of on merit and not on the basis of any irrelevant considerations or personal predisposition of the judges. This is because the presence of impartiality is a fundamental judicial virtue.

Furthermore, public confidence in the courts is enhanced by numerous principles and practices, which aim to ensure that justice, will not only be done but also seen to be done. The open court principle and reasons for the decisions are fundamental principles of legal system. This significant obligation also contributes to the development of logical, analytical methods of thought which lie at the foundations of the legal process, and allows for the review of decisions on appeal, and for a reliance on precedents. The media also play a significant role in maintaining public confidence in courts and judges

43 Shimon Shetreet, supra note 41, pp.303-305.
47 Shimon Shetreet, supra note 13, p.7.
49 Shimon Shetreet, supra note 13, p.7.
by reporting what is going on in the courts.\textsuperscript{50} The judiciary will indeed be in trouble if it loses public confidence.\textsuperscript{51}

\subsection*{2.2.5 Constitutional Guarantees}

One of the institutional arrangements often looked up to as the most fundamental way of protecting judicial independence are ‘guarantees’ of judicial independence in the country’s written Constitution.\textsuperscript{52} When a matter is regulated by ordinary legislation, the legislature can effect an amendment by simple majority. In contrast, protection granted by the Constitution is modifiable by a constitutional amendment only.\textsuperscript{53} Thus, in order to better guard judicial independence, judges must not be part of the administrative arm of the executive branch; rather, they should be viewed as independent constitutional or statutory officers of the State, and completely separate from the civil service; issues, such as the appointment, transfer, removal, terms of office and service conditions of judges, should be protected through constitutional provisions. For example, in the composition of the Supreme Court of United States - the number of judges constituting the court- is not constitutionally regulated; the number of sitting judges can be changed by legislation.\textsuperscript{54} During a controversy in the United States over the ‘New Deal’ legislation, President F.D. Roosevelt attempted to pack the court- increasing the number of judges- which he could do by ordinary legislation.\textsuperscript{55} Indian Constitution makes detailed provisions on basic patterns of the courts, their composition, powers, jurisdiction etc.,\textsuperscript{56} which cannot be touched by ordinary legislative process.

\subsection*{2.3 Doctrine of Separation of Powers}

The principle of judicial independence rests on the idea of separation of governmental powers- executive, legislative and judicial.\textsuperscript{57} Hence, judicial independence is an essential ingredient of the ‘Doctrine of Separation of Powers’ which differentiates

\begin{itemize}
\item \textsuperscript{50} Ibid, p.9.
\item \textsuperscript{53} Shimon Shetreet, \textit{supra} note 13, p.19.
\item \textsuperscript{54} \textit{The Judiciary Act}, 1789 initially set the number of Supreme Court Judges at six. In later years, the number was increased and decreased until it was finally settled at nine.
\item \textsuperscript{55} Shimon Shetreet, \textit{supra} note 13, p.20.
\item \textsuperscript{56} Article 124 – 147, 214-237, the \textit{Constitution of India}.
\item \textsuperscript{57} Kate Malleson, \textit{supra} note 42, p.659.
\end{itemize}
the agencies of government that exercise those powers so that they are dispersed.\textsuperscript{58}

2.3.1 Meaning

The separation of powers is simply described as the three branches of government- the executive, legislature and judiciary acting independently of each other. It means that no branch of government may arrogate to itself the core functions of a coordinate branch of government, and no branch may deprive another branch of the powers and resources necessary to perform its core functions.\textsuperscript{59}

2.3.2 Evolution

The doctrine of separation of powers is an integral part of the evolution of democracy itself.\textsuperscript{60} Its origins are in the ancient period, where the theories of government and the concept of governmental functions were developed.\textsuperscript{61} The concept of governmental functions evolved gradually over many centuries. Aristotle (384-322 B.C.) identifies three elements or powers in a government, common affairs, the system of public offices and the judicial element or the system of courts including the constitution and classification of courts and the manner of appointing the judges.\textsuperscript{62} However, there was no suggestion in Aristotle’s observation that the different powers should be vested in different organs of government.\textsuperscript{63} In the 17\textsuperscript{th} century, Locke (1632-1704) propounded the first modern theory of the separation of powers.\textsuperscript{64} In 1690, in his \textit{Second Treatise of Civil Government}, Locke says:

“It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.”\textsuperscript{65}

Locke emphasises the need for independent and impartial judges and makes a distinction between pronouncing judgment and enforcement of judgment, but he does not

\begin{thebibliography}{9}
\bibitem{60} Somnath Chatterjee, “Separation of Powers and Judicial Activism,” \textit{AIR (J)} Vol.100, 2013, p.97.
\bibitem{63} M.J.C. Vile, \textit{supra} note 61, pp.59-60.
\end{thebibliography}
consider judicial power to be distinct. He emphasises only the separation of executive and legislative power, but does not formulate a separate judicial power.\textsuperscript{66} The theory of Separation of Powers was further developed in the 18\textsuperscript{th} Century by the French writer Montesquieu (1689-1755) who contributed new ideas to it. He is commonly recognised as the founder of the modern theory of Separation of Powers.\textsuperscript{67} The exposition of Montesquieu was based on the British Constitution of the early 18\textsuperscript{th} century, as he understood it.\textsuperscript{68} In 1748, Montesquieu writes:

“\textquotesingle\textquotesingle When the legislative and executive powers are vested in the same person, or in the same body, there can be no liberty…\textquotesingle\textquotesingle Again, there is no liberty if the power of judging is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control for the judge would then be the legislator. If it jointed to the executive power, the judge might behave with violence and oppression. There would be an end to everything…\textquotesingle\textquotesingle\textsuperscript{69}

Montesquieu emphasised certain elements in it, particularly in relation to the judiciary \textsuperscript{70} and a rigid separation of governmental powers. At the end of the 20\textsuperscript{th} Century \textquotesingle\textquotesingle most modern western democracies claimed a system of government based on a functional separation of powers of some kind.\textsuperscript{71}

2.3.3 Importance of Doctrine of Separation of Powers

Separation of powers, the classic doctrine which is fundamental to the organization of a state\textsuperscript{72} and to the concept of constitutionalism – in so far as it prescribes the appropriate allocation of powers, and the limits of those powers, to differing institutions,\textsuperscript{73} is a vigorous, contemporary doctrine that recognizes the central importance of institutional choice in constitutional writing.\textsuperscript{74} Separation of powers is a distinctive constitutional tool;

\begin{itemize}
\item \textsuperscript{66} M.J.C. Vile, \textit{supra} note 61, pp.59-60.
\item \textsuperscript{68} Wade and Phillips, \textit{supra} note 65, p.45.
\item \textsuperscript{70} M.J.C. Vile, \textit{supra} note 61, p.77.
\item \textsuperscript{71} Karl Loewenstein, \textit{Political Power and the Governmental Process}, (Chicago: The University of Chicago Press, 1965), p.34.
\item \textsuperscript{72} Harold J. Laski, \textit{A Grammar of Politics}, (New Delhi: S. Chand and Company Ltd., 1992), p.104.
\item \textsuperscript{73} Hilaire Barnett, \textit{supra} note 69, p.97.
\item \textsuperscript{74} N.W. Barber, \textit{``Prelude to the Separation of Powers,\textquotedblright} 60 \textit{CLJ} 1 (2001), p.71.
\end{itemize}
it purports to lay down how constitutions should be arranged.\textsuperscript{75} It addresses itself to the authors of the constitution; it enjoins them to match function to form in such a way as to realize the goals set for the state by political theory\textsuperscript{76} and necessary for a constitution to take to achieve political liberty.\textsuperscript{77} Separation of powers is not therefore just theory about the division of powers; it is also concerned with the creation of institutions.\textsuperscript{78}

The Theory of Separation of Powers is a synthesis of a number of distinct ideas: the distinction between law-creation and law-application, the independence of the judiciary and the desirability of a balance of power between different constitutional institutions.\textsuperscript{79} The core of the doctrine is not liberty, as many writers have assumed, but efficiency.\textsuperscript{80} The separation of power acts as a restraint on the power of the state.\textsuperscript{81} Absolute power necessitates some basic application of the institutional checks implied in the doctrine of separation of powers.\textsuperscript{82} The objective of this theory is to secure efficiency, transparency and accountability of the functionaries.\textsuperscript{83} It has now become a central feature of a system of ‘limited’ constitution.\textsuperscript{84} Brandeis J. who, in \textit{Myers v. U.S},\textsuperscript{85} wrote that the purpose of Separation of Powers “…was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”\textsuperscript{86}

Separation of powers protects both the independent process of adjudicating according to existing law, and the finality of its outcome in the hands of the judicial branch.\textsuperscript{87} The theoretical basis for judicial independence is the doctrine of Separation of Powers.\textsuperscript{88} The doctrine has received its main application in democratic countries by

\begin{footnotesize}
\begin{enumerate}
\item[76] N.W. Barber, \textit{supra} note 74, p.71.
\item[79] Richard White, \textit{supra} note 75, p.474.
\item[80] N.W. Barber, \textit{supra} note 74, p.59.
\item[85] (1926)272 U.S. at p.52.
\item[86] N.W. Barber, \textit{supra} note 74, p.61.
\item[88] Shimon Shetreet, \textit{supra} note 13, p.9.
\end{enumerate}
\end{footnotesize}
securing the independence of the judiciary from the control of the other, political branches, particularly the executive government.\(^{89}\)

### 2.4 Judicial Independence

The concept of judicial independence is an integral part of the separation of powers in the constitutional framework\(^ {90}\) and central to the judicial process. The judicial branch has to be independent in order to carry out its function of controlling and balancing vis-à-vis the other two principal branches of government: the executive and the legislature.\(^ {91}\) In the process of preserving the State internally, courts play a prominent, although not an exclusive, role. They provide the instrumentality for the trial of disputes between individuals and between the State and individuals for the protection of human beings living in organized society. A court is a tribunal presided over by a judge or judges exercising power conferred by law and deciding cases according to law.\(^ {92}\) Independence of the judges has now come to be accepted as an essential trait of free a democratic State.\(^ {93}\)

#### 2.4.1 Meaning

Judicial independence is an important topic of discussion among judges, lawyers, academics, commentators and researchers in different countries. In any discussion of the topic of judicial independence one essential question needs to be asked: what is meant by the concept of judicial independence? The meaning and content of this principle vary somewhat from one country to another depending upon the system of government and it may carry different meanings in different periods.\(^ {94}\)

Different dictionaries have given different meanings to the word ‘independent’: ‘independent means ‘enjoy of outside control’;\(^ {95}\) ‘not influenced or controlled by others in matters of opinion, conduct, etc’; ‘thinking or acting for oneself’; ‘not subject to another’s authority or jurisdiction; autonomous’; ‘not influenced by the thought or action

---


\(^{91}\) Shimon Shetreet, *supra* note 13, p.9.


\(^{93}\) Justice H.R. Khanna, *supra* note 40, pp.243-244.

\(^{94}\) Shimon Shetreet, *supra* note 13, p.9.

of others’; ‘not dependent; not depending or contingent upon something else for existence, operation’; ‘not relying on another or others for aid or support’; ‘declining for others aid or support; refusing to be under obligation to others’; ‘possessing a competency; to be financially independent’; ‘self confident; unconstrained’.96 - of that have chosen three- ‘freedom from outside control’; ‘Not influenced or affected by others; impartial’ and ‘capable of thinking or acting for oneself’. Independence in all these senses must be complete, unimpaired and uncorrupted and that means first- that independence is antithetical to corruption and second- that it is ensured by accountability.97

In the phrase ‘judicial independence’, there is another word that may need some clarification that is the word ‘judicial’. When referring to the ‘judiciary’ having or not having ‘independence’, it is not always clear which officials or institutions are being referred to? Does ‘judicial’ or ‘judiciary’ have a common enough meaning to enable us to construct a general theory of judicial independence?98

Shimon Shetreet surveying judicial independence in twenty-nine countries takes the positions that for all of these states ‘the judiciary could be defined as the organ of government not forming part of the executive and legislature, which is not subject to personal, substantive and collective controls, and which performs the primary function of adjudication.99 Application of the principle should be confined to functionaries called judges or institutions called courts (or their linguistic equivalents). Indeed, one way of undermining judicial independence is to transfer judicial functions from a judiciary enjoying a high degree of autonomy to officials and agencies that have very little independence.100

Generally, judicial independence means the freedom of judges to exercise judicial powers without any interference or influence. The ‘most central and traditional’ meaning

---

98 Peter H. Russel, supra note 52, p.8.
100 Peter H. Russel, supra note 52, p.8.
of judicial independence is the collective and individual independence of judges\textsuperscript{101} from the political branches of the government, particularly from the executive.\textsuperscript{102} It requires that judges should not be subject to control by the political branches of government and that they should enjoy protection from ‘any threats, interference, or manipulation which may either force them to unjustly’ favour the government or ‘subject themselves to [punishment] for not doing so.’\textsuperscript{103} However, the contemporary concept of judicial independence envisaged in numerous international instruments requires as well that judges should be free to decide cases impartially, ‘without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.’\textsuperscript{104}

2.4.2 Definition

Any analysis of judicial independence must begin with some idea of its core meaning.\textsuperscript{105} At the most basic level, judicial independence is related to the notion of conflict resolution by a ‘neutral third’; or the idea that a dispute should be decided by a judge who has no relation to the litigants and no direct interest in the outcome of the case. As noted by Martin Shapiro, this ideal is at the root of the ‘social logic’ of courts, and is indispensable lest dispute resolution becomes a ‘two against one’ situation.\textsuperscript{106} Thus, in formulating a general definition of judicial independence, most scholars have placed a great deal of emphasis on impartiality and insularity. For example, in an oft-quoted definition, Becker referred to judicial independence as:

“(a) The degree to which judges… decide [cases] consistent with… their interpretation of the law, (b) in opposition to what others, who are perceived to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision averse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court.”\textsuperscript{107}

\begin{footnotesize}
\begin{enumerate}
\item Christopher M. Larkins, supra note 9, p.608.
\item Montreal Declaration, 1983, Art. 2.02; UN Basic Principles, 1985, Art. 2; See also Beijing Statement, 1995, Art. 3(a).
\item Christopher M. Larkins, supra note 9, p. 608.
\item Christopher M. Larkins, supra note 9, p.609.
\end{enumerate}
\end{footnotesize}
Along the same lines although slightly simplified and improved, legal scholar Keith Rosenn defined judicial independence as:

“...the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice, free from the coercion, blandishments, interference, or threats from governmental authorities or private citizens.”\(^{108}\)

Finally, consider Joel G. Verner’s brief definition of judicial independence:

“[the ability] to decide cases on the basis of established law and the ‘merits of the case,’ without substantial interference from other political or governmental agents.”\(^{109}\)

Besides these two necessary attributes, however, another important component must be incorporated into the definition of judicial independence: the scope of the judiciary’s ‘authority as an institution’ or, in other words, the relationship of the courts to other parts of the political system and society and the extent to which they are collectively seen as a legitimate body for the determination of rights, wrong, legal and illegal.\(^{110}\) Thus, a more accurate definition of judicial independence might look something like the following:

“Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial to the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact “neutral’ justice, and determine significant constitutional and legal values.”\(^{111}\)

In fact, we do not even agree on what judicial independence really is. Professor Burbank says that, at its core, judicial independence is a particular set of outcomes that flow from certain structural features of a federal government, including separation of powers and ‘checks and balances’.\(^{112}\) Professor John Ferejohn defines judicial independence as an ‘aspect of a judge’s moral character,’\(^{113}\) Dr. Frances Zemans says that judicial independence is the means of creating the ‘rule of law.’\(^{114}\)


\(^{110}\) Christopher M. Larkins, supra note 9, p.610.

\(^{111}\) Ibid, p.611.


\(^{113}\) John Ferejohn, supra note 101, pp.353-354.

From the above definitions, it may at first appear simple to identify and measure judicial independence. All one would need to do, it seems, is find evidence of impartiality, insularity, and the courts’ scope of authority, and determine the degree to which these traits exist. However, it is not that elementary, as there are a number of problems which must be taken into consideration before judicial independence can be identified and measured.\textsuperscript{115}

Can ‘judicial independence’ be identified and gauged? Obviously, it is no easy task; however there is a way to recognize and measure it. The first key to this approach is to look for evidence of dependence instead of independence. In other words, one should identify obstacles to the exercise and manifestation of independence- to judges’ impartiality and insularity and the courts’ institutional scope of authority. Too often scholars look for independence when it is quite likely that, in its pure form, it does not exist anywhere. Judicial dependence, by contrast, exists in virtually every political system and is much more easily identifiable.\textsuperscript{116}

Despite the abundant literature on the subject, there is no consensus amongst scholars on what exactly is meant by judicial independence. The main definitional problem is that judicial independence is a relative, and not an absolute concept. It does not refer to single kind of relationship or something that a judicial system ‘has’ or ‘does not have’, but rather it may have ‘more of it’ or ‘less of it’.\textsuperscript{117} In any event, no general theory of judicial independence exists.\textsuperscript{118}

\textbf{2.4.3 Importance of Judicial Independence}

The independence of the judiciary is and always must be the best of all securities for the stability of a state for four connected reasons: First, because it insures that the judges, to whom the duty of defining and regulating the powers and duties of the persons and bodies exercising governmental functions is entrusted, carry out this important duty impartially.\textsuperscript{119} Secondly, because, as against those persons and bodies, it guarantees the liberties of the subject. Thirdly, because it creates a law abiding habit in the nation and

\textsuperscript{115} Christopher M. Larkins, \textit{supra} note 9, p.612.
\textsuperscript{116} \textit{Ibid}, p.618.
\textsuperscript{118} Robert Stevens, \textit{supra} note 90, p.597.
fourthly, because it grounds the authority of the State upon the rule of law. As Alexander Hamilton asserted:

“…the complete independence of the courts of justice is peculiarly essential in a limited [C]onstitution…, court of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.” Courts are “the bulwarks of a limited Constitution against legislative encroachments.”

As Larkin says, ‘an independent judiciary is the essential - indeed an indispensable -component of a free and democratic society.’ The judiciary has a responsibility for ensuring that ‘individual rights and liberties are secure.’ This responsibility cannot be effectively discharged without judicial independence. The function of the courts as arbiter of disputes between the state and the citizen highlights the importance of the independence of the courts.

The importance of judicial independence in a democratic society is unequivocal to ensure the fair administration of justice and to gain public confidence in the justice system. As Felix Frankfurter J. says, ‘[t]he Court's authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction.’ Without that confidence the effective functioning of the judicial branch is quite impossible and its legitimacy would be endangered. A modern state has to arm itself with immense powers in order to bring about socio-economic changes and reforms. Acquisition of vast powers by any human institution, including a government which too operates through a human agency, is always fraught with the danger of abuse of power. This is because without the independence of the judiciary ‘the power over life and liberty

---

120 Ibid.
122 Ibid, p.399.
126 H.R. Khanna, supra note 37, pp.15-16.
128 Elizabeth Handsley, supra note 35, p.184.
130 Justice H.R. Khanna, supra note 40, pp.243-244.
of the citizens would be arbitrary.”

The independence of judiciary has been a powerful tool in guarding the Constitution and the rights of individuals.

2.4.5 Elements of Judicial Independence

The concept of judicial independence carries two opposite senses: negative and positive. In the negative sense the concept of judicial independence seeks to avoid any kind of dependence, interference or influence in administering justice. In other words, judicial independence refers to the existence of a judiciary that enjoys freedom from dependence, interference or influence from any source, whether from the executive, the legislature or private individuals. In the positive sense judicial independence means the freedom of judges to exercise judicial functions impartially, in accordance with their own understanding of law and fact. A comprehensive definition of judicial independence is given by Green. He defines judicial independence as:

“…the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.”

This is the sense in which judicial independence is used in this thesis. The definition emphasises that in exercising judicial functions, judges should be free from any direct or indirect interference by the executive, any institution or any private individuals. It also emphasises the freedom from ‘actual or apparent dependence’ on any of the sources of interference. Therefore, the contemporary concept of judicial independence emphasises the independence of each and every member of the judiciary and the independence of the judiciary as an institution or organ of government. In other words, the concept of judicial independence has two important elements: the individual independence of judges and the collective or institutional independence of the judiciary.

131 Montesquieu, supra note 69, p.157.
2.4.5.1 Individual Independence of Judges

Individual independence of judges means that a judge is free to exercise judicial functions without any fear or anticipation of retaliation or reward.\footnote{137}{John Ferejohn, supra note 101, p.355.} It requires that a judge should decide cases in accordance with an impartial ‘assessment of the facts’ and ‘understanding of the law’ without any direct or indirect improper influence or interference ‘from any source’ or ‘for any reason.’\footnote{138}{Montreal Declaration 1983, Art. 2.02; UN Basic Principles, 1985, Art. 2; Beijing Statement 1995, Art. 3(a).} In fact, the first essential for an independent judiciary is that the individual judge should enjoy complete freedom in discharging his or her judicial functions and other official duties. The complete freedom of an individual judge has three elements: (1) personal independence, (2) substantive independence, and (3) internal independence.\footnote{139}{Shimon Shetreet & Jules Deschenes (eds.), supra note 99, pp.598-599.}

2.4.5.1.1 Personal Independence

Personal independence signifies that the tenure of judges and the terms and conditions of their service are adequately secured, so as to ensure that individual judges are not subject to executive control. In other words, the terms of judicial service including transfer, remuneration and pension entitlements should not be under the control of the executive and the tenure of judges should be guaranteed until a mandatory retirement age.\footnote{140}{M.P. Singh, supra note 135, p.249; Sarkar Ali Akkas, supra note 106.} These are the prerequisites to ensure that an individual judge may exercise judicial functions without ‘fear or favour, affection or ill-will’.\footnote{141}{Kate Malleson, supra note 42, p.660.} This aspect of judicial independence is very significant for an individual judge.\footnote{142}{Shimon Shetreet, supra note 13, p.15.} In order to secure the administration of justice a judge should be ‘placed in position where he [or she] has nothing to lose by doing what is right and little to gain by doing what is wrong’.\footnote{143}{R. M. Dawson, The Government of Canada, (Toronto: University of Toronto Press, 1954), p.486.} Such a position can be guaranteed by ensuring the personal independence of a judge.

2.4.5.1.2 Substantive Independence

Substantive independence, which is also referred to as functional or decisional independence, means that, in the discharge of their judicial functions and other official
duties, judges are subject to nothing but the law and their conscience.\textsuperscript{144} In discharging judicial functions, a judge performs three kinds of duties: administrative, procedural and substantive. Administrative duties include the responsibility for managing the cases, fixing dates for their hearing, organising the judicial workload and expediting the hearings and resolution of cases. Procedural duties concern the responsibility for ‘conducting resolution of the trial’ in accordance with the rules regarding the examination of witnesses, recording of evidence and disposal of other interlocutory matters. The substantive aspect of the duties of a judge is the actual decision-making role. It concerns ‘the determination of the finding of fact and the application of the relevant legal norms to the facts of the case.’\textsuperscript{145} The substantive independence of judges requires that in performing all the administrative, procedural and substantive duties, a judge should be free from any direct or indirect interference, improper influence or pressures.\textsuperscript{146} It ensures the impartiality in judges: their capacity to make judicial decisions on the merit of cases, without any fear or favour.\textsuperscript{147}

2.4.5.1.3 Internal Independence

Internal independence means the independence of a judge from his or her fellow judges.\textsuperscript{148} The independence of individual judges may be undermined not only by outside sources of interference or influence but also by fellow judges particularly by senior judges using their administrative authority and control.\textsuperscript{149} The threats to internal independence may come from the superior courts or judges. In addition, internal independence covers the process of pronouncing judgment, that is the actual decision making process. Hence, internal independence of judges is relevant to both the procedural and substantive aspects of judicial duties. As discussed earlier, procedural duties include the examination of witnesses, recording of evidence and disposal of interlocutory matters that are integral parts of the decision-making process. Any attempt to influence or interfere with these functions by fellow judges may represent danger to

\textsuperscript{144} Shimon Shetreet & Jules Deschenes (eds.), supra note 99, p.630.
\textsuperscript{145} Ibid, p.697.
\textsuperscript{146} Ibid, p.630; Sarkar Ali Akkas, supra note 106.
\textsuperscript{149} Peter H. Russel, supra note 52, p.7.
the independence of individual judges. Similarly, any attempt to influence a fellow judge in substantive duties that are part of their actual decision-making functions is of great concern for internal independence. However, not all influences from senior judges are to be regarded as violating the independence of individual judges.\textsuperscript{150} Since, in common law, the decisions of superior courts must be followed by lower courts the influence of superior judges’ judicial decisions is certainly not objectionable.\textsuperscript{151} In addition, in the course of hearing appeals, superior judges may give directions to judges of the lower courts and such directions are not considered prejudicial to the independence of an individual judge.

\textbf{2.4.5.2 Collective Independence of the Judiciary}

The concept of collective or institutional independence is concerned with responsibility for the effective operation of the judicial branch of government.\textsuperscript{152} This aspect of judicial independence has a great impact on the individual independence of judges. If the judiciary as an institution depends on the executive, the legislature or other institutions for its operation, this may affect the performance of judicial duties by individual judges.\textsuperscript{153} A judge may not be able to exercise judicial functions independently unless he or she is part of an institution with authority over those human and physical resources incidental to performing judicial functions. Therefore, collective or institutional judicial independence is necessary to ensure the individual independence of judges. It creates an environment in which judges may exercise their judicial functions without fear or favour. Although diminution of institutional independence may, by definition, have a detrimental effect on decisional independence.\textsuperscript{154} Collective or institutional independence is associated with court administration, which includes assignment of cases, control over administrative personnel, maintenance of court buildings and preparation of judicial budgets and allocation of resources. The main responsibility for court administration should be vested in the judiciary.

In fact, the principle of collective judicial independence requires that in different aspects of court administration, the involvement and control of the executive or

\textsuperscript{150} Shimon Shetreet, \textit{supra} note 13, p.17; Sarkar Ali Akkas, \textit{supra} note 106.
\textsuperscript{151} Peter H. Russel, \textit{supra} note 52, p.7.
\textsuperscript{152} Roger K. Warren, \textit{supra} note 15.
\textsuperscript{154} Frances Kahn Zemans, \textit{supra} note, 114, p.628.
legislature should be removed.\textsuperscript{155} In respect of judicial budgets, the executive and the legislature may have a legitimate role, but the judiciary should have an effective role in preparing them. Judicial budgets shall be prepared by the competent authority in collaboration with the judiciary. The judiciary shall submit their estimate of the budget requirements to the competent authority.\textsuperscript{156}

Regarding the assignment of cases, the judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.\textsuperscript{157} Ultimate control must belong to the chief judicial officer of the relevant court.\textsuperscript{158} In respect of the other aspects of court administration,\textsuperscript{159} the appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.\textsuperscript{160}

\subsection*{2.4.6 Control and Undue Influence on Judicial Independence}

A theory of judicial independence cannot deal comprehensively with all possible undue influences that may impinge on judicial autonomy.\textsuperscript{161} The principal ways in which judicial independence, both collectively and individually, may be encroached upon can be grouped into four categories: structural, personal, administrative, and direct.

\subsubsection*{2.4.6.1 Structural}

The power of legislatures to create, modify and destroy judicial structure as well as to establish, alter the system of appointing, removing and remunerating judges are vulnerable.\textsuperscript{162} In some countries this vulnerability is moderated by constitutional ‘guarantees’ that restrict legislative control over the judiciary.\textsuperscript{163} Judicial structures must have some flexibility, if they are to serve needs of society. Judicial independence is at risk, however, when the ‘political branches’ use or threaten to use their control over structure to shape adjudicative outcomes threaten judicial independence in the collective

\begin{flushleft}
\textsuperscript{155} Arthur T. Vanderbilt, \textit{supra} note 7, pp.1-2.  \\
\textsuperscript{156} \textit{Beijing Statement}, 1995, Art. 37; Sarkar Ali Akkas, \textit{supra} note 106.  \\
\textsuperscript{158} \textit{Beijing Statement}, 1995, Art. 35.  \\
\textsuperscript{159} Frances Kahn Zemans, \textit{supra} note, 114, p.628.  \\
\textsuperscript{160} \textit{Beijing Statement}, 1995, Art. 36.  \\
\textsuperscript{161} Peter H. Russel, \textit{supra} note 52, p.12.  \\
\textsuperscript{162} Pamela S. Karlan, \textit{supra} note 133, p.538.  \\
\textsuperscript{163} Peter H. Russel, \textit{supra} note 52, p.13.
\end{flushleft}
sense. For example Franklin Roosevelt’s ‘court packing plan.’ And governments may strip courts of their jurisdiction to adjudicate matters in which the government of the day has a vital interest, or they may transfer jurisdiction over such matters from the regular courts to tribunals whose decisions makers lack the security of tenure enjoyed by the judiciary. It is an interesting variant of this structural threat.

2.4.6.2 Personal

Under this heading, the policies and procedures that apply to all aspects of judicial personnel are covered. These include the methods of appointing, remunerating, and removing, promotions and transfers. In all these areas, the independence of judges may be threatened by both external and internal forces.

The security of tenure required for judicial independence is consistent with mandatory retirement and limited – term appointments, indeed, for judges of constitutional courts exercising the extraordinary power of judicial review. Judicial independence is seriously at risk when judges can be removed because their decisions have offended some one- be that someone a party to the proceedings, a senior judge, the government, the media, an interest group, or the general public. The formal mechanisms for removing judges meet a high standard of judicial independence, as is the case in civil law countries of Western Europe and the common law countries of the English speaking world, judges who make unpopular decisions or whose political orientation offends powerful politicians may be pressured into resigning. The essential for judicial independence is that removal should be very difficult and should be based on a demonstration, judiciously arrived.

Political insularity of the judges is compromised regardless of which of the three major systems of judiciary staffing is in place – election by the people, appointed by elected politicians or appointment into a professional career judiciary. All three systems are open to the possibility of political forces outside or within the judiciary trying to influence the course of adjudication by putting persons on the bench who will take the

165 Dr. Justice David Annoussami, supra note 35, pp.110-120.
166 Peter H. Russel, supra note 52, p.15.
167 Charles Manga Fombad, supra note 117, pp.244-248.
168 Peter H. Russel, supra note 52, p.16.
169 Ibid, p.17.
170 Charles Manga Fombad, supra note 117, pp.244-248.
appointments position in applying and interpreting the law.\textsuperscript{171} Popular election of judges poses a much greater threat to judicial independence.\textsuperscript{172} The elected judges who face the prospect of standing for re-election may be unduly influenced by that prospect. Judges often have to decide cases involving the rights of unpopular individuals or groups.\textsuperscript{173} A system that requires judges to win popularity contests to retain office takes democratic accountability to the point of destroying judicial independence.\textsuperscript{174} Roscoe Pound in an address before the American Bar Association, charged that ‘such elections were destroying the respect for the judiciary.’\textsuperscript{175}

The greatest danger to judicial independence from political manipulation of the staffing or promotion process is ideologies conformity.\textsuperscript{176} In the U.S.A, the appointment of judges is in the hands of the President. Lack of transparency in appointment process makes it even easier for politicians to pack the judiciary with their political and social friends. The political branches’ control of the judicial appointment process poses as much of threat to judicial independence.\textsuperscript{177}

Where judges are appointed by politicians or recruited into a career judiciary – the systems that are most prominent in the common law and civil law world – the danger point for judicial independence may be more in the process of promotion and career advancement than initial appointment. Many lawyers want to become judges;\textsuperscript{178} many sitting judges have aspirations for elevation to higher courts. Much of the discussion of judicial independence focuses on the threats posed by career considerations.\textsuperscript{179} Thus, a judge’s personal ambitions may interact with political control to constrain him. Judicial tenure may be well protected. Yet, if those who control career advancement within the judiciary are perceived to ‘reward’ or ‘punish’ a particular ideological orientation in judicial decision making, judicial independence can be seriously compromised.\textsuperscript{180}

\textsuperscript{171} Peter H. Russel, \textit{supra} note 52, p.17.
\textsuperscript{172} Harold J. Laski, \textit{supra} note 72, p.545.
\textsuperscript{174} Peter H. Russel, \textit{supra} note 52, p.17.
\textsuperscript{176} Pamela S. Karlan, \textit{supra} note 133, p.544.
\textsuperscript{177} \textit{Ibid}, p.540; Sarkar Ali Akkas, \textit{supra} note, 37, pp.200-201.
\textsuperscript{178} Justice P.B. Sawant, \textit{supra} note 8, p.56.
\textsuperscript{179} Pamela S. Karlan, \textit{supra} note 133, p.540.
\textsuperscript{180} Dr. Justice David Anoussami, \textit{supra} note 35, pp.110-120.
The independence of the individual judges can be put seriously in jeopardy if the support they receive is so ‘inadequate’ a remuneration that they are readily open to bribery or compromising business ventures.\textsuperscript{181} The danger in more affluent countries is a system of remuneration (including pension and other benefits) that subjects either the individual judge or the judiciary collectively to the unfettered discretion of political or judicial authorities. The possibility of undue influence opens up when judicial salaries and benefits are not set in a regularized manner according to established criteria but seem to depend on the whims of the paymaster.\textsuperscript{182}

\textbf{2.4.6.3 Court Administration}

Legislatures and executives led by elected politicians control the management of courts and judges work of adjudication, judicial independence can be seriously undermined.\textsuperscript{183} Judicial independence may be threatened not only in relatively well-know ways from the outside but also from inside the judiciary itself, by senior judges using administrative and personal controls to direct the decision making of individual judges lower in the judicial hierarchy. In this context,\textsuperscript{184} in Japan, senior judges can reward or punish judges by of withdrawal of cases, and of transfer of cases \textsuperscript{185} and assigning them to difficult locations.\textsuperscript{186} Requiring that, judicial administrations be accountable to their colleagues and building a culture of collegiality in the management of courts are important protections against this internal danger to judicial autonomy.\textsuperscript{187}

\textbf{2.4.6.4 Direct Approaches}

With regard to societal links, judges’ independence may be compromised in many ways leading to unhealthy developments. There may be efforts to use the direct approach and try to influence judges directly to favour or disfavour a particular party or interest. Attempts at bribery or threats to the personal safety of the judge or the judge’s family are obvious examples.\textsuperscript{188} There are many ways in which interested parties may try to bring

\begin{flushleft}
\textsuperscript{181} Peter H. Russel, supra note 52, p.18.
\textsuperscript{182} Ibid.
\textsuperscript{183} Ibid, p.20.
\textsuperscript{184} Ibid, p.7.
\textsuperscript{185} Dr. Justice David Anoussami, supra note 35, pp.110-120.
\textsuperscript{187} Peter H. Russel, supra note 52, p.20.
\textsuperscript{188} Ibid, p.21.
\end{flushleft}
pressure to bear on judges that may not be criminal but, if condoned, could certainly undermine independence and as these can most certainly occur in well established liberal democracies. The options range all the way from telephone calls and private visits through huddled conversations at social events to high-pressure media campaigns. This continues to go on in the liberal democracies. Open attempts through the media by politicians, pressure groups, or concerned citizens either to influence judges in the course or their decision making, or to criticize them afterward, are more tolerable. A number of external influences on judges, such as critical writings of legal scholars, and internal influences such as judges exchange with one another through memoranda and conferences- none of which is regarded as violating the principle of judicial independence.189

2.5. Judicial Accountability

A mature democracy requires those who exercise significant public power to hold themselves open to account.190 The legislature is directly accountable to the electorate. The executive is indirectly accountable to the people through the elected legislature.191 Accountability of public institution is very important for the survival of democracy itself. The absolute and unlimited power to any high public institution, without accountability is harmful to the society at large.192 Authority is given in trust, and judicial authority is no exception. In principle, unaccountable power is bad and dangerous.193 However, judiciary as an institution and every judge as a public functionary, is accountable to the political sovereign- the people. The only difference is in the form or nature of the mechanism needed to enforce their accountability, in short, judicial accountability is a facet of the independence of the judiciary; and the mechanism to enforce judicial accountability must also preserve the independence of the judiciary.194

---

191 Dr. Nihal Jayawickrama, supra note 28, pp.167-168.
192 Dr. Sunil Deshta & Kamal Jeet Kaur Sooch, supra note 18, p.60.
194 Justice J.S. Verma, supra note 39, p.159.
2.5.1 Meaning

The word ‘accountable’ means ‘the quality or state of being accountable, or responsible’;\textsuperscript{195} ‘subject to, having to report, explain or justify; responsible; answerable’;\textsuperscript{196} ‘responsible for your own decisions or actions and expected to explain them when you are asked.’ Transparency facilitates accountability; accountability is the \textit{sine qua non} of democracy.\textsuperscript{197} It means the obligation of public officials to explain, justify and legitimise the use of power in discharging public duties.\textsuperscript{198} No public institution or public functionary is exempt from accountability although the manner of enforcing accountability may vary depending upon the nature of the office and the functions discharged by the office holder.\textsuperscript{199}

2.5.2 Rationale for Judicial Accountability

All governmental powers, is derived from the people it serves; this creates a trusteeship between the people and members of the three branches of government. The justice system involves complex inter-relationships among the three branches of the government, the demand for openness and transparency cannot shield the judiciary from scrutiny. The objectives of judicial accountability are to ensure high standards of decision-making and public acceptance of judicial decisions. The standards of decision-making depend on the quality of judges and their independence in the decision-making process. It is an important factor to create public respect for judicial decisions, which has an immense impact on public confidence in the judiciary. Public acceptance of judicial decisions, the second objective of judicial accountability, depends on public confidence in the justice system, particularly on judicial impartiality. Thus, both the objectives of judicial accountability are ultimately concerned with public confidence, which engenders public respect for the judiciary. In the absence of public confidence in the judiciary the decisions of the judges cannot be respected by the public.\textsuperscript{200} Consequently, judges are accountable to the public for maintaining public confidence in the judiciary.

\textsuperscript{195} Philip Gove Babcock (ed.), \textit{supra} note 95, p.13.
\textsuperscript{196} \textit{Supra} note 96, p.723.
\textsuperscript{197} Justice Ruma Pal, \textit{supra} note 97, p.30.
\textsuperscript{198} Prof. K. C. Jena, \textit{supra} note 17, p.13.
\textsuperscript{200} Prof. K. C. Jena, \textit{supra} note 17, p.13.
The system or mechanism of accountability is the main factor that can contribute to erode or enhance public confidence and undermine or strengthen judicial independence. In order to identify the mechanisms for accountability, one needs to understand that the accountability of judges may be described in a number ways. Decisional accountability relates to the manner in which a judge uses judicial power. It is almost universally recognised that in exercising judicial functions judges are primarily accountable to the law and conscience.\textsuperscript{201} In the administration of justice, a judge should maintain certain established legal rules and procedures. At every stage of the proceedings of a case a judge is bound to follow the direction of the law of the land. Under long established principles judges are obliged to perform judicial functions in full view of the public and to resolve all disputes after hearing both parties. All these rules and procedures ensure judicial accountability to law. ‘To be faithful to his oath is the test of his integrity as a judge’- implicit in this is that he must resist any influence or temptation. Indeed, independence is a vital component of a judge’s accountability, since a judiciary which is not truly independent, competent or possessed of integrity would not be able to give any account of itself.\textsuperscript{202} As J.S.Verma J. observed that, “…the accountability of the judges is to the people in whom the ultimate sovereignty vests. It is, therefore, imperative to retain public confidence which is the real source of strength of the judiciary.”\textsuperscript{203}

The growth of judicial power in liberal democracies has been accompanied by demands for new forms of judicial accountability. Public complaint procedures have been instituted in many jurisdictions to provide consumers of courts services some redress when judges fail to treat them in a polite, fair and efficient manner. Typically, these complaints raise matters that are not serious enough to be grounds for removal but that are serious enough to warrant some intermediate sanction such as a reprimand or temporary suspension.\textsuperscript{204} Complaint procedures can be conducted judiciously (which


\textsuperscript{204} Peter H. Russel, supra note 52, p.17.
does not necessarily mean solely by judges), so that judges, while being induced to treat those who appear in their courts with due respect, are not constrained to alter their decision making. To manage minor measures countries have established some judicial council or similar bodies have been empowered to impose a variety of minor measures such as: issuing advisories, request for retirement, stoppage of assignment of judicial work for a limited time, warning and censure or admonition (public or private).

2.5.3 Elements of Judicial Accountability

The accountability of judges may be ensured through a number of ways: (1) public exposure of judicial functions, (2) reasons for judicial decision (3) appellate process, (4) discipline of judges and (5) scrutiny by lawyers.

2.5.3.1 Public Exposure of Judicial Functions

Public exposure of judicial functions is a traditional form of judicial accountability. In the decision-making process, judges are obliged to maintain certain established principles or procedure, which open the judiciary to public scrutiny. The most important among them, is the requirement of public hearings. The public hearing of cases by the courts is recognised as a fundamental human right by the *Universal Declaration of Human Rights*, 1948 and the *International Covenant on Civil and Political Rights*, 1966.\(^{205}\) It is an established principle of common law that judicial proceedings should be conducted in open court where the public has free access,\(^{206}\) except in exceptional circumstances.\(^{207}\) Therefore, the public hearing of cases is a significant scrutiny for impartial and efficient administration of justice and an effective way of gaining public confidence and respect for the justice system.\(^{208}\) The public may be assured that their disputes are resolved by impartial assessment of the facts and the law. Thus, it fosters public confidence in the administration of justice and the acceptability of judicial decisions. Public understanding of the functions of the judiciary is essential for public support to the judiciary's authority and role. Public support is related essentially to public knowledge or understanding of the working of the judiciary. Therefore, the judiciary has a responsibility to promote public understanding by


\(^{206}\) E. Campbell & H.P. Lee, *supra* note 200, p.49.

\(^{207}\) For example, proceedings in camera to protect those appear before the court.

\(^{208}\) *Scott v. Scott* (1913) AC 417, 463; Sarkar Ali Akkas, *supra* note 106.
informing the public of the activities of the judiciary. This responsibility of the judiciary provides judicial accountability and at the same time reinforces judicial independence.

The public hearing of cases is an opportunity for the public to scrutinise the activities of the courts. The general public relies on the media for information about the activities of courts.\textsuperscript{209} Public hearings provide an opportunity for the media to watch and scrutinise the functions of the judiciary. By reporting the activities of courts the media play a crucial role in shaping public understanding of the courts, which in turn, has a great impact on public confidence in the judiciary.\textsuperscript{210}

\subsection*{2.5.3.2 Reasons for Judicial Decisions}

Judges are under an obligation to give full reasons for their judicial decisions and to state them publicly. The obligation to give reasons for judicial decisions is a requirement of good decision-making. It promotes public acceptance of judicial decisions. The custom of judicial opinion writing is a developed system for providing accounts of the resolution of disputed questions.\textsuperscript{211} Giving of reasons for judgement is necessary to satisfy the parties that bring their grievances. It helps the parties to appraise the decisions of the judges and to assess whether there is any ground for an appeal. It may alleviate the grievances of the defeated party in a case.\textsuperscript{212} The practice of giving reasons for judicial decisions can significantly enhance public confidence in the justice system.\textsuperscript{213}

\subsection*{2.5.3.3 Appellate Process}

The appellate process ensures the adjudicative accountability of subordinate courts.\textsuperscript{214} Judicial decisions of the subordinate courts are subject to appeal to the superior courts.\textsuperscript{215} The appellate process is a means of reviewing judicial performance. The appellate courts may identify and correct judicial error made by judges in making judicial decisions.\textsuperscript{216} Therefore, the appellate process encourages good decision-making.

\textsuperscript{212} E. Campbell & H.P. Lee, \textit{supra} note 200, p.226.
\textsuperscript{214} Cyrus Das, \textit{supra} note 202, pp.6-9; Sarkar Ali Akkas, \textit{supra} note 106.
\textsuperscript{215} Justice Nicholson, \textit{supra} note 186.
\textsuperscript{216} Murray Gleeson, “Judging the Judges,” 53 \textit{ALJ} (338) 1979, p.343.
and public acceptability of judicial decisions. Despite this, the appellate process is not an adequate mechanism of judicial accountability. This is because an appellate court can correct only departures from standards required for the administration of justice. Its jurisdictions are limited to (a) ensure that justice is done according to law; (b) enunciate general principles of law to be applied by lower courts and (c) ensure that the decisions of those courts are regularly reached in conformity with proper procedural standards. Therefore, appeals are effective in the rectification of certain types of judicial errors or miscarriage of justice but cannot provide a complete system of making judges accountable for using judicial power.217

### 2.5.3.4 Disciplinary Proceedings

Discipline of judges is an important form of judicial accountability. In administering justice, judges are obliged to maintain high standards of judicial performance and conduct. In the case of failure to maintain these standards, judges may be subject to disciplinary action, including suspension or removal from office. Hence, judicial discipline relates to the tenure of judges which is an important aspect of individual independence of judges.

Judicial discipline is a significant aspect that combines both the conflicting values of judicial independence and judicial accountability. In other words, in the context of disciplining judges there is a great tension between judicial independence and accountability. This tension can be reconciled by a mechanism which ensures that disciplinary proceedings against judges cannot be manipulated to their detriment and that transgressing or incompetent judges are subject to appropriate sanctions. Frances Kahn Zemans says, ‘[a] legitimate mechanism of judicial discipline actually enhances judicial independence because it contributes to the public's willingness to grant authority to the courts.’218

### 2.5.3.5 Scrutiny by Lawyers

The performance and conduct of judges may be scrutinised by practicing lawyers. This form of scrutiny is crucial to make judges careful about their standards of judicial

---


performance and conduct. The Bar is the best judge of the judges; it has kept the criteria of judging the judges as a safely guarded secret within its guild. In their professional capacity academic lawyers can evaluate and criticise the performance and conduct of judges. However, in doing so they should ensure that they have an adequate understanding of the practical operation of the justice system. Scrutiny by practising lawyers is relatively more important. This is because legal practitioners spend most of their time in the courtrooms and observe the conduct and performance of judges very closely. In addition, they have close contact with litigants and therefore, they are in a position to convey information about the functions of the courts to the public. Therefore, scrutiny of judges by practising lawyers is very significant in checking judicial performance and behaviour and in promoting public understanding of courts and judicial functions. If they are not satisfied with the performance and conduct of judges they may report to the disciplinary authority or Chief Justice.

2.6 Tension Between Judicial Independence and Judicial Accountability

There is a continuing tension between the concepts of judicial independence and accountability. How the tension between judicial independence and accountability can be reconciled is a matter of discussion. At a basic level, the aim of judicial independence is to ensure that the judges are free from all kinds of interference or influence in exercising judicial power while the aim of judicial accountability is to make judges accountable for the use of judicial power. From this perspective judicial independence and accountability are seen as two competing qualities which are traded-off in a search for the correct balance. Despite this, the values of judicial independence and accountability are not opposed to each other: rather they work towards the same end. The main object of both the concepts is the same: to enhance or maintain public confidence in the judiciary. Therefore, they should be construed as interrelated rather than contrary values. As Morabito observes:

---

221 Elizabeth Handsley, supra note 35, p.192.
“Judicial accountability and judicial independence are not inherently inconsistent. It is true that the more we scrutinise the behaviour of judges, the greater the likelihood that attempts will be made to exert improper pressure on them; whether or not judicial independence is, in fact, impaired will depend on the features of the system of accountability which [are] in place.”

Therefore, judicial accountability itself is not opposed to the concept of judicial independence: rather it is an important means of strengthening judicial independence. Judicial independence can be promoted by ensuring judicial accountability. In fact, judicial independence cannot be sustained without ensuring corresponding accountability for failure, errors or misconduct of judges. Judicial accountability is complementary to the concept of judicial independence if it is dealt with its goal of enhancing public confidence in the judiciary, which is the foundation of judicial independence. Therefore, the tension between judicial independence and accountability should be resolved carefully so that the proper balance between these very important values can be maintained.

Morabito argues:

“If a given system of accountability has sufficient safeguards to ensure that it cannot be manipulated to the detriment of judges and is also able to generate or enhance public confidence in the judiciary, through the public's knowledge that instances of judicial misconduct and disability will be appropriately dealt with, it will provide judicial accountability and, at the same time, enhance judicial independence.”

Although both judicial independence and judicial accountability are vital for maintaining the rule of law, they sometimes seem to conflict. When misconduct is alleged, there will be a demand for action against the judge in question, just as there would be against any governmental officer. Judicial independence should not protect a judge from investigation and censure for a valid charge; judges should not have immunity from the demands of justice for misdeeds. Indeed, there can be several valid reasons for censure or removal of a judge, such as bribery, other forms of corruption, commission of a felony, and senility. It suggests that to preserve judicial independence, these

---

227 Shimon Shetreet, supra note 213, p.16.
228 V. Morabito, supra note 224.
investigations should be left primarily to the judicial branch. Giving power to the executive or legislative branch to investigate judges for all misconduct can interfere with an independent judiciary. It provides too ready a tool to harass whose judicial opinions are not consistent with the wishes of political leaders.\(^{230}\) It is important to keep the process within the judiciary; keeping judicial oversight within the judiciary, protects the independence of this branch and ensures that judges will not face reprisals from other branches for unpopular decisions or feel pressure to make their decisions conform with ‘politics’.\(^{231}\) Absolute immunity may be conducive to independence, but it may give protection to corrupt judges or to gross forms of misconduct.\(^{232}\) Judges should not be held accountable for following the rule of law. This canvasses a picture of conflict between judicial independence and judicial accountability, but they are inseparable and not inconsistent with each other; in fact they nourish each other.

2.7 Conclusion

The enjoyment of judicial independence by courts will be important to the proper operation of any constitutional democracy, as it allows them to act as an institutional mechanism to safeguard the rule of law. This is especially the case for those nations undergoing processes of democratization. Institutionalizing respect for the rule of law is of utmost importance. Once the states attain political goals, a constitutional culture will be attained, and lead to the consolidation of democratic rule. The court can have a significant role in establishing this culture of legality if they are given adequate latitude to enact neutral justice, regulate the legality of government behaviour and mandate important legal and constitutional values.

The focus of any practical endeavour to secure judicial independence must be on institutional arrangements designed to protect and foster independence. Judicial independence of mind and behaviour cannot be manufactured. But institutional arrangements, considered to be conducive to an independent-minded judiciary, can be established and maintained. Judges have the independence to assure legal stability.

All mechanisms for judicial appointment may have some advantages and disadvantages and therefore, no particular system can be treated as the best system.

\(^{230}\) Ibid.
\(^{231}\) Ibid, p.99.
\(^{232}\) Gavison Ruth, supra note 193, p.1655.
Despite this, in order to maintain public confidence in the appointment system and to ensure judicial independence the commission system is perhaps a very effective mechanism for judicial appointment.

Judicial integrity is more important than judicial independence. The accountability mechanism should not only develop highly ethical and professional standards but also generate social legitimacy. The functioning of the judiciary is, at the end of the day, based on the doctrine of public trust. If judges are to acquire judicial authority, they need the people to believe in their integrity and capacity to deliver socially meaningful judgments.