CHAPTER -8

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According to Shrimad Bhagvad Gita, judges are bequeathed with power. The Lord says, “He who is the same to foe and friend and also in honour and dishonour, who is the same in cold and heat, in pleasure and pain, who is free from attachment, to whom censure and praise are equal, who is silent – uncomplaining - content with anything, homeless, steady-minded, full of devotion - that man is dear to me”. In a democratic constitution the need for competent, independent, and impartial judiciary is compulsory and acknowledged around the world. The Bangalore principles of Judicial conduct is depending on independence, impartiality, integrity, propriety, equality and diligence of judges. It is the bedrock of legal framework. The Preamble states “inter alia” envisioned to set up moral benchmarks and discipline amongst judges. They are intended to give legal guidance and discipline to the judges. But accountability as one of the fundamental principles was removed from the final draft. There were two reasons for it: first, the principles incorporated into the Bangalore Principles assume the “accountability” on judges as inherited in the principles; secondly, the system and technique of accountability differ from one country to another and therefore taken care within their jurisdiction. When a judge is on trial, he is on trial. The trust and confidence of the general population lies on the capacity to administer reasonable and unbiased justice. It cannot be accepted that a judge is working in a shift from 10am to 5pm or at night shift. He is under constant public vigilance. A judge is considered as a public trust and accordingly, the general public anticipates him to be a man of high integrity, honesty, morality, ethics, and impervious to corrupt or excusable impact. He needs to keep up a higher standard of appropriateness in judicial conduct. Any conduct of the judge which undermines the public confidence is detrimental to the judicial procedure. The unwritten code of conduct summons judicial officers at large to follow and imbibe high moral and ethical standards which would generate public confidence accord dignity, enhance public image not only of the judge but the court too.

The greatest quality in a judge is to have tolerance. Tolerance is the presence of mind of one’s own spirits under torment and incitement. Tolerance is an inner quality which encourages a

249 Gita, XII.18-19.
man to defeat misconception and challenges. Justice G.P. Singh mentioned that canons of ethics cannot be learned or taught. One should carry on the life by values, brevity, lucidity, and clarity in judgement. Simple living and high thinking leaves indelible marks on sand of time. Those imprints never blur; however, several footsteps cross them.

All India Judicial Services (AIJS) concept was initiated by Law Commission in the year 1950. But the proposition has never pushed ahead for the argument both in support and against of it. A judge gives a verdict in views with the law. A judge is expected to be removed on the ground of proven misbehaviour or incapacity under Art. 124 (4) or 217 of the Constitution. A judgment could be good or bad but it is not sufficient for a disciplinary action. The “Union of India vs. R.K. Desai”, held that “while exercising judicial/quasi-judicial function if the officer takes the decision pursuant to corrupt or improper motive disciplinary action would lie”.

The Supreme Court in H.C. of Judicature at “Bombay v Shashikant held that “Dishonesty is the stark antithesis of judicial probity”. Any occasion of a High Court condoning or compromising with a dishonest deed of any of its officers would contribute to erosion of the judicial establishment. The judiciary must be reminded consistently that it drifts only over the confidence of the general population in its probity. Such confidence is the establishment on which the pillars of the judiciary are constructed.

The judges, at whatever level they might be, epitomize the State and its power, unlike the bureaucrats or the members of other service. Judicial service is not just a business nor the judges are mere employees. They exercise sovereign legal power. They are holders of public offices of great trust and responsibility. If a judicial officer "tips the scales of justice its rippling effect be disastrous and deleterious" A dishonest legal personage is an oxymoron.

A judge is not found giving decision as opposed to law and constitution. The verdict is made considering the degree of crime, evidences and witnesses. In the event that a wrong decision is given by any judge on wrong interpretation of law, on such cases no disciplinary action is

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251 Ezekiel Malekar, Lessons on Patience and Tolerance, The Speaking Tree, The Times of India.
252 Guru Prasanna Singhas the Chief Justice of Madhya Pradesh High Court.
253 First Nani A. Palkhivala Memorial Lecture, 16th January, 2004
254 1993 SCC (L&S) 318
255 2000 SCC (L&S) 144
256 Lecture delivered on Refresher Course for Civil Judges (Junior Division) – II Batch at Tamil Nadu State Judicial Academy on 20.02.2011, JUDICIAL ACCOUNTABILITY IN REFERENCE TO JUDGMENTS CONDUCT AND ETHICS, by The Hon’ble Thiru. Justice P. Shanmugam, Former Madras High Court, Judge: http://www.tnsja.tn.nic.in/article/Judicial%20Accountability%20PSMJ.pdf
made. If some verdict is given in lower court, the victim can appeal in higher courts. But if the Supreme court passes a similar decision, then they cannot revert that decision. For example, in the Salman Khan attempt at “hit and run case”, the lower court judge and the High court judge had the same evidence and they are complied with the similar constitution. Yet, the decision given by both the courts has hell and heaven difference. However, judges are not accountable for any of the decision given in lower court or in higher court. They are not accountable for the decision to keep up the independence of judiciary.

The judiciary is accountable in two ways. First, accountability of judiciary for their judgement; second, the institutional method of making judges accountable for appointment, removal, and criticism of their work by the law of contempt. There is no accountability of judges on property and financial issues. The judgement given in the case of Maneka Gandhi, have proved the judges’ powers and functions. The appointment of judiciary and absence of disciplinary control including their removal raises the question of accountability. The failure to remove Justice V. Ramaswami is an example of the impracticability of the legal framework. Another misconduct proven by a committee of three judges appointed under the Judicial Enquiry Act where the motion failed due to political decision of the ruling Congress party asking the members of the Parliament to refrain from voting. The delivery system of judiciary and the affected parties must ensure the continuation of public confidence in the credibility and impartiality of judiciary. There is a need for accountability in judiciary but the fact is that they enjoy public confidence and trust than any other organ of the state. Accountability is essential for a transparent judicial system, and ensure that the authority is working within the powers assigned to them. According to Justice Bhagwati: “There is pernicious tendency on the part of some to attack judges if the decision does not go the way they want or if it is not in accordance with their views. Of course, there is nothing wrong in critically evaluating the judgment given by a judge because, as observed by Lord Atkin, justice is not cloistered virtue and she must be allowed to suffer the criticism and respectful, though outspoken, comments of ordinary men and women. But improper and intemperate criticism of judges stemming from dissatisfaction constitutes a serious inroad to the

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259 James Richard Atkin, Baron Atkin also known as Dick Atkin was a judge and lawyer of England and Wales.
The primacy of judiciary in the appointment of judges is the only way of securing independence has no basis in constitution or in governmental issues. The Supreme Court did not have two choices between primacy of judiciary and power of executive. It ruled out “non-primacy of judiciary”, had it held the primacy of judiciary did not frame the constitution the appointment procedure that set up power of executive would disregard it. The historic judgement of Supreme Court in the case of S.C. Advocates on Records Association v. Union of India, held that appointment of judges in Supreme court and High court has to be made in consultation with the Chief Justice of India. The dominance of executive is reduced and political impact is wiped out. Whereas the appointment of Chief Justice of India shall be based on seniority of Judges. This judgement will ensure lifetime impartiality and independence of judiciary which is essential in the Constitution. However, the appointment of retired judges in some cases is a risk to the independence of judiciary.

It is evident that judicial independence has endured numerous difficulties in relation to appointment, removal and transfer of judges. The recent incorporation of the whistle blowing policy by the Law commission aimed at securing the judges against objections in a drafted bill. Another crucial step in sustaining the independence of judiciary is irrevocability. Judges in lower court are appointed permanently until retirement. The security of judges from involuntary transfer, satisfactory compensation, are the foundation of independence. Disciplinary control of judges should not reach out to their decision or legal mistakes. The body that initiates judicial discipline should not mediate them. Judges confronting such bodies enjoy procedural shields and disciplinary hearings. In many commonwealth nations, judicial accountability is important but they cannot use judicial independence to defend themselves from accountability. But in a country like India, as soon as judicial accountability shudders, political interference and vested interests would pour in to diminish the credibility of the institution. In American constitution, the judicial independence is enshrined in Article III which expresses that, “The Judges, of the Supreme and inferior courts shall hold their

offices during good behavior and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office.  

Sometimes it was believed that judiciary simply applies law between two disputed parties. But apart from applying laws between disputed parties, judiciary also makes policy, when dealing with issues between government and its organizations. As indicated by Sheertreet, judges decide cases based on the fundamental values of the system. Judges background plays a key role in decision making. Those countries which maintain judicial independence has made it either a statutory rule or convention. With the transfer of judges, the judicial independence is in consonance with the provisions of the Constitution. The transfer of judge with judges’ consent is not a part of judicial independence. Various government bodies support this power specially Law Commission of India. The power was misused during the emergency of 1975-77 which exposed its potentiality. The transfer during the emergency including the one recommended by CJI in 1998 exposed the potentiality of harming the judicial independence. But such misuse is protected by making transfer cumbersome than fresh appointment of High Court judges which requires consent and consideration of facts for the transfer of the judge. The Constitution framers expected that constitution will function in public interest for the judicial independence uninfluenced by political, personal, and ideological reflections. There are ample of job openings unfilled which the Chief Justice and Collegium needs to be filled in accordance with the norms. Appointment and transfer are crucial for judicial independence. The severe problem lies in the arrears and delays of the courts and the under trials those are languishing behind the bars for justice for the infringement of rights. The judiciary cannot maintain its independence if people loses their confidence. Another factor eroding the confidence of people on judiciary is the allegation of corruption amongst judges. Independence and corruption are self-regulatory and cannot exist together. To maintain the independence in judiciary powerful measures must be taken to remove and prevent corruption. Post-retirement employments of judges are a risk to judicial independence. Recently, the Attorney General of India has eliminated this practice and solicited to increase the retirement age of judges. The Chief Justice of India is requesting for

264 Shetreet, Judicial Independence, supra note 10, at 633-34.
functional and financial independence of courts for fast and effective delivery of justice and functioning of courts.\textsuperscript{266} The accountability of judiciary in scrutinizing the acts of legislature and executive are complicated since the judiciary should not be left completely unchecked. If the independence of judiciary is infused in the separation of powers, then the judiciary should support executive interference and respect the autonomy of executive and legislature. The judiciary cannot remove each flaw from the society, but sometimes it gets approval of its invasion in the domain of legislature and executive.\textsuperscript{267}

In Nigeria, judicial independence lies at the heart of the separation of powers. The government is accountable to people, but judiciary is accountable to the values and standards of judicial correctness.\textsuperscript{268} The European Network of Council gathered data to assess the judicial independence in 20 European countries. The study found that old democracies has improper allocation of cases and altered working environment due to changes in remuneration, pensions and retirement age claims of personal liability while the new democracy has improper appointment, undue pressure, and influence of media. The legal position of judiciary is important in new democracy and funding of judiciary is important in the old democracy.\textsuperscript{269} In Canada, judicial independence is a foundation of the Canadian judicial system. The Constitution and judiciary is separate from other branches of government, executive and legislature. Judicial independence allows the judges to make decisions free from influence, based on facts and evidence.\textsuperscript{270} The Constitution of Bangladesh has an independent judiciary since its independence in 1971. The executive emphasizes absolute power over lower judiciary who has little independence in performing judicial function. The law Ministry and Supreme court formulated Code of conduct for lower judiciary to maintain judicial ethics, morality, personal integrity, impartiality of Judges and following constitutional rule in decision making.\textsuperscript{271}

\textsuperscript{266} CJI Calls for Financial Autonomy, SUNDAY PIONEER, Jan. 17, 1999, at 5. See also “RAJEEV DHAVAN, JUSTICE ON TRIAL” 82 (1980).
\textsuperscript{267} Shetreet, Judicial Independence, supra note 10, at 635; Rao, supra note 88; “STEVENS, THE INDEPENDENCE OF THE JUDICIARY”, supra note 7, at 179. Cf BARENDT, supra note 7, at 139
\textsuperscript{268} An Independent Judicial System by Felix Frankfurter
\textsuperscript{270} Department of Justice, Government of Canada, 2016: http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/05.html
The check and balances in judiciary protect the public against arbitrary and unjustified exercise of power. The Canadian Constitution and Judges act provide the mechanism of removal of a judge in case of proven misconduct. They are embedded in the disciplinary code established by the judicial council operating at provincial and federal level. The informal mechanisms exist in open court procedure giving reason for peer and public review. Government attract scrutiny in accountability. Judiciary meets the change demand rationally depending on the objectives – the proposed change must be effective in decision making, public should respect the institution of law and court, and strengthen democratic principles. Accountability must commensurate with judicial independence and neutrality. The accountability mechanisms must not undermine judicial independence which Canadians deserve.

In Mexico, common people’s opinion about judiciary is “cash equals justice”. The courts are struggling hard to fight corruption and to re-establish trust of people on the noble profession. The Federal Judicial Council failed to investigate judicial corruption. The FJC is a part of judicial power, which lacks independence and impartiality. The European Council of “Recommendation on the independence, efficiency and role of judges” established a special body on court for judicial discipline. The European Charter established an independent body for the citizens to file a complaint against misconduct of judges. In Georgia, United Nations Human Rights Committee established an independent body to file corruption cases against judges. An international law should be framed on international principles of judicial independence and accountability which would be implemented and monitored by an independent agency. The law would ensure that the investigation on disciplinary issues are fair, transparent, and impartial. Mexico has a good scope of judicial accountability.

274Council of Europe, European Charter on the statute for judges, DAJ/DOC (98) 23, 10 July 1998. See also Concluding Observations of the Human Rights Committee on Georgia, United Nations document CCPR/CO/74/GEO, paragraph 12, 19 April 2012.
to clandestine unethical behaviour. The public trust on judiciary would be restored and the rule of Constitution would be sustained while firming Mexican democracy.277

In Australia, appointment of judges belongs to executive government. Judges were appointed from the Bar and controlled by law on disqualification. The true foundation for accountability lies on the attributes of the judicial administration. The practice to state reason and publish them is a good practice. They are subject to scrutiny and criticisms by litigants, media and colleagues.278 The decisions of Australian courts are published online within a brief time of delivery. They are freely downloadable and readable. This has enhanced the judicial accessibility recently. In the formal procedure of accountability media reports every activity of the court. Media openly criticizes the law, procedures, and experts. Previously, the criticism on judiciary was absent. The offence of “scandalizing the court” lead to often punishing the journalist who has committed some sort of crime.279 The contempt of court was considered evil and apologize to the judiciary for the wrong news and modify it. But recently the contempt of court has been withdrawn from Australian courts.280 There are legal regulations for the judiciary to interview in press, media, radio or TV. The criticism of the judiciary is an entertainment.281 Judges are now accountable on tabloids. The judges do not enjoy any form of immunity from criminal and civil law other than other activities as a judge.282 Introduction of cameras in courtroom was set back in Australia as few people aroused the issue that media would underestimate the court proceedings and misrepresent the concern. The judges and lawyers might “play to the gallery” and such things would not promote accountability but questionable entertainment. The Supreme Court of Canada has continuous presence of TV cameras in the courtrooms and has live telecast in a channel which is quite popular and interesting. Though cameras are present in many Australian courts under proper conditions. In the end, Courts are an institution of government. Increasing attention is paid in the conduct of judges. Development of guidelines, for the judicial officers is the basic structure to the rule. The code of conduct is widely accepted in

References


279 The King v Nicholls (1911) 12 CLR 280; The King v Dunbabin; Ex parte Williams (1935) 53 CLR 434; cf R v Brett [1950] VLR 226; Ambard v Attorney-General for Trinidad and Tobago [1936] AC 322 at 335.

280 cf Australian Law Reform Commission, Contempt (Report No 35, 1987) 239ff where the relevant authorities are collected. See eg Re Colina; Ex parte Torney (1999) 200 CLR 386 at 391 [5].


many countries across the world. But some judges fear that this code could be a source of harassment to the judges. But such a movement could be more of an acquiescent judiciary though this would not serve the best interest of the public. In Australia, financial corruption is not an existing problem of judiciary, but they should embrace the international laws of accountability.

Judicial activism is an ignored fact in Canada. The former Chief Justice of Canada Supreme Court once said, “there is no such thing as judicial activism in Canada.” The debate of judicial activism raised judicial difference where legislature and executives could act without scrutiny of the judiciary. The legislature under The Canadian Charter of Rights and Freedom in 1982 faced unsatisfactory and unsuccessful judgments and law despite the judicial activism under the Charter garnered most attention. Judicial activism exists in Canada long before the enactment of the Charter. But judicial activism has remained to be legal and democratic in Canada. There has been instances where Supreme Court was inappropriately activist, but the extent of judicial activism was exaggerated. Sometimes the judicial activism has produced severe problematic situation pointed out by the legislature. the entrenchment of the Charter has prompted the judiciary to protect the rights of individuals. The Canadian Bill of Rights suggests judicial restraints. Some popular constitution upholds that active judiciary is necessary for protecting minority rights and maintaining equality. But Warren courts did not expand the equality rights in judicial activism, but in its restraint by allowing Congress to protect those rights. Inspired by the Warren court, many scholars felt active judiciary is important for protecting the rights of “discrete and insular minorities”.

285 Professor, Faculty of Law, University of Alberta, sanand@law.ualberta.ca. “is article is a revised version of a paper delivered at the 26th Annual Community Seminar: “e Role of Canadian Judges as Makers or Interpreters of the Law, Calgary Institute for the Humanities, University of Calgary, Calgary, Alberta, 15 June 2006
286 See Kent Roach, ie Supreme Court on Trial: Judicial Activism or Democratic Dialogue (Toronto: Irwin Law, 2001) at 89-95 and 277-85 [Roach].
289 See Chemerinsky, supra note 4, at 1025.
290 “A recent Lexis search uncovered 506 law review articles written in the past twenty years advocating the proposition that courts should protect minorities against the will of the majority. For just a few of the many prominent scholars supporting this view”, Judith A. Baer, Equality Under the Constitution: Reclaiming the Fourteenth Amendment 281 (1983); Charles L. Black, Jr., A New Birth of Freedom: Human Rights, Named and Unnamed 125 (1997); Karst, supra note 9, at 9. The term “discrete and insular minorities” is borrowed from Justice Stone’s influential footnote four in United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).
Judicial restraint is necessary for healthy development of rights of the citizens. However, in India, judicial activism has been strongly criticized. It is often said that in the name of activism, judiciary writes his own opinion. The theory of separation of power is also overturned. The importance lies with the institution accorded to the institution for hope by the aggrieved person.

Judicial corruption affects the poor and the marginalized. They cannot pay financial bribes to gain access to influential people. In 2010, a study by UNDP found that excessive use of pre-trial detention affected the poor and marginalized people who are the outcome of low socioeconomic status. This poor people are trapped in the web of corrupt justice and legal system when they lack adequate evidence during the initial phase of judicial process and post bail. To promote judicial independence many Judicial Council are planted in various regions of the world. In countries like Austria, France and Germany, judges career from appointment to retirement is maintained by heads of courts, Judicial Council of ad hoc agencies. In Bosnia and Herzegovina, 1000 seats declared vacant for the post of judge. The serving judges and prosecutors can also apply. The selection process of the sitting judges and lawyers comprise of the review of their performance and professional record, disclosure of their assets and liabilities, background check, and professional competence report. In this process, 30% of the applicants were not reappointed, based on their credentials submitted and checked. Rest of the officers received permanent post in the office (OECD, 2015).

In Philippines, e-courts are an initiative by Supreme Court that aimed to modernize the court proceedings. The use of technology minimizes human intervention, and integrity risks. From the electronic raffle machine cases are assigned, Automated Hearing System electronically

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291 For a detailed account of this phenomenon, see ZIETLOW, ENFORCING EQUALITY, supra note 9, at Ch. 3–5 (discussing the historical dynamics of congressional protection of rights of belonging during Reconstruction, the New Deal, and the “Second Reconstruction” of the 1960s).
292 Jagran josh, 2015, Available at: http://www.jagranjosh.com/general-knowledge/judicial-review-and-judicial-activism-1438065325-1
293 “Excessive pre-trial detention is not only a consequence of problems in the judiciary. It is often a result as well of prosecutors or police who request pre-trial detention, of delays in investigations or in the presentation of evidence, or of a system that does not permit conditional release”, Country studies developed for Ghana, Guinea Conakry, and Sierra Leone (UNDP & Open Society Justice Initiative, 23 May 2013).
294 “The number of centralized Judicial Council has increased in Europe, Latin America, Middle East, and Africa. Most of them are promoting judicial independence. This is evident in the countries where Council have played a pivotal role for the promotion of judicial independence. The power of Councils varies based on the status of judges, their composition, and the process of appointment or election of their members. Such differences protect and promote judicial independence and accountability. However, there is no valid proof that such Councils promote judicial independence. It is therefore difficult to contend that judges of other countries like Austria and Germany are less independent than Netherlands, Bulgaria, Spain, Georgia Belgium and so on. In some countries like France, Italy and Spain, the national councils have judge members appointed by their colleagues and so the corporate interest of the judiciary are inclined to protect their important values, like judicial accountability for proper functioning of their judicial system” – Adapted from UNODC (2011).
captures every detail of hearing, including judge’s order, minutes and specific evidence. E-courts reduce backlog of cases, increase public access to information, supports transparency and anti-corruption tool, saves time for judgement, and adopt templates and forms. In Indonesia, the judicial reform team realized that lack of transparency is the major cause of corruption in the judiciary. In the era of modernization and technology, ICT is well suited to make court decisions public. Judges make comprehensive and clear judgement which are made available online for public. The online information contains the kind of case, judges’ verdict and the lawyers involved. Various case documents are made available online to monitor the status, ongoing progress, exercise oversight, and conduct necessary intervention to prevent corruption. According to Global Corruption Barometer, 2013, 60% of the Afghani respondents considered the judiciary of Afghanistan as corrupted. There is no judicial transparency or accountability of higher officials and the “right to access to justice” for Afghani citizens is at the bottom level. The Community Based Monitoring on Trials (CBM-T) increased citizens participation in courts and trials. The daily observation of the trials by local people will improve the behaviour of judiciary. In Nepal, judicial system is delayed by series of problems resulting from inefficient laws, unwanted delays, and procedural incongruities causing docket congestion in courts. Citizens poor perception of the court regarding their integrity, impartiality and fairness has added fuel to the fire. Since 1990, the judiciary is giving firm attention to these problems making it systematic, legal and resourceful. It has established National Judicial Academy in 2004, to probe and manage problems of the judiciary. In 2010-2011, Nepal with the assistance of UNDP developed the code of conduct for judges in consultation with judiciary, Bar association and attorney general. The code consists of Bangalore Principles of Judicial Conduct to be followed295. The judiciary published “Citizens charter” and client related information desk to assist lawyers and court officials to enquire information about a case. The information desk also provides court related procedures and services. The charter provides information related to laws, court services, policies and procedures, legal system, to the citizen who needs information to claim their rights and hold court officials accountable. The increasing number of complaints filed against malpractices in judiciary suggests that the citizens are aware of the court procedures, their rights and duties, Code of conduct and their right to demand accountability. The Judicial Council has to look after the cases pending on account of misconduct in lower courts against

the judiciary. Though the appointment procedure of judges is fair enough but still there is lack of clarity and accountability.\footnote{296}

The judicial power has acquired greater political influence. Judges must be impartial, efficient, diligent and competent to protect their judicial independence. During their service in the office, their behaviour must inspire confidence among people. The checks and balance method ensure court efficiency and accountability and guard against wrong methods of bureaucratic appointment of judiciary. A detailed code of conduct in the judiciary avoids extra judicial appointment, participation in partisan activities, and misconduct in the court.\footnote{297}

Judicial discipline strengthens judicial accountability.\footnote{298} Technical modernization in the court promotes equilibrium and values of independence, accountability and efficiency by making the internal system transparent. Extra judicial activity is quite active in Italy. Judges indulge in political parties’ activities to obtain sought after positions. Extra judicial activities are obtained from the sponsorship of political parties. The judges perceive that relation with political parties and their support help them to achieve higher judicial position in the community. Judges often act as political party representatives in Parliament and return in the judiciary as a judge. It is perfectly legitimate for a judge to oppose a political party leader in court whom he has represented for years in the past.\footnote{299} In Italy and other western European countries Judges are appointed from fresh law colleges as graduates’ just like any other government jobs.\footnote{300} In South Africa, the role of judiciary is to enforce law and hold government officers accountable. According to anti-corruption activist lack of judicial independence is the main cause of high corruption. The judges and prosecutors are beholden to political interest when the executives control them. In a survey, it was found 54 African countries lack judicial independence out of which Botswana, Cape Verde, Mauritius, and

\footnote{296} out of 8 Supreme Courts are corrupted in Nepal (Nepali Times, April 2014).
\footnote{297} “A good model to be adapted to the local needs could be the code of judicial ethics of the American Bar Association”. For an annotated presentation see J. M Shaman, S. Lubet, J. J. Alfiniti, Judicial Conduct and Ethics, Michie Law Publishers, Charlottesville, Va. 1995. For the Code adopted in Canada see Ethical Principles for Judges, Canadian Judicial Council, website www.cjc.ccm.gc.ca
\footnote{298} For the purpose to link judicial accountability with people’s demand, the experiences of judicial conduct at various organizations in USA: a) allowing people to file complaints; b) representatives of the citizens promote investigations, conduct hearings, and decides malactivities; c) inform the citizens of the outcome of the disciplinary proceeding or the reasons of not proceeding
\footnote{299} A judge in the Court of Cassation, Pierluigi Onorato, had been MP for many years in the Communist Party. In one of his opinion he wrote that Marcello Dell’Utri, an anticommunist politician was sentenced. The opinion written by the former communist MP ruled that, the Dell’Utri should be removed as member of both the European and Italian Parliaments.
\footnote{300} Giuseppe Di Federico, Independence and accountability of the judiciary in Italy. The experience of a former transitional country in a comparative perspective* (This is a slight modification of an article that was published last year in Andras Sayo (Ed) Judicial Integrity, Kroninlelijke Brill, Leiden, NL): http://siteresources.worldbank.org/INTECA/Resources/DiFedericopaper.pdf

The federal system adopted by Indian Republic has less inter and intra-branch disputes. Judiciary is accountable to people often expressed pro-fundamental attitudes towards amendments in the Constitution, the legislature and executive suggested either to nullify the judgement or deny legitimate right to the judges. Therefore, in India, judicial independence is accepted but not practised. The principle of accountability with impeachment procedure while judging without fear or partiality, kindness or ill-will, judges are accountable for “conduct in their trust to the founder of the society”. The Supreme Court has adopted the activist approach like “legal aid for the marginalized and poor people and Public Interest Litigation (PIL) to help the interest of the millions. The historical aspect and interpretation of the Constitution separated from “textual interpretation is another innovation, which helped in discharging its accountable role”. “Access to Justice” is the human right of every citizen. According to the rule of law, as projected in Rio de Janeiro and Bangkok Conference in 1955, and passing through World Conference of Justice in Montreal, 1983, with restatement in Beijing Conference of Chief Justice of Asia, and Pacific the independent judiciary accepted as an inseparable part of law and practiced worldwide. This patronage of UN at an international level adds importance to the independence of judiciary. The declaration and resolution of the principles of independent judiciary at Syracuse, consolidated the principle of independent judiciary to support human rights. To support an institution, they arranged for all necessary resources to fulfill the needs of independent judiciary. Article 25 of Syracuse

301 In 2011, South Africa’s chief justice, Mogoeng Mogoeng was appointed by President Zuma over then deputy chief justice Dikgang Ernest Moseneke, who was known for better experience and higher qualification. Civil society and opposition parties opposed the appointment, stating that the executive choked the independence of the judiciary and skew its decisions in favor. But South African Constitutional Court and judiciary appointments by the politicians, do not tie the hands of judges’. Cape Verde, is one of Africa’s strongest democracies, appoints its judges and magistrates through a appointments based on merit. Africa Renewal, Judiciary: Fighting graft needs muscles, 2016: http://www.un.org/africarenewal/magazine/august-2016/judiciary-fighting-graft-needs-muscles

302 Indian constitution describes India as “quasi federal or hybrid federal State with strong center oriented prejudice”. See “Articles 1 to 11, 53 to 55, 61, 66, 73, 80 read with Schedule VI; Articles 54, 156, 162, 168 to 201, 245, 246 read with Schedule VII and Articles 248 to 258, 262, 263, 267, 268, 279 to 281, 285 to 289, 352 to 360 and 369” of the Constitution. Supreme Court accepts that Republic of India is federal. See also S.R.Bommai v Union of India : AIR 1994 SC 1918.


304 Article 10 of UDHR and Article 14(1) of ICCPR

305 International Congress of Jurists, 1962 & 1965

306 International Commission of Jurists (ICJ), 1955 held in Africa

307 At Beijing on 19th August,’95

308 Committee of Jurists and ICJ, Syracuse, Sicily, May, ‘81

309 Syracuse principles - Articles 1, 24, 25 and 26
Principle supports separate budget for judiciary to enable Courts to function without restrictions. The UN Congress on Prevention of Crime and Treatment of Offenders provides each member states to furnish judiciary with sufficient resources to enable them work efficiently. Similarly, the Lusaka Seminar on the independence of judiciary in 1986, ICJ Conference on independence of judiciary at Caracas in 1989, and Tokyo Principles improved at Colombo.

The Chief Justice of India is the “pares patrias”. The judiciary impartially holds the rule of law and prevents individuals from violating rights. They stand accountable against any improper use of power by anyone. Constitution of India has enrooted the faith of every India. As a unified institution, it is the duty of judiciary to offer justice to people in lesser possible times and in lesser expenses. Time consuming legal procedures becomes extremely expensive which is a problem. Independence of judiciary and rule of law is basic feature of the Constitution. The appointment of judiciary at State level is independent and free from executive powers. Though the Constitution do not bind judiciary in the final appointment of higher judiciary, the primacy of judiciary and his colleagues are in place. Judges of the Supreme court adopts non-binding values known as “Restatement of Values of Judicial Life” to be observed by all judges in the country. It is a 16-point code of conduct to be followed by judges. An in-house remedial action procedure is also mentioned (See Appendices Fig.1).

The Judges Inquiry Act, 1968 would be replaced by Judges Inquiry Act 2005, mentioning whereby and under whom the Judicial Council would conduct the inquiry. The judges are immune to baseless charges and cannot be removed from the office except for special impeachment procedure. The judges cannot have various conditions of service during their tenure in the office nor their remunerations could be slashed. Unless their remuneration are decided by the parliament, they would remain same as stated in II Schedule to the

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310 At Milan, August & September 1985
312 Fifth Conference of Chief Justices of Asia and Pacific held at Colombo, Sri Lanka, in September 1993
313 The basic features doctrine in Kesavananda Bharati v State of Kerala: AIR 1973 SC 1461, claims that on the power of the Parliament, the basic features of the Constitution cannot be amended which are judicial powers, separation of powers, secular government etc.
314 Articles 124 and 217 of Constitution.
316 Restatement of values of judicial life (code of conduct) adopted in the chief justices’ conference in December, 1999, code of conduct: resolution adopted by the supreme court in respect of declaration of assets, and report of the committee on in-house procedure for remedial action against judges
317 Articles 124(4) and 217(1)(b) of Indian Constitution
Constitution. The “plenary power” to control the judiciary of lower courts rests on the High Court. This power controls the lower judiciary, officers and public servants including their appointment, transfer and misconduct. The Constitution has provision to control State and Central Government. All the funds collected by the Union goes to Consolidated fund of India (CFI) or Consolidated Fund of State (CFS). The constitution provides that withdrawing money from the Consolidated fund needs approval of law made by the Parliament. Every budget year the executive presents a budget to the Parliament and gets it approved.

During the Ninth Plan (1997-2002), the Central government released Rs. 385 crores and in the Tenth Plan (2002-2007) Rs. 700 crores for the judiciary. In the 125th Report of the Law Commission, the judiciary was brought under planned expenditure to annihilate that expenditure on justice is unplanned and must be treated as a planned one. After the First Judges Case, the Supreme Court said that for efficient functioning of the judiciary in a democratic country, the nation has to pay a price. In the Second Judges case, the judiciary found that they have been included in the Planning Commission. It was mentioned that financial constraint should not intervene in the functioning of the judiciary.

The judiciary is accountable for providing speedy justice to the aggrieved parties. It is met only with the cost of resources and their training. The pending cases in the system makes judicial endeavor difficult. This area particularly needs special attention and reform. Recently, after the decision of All India Judges Association, judicial education of the officers and fresh recruits have been mandated by all the High courts. The judicial education keeps the officers updated of the latest developments and techniques in law. The curriculum has been expanded to include district court staffs too. Some measures have been adopted to speed up justice delivery including introduction of ADR system, amicable settlement of issues through mediation, conciliation, arbitration, and judicial settlement. The Law Commission is amending he procedure in case management, court management, mediation and conciliation. Right now, experimentation with ideas for improvements are necessary.

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318 Articles 125 and 221 of Indian Constitution.
319 Articles 233 to 237 of Indian Constitution.
320 Article 283 of Indian Constitution
321 Article 112 of Indian Constitution
322 125th Law Commission of India Report, A Fresh Look 21, 1988
323 (1992) 1 SCC 109
324 All India Judges Association v. Union of India, (2002) 4 SCC 247
Suggestions

The judicial system and process has to be streamlined. The judiciary needs to undergo lot of changes which could help in reducing case times, quick procedure, and quick justice to people. some of the points elaborated below:

1. Judiciary must keep distance from politics because the public has very high expectations from courts for rendering justice and thus it should take all steps to gain the confidence of public. It should show that justice is being dispensed to society in timely manner without any unreasonable delay.

2. Judiciary should realize that effective accountability mechanism is lacking in our system and thus it should not compromise with accountability mechanism in the interest of judicial independence in the democratic set up.

3. Administrative control of the High Courts over subordinate courts require major changes so that the public may get fair and speedy justice on time. Delay in expeditious disposal of criminal trial infringes the right to life and personal liberty. It is a known fact that a criminal case is dragged on for several years till final decision as a result of which the accused had to go from the ambit of "anguish" to the ambit of "sympathy". Sometimes, the witnesses are either won over or they start having sympathy towards the accused and thus the prosecution fails to prove the guilt of the accused. Sometimes, the witnesses fail to recollect the real facts as their memory fades away with the passage of time. Sometimes, the witnesses die before their evidence is recorded in court. Unreasonable delay in disposal of cases results in great hardship not only to the accused but even to the victim and the State. The accused, who is not released on bail may languish in jail for years together waiting for conclusion of the trial and, therefore, serious steps are required to be taken for improving the management of case by the prosecution so as to ensure conviction and punishment particular in serious cases.

4. Judges must announce verdicts within a reasonable time which should be fixed by suitable legislation by the parliament. Once any judgment is reserved in any case, it should be delivered within the stipulated time at all cost.

5. A large number of cases are filed on somewhat similar points. One judgment in such cases can decide those cases. Such cases should be clubbed together for disposal on a priority basis. It will reduce the arrears.
6. Old cases can be separated and listed for hearing on top priority after giving short adjournments particularly in the cases of senior citizens.

7. Attention of the legislature is called for to eliminate the concept of "Uncle Judges". Everybody knows that a person, who had either worked as a district judge or a practicing advocate in a particular high court is appointed as a judge of the high court in the same state. Generally, complaints pour in against 'Uncle Judges'. If a practicing advocate in a particular high court is appointed as a judge in the same high court, in that situation, we cannot expect immediate change in his attitude and conduct as such judge in view of the fact that he has his advocates friends with whom he used to do his practice before his elevation. Like-wise, he is having his kith and kin who had been practicing with him before his elevation. In the same way, the children or close relatives of the district judges elevated to a particular high court may be doing practice in the same high court. There may be certain occasions when advocate turned judges may either try to settle their scores with any advocate, who had practiced with them, or they may adopt favourable attitude towards them in the justice delivery system and if it happens then it is bound to affect their impartiality in rendering justice which becomes the loser in democracy. The principles of justice, equity and good conscience mandates that justice should not only be done, but it seems to have been done in real sense. It is submitted that the judges, whose sons, daughters, or close relatives, kith and kin etc are practicing advocates in the same high court should not be appointed and posted in the same high court after their elevation in the interest of justice.

8. Increase in salaries, perks and other usual facilities to the judges will be fruitful so as to reduce the judicial corruption from this institution.

9. Improving the internal complaint procedures etc for examining the complaints against the judges can provide better mechanisms of accountability within judiciary itself.

10. Courts' enforcement powers and techniques require its re-strengthening in the world of today due to large scale corruption in judiciary.

11. The legislature must enact adequate effective mechanism so as to award punishment to a person for levelling false and baseless allegations against honest judges to protect their image.
12. Indian parliament through suitable legislation should set up an independent institution as par with the Judicial Appointments Committee of the United Kingdom and Judicial Service Commission of South Africa. Eminent persons of repute with high integrity from all the three organs of State be involved in the process of appointment of judges so that we may get good judges in justice delivery system.

13. Executive must have its final say in the matter of cancellation of a particular selection, if irregularity of any kind is detected by subsequent deliberations on the part of the Oversight committee as well as the Scrutiny panel. There should be legal and compulsory disclosure of assets of the judges and their dependent family members so as to build public confidence in higher judiciary.

14. There is urgent need to abolish the system of appointment of retired judges of the Supreme Court and High Courts as Chairpersons, members of different commissions and other positions under the executive so as to maintain its independence.

15. Retirement age of High Court and Supreme Court Judges to 65 years and 70 years respectively be raised through legislation so as to discourage them from taking up other engagements after retirement. Also as the NCRWC recommended, under Article 124(3) (b) & (c) appointments from distinguished jurists have not been made till date which shows lack of trust shown by the judiciary qua these persons. It is not that since independence, no person of such calibre had born in India, to count list is lengthy, but it is the deficit of openness of this system of appointments which negate such persons to be involved in the process as a candidate. "Judges appointing judges" was never the idea when the constitution was framed.

Lord Denning Says -

"Power tends to corrupt. This is why in civilised society there should be a system of checks balances-to restrain the abuse of power. It is why in times past we stood firm against the oppression of King John, and set store by our Magna Carta. It is why we rebelled against the divine rights of the kings and enacted our bill of rights. It is why we resist absolute power to any person or body, or any section of the community. There is as far as I know only one restraint on which we can rely. It is the restraint afforded by law. We have to respect all that parliament has done, and may do, in granting the powers- and of rights and immunities- but let us build up a body of law to see that these powers are not misused or abused, combined
with the upright judges to enforce the law. It is the task which I commend to all. If we achieve it we shall be able to say with Milton:

Oh, how comely it is and how reviving, To the spirits of just men long oppressed! When God into the hands of their deliver, Puts invincible might…..