

## **JUDICIAL INDEPENDENCE & ACCOUNTABILITY: DETERMINE THE EXTENT OF JUDICIARY**

### ***Abstract***

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*“the independence of the Judiciary is not the property of the Judiciary, but a commodity to be held by the Judiciary in trust for the public.”*

**- Lord Woolf**

*It is a truth, which is universally acknowledged, that judicial independence is one of the principal building blocks of the rule of law. The role played by the judiciary has been pivotal in ensuring a process of fairness in governance and administration. Thus, be it the pragmatic interpretation of Article 21 or propounding doctrines of equality, the judicial decisions in India have infiltrated through every strata of the society. The courts have therefore worked hard in expanding both justice and freedom by way of judicial decisions. While many of these decisions are laudable, in recent times, allegations, questioning the integrity of this great institution have multiplied. Lack of accountability and the alleged wide spread corruption have endangered the spirit of democracy, calling into question the integrity of the conscience keepers of the law. There has been a raging debate on the proper scope and limits of the judicial role – especially of that played by the higher judiciary which consists of the Supreme Court of India at the Centre and the High Courts in the various States. One of the finest point of controversy is the collegium system of appointment which operates today is founded on an obscure and inadequately explicated understanding of judicial independence which asks more questions than it answers. This paper, in its limited scope, aims to examine the veracity of the rhetorical resistance between the judicial independence and judicial accountability especially in the light of the Constitution (One Hundred and Twenty First Amendment) Bill, 2014.*

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## INTRODUCTION

*“There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in it. And the question is how these two objects can be secured”.*

- Dr. Bhimrao Ambedkar *in the constitutional assembly debate*

As the custodian of rights of the citizens of a country, the judiciary is bestowed with the task of realizing the constitutional values to its fullest extent, in furtherance of the vision of the Constitution Makers. The Preamble to the Constitution enshrines the ideals of securing social, economic and political justice to all its citizens.<sup>1</sup> An independent judiciary can be stated to be the cornerstone of a democracy.<sup>2</sup> In *Union of India v. Sankalchand Himmatlal Seth*,<sup>3</sup> Untwalia J. called the judiciary as a “*watching tower above all the big structures of the other limbs of the state from which it keeps a watch like a sentinel on the functions of the other limbs...*”. Therefore, the presence of a strong, independent and efficient judiciary, both in letter and spirit, is an absolute necessity to achieve the laudatory goals imbibed in the Constitution. It is a well-known fact that the independence of the judiciary is the basic requisite for ensuring a free and fair society under the rule of law. Rule of law that is responsible for good governance of the country and can be secured through unbiased judiciary.<sup>4</sup>

The doctrine of Separation of Powers which was brought into existence to draw upon the boundaries for the functioning of all the three organs of the state: Legislature, Executive and the Judiciary. It provides a responsibility to the judiciary to act as a watchdog and to check whether the executive and the legislature are functioning within their limits and not interfering in each other's functioning. But this task given to the judiciary to supervise the

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<sup>1</sup> Justice, failed to be meted out in a fair manner, jeopardizes the interests of the civil society, vitiating the principle of rule of law.

<sup>2</sup> It is a part of the basic structure of the Constitution of India: *see generally All India Judge's Association v. Union of India* (2002) 4 SCC 247 p24; *S.C. Advocates -on-Record v. Union of India* AIR 1994 SC 268, 421; *S.P. Gupta v. Union of India* AIR 1982 SC 149,197,198; *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261,301; *Kumar Padma Prasad v. Union of India* AIR 1992 SC 1213, 1232.

<sup>3</sup> AIR 1977 SC 2328

<sup>4</sup> Mulnivasi Organiser, *Independence of Judiciary in India: A Critical Analysis*, Source: <http://www.mulnivasiorganiser.bamcef.org/?p=482>

doctrine of separation of powers cannot be carried on in true spirit if the judiciary is not independent in itself. An independent judiciary supports the base of doctrine of separation of powers to a large extent. It is theoretically very easy to talk about the independence of the judiciary as for which the provisions are provided for in our constitution. But the major task lies in creating a favourable environment for the functioning of the judiciary in which all the other state organs function in cooperation so that the independence of the judiciary can be achieved practically. Whenever there is a talk regarding the independence of the judiciary, there is also a talk of the restrictions that must be imposed on the judiciary as an institution and on the individual judges that form a part of the judiciary. In order to ensure smooth functioning of the system there must be a right blend of the two.

### **MEANING OF INDEPENDENCE OF JUDICIARY**

*The bedrock of our democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing.*

- Caroline Kennedy

The meaning of the independence of the judiciary is still not clear after years of its existence. Our constitution by the way of the provisions just talks of the independence of the judiciary but it is nowhere defined what actually the independence of the judiciary is.

In *S.P. Gupta v. Union of India*<sup>5</sup>, Supreme Court has held that:-

*“The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law under the Constitution; it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law thereby making the rule of law meaningful and effective.”*

The independence of the judiciary is the independence of the exercise of the functions by the judges in an unbiased manner i.e. free from any external factor. So the independence of the judiciary can be understood as the independence of the institution of the judiciary and also

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<sup>5</sup> AIR 1981 Suppl. 87

the independence of the judges which forms a part of the judiciary. Independence is a bulwark of rule of law.<sup>6</sup> If law is to be applied equally to all citizens in the country, then it is equally important that the judges should be independent in applying law and rendering judicial decisions. Judges can be subject to threats and pressures from litigants, including society's criminal element.<sup>7</sup> On reading the provisions of the Constitution of India, it can be said that the Constitution accepts the doctrine of Separation of Powers. The primary talk on the independence of the judiciary is based on the doctrine of separation of powers which holds its existence from several years. The most important feature of the above doctrine is that there should be independence of judiciary i.e. it should be free from the other organs of the state and if it is so then justice would be delivered properly. The judiciary is the scale through which one can measure the actual development of the state if the judiciary is not independent then it is the first step towards a tyrannical form of government i.e. power is concentrated in a single hand and if it is so then there is a cent percent chance of misuse of power. Hence the Doctrine of separation of power do plays a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as there is independence of judiciary. In **Indira Nehru Gandhi v. Raj Narain**<sup>8</sup>, it was observed: "*That in the Indian Constitution there is separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India. Chandrachud J. also observed that the political usefulness of doctrine of Separation of Power is not widely recognized. No constitution can survive without a conscious adherence to its fine check and balance. The principle of Separation of Power is a principle of restraint which has in it the precept, innate in the prudence of self-preservation, that discretion is the better part of valour.*" The doctrine of separation of powers is not fully accepted in the Indian Constitution. It can be said with the observation of Mukherjee, J. in **Ram Jawaya v. State of Punjab**<sup>9</sup> "The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have

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<sup>6</sup> David Pimentel, 'Reframing the Independence vs Accountability Debate', p.5, in <http://www.clevelandstatelawreview.org/57/issue1/Pimentel.pdf> [Accessed on 16.12.2014]

<sup>7</sup> Ibid , p.6

<sup>8</sup> 1975 SCC (2) 159

<sup>9</sup> 1955 2 SCR 225

been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.” Therefore, an independent judiciary supports the base of doctrine of separation of powers to a large extent. Apart from this there are many provisions in the Constitution which ensure the independence of judiciary.

1. **Powers and Jurisdiction of Supreme Court:** Parliament can only add to the powers and jurisdiction of the Supreme Court but cannot curtail them. In the civil cases, Parliament may change the pecuniary limit for the appeals to the Supreme Court. Parliament may enhance the appellate jurisdiction of the Supreme Court. It may confer the supplementary powers on the Supreme Court to enable it work more effectively. It may confer power to issue directions, orders or writs for any purpose other than those mentioned in Art. 32. Powers of the Supreme Court cannot be taken away. Making judiciary independent.
2. **No discussion on conduct of Judge in State Legislature / Parliament:** Art. 211 provide that there shall be no discussion in the legislature of the state with respect to the conduct of any judge of Supreme Court or of a High Court in the discharge of his duties. A similar provision is made in Art. 121 which lays down that no discussion shall take place in Parliament with respect to the conduct of the judge of Supreme Court or High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the judge.
3. **Power to punish for contempt:** Both the Supreme Court and the High Court have the power to punish any person for their contempt. Art. 129 provide that the Supreme Court shall have the power to punish for contempt of itself. Likewise, Art. 215 lays down that every High Court shall have the power to punish for contempt of itself. If the restrictions that operate upon such rights are unreasonable, they will stand annulled by the operation of article 19(1)(a) of the Constitution. A total embargo on truth as justification may be termed as unreasonable restriction. It would, indeed, be ironical if, in spite of the emblems hanging prominently in the court halls, manifesting the motto of “*Satyameva Jayate*”, in the High Courts and “*Yatho dharma statho jaya*”, in the Supreme Court, the courts could rule out the defense of justification by truth.

4. **Separation of the Judiciary from the Executive:** Art. 50 contains one of the Directive Principles of State Policy and lays down that the state shall take steps to separate the judiciary from the executive in the public services of the state. The object behind the Directive Principle is to secure the independence of the judiciary from the executive. Art. 50 say that there shall be a separate judicial service free from executive control.

The spirit of independence has been captured very aptly by Lord Woolf, “the independence of the Judiciary is not the property of the Judiciary, but a commodity to be held by the Judiciary in trust for the public.”

### NEED FOR ACCOUNTABILITY

*“While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self restraint.”*

- Justice Harlan F. Stone<sup>10</sup>

Judicial accountability is in fact a corollary of the independence of the judiciary. Accountability is a facet of independence the Constitution has provided in **Article 235**, for the ‘control’ of the High Court over the Subordinate Judiciary clearly indicating the provision of an effective mechanism to enforce accountability. Thus entrustment of power over subordinate judiciary to the High Court preserves independence as it is neither accountable to the executive or the legislature.<sup>11</sup> The provision of the difficult process of impeachment has also been directed towards this goal. The absence of any mechanism for the higher judiciary except for extreme cases is because the framers of the Constitution had thought that ‘settled norms’ and ‘peer pressure’ would act as adequate checks. However it hasn’t happened completely in that manner. The main problem is that the judiciary is neither democratically accountable to the people nor to the other two organs. The Supreme Court had rightly asserted that “A single dishonest judge not only dishonours himself and disgraces his office

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<sup>10</sup> *United States v. Butler* 287 US 1 (1936)

<sup>11</sup> J.S. Verma, ‘Mechanism for judicial accountability’, p.1, Available at: [http://www.judicialreforms.org/files/mechanism\\_jud\\_acc\\_verma.pdf](http://www.judicialreforms.org/files/mechanism_jud_acc_verma.pdf) [Accessed on 17.12.2014]

but jeopardizes the integrity of the entire judicial system.”<sup>12</sup> Justice Krishna Iyer, emphasizing the need for an accountable mechanism in a democratic framework considered it to be fundamental, so that the dreams of Constitution makers envisioned in Part III, IV and IVA of the Constitution do not remain a mere illusion.<sup>13</sup> The need for accountability, thus, cannot be over emphasized. While the need for the same is desirable for the efficient functioning of any institution, it assumes a greater degree of responsibility when Judiciary is called into question. Judiciary, as one understands, is the edifice of a strong democracy as it endeavours not merely to interpret the black letter of the law but also adopting an activist stance of creatively interpreting it to suit the needs of the society.<sup>14</sup> The office of the robed brethren is based on the great trust reposed by the citizens who seek recourse to judicial powers to defend their democratic rights.<sup>15</sup> Hence, the need for accountability in Judiciary arises from within, to ensure a system of checks and balances operative to prevent any unwarranted usurpation of power. The word ‘accountable’ as defined in the Oxford Dictionary means ‘responsible for your own decisions or actions and expected to explain them when you are asked’. Accountability is the sine qua non of democracy. Associated with the higher cause of truth and justice, judiciary and the judges have been accorded a distinct position. What the Constitutional provisions provide for is that “there should be an impartial and independent judicial body to adjudicate upon the matters and to act as the interpreter and guardian of the Constitution.” It is also a well settled principle of modern day governance that an authority deriving its existence from same source cannot claim to be absolute and unaccountable. It must be accountable either to the source of its origin, to the institution and more importantly to the people. All wings of Government belong to the people, when the legislature and the executive both are accountable, the judiciary cannot remain unaccountable

<sup>12</sup> Anil Divan, ‘Judicial Integrity’, p.1, Available at: [http://www.judicialreforms.org/files/Hindu\\_judicial\\_integrity\\_lessons\\_from\\_the\\_past.pdf](http://www.judicialreforms.org/files/Hindu_judicial_integrity_lessons_from_the_past.pdf), [Accessed on 16.12.2014]

<sup>13</sup> Justice V.R. Krishna Iyer, *Limits of Judicial Conduct*, The Hindu, 7<sup>th</sup> August 2009, Available at <http://www.thehindu.com/2009/08/07/stories/2009080754240900.htm>

<sup>14</sup> In our opinion, in so far the facets of Article 21 of the Constitution is concerned, it has been often seen that Judges have read into the given law in an attempt to widen the scope and achieve the goals of social justice. The recent judgment of *Naz Foundation v. Government of NCT*, (2009) 160 DLT 277, too has been an indicator of the same where sexual orientation has been read into the grounds of “sex” under Article 15(1) of the Constitution. These are the instances where the interpretation has demonstrated judicial creativity and has realized the goals of the Constitution.

<sup>15</sup> Nathubhai Bhat, *Accountability of Judiciary to Bar and Society at Large*, Indian Bar Review, p.163 (2001).



and absolute. No person, howsoever high is above the law similarly, no institution howsoever sanctified can claim to be unaccountable. Ultimately, every institution is accountable to the people in every democratic polity like ours. Several countries in their constitutions have already provided for ensuring accountability of judiciary. This to prevent concentration of power in the hands of a single organ of the state especially in countries where judicial activism interferes with and invades into the domain of other organs. But at the same time Judicial independence is a pre-requisite for every judge whose oath of office requires him to act without fear or favour, affection of ill-will and to uphold the constitution and laws of the country. As stated earlier, the integrity of this great institution has been called into question,<sup>16</sup> since there has been an absence of a transparent mechanism in place to cure the malady. It is interesting to note that while the demand for greater accountability on such counts has been constantly emphasised, unanimous voices of dissent have also risen in a defence “to enforce silence in the disguise of preserving dignity.”<sup>17</sup>

## RELATIONSHIP BETWEEN JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

*“The principle of the complete independence of the judiciary from the executive is the foundation of many things in our island life. It has been widely imitated in varying degrees throughout the free world. It is perhaps one of the deepest gulfs between us and all forms of totalitarian rule.”*

- Sir Winston Churchill<sup>18</sup>

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<sup>16</sup> With respect to the Indian position, one of the landmark controversy regarding the same was of Justice Ramaswamy when he was sought to be impeached on grounds of brazen financial irregularities committed during his tenure as the Chief Justice of Punjab and Haryana High Court. (*See Sarojini Ramaswami v. Union of India* AIR 1992 SC 2219). In recent times, there were allegations against the former Chief Justice of India, Y.K.Sabharwal of having directly benefited his sons by ordering the demolition of the commercial outlets in New Delhi. In an interview with Tehelka, Prashant Bhushan, spear heading the movement of Campaign for Judicial Accountability Reform (CJAR) opined it to be a watershed in the movement for demanding judicial accountability. See, *Half of the Last 16 Chief Justices were Corrupt*, TEHELKA, available at, [http://www.tehelka.com/story\\_main42.asp?filename=Ne050909half\\_of.asp](http://www.tehelka.com/story_main42.asp?filename=Ne050909half_of.asp)

<sup>17</sup> Justice Black in *Bridges v. California* (314 U.S. 252) observed that “the assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion...An enforced silence, however limited, solely in the name of preserving the dignity of the Bench, would probably endanger resentment, suspicion and contempt much more than it would enhance respect.”

<sup>18</sup> P.J. Dhan, *Dr. Ambedkar and the Principle of Independence of Judiciary*, 24 INDIAN BAR REVIEW 97 (1997).



The existence of an independent judiciary can be said to be the bulwark of governance. Needless to say, there has always existed a tussle between the legislature and the executive to assume control over the judiciary as can be traced back to the Constituent Assembly Debates in India. At this juncture, one needs to take note of the fact that the facet of independence was sought to be achieved by enactment of various constitutional provisions, most importantly the appointment of the Judges.<sup>19</sup> In America by the Senate and President was felt to be an unsupervised and politicized process and was a sentiment shared by many in the Constituent Assembly<sup>20</sup>.

A contextualized understanding of judicial independence in India therefore entails a plethora of rulings pronounced by the Hon'ble Supreme Court (hereinafter SC), emphasizing the need for an independent judiciary time and again. In *State of Bihar v. Balmukund Shah*<sup>21</sup>, independence of judiciary was elevated to the status of being a constituent of the Basic Structure of the Constitution. The same words were uttered in the case of *Keshavananda Bharati v. State of Kerala*<sup>22</sup>. In a host of other rulings, the need for an independent judiciary free from the interference of unwarranted political processes has been advocated as the sine qua non of a democratic society<sup>23</sup>. The idea of judicial independence shares an inextricable relationship with judicial ethics, of which accountability is one of the significant dimensions. It is often thought that the two are antithetical to each other and hence, one cannot exist in the presence of the other. Judicial independence cannot be viewed to have a separate existence because it is only in an accountable judiciary that the faith of the citizenry can be reposed. The central argument that can be contending through this piece is that the tension between

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<sup>19</sup> Appointment of Judges in England is by the Lord Chancellor, but after law reform in 2005 the executive and legislature appoint judges.

<sup>20</sup> See *Constituent Assembly Debates*, Vol. VIII, p 258. The provisions of appointment of the Judges to SC and High Courts (Article 124 (2) and Article 217 (1) ) and insulation of the conduct of the Judges by the enactment of Articles 121 and 211, which provides that the discharge of the duties by a SC or a High Court judge cannot be discussed in the Parliament or State Legislature crystallize the concept of judicial independence by making the judiciary insulated from the political processes of the outside.

<sup>21</sup> AIR 2000 SC 1296, para 294

<sup>22</sup> AIR 1973 SC 1461, (Sikri C.J. had mentioned the separation of powers between the Legislature, Executive and the Judiciary to be one of components of the basic and foundation structure of the Constitution).

<sup>23</sup> See *S.P. Gupta v. Union of India*, AIR 1982 SC 149, where it was stated that independence of judiciary constitutes the foundation over which the edifice of the Indian democratic polity rests. See also *Union of India v. Sankal Chand Himmatlal Seth* AIR 1977 SC 2328.

judicial independence and judicial accountability is an artificial one since judicial independence is largely dependent on the public acceptance of the judiciary to be a fair institution, executing its responsibilities in accordance with the law of the land. It seems that the dichotomy between the two is rather superimposed and dispelling the myth surrounding the same is the need of the hour. The demand of accountability, according to us, is the first step towards eradicating the occurrence of any event of misfeasance as a dishonest Judge should not be serving the Bench. Thus, as Prashant Bhushan stated in a recent interview, the fact that a greater demand of accountability, if at all, compromises with the need for independence, is welcome as a step to eradicate any disastrous consequences of letting a dishonest adjudicator decide on the fate of the people<sup>24</sup>.

The deliberation surrounding the lack of transparency and the demand for an accountability mechanism has gathered much momentum in the recent past with various for a vociferously demanding the same. Undoubtedly, the public debate surrounding the Bill has catalyzed the want for accountability emphasizing on the need of preserving the sacrosanct judiciary in the environment of weakening credibility. As former CJI Hon'ble Justice J S Verma puts it, *"I Believe most of us prefer voluntary correct behaviour instead of outside imposition. That, in my humble view, is the dignified course for judges of the higher judiciary, which appears to have been the view also of the framers of the Constitution."*<sup>25</sup>

## ERA OF APPOINTMENT OF JUDGES

### *First Era before 1993 (Era of Executive Dominance):*

Before 1993, the president's power to appoint the Supreme Court judges was purely of a formal nature, for, he would act in this matter, as in other matters, on the advice of the

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<sup>24</sup> V. Venkatesan, *Accountability to the People*, FRONTLINE, September 2009, p33, [accessed on 11.12.2014]

<sup>25</sup> Justice Verma in one of his later writings however emphasized the need for a legislative framework. See Justice Verma, *In a Higher Court* on 11<sup>th</sup> September 2009, available at [http:// www.indianexpress.com/story-print/515773/](http://www.indianexpress.com/story-print/515773/) (Last visited on September 29, 2009). Arun Thiruvengadam opines this change in Justice Verma's stance to be a reflection of the current perception of the judiciary and the judicial environment which mandates the need for a legal sanction to curb the malady of corruption. He notes about the recent move of the Madras High Court to declare the assets of judges without insisting any immediate safeguarding against the potential harassment to the judges which has been a concern voiced by many in the judiciary. Thiruvengadam seeks to evaluate if it is advisable to enact a regulatory framework based on the immediate judicial delinquency in the society as is suggested by Justice Verma. See Arun Thiruvengadam, *Justice Verma on Justice Bhat's judgment and judge's asset controversy*, September 11, 2009, Available at: <http://lawandotherthings.blogspot.com/2009/09/justice-verma-on-justice-bhats-judgment.html>

concerned minister. The practice in India had been to appoint the senior-most judge of the Supreme Court as the Chief Justice as the vacancy occurred in that office. The executive dominance was shown twice in this era when in 1973, the government suddenly departed from this practice and appointed as Chief Justice a Judge ( Justice A.N. RAY) who was fourth in the order of seniority. The government was accused of tempering with the independence of Judiciary<sup>26</sup>. Again in 1976, the government appointed Justice BEG as the Chief Justice by-passing over Justice KHANNA. But, still India's tradition has been to have a non-political Judiciary and it appears to be best to maintain that tradition. Since, 1978, again, the practice has developed of appointing the senior-most judge as the Chief Justice.

***Second Era after 1993(Era of Judicial Dominance):***

The question of selection and appointment of Judges was crucial to the maintenance of independence of judiciary. If the final power was left with the executive, then it is possible for the executive to subvert the independence of judiciary by appointing pliable judges.<sup>27</sup>

In *S.C. Advocate on Record Association v. Union of India*<sup>28</sup>, it was made clear by the apex court that the ultimate power or discretion is not in the hands of the executive. All the appointment of Judges to the Supreme Court can be made by the president unless it is in conformity with the Chief Justice. The main purpose underlining the law laid down by the Supreme Court in the matters of appointment was to minimise the political influence in judicial appointment as well as minimise individual discretion of the constitutional functionaries involved in the process of appointment of Supreme Court Judges. Finally, in *Re Presidential Reference Case*<sup>29</sup> the court made it clear that in making recommendations to the Supreme Court, the Chief Justice of India ought to consult four senior-most judges of Supreme Court (i.e. collegiums of five judges).

Thus, the responsibility to make recommendation for appointment as Supreme Court Judges has been taken away from central executive and has now been placed on collegiums. There is

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<sup>26</sup> For Details of the Controversy, See, Kuldip Nayar, *Supression of Judge* (1973); Kumaramanglam, *Judicial Appointments* (1973); Palkivala, *Our Constitution Defaced And Defiled*, 93-105(1974), And *A Judiciary Made To Measure*.

<sup>27</sup> *Subhash Sharma v. Union of India* , AIR 1990 SCC 421

<sup>28</sup> AIR 1994 SC 268: (1993) 4 SCC 441

<sup>29</sup> AIR 1999 SC 1: (1998) 7 SCC 739

power vested in the Supreme Court to hold any legislation made by the legislature as unconstitutional having the power of judicial review same in the case of executive acts. But there is no such power in case of judicial act. This reminds us of the famous saying:

“Power tends to corrupt, and absolute power corrupts absolutely”

- Lord Acton

An untamed power can always lead to autocracy, which can be brutal in many ways.

### **THIRD ERA AFTER 121<sup>st</sup> AMENDMENT (MODERN ERA)**

This amendment proposed the establishment of Judicial Appointing Commission(JAC) comprise of the Chief Justice of India, who will act as the Chairperson, two senior-most judges of the Supreme Court, Union Law Minister and two eminent citizens to be nominated by the Chief Justice of India, Prime Minister and Leader of opposition or Leader of largest opponent party in the Lok Sabha. One of the eminent citizens will be nominated from among the SC/ST, OBC, minorities or women.<sup>30</sup> It aims at changing the collegiums system by a commission through inserting an Article 124A<sup>31</sup> and amending Article 124(2) (a). It seeks to enable equal participation of judiciary and executive, make the appointment process more accountable and ensure greater transparency and objectivity in the appointment to higher judiciary. The Bill, if ratified by half of the state legislatures in India and assented by

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<sup>30</sup> PRS legislative research, <http://www.prsindia.org>, [Accessed on 13.12.2014]

<sup>31</sup> 124A. (1) There shall be a Commission to be known as the Judicial Appointments Commission.

(2) Parliament may, by law, provide for-

(a) the composition of the Commission;

(b) the appointment, qualifications, conditions of service and tenure of office of the Chairperson and other members of the Commission;

(c) the functions of the Commission;

(d) the procedure to be followed by the Commission in discharge of its functions;

(e) the manner of selection of persons for appointment as Chief Justice of India and other Judges of the Supreme Court, Chief Justices and other Judges of High Courts; and

(f) such other matters as may be considered necessary.

the President of India, will replace the collegiums system for the appointment of judges as mandated in the existing pre-amended constitution by a new system. Along with the Constitution Amendment Bill, the National Judicial Appointments Commission Bill, 2014, was also passed by the Lok Sabha and the Rajya Sabha to regulate the functions of the National Judicial Appointments Commission. Thus the aim of the amendment need to be achieved by seeing the circumstances in which we stand today. The doctrine of check and balance that all organs will have a check on each other, it will lead to transparency by making the judiciary more accountable. The major drawback of this new commission is that, it gives enough scope for political interference which is a threat to judicial independence. It also violates the basic structure of the constitution and concept of separation of powers. Apart from this, there are also other drawbacks such as procedural delay in appointment, tampering with IB reports of a candidate not having good rapport with political parties. Definitely, the bill has certain advantages like transparency in selection, more accountability in judiciary etc, but this does not meet the purpose for which the collegium system was setup. National Judicial Appointment Commission does not guarantee the much needed freedom, to the judiciary. *Noted jurist Fali S Nariman pointed out that, this system hits at the root of judicial independence and might be struck down by the highest court of the land.*

## CONCLUSION

The independence of the judiciary as is clear from the above discussion hold a prominent position as far as the institution of judiciary is concerned. It is clear from the historical overview that judicial independence has faced many obstacles in the past especially in relation to the appointment and the transfer of judges. Courts have always tried to uphold the independence of judiciary and have always said that the independence of the judiciary is a basic feature of the Constitution. The interpretation in the *Judges Case* giving primacy to the executive, as we have discussed has led to the appointment of at least some Judges against the opinion of the Chief Justice of India. The decision of the *Judges Case* could never have been intended by the framers of the Constitution as they always set the task of keeping judiciary free from executive and making it self-competent. But, the decision of the *Second Judges Case* and the *Third Judges Case* is a praiseworthy step by the Court in this regard.

Whenever there is a mention of the independence of the judiciary, there is always a concern about the latent dangers of the judicial independence and there arises the importance of “Judicial Accountability”. In the recent Amendment bill, the aim is to achieve judicial

accountability. But, there is a genuine threat of judiciary making use of its power to curb any part of the legislation, amendment etc. as null and void and against the doctrine of basic structure which left open ended in the case of fundamental rights case<sup>32</sup> to all the provisions that curtail its power. The final outcome of the above discussion is that Judicial Accountability and Judicial Independence should go hand in hand to ensure the real purpose of setting up of the institution of judiciary. So, the introduction of such a bill by the Law Commission is a major step in the direction of making changes to the rigid procedure in our constitution for the removal of the judges of the Supreme Court and the High Courts.

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<sup>32</sup> *Keshwananda Bharati v. Union of India*, AIR 1973 SCC 1461