

CHAPTER VIII

JUDICIAL ACCOUNTABILITY AND JUDICIAL INDEPENDENCE.

As we discussed the concept of judicial accountability in last chapter, moving forward now we are going to discuss the concept of judicial accountability with judicial independence. As we already focused the concept of judicial accountability in last chapter now we will discuss the concept of judicial accountability first and then we will discuss the concept of judicial independence in reference to judicial independence.

Judicial accountability in India-

There are three wings of the Indian government – Legislature, Executive and Judiciary. They perform three vital functions of making rules, application of rules and adjudication of rules respectively. The main principle behind such division of functions is “Separation of Powers” which brings accountability and keeps the government restrained and thus our rights and liberties are safeguarded. The main theme behind this is ‘Power corrupts man and absolute power corrupts absolutely’.

As described by Montesquieu, “Constant experience has shown us that every man invested with power is apt to abuse it, and to carry his authority until he is confronted with limits’. In short absolute power without accountability leads to corruption. In India, corruption has always been in limelight. Mr. Kofi Annan, the then Secretary General of the United Nations, in his foreword to the UN Convention against Corruption wrote, “Corruption is an insidious plague that has a wide range of corrosive effects on society. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of

life and it allows organized crime, terrorism and other threats to human security to flourish.” However recently what drew our attention is the corruption charges levied against judges; for examples, Judge Soumitra Sen, being a Calcutta High Court guilty of misappropriating large sums of money and making false statements regarding it and P D Dinakaran, Chief Justice of Karnataka High Court, alleged for land grabbing and corruption. These instances give rise to one question ‘who is judging the judges?’

The principle of separation or balance of power works with one more principle i.e., checks and balances. The theory of checks and balances simply put that no organ should be given unchecked powers. A balance is secured by putting the power of one organ checked and restrained by the other two. After all ‘power alone can be the antidote to power’. So we find in India that how the executive is individually and collectively responsible to the legislature, although here the accountability has decreased because of anti-defection law, whereby if there is any amount of dissent from the legislator, he is threatened with removal which can cost his constituency being unrepresented. Thus all decisions of party leaders are now just rubber-stamped by parliament. The laws passed by the legislature are tested by the judiciary, if it violets the constitution the court declares it null and void. In addition, the legislature is accountable to the people at large who elect them. Thus, it becomes clear that the judiciary is the guardian of the constitution and protector of fundamental rights. Recently some of the examples showed the lack of accountability in the institution. This is important because in the preamble we give to ourselves JUSTICE- Social, Economic and Political. In democracy, any authority having some amount of public power must be responsible to the people. The fact is that in a ‘Democratic republic’, power with accountability of the individuals is essential to avert disaster for any democratic system. It is pertinent to

note that judicial accountability and judicial independence has to be studied together in order to understand the concept in whole.

Meaning-

Judicial accountability is a corollary fact of the independence of the judiciary. Simply put, accountability means taking responsibilities for your actions and decisions. Generally it means being responsible to any external body; some insist accountability to principles or to oneself rather than to any authority with the power of correction or punishment. Since accountability is one of the aspect of independence which the constitution provided in Article 235. The 'control' of the High Court over the subordinate judiciary clearly indicates the provision of an effective mechanism to enforce accountability. Thus entrustment of power over subordinate judiciary to the High Court maintains independence as it is neither accountable to the executive or the legislature. The provision of the difficult process of impeachment is also directed towards this goal. Except for extreme cases, the absence of any mechanism for the higher judiciary is because the framers of the constitution thought that 'settled norms' and 'peer pressure' would act as adequate checks. However it didn't happen completely in that manner because the judiciary is neither democratically accountable to the people nor to the other two organs. The Hon'ble Supreme Court rightly asserted that "A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system." This brings us to think that why do we need accountability. A campaign issued by the people's convention on Judicial Accountability and Reforms had mentioned, "The judicial system of the country far from being an instrument for protecting the rights of the weak and the oppressed has become an instrument of harassment of the common people of the

country.... The system remains dysfunctional for the weak and the poor... (and has been) displaying their elitist bias.”

Mona Shukla mentioned three promotions done by judicial accountability:

1. It promotes the rule of law by deterring conduct that might compromise judicial independence, integrity and impartiality.
2. It promotes public confidence in judges and judiciary.
3. It promotes institutional responsibility by rendering the judiciary responsive to the needs of the public it serves as a separate branch of the government.

The process of accountability facilitates transparency. It can be best achieved when one is accountable to law. The existing system of accountability is failed, and therefore growing corruption is eating away the vitals of this branch of democracy. This lack of accountability is criticized by Pt. Nehru in a diatribe, “Judges of the Supreme Court sit on ivory towers far removed from ordinary men and know nothing about them.” Judges are awarded the image of demi god’s. After all judges are also humans capable of making mistakes and committing vices. But what went wrong? The problem in making the judiciary accountable is discussed below which will help us in understanding the issue and later find solutions to achieve it.

Need of judicial accountability

In a ‘Democratic republic’ power with accountability of the individual enjoying it, is essential to maintain any democratic system. The accountability should be comprehensive to include not only the politicians, but also the bureaucrats, judges and each and every person bestowed with power. Power and position in a democracy come with responsibility, and every public office must remain

constantly accountable to the people, who are the repository of political sovereignty.

Through the agency of courts, the judicial system deals with the administration of justice. Judges are the human beings who preside over the courts. They are not merely visible symbols of courts but they are actually representatives in flesh and blood. The manners in which judges discharge their duties, determine the image of courts as well as the credibility of judicial system. In India since immemorial time judges have been held in high esteem. But recently due to some unpleasant instances people are slowly losing faith in judiciary and are taking law into their hands. It is highly deplorable. Therefore it is required to make judiciary accountable, as derogation of values in judiciary is unaffordable than in any other wing of the government as judiciary has to act as the guardian of our constitution. Judicial accountability and answerability of the judges is an old concept. Several countries provide in their constitutions for ensuring accountability of judiciary. It is for preventing concentration of power in the hands of a single organ of the state specially, in countries like India where it is criticized that 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.

Former chief Justice of India, Hon'ble Mr. Justice S.H. Kapadia remarked: “When we talk of ethics, the judges normally comment upon ethics among politicians, students and professors and others. But I would say that for a judge too, ethics, not only constitutional morality but even ethical morality, should be the base...”

The well-known legal luminaries like former Hon'ble Chief Justice of India S.Venkataramaiah and former Judge of the Hon'ble Supreme Court D.A.Desai and another former Judge of the Hon'ble Supreme Court Chennappa Reddy expressed the view that if all the sections of the society are accountable for their actions, there is no reason why the judges should not be so. Former Hon'ble Chief Justice, Verma recognized the validity of this plea when he remarked on one occasion, "These days we (Judges) are telling everyone what they should do but who is to tell us? We have task of enforcing the rule of law, but does not exempt and even exonerate us from following it". For proper implementation of this concept of judicial accountability, it is expected that the judges should follow a code of conduct which may be broadly called as ethics for judges.

Ethical code for judges:-

1. Judicial decision to be honest-

It is very important that in order to have full of public confidence in their role in the society, the judicial decision has to be honest and fair. No judicial decision is honest unless it has been decided in response to an honest opinion formed in the matrix of the judges proficient of law and fact. However, the perception of an individual judge may be incorrect. But an incorrect decision honestly made does not make that decision dishonest. A decision becomes dishonest if not decided on judicial conviction of honesty, fairness and neutrality.

2. No man can be a judge in his own cause-

The basic ethics principle is that no man can be judge in his own cause. The principle confines not only to the cause where the judge is an actual party to a case, but also to a case in which he has interest. A judge is not expected to adjudicate in

a case if he has got interest therein. A judge do require certain a degree of detachment and objectivity in judicial dispensation. They being duty bound by the oath of office taken by them in adjudicating the disputes brought before the court in accordance therewith, judges must remain impartial and should be known by all people to be impartial. It has been made clear by Hon'ble the Supreme Court.

3. Administer justice –

Judges should be fearless to administer justice. “Fiat justitia, ruat caelum” means “Let justice be done though the heavens fall” must be followed as a motto by a judge.

4. Equal opportunity –

Parties to the dispute should be treated equally and in accordance with the principles of law and equity. A judge does not belong to any particular section or division or group. He is a judge of all people. In the courts of law there is always equality. A judge should be departed from personalities who are parties to the case but only with merits. He should treat the parties to the dispute equally, giving them an equal opportunity during the trial. The Rt.Hon.Lord Hewart of Bury, Lord Chief Justice of England, stated that “It is essential to the proper administration of justice that every party should have an opportunity of being heard, so that he may put forward his own views and support them by argument and answer the views put forward by his opponents”. The Hon'ble Supreme Court stated in the celebrated case “No man's right should be affected without an opportunity to ventilate his views”. In classical language of metaphor, the God of Justice sits on a golden throne, but at his feet sit two lions-‘law and equity’. A judge will fail to discharge his duty if he disregards their presence and participation.

5. Maintenance of distance from relatives-

Since judging is not a profession but a way of life, the judge must maintain distance between himself and the parties to the dispute and their lawyers during the conduct of the trial. One can take into notice that now a days the growth of a new caste in legal profession who thrive not by intellectual or professional capabilities but by utilizing their close connection with the judges. The growth of this suspicious trend can be controlled by avoiding meeting frequently in private with practicing lawyers .Persons occupying high public offices must take care to see that those who claim to be close to them are not allowed to exploit that closeness, alleged or real.

6. Too much of activity and participation in social functions be avoided-

Often, it is said that as a result of a very considerable amount of ordinary social activity, a judge may become identified with people and points of view, and litigants may think they may not get fair trial. To avoid that feeling, a judge should avoid too much of social activity. Again, it is recommended that judges should be selective in attending social functions. Judges in USA and England generally decline such participation. If they attend any private function, they ask for the list of invites.

The Hon'ble Supreme Court in *Ram Pratap Sharma v Daya Nand*¹ issued a note of caution to the effect that a judge should not to accept any invitation and hospitality of any business or commercial organization or of any political party or of any club or organization run or sectarian, communal or parochial line.

¹ 1977 AIR 809

7. Media Publicity be avoided-

As far as possible a judge should keep away himself from the media. He should keep himself away from expressing his views in media on matters either pending before him or likely to appear for judicial consideration otherwise he may be accused of prejudging the issue and his neutrality may be questioned thereby. Lord Chief Justice of England since 1971 to 1980, Mr. Lord Widgery said that “The best judge is the man who should not court publicity and should work in such a way that they don’t catch the eyes of the newsmen”. Lord Hailsham said that “The best judges are those who do not find their names in the The Daily Mail and still, who abhor it”.

Lack of judicial accountability in India

The framers of the Indian constitution would not have imagined that the Indian judiciary would emerge as the most powerful institution of the State, within 60 years of the framing of the constitution. The constitution established the Hon’ble High Courts and the Supreme Court as watchdog institutions, separate and independent of the executive and the legislature, not only for dispensing the justice, but also for ensuring that the executive and the legislature did not exceed the authority conferred upon them by the constitution. Thus, the judiciary was conferred the powers to interpret the laws and the constitution, in addition, to strike down executive action which violated any law or the fundamental rights of citizens. It has got the authority to examine whether laws framed by parliament conformed to the constitution and declare them void if they violated it. Thus, by a creative interpretation of the provision authorizing the parliament to amend the constitution, the Hon’ble Supreme Court in 1973 also acquired the power to strike down even constitutional amendments which were found by the court to be

violative of the basic structure of the constitution. Till present, many laws and some constitutional amendments have been struck down by the courts during this period.

Through all this, the Indian judiciary have emerged as the most powerful courts in the world, exercising virtually imperial & unchecked powers. It is criticized that, while executive action and even legislation could often be struck down by the courts, the directions of the courts, sometimes issued without even notice to the affected parties, were beyond question, and had to be obeyed by all executive officers on pain of contempt of court. Of course, often these powers were wisely exercised to correct gross executive inaction.

Further it is criticized that while acquiring these powers, the court, by an even more inventive, namely purposive interpretation of the provision regarding appointment of judges by the government, took over the power of appointment of judges. Thus judges of the Hon'ble High Court and Supreme Court are being appointed by a collegium of senior judges of the Hon'ble Supreme Court. Thus it is criticized that judiciary has thus become like a self perpetrating oligarchy. There is no straight jacket formula followed in the selection of judges and there is no transparency in the system. Specifically, no regard is given to examining the record or credentials of judges in their ideological adherence to the constitutional ideals of a secular, socialist democratic republic or their understanding of or sensitivity towards the common people of the country who are poor, marginalized and unable to fight for their rights in the courts. In short it is further criticized that, the courts in India enjoy virtually absolute and unchecked power unrivalled by any court in the world. In such a situation, it is absolutely necessary that judges of the superior judiciary should be made accountable for their performance and their conduct – whether it be in respect of corruption or for disregard of constitutional values and

the rights of citizens. Unfortunately, neither the constitution, nor any other law has specifically created any institution or system to examine the performance of judges or examine complaints against them. The constitution states that High Court and Supreme Court judges cannot be removed except by impeachment. The process of impeachment requires signatures of 100 MPs of the House of People or 50 MPs of the council of states for its initiation. If a motion containing charges of serious misconduct with the requisite signatures is submitted, and approved by the speaker of the House of People or the chairperson of the Council of States, an Inquiry Committee of 3 judges is constituted to hold a trial of the judge. If he is found guilty then motion is placed before each house of parliament where it has to be passed by a 2/3 majority of each house. Practically, it is highly difficult to remove a judge through impeachment even if one is somehow able to get documentary evidence of serious misconduct. It is further criticized that it happens because MPs are not keen to take on a sitting judge because it could be possible because of pending cases in courts. Till present, the only impeachment of a Judge to have gone far was that of Justice V. Ramaswami during early 90's. After the motion was presented, a Judges Inquiry Committee found him guilty of several charges of misconduct when the matter went up for voting to parliament.

The ruling congress party directed all their MPs to restrain themselves from voting. Thus, even after passing the motion unanimously in the Lok Sabha, it could not get the support of the majority of the total membership of the house and, therefore, failed. The judge continued in office till he retired, but was not assigned any judicial work by the then Hon'ble Chief Justice. Secondly, it was seen a second motion against a judge of the Calcutta High Court signed and submitted to the Chairman of the Council of States.

Further, it is criticized that allegations and charges against a judge though supported by documentary evidence, rarely get any coverage in the media because of the fear of contempt of court. The contempt law in India provides discretion to a judge of the Hon'ble High Court and Supreme Court to charge the offender with criminal contempt and send him to jail, on the ground that he/she has "lowered the authority or scandalized the court". What "lowers or scandalizes" the authority of a court is also the subjective judgment of each Judge. In Arundhati Roy's case ², the Hon'ble Supreme Court charged her with contempt and sent her to jail because she criticized the court in her affidavit lowering the dignity of the court.

It is also criticized that the criminal contempt jurisdiction of the court is an example of the enormous and unchecked power of the superior courts in India. The campaign for Judicial Accountability is demanding that the courts' power to punish for "scandalizing and lowering the authority of the court" should be taken away by legislation which was resisted by the courts on the ground that deleting this provision would greatly encourage baseless allegations and abuse of judges by disgruntled litigants and would thereby erode public confidence in the courts. Further, this power of punishment for contempt of the court is provided by the constitution of India.

In 1991, the Supreme Court in its judgment, involving Justice Veeraswami who was Chief Justice of the Tamil Nadu High Court, was caught with assets, vastly disproportionate to his income, laid down that no judge of a superior court could be subjected to a criminal investigation without the written permission of the Chief Justice of India. It is opined that this view created a feeling that judges who were used to the feeling that they could get away with any kind of misconduct or even

² Contempt Petition (crl.) 10 of 2001

criminal conduct, without any fear of any criminal action or action for removal. Further the power of contempt protected them from fear of public exposure. All this has made an alarming picture of lack of accountability of the higher judiciary in India. It is opined that one could not practically take any disciplinary or criminal action against misconduct or crimes committed by judges. Exposure of them publicly carries the risk of contempt. The lack of accountability may lead to corruption in the judicial institution.

Judicial accountability and discipline

The judiciary is required to be independent and outside influence of political and economic entities such as government agencies or industry associations. But judicial independence does not allow that judges and court officials are free to behave as they like. Indeed, judicial independence is based on public trust and, to maintain it, it is necessary that judges must uphold the highest standards of integrity and must be accountable to them. Where judges or court personnel are suspected of breaching the public's trust, fair measures must be in place to detect, investigate and sanction corrupt practices.

To whom the judiciary is expected to be accountable?

Normally, accountability means the ability to hold an individual or institution responsible for its actions. The question for the judiciary is accountability to whom and for what? Broadly speaking, the judiciary must be accountable to the law, in the sense that the decisions made are in accordance with the law and are not arbitrary. Like any other branches of government, it must also be accountable to the general public it serves.

How judicial accountability can be achieved?

Developing a culture of independence, impartiality and accountability amongst the judges is an important step towards ensuring the overall integrity of the judiciary. Developing codes of judicial conduct also provides an important means of fostering judicial accountability, since they serve as both a guide to and a measure of judicial conduct. Further reasoned orders and judgments are the best way of judicial accountability.

An impeachment motion-

1. Justice V. Ramaswami's case-

On May 11, 1993, 205 Lok Sabha members belonging to the Congress and its allies initiated the impeachment proceedings against Justice V. Ramaswami of the Hon'ble Supreme Court by voting. Despite the motion for removal being passed unanimously by the members who voted, it failed. Therefore, the result was that despite a high-power inquiry committee of three eminent judges who came to the conclusion that Ramaswami was guilty of several acts of gross misbehaviour which warranted his removal, the judge was entitled to discharge judicial functions from the highest court of the land. After failure of impeachment motion, Ramaswami was persuaded to resign but it gave rise to several grave issues for the future of the administration of justice in this country and indeed for probity in public life in general.

2. Justice Ashok Kumar-

Justice Ashok Kumar was appointed an additional judge in April 2003 but it is stated that the Collegium of three senior judges of the Hon'ble Supreme Court unanimously decided not to confirm him as a permanent judge in August 2005

because of adverse reports regarding his integrity. It is alleged that despite this, an extension was given to him as an additional judge, and finally came to be confirmed in February 2007 on the Hon'ble Chief Justice's recommendation, which was criticized as made without consulting other members of the Collegium of judges, in complete violation of several judgments of the Hon'ble Supreme Court. This laid down that in a case of appointment of judges, it should be appointed with the majority view of the Collegium of senior judges of the Hon'ble Supreme Court and not by chief justice alone. The 9 Judge judgments also provided that an appointment made without consulting the Collegium was challengeable and could be struck down in a judicial proceeding. The memorandum of procedure laid down by the law ministry also made it abundantly clear that in such matters the Hon'ble Chief Justice must consult the Collegium of senior judges, as well as those other judges who have come from the same High Court in which the proposed appointment is to be made. Thus, it was criticized that Justice Ashok Kumar's appointment was made contrary to the constitution, and the law laid down by the Hon'ble Supreme Court itself. Though Justice Ashok Kumar's confirmation as a permanent judge was challenged by senior advocates of the Supreme Court, the court upheld his confirmation.

3. Justice Soumitra Sen-

Chief justice of India recommended remove justice Sen by impeachment proceeding for the offence of misappropriating funds received by him as a court receiver and thereafter for giving false explanations to the High Court. The Chief Justice made this recommendation on the basis of a report filed by a committee of three Judges, who gave conclusion that he committed several acts of serious misconduct. It was alleged that despite these acts of misconduct were the subject matter of proceedings pending against him in the Calcutta High Court, yet he came

to be appointed during that time, due to the lack of transparency in the matter of appointments. It is criticized as one of the examples of lack of judicial accountability.

4. Case of Justice Ashwini Kumar Mata-

The proposed appointment of Mr. Ashwini Kumar Mata who was recommended for appointment as Judge to the Delhi High Court was under dispute. It was alleged that Mr. Mata purchased one floor of a house in Safdarjang Enclave from a builder who had an agreement with the owner of the plot that he would construct the building and hand over three floors to the owner. The remaining two floors would remain with him which he could sell only after handing over possession of the three floors to the owner. Despite the fact, that the builder neither completed the construction of the building nor handed over the possession of the floors belonging to the owner to him, Shri Mata entered into an agreement for purchasing one of the floors which was to go to the builder from him. Thereafter it was alleged that Shri Mata used the said agreement with the builder to seek mutation of that floor in his name. In his application, he attached a copy of his agreement with the builder, containing the forged signatures of the owner, Mr Joshi. When it was noticed by Mr. Joshi, he lodged a complaint to the police regarding the forgery. Eventually, at the instance of a magistrate, an FIR came to be registered and an investigation began into this forgery. It was contended that the act of forgery became clearer when Mr. Mata filed a different version of the same agreement in arbitration proceedings which he had initiated. In this version of the agreement, the signatures of the owner were not there. These facts were learnt only after the recommendation for the appointment of Shri Mata had already been sent to the Law Ministry by the Collegium of the High Court. After that a representation was sent to the collegiums in the Hon'ble High Court and the Hon'ble Supreme Court. Mr. Mata responded

to the representation and said that the criminal investigation by the police had exonerated him. It was alleged that the police report was given hurriedly after the representation, without even waiting for the forensic examination of the forged signatures, and is dishonest. Thereafter another representation was sent to the Hon'ble Supreme Court and the Hon'ble High Court collegiums detailing the misconduct of Mr. Mata and pointing out why it is not possible for the signatures of the owner to have been forged without Mr. Mata's knowledge and consent. Therefore it was stated that even if it was not certain that Mr. Mata participated in the forgery of his agreement with the builder, it would be better to err on the side of caution by not appointing him, instead of being faced with a situation as that with regard to Justice Soumitra Sen of the Calcutta High Court.

5. Arundhati Roy's Case-

After the judgment of the Hon'ble Supreme Court in the Narmada Dam case, there was a public protest outside the Hon'ble Supreme Court in which Medha Patkar (the leader of the anti-Dam movement in India) and Arundhati Roy participated. A couple of lawyers filed a contempt petition against Patkar, Roy and Mr. Prashant Bhushan alleging that they raised abusive slogans against the Court. Roy, in her reply to the court notice betrayed the court. The Hon'ble court issued a contempt notice to her. She was found guilty and was sent to jail. The Hon'ble courts action was severely criticized

Judicial accountability Bill-

The Judicial Standards and Accountability Bill aimed at setting judicial standards and making judges accountable for their lapses. It also mandates that judges of the Hon'ble High Courts and the Supreme Court should declare their assets and liabilities, including those of their spouses and dependants. The Union Cabinet

approved the draft Judicial Standards and Accountability Bill, 2010 which provides for setting up a five-member oversight committee to deal with complaints against members of the higher judiciary. Official sources said judges would also be required to declare their assets and file an annual return of assets and liabilities. All these details will be published on the websites of the Hon'ble Supreme Court and High courts. Judges are expected not to have close ties with any member of the Bar, especially those who practice in the same court where a judge is posted. The enactment of the Bill will try to solve the growing concerns regarding the need to ensure greater accountability of the higher judiciary by bringing in more transparency, and will further strengthen the credibility and independence of the judiciary. The oversight committee would be headed by a former chief justice of India and include the attorney general, a Supreme Court judge, a chief justice of a High court and an eminent person nominated by the President.

Oversight committee-

The Bill is to replace the Judges Inquiry Act which retains its basic features. It contemplates setting up of a national oversight committee which is to be headed by a former Chief Justice of India where the public can lodge complaints against erring judges, including the Chief Justice of India and the Chief Justices of the High Courts. Currently, there is no legal mechanism for dealing with complaints against judges, who are governed by 'Restatement of Values of Judicial Life,' adopted by the judiciary as a code of conduct without any statutory sanction. The five-member committee will be appointed by the president. It will have a serving judge of the Hon'ble Supreme Court and a serving High Court judge, both nominated by the Chief Justice of India; the Attorney-General; and an eminent person nominated by the president.

Scrutiny panels-

On receiving a complaint, the committee will forward same to a system of scrutiny panels. If the complaint is against a Supreme Court judge, the scrutiny panel will consist of a former Chief Justice of India and two sitting Supreme Court judges, and if it is against a High Court judge, the panel will consist of a former Chief Justice of the High Court and two of its sitting judges. The members of the Supreme Court panel will be nominated by the Chief Justice of India, and that of the High Court panels by the Chief Justice of the High Court concerned. The scrutiny panels will be having the powers of a civil court like power to call for witnesses and evidence. They should give their report within three months to the oversight committee. When a complaint is against a Chief Justice, the oversight committee itself will conduct the scrutiny. After receiving the report from the scrutiny panels, the oversight committee will set up a committee to further investigate the case. Like the scrutiny panels, the investigation committee will have the powers of a civil court; it will be having the power to frame definite charges. In case of failure to prove the charges, the investigation committee can dismiss the case. Otherwise, it will forward a report to the oversight committee, which can issue an advisory or warning or recommend minor punishment if the charges are not too serious in nature. In case of serious charges, the committee can request the judge concerned to resign. If the judge is not willing to do so, the oversight committee will forward the case to the president with an advisory for his removal.

The Bill mandates that judges should avoid any close association with individual members of the Bar and not allow any member of their immediate family to appear before them in courts. Judges should avoid contesting any election to any office of club, society or other association, except those associated with the law or any

court. Further, they should be free from any bias in judicial work or judgments on the basis of religion, race, caste, sex or place of birth.

It is stated that corruption in the judiciary is not affordable as people are having faith in judiciary who expects an impartial and fair judgment from the judiciary. It is alleged that there are some instances from where we can gather that the judiciary is facing the issue of corruption though it is in very less percent but it is not totally free from corruption. In such a situation it is necessary to make the judiciary accountable but it has also needs to be looked into that while making judiciary accountable the independence of judiciary need not be compromised in any way and which is not at all affordable. In such circumstances it is necessary to analyze the concept of judicial accountability in connection with the independence of judiciary.

Different steps by judiciary for increasing it's accountability

Following are the different steps which the judiciary is taking for maintaining its accountability. Those steps are-

1) Central Information System-

This system shows the details of the cases like next date, rojnama etc and stages of those cases pending in the courts of law.

2) Complaints with affidavit-

This is the second way by which the judiciary is entertaining the complaints. Initially, only plain complaints were used to be entertained but after words it was found that vague complaints were filed against the judges therefore now the complaints with affidavits are only entertained.

3) Appeal-

By way of appeal also we can make the judiciary accountable as the orders and judgments can be challenged before the higher judiciary therefore the judgments and orders of lower judiciary are accountable to the higher judiciary.

4) Reasoned orders-

Passing a reasoned order is also a part of accountability. It is always expected that a judge should always pass a reasoned order. Passing of a reasoned order makes it clear that why a judge has come to a particular conclusion while passing that judgment.

Independence of judiciary-

Dr. Ambedkar had, in the constituent assembly, expressed that the judiciary should be independent of the executive and competent in itself. Nehru felt : “They (the judges) should be first class and seen to be first class.”

Independence is a bulwark of rule of law. For the applicability of law equally to all citizens in the country, then it is 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. Independence of judiciary is a recognized principle adopted by most of the democratic countries.

United Kingdom:

The concept first originated in United Kingdom. There was a long struggle between the parliament and monarchy to control judiciary. In the 17th century, the parliament passed a settlement Act, which stated that the tenure of the judges

would be subject to good behaviour and their removal after an address to both houses of parliament.

United States: in the 1985, attempt for independence was seen. Basic Principles on the Independence of Judiciary states “The judiciary shall decide matters before them... without any restrictions, improper influence, inducement, pressures, threats or interference, direct or indirect, from any quarter or for any reason”.

India: Before independence, judges were appointed by the Crown, but they were yet independent from it. After independence, this principle became a part of the basic structure of the constitution, which cannot be amended. But before focusing on the concept of independence of judiciary, we will discuss on the need of independence of judiciary. Before discussing the need of judicial independence it is necessary to discuss the scheme of Indian judicial system.

The integrated Indian judicial system -

The scheme of the constitution has provided for establishing an integrated judicial system of which the Hon’ble State High Courts are one of the essential elements, the Hon’ble Supreme Court of India being at the apex. It is important to mention that the constitution, powers, and jurisdiction of the State High Courts are also defined in the constitution itself. And as a matter of fact every judge of Hon’ble High Court is to be appointed by the president of India after consultation with the Hon’ble Chief Justice of India, the governor of the state, and, in the case of the appointment of a judge other than the Chief Justice, the Hon’ble Chief Justice of the High Court. The survey of the jurisdiction of the Hon’ble Supreme Court of India made in the foregoing paragraphs shows that the Hon’ble Supreme Court of India not only performs the essential functions of a federal court but also functions

as a regular court of appeal in ordinary civil and criminal cases decided by the Hon'ble High Courts.

The problem lies in the understanding the concept of independence; it should be understood as independence from executive and legislature and not independence from accountability. 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."

Meaning of judicial independence-

Before we discuss the concept of independence of judiciary in India, it is essential to explain what is mean by the term "independence of judiciary". In the words of Dr. V.K. Rao, "Independence of judiciary has three meanings:

(i) The judiciary must be free from encroachment from other organs in its sphere. In this respect, it is called separation of powers. Our constitution makes the judiciary absolutely independent except in certain matters where the executive heads are given some powers of remission etc.

(ii) It means the freedom of the judgments and free from legislative interference. In this respect, our constitutional position is not very happy because the legislature can in some respects override the decisions of the judiciary by legislation.

(iii) The decisions of the judiciary should not be influenced by either the executive or the legislature—it means freedom from both, fear and favour of the other two organs."

The constitution of India provides for an independent Supreme Court. In fact, every member of the constituent assembly had been eager to see that the court was made independent, as it could possibly be. In the words of Austin, "The members

of the constituent assembly envisaged the judiciary as a bastion of rights and of justice. The Assembly has been careful to keep judiciary out of politics.”

In the words of a member of the constituent assembly, “This is the institution which will preserve those fundamental rights and secure to every citizen, the rights that have been given to him under the constitution. Hence, it must naturally be above all interference by the executive. The Supreme Court is the watchdog of democracy.” In fact, independence of judiciary is essential for maintaining purity of justice in the social system and enabling them to earn public confidence in the administration of justice.

In the words of Graham Waller, “The psychological fact behind the principle of independence is not the immediate reaction of feeling in a man whose impulses are obstructed but the permanent result in his conduct of the destruction of some impulses and the encouragement of others. We make a judge independent not in order to spare him personal humiliation but in order that certain motives shall not and certain other motives shall direct his official conduct.”

Methods for securing independence of judiciary:

Indian constitution tried to secure the independence of judiciary through the following methods:

(a) High Qualifications-

Politics in the appointment of judges is tried to be avoided by prescribing high minimum qualifications for such assignments in the constitution itself. An aspirant for such an important office must have been a judge of a High Court, at least for five years or must an advocate of a High Court be at least for ten years, or be a distinguished jurist.

(b) Handsome remuneration subject to vote of legislature-

By offering high salaries the independence is tried to be maintained as every judge is paid a high salary to maintain his status and dignity. In addition, they enjoy free residential accommodation and many other perks. During their term of office, their salaries and allowances cannot be altered to their disadvantage, except in grave financial emergency. The administrative expenses of the court are charged on the consolidated fund.

(c) Security of tenure-

The Judges of the Hon'ble Supreme Court enjoy security of tenure. They cannot be removed from office except by an order of the president and that also only on the ground of proved misbehavior or incapacity, supported by a resolution adopted by a majority of total membership of each house and also by a majority of not less than $\frac{2}{3}$ of the members of that house present and voting.

(d) Lengthy tenure-

The Indian constitution prescribes the retiring age of a judge as 65 years which is considerable high, considering the average span of life in India and also the average fitness of persons for work in old age. Moreover, a retired judge according to Article 128, may be reappointed a judge by the Chief Justice of India, with the consent of the president.

(e) Oath to work fearlessly-

Before joining of office, every judge has to take an oath to perform their duties fearlessly and to uphold the constitution. The supersession of three judges and appointment of a junior judge as Chief Justice raised the issue. Further a judge is expected to be very impartial.

(f) No practice after retirement-

A retired judge of the court is prohibited from practising law before any court below the rank in which he served as a judge however the constitution permits the appointment of a retired judge for a specialized form of work by the government, for instance for conducting enquiries and special investigations.

(g) Powers to make rules to regulate their procedure-

The Hon'ble Supreme Court is empowered with full powers to make rules for regulating its practice and procedure and to take effective steps for the enforcement of its decrees and orders.

(h) Control over establishment-

The court is fully authorized to have its own establishment and have complete control over it. It was, however, thought that in the absence of such a provision, the court's independence would have been illusory. If for promotion, the establishment is to look to other quarters, it is likely to affect the independence of the judiciary. Hence, all appointments of officers and servants of the Hon'ble Supreme Court are made by the Chief Justice and the judges of the Hon'ble Supreme Court whom he may direct for the purpose. Their conditions of service also are determined by the Hon'ble Supreme Court.

(i) Denial of political office before or after retirement-

The judges are not expected to hold political office after retirement otherwise it could be possible that it may bring into danger the independence of judiciary.

(j) Immunities-

The actions and decisions of the judges in their official capacity are immune from criticism. However, they may, be subject to critical academic analysis. In order to

maintain the dignity of the court and to protect it from malicious criticism, the court has been empowered to initiate contempt proceedings against any alleged offender and take appropriate action. Further, the court authorized to stop any act that might prejudicially affect its arriving at an impartial and independent decision.

(k) Appointment by the executive-

Recently the appointment of judges became a controversial issue. Independence of judiciary depends on the method of appointment of judges to a great extent. Election of the judiciary by the people or the legislature, would make it subservient to the whims of the masses or a tool in the hands of legislators. The “Judiciary should be above suspicion and should be above party influences.” Hence judiciary should be appointed by the executive. Every judge of the Hon’ble Supreme Court is appointed by the president, after consultation with such of the judges of the Hon’ble Supreme Court, and the High Courts of the state, as the president may deem necessary for the purpose. In the appointment of a judge other than the Chief Justice, the president must consult the Chief Justice.

The Indian judiciary has seen the dark day of appointing a committed judge which is termed as ‘black day’ in Indian judiciary where an elevation of a junior Judge namely Mr. A.N. Ray to the post of Chief Justice of the Hon’ble Supreme Court by superseding three judges viz., Messers J.M. Shelat, K.S. Hegde and A.N. Grover. In this case three superseded judges gave verdict against the controversial 24th and 25th Amendments on April 24, 1973. Only two days later on the retirement of Chief Justice, S.M. Sikri, a junior judge was promoted to the post of Chief Justice. In the opinion of distinguished lawyers and judicial luminaries, it was very unfortunate action on the part of the executive since it impaired independence of judiciary a great deal. It was criticised that judges toeing the line of the ruling party alone could hope for promotions. Besides, it was feared that the future

appointments might be made only out of judges or advocates or jurists who will be committing themselves to the philosophy of the party in power.

(I) Right to Information Act-

Hon'ble Balakrishnan , 37th Chief Justice of Apex Court stated that judges are the constitutional functionaries. Hence they are not coverable under the 'Right to Information Act'. The Chief Justice of India opined "...I am holding a constitutional office" This view is not accepted by the parliamentarians. Parliamentary Standing Committee presented the report to the Rajya Sabha on April 29, 2008 stated, "Except judicial decisions making, all other activities of administration and persons included in the judiciary are subject to the RTI Act. The pith and substance of the Act is to empower people by allowing them to seek information regarding those occupying high office and making decisions which affect their lives. Any reluctance only accounts to dilution of people's right to know. According to parliamentarian if other constitutional functionaries are covered why not the judges be covered by it? Further it will help in maintaining independence of judiciary as they will be accountable to the people of the country as well. Of course judicial decisions are exempted from 'RTI Act' because that could have impaired right judgments. Some of the remarks of the legal luminaries expressing high-handedness of the executive impairing the dignity of the Indian judiciary and striking at the root of its independence are worth quoting. In the words of Mr. S.M. Sikri, ex chief Justice of India, the supersession of three judges was "a big blow to the independence of judiciary...they were superseded after they decided against the government."Six eminent jurists including M.C. Setalvad and M.C. Chagla ex-chief Justice of Bombay were of the view that the union government's decision to supersede three senior most judges of the Hon'ble Supreme Court was "a manifest attempt to undermine the courts' independence...It

is the saddest day in the history of our free institutions. ”A resolution of Supreme Court Bar Association also emphasized the same point in the words, “It is a blatant and outrageous attempt at undermining the independence and impartiality of the judiciary and lowering the prestige and dignity of the Supreme Court.”No doubt if the judges are to be committed to a particular social philosophy, a similar case will be decided differently in different states. Moreover with the ousting of the party in power, judges will become out of tune with the new party coming in power. This will vitiate the whole atmosphere of the country. The executive and the judiciary in that case will always be on the look out to undermine each other’s prestige.

P.A. Sangma former Lok Sabha Speaker portrayed judicial activism viz-a-viz executive and the legislature in a balanced statement: “All the three arms of the government are meant to be active and complimentary. The inactive role of the executive in the recent past has resulted in the emergence of judicial activism... executive dormancy does trigger off judicial activism...If the people of this country find that their aspirations and fundamental rights are not protected because of the state’s inactions, they go to the courts. Why blame the courts it can only be blamed on the undesirable proclivity to acquiescence. ”However acclaiming yeoman service rendered by the judiciary, he suggested a restraint based on extraordinary understanding of the governmental system of functioning and rightly pointed out that “the courts of last resort should not end becoming the courts of first resort. ”

Considering the case of super-session of senior judges, the Law Commission’s recommended that seniority alone may not be the criterion for elevation of a judge to the post of Chief Justice. This concept of committed judiciary is dangerous which gives severe set-back to the concept of independence of judiciary. Hence Dash has remarked, “Thus the Indian judiciary has not been so well protected

against temptations and allurements or threats of punishments as will eliminate all possibilities of consideration of personal career in the discharge of their duties,” Thus it can be concluded that the constitution and its executors have made genuine attempts to make the Hon’ble Supreme Court independent and impartial but still history suggests that attempts are made to tamper with the judicial independence.

Need for judicial independence-

The concept of “Independence of the judiciary” is mainly based on the doctrine of “Separation of Powers”. The doctrine speaks about the independence of the judiciary from the interference of the executive and the legislature as the judiciary has got power to interpret the laws and render judicial decisions; the independence of judges is necessary for its appropriate working as sometimes it could happen that judges may be subjected to improper influence, inducement, pressures, threats or interference by litigants or any other criminal elements of society. 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. Therefore, it is necessary to discuss what constitutes independence of judiciary. The concept of independence of the judiciary may be defined as “the independence of judges from any external factors which interfere with the performance of their functions in an unbiased manner.” So the independence of the judiciary can be considered as the independence of the institution and also the independence of judges which forms a part of the judiciary. The constitution provided immunities to judges to ensure judicial independence which is intended for the benefit of the citizens and not for the fulfillment of their personal interests. To sum up it may be said that these immunities provide unrestrained and boundless powers which further may lead to the probability of

arbitrary and unfair use of these constitutional powers, privileges and immunities. But recently, it is called for better accountability from the judiciary

The independence of the judiciary is an important concomitant of the power of judicial review under a democratic constitution. The origin of judicial review without a specific provision under the American Constitution was laid by Marshall, C.J. in 1803 in *Marbury v. Madison*; though much earlier in 1608 Lord Coke opined it in *Dr. Bonham's case*. The Indian Constitution provides for judicial review under Articles 13, 32, 136, 141, 142, 226 and 227 of the Indian constitution. It further recognizes it as a basic feature forming an indestructible part of the constitution of India pursuant to the decision in *Keshavananda Bharti*³. Part IV of the Indian constitution provides for the directive principle of State policy in which Article 50 mandates separation of judiciary from the executive in order to maintain its independence which is essential for its function as the watchdog under the constitution. However, like every other organ of the state and every public institution in a democracy the judiciary as an institution where every judge is a public functionary and is accountable to the political sovereign—the People. The only difference lies in the form or nature of the mechanism which is required to enforce their accountability. To sum up, judicial accountability is a facet of the independence of the judiciary; and the mechanism to enforce judicial accountability should also preserve the independence of the judiciary. The rule of law is the base of democracy which will be adversely affected if the independence of the judiciary is compromised by the erosion of the integrity of the judiciary.

³ AIR 1973 SC 1461

Judicial independence under Indian constitution-

The principle of “Independence of Judiciary” is adopted by most democratic nations in the world but the meaning of independence of the judiciary is not explained anywhere. Our constitution by way of incorporating the provisions provide for judicial independence but it has not been defined as to what actually constitutes judicial independence. The constitutional provisions which ensure the independence of judiciary in India are:-

1. Article 50 mentioned under the Directive Principles of State Policy provides for the provision for separation of judiciary from executive. It states 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.

2. Art. 211 of the constitution states that “No discussion shall take place in the legislature of a state with respect to the conduct of any Judge of the Hon’ble Supreme Court or of a High Court in the discharge of his duties.” In the same way provision made in Art. 121 states that “No discussion shall take place in parliament with respect to the conduct of any Judge of the Hon’ble Supreme Court or of a 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.” Thus, the constitution of India separates the Hon’ble Supreme Court and the High Court’s from political criticism, and thus accords their independence from political pressures and influence.

3. Article 129 provides the Hon’ble Supreme Court the power to punish for contempt of itself. Similarly, Article 215 provides every High Court the power to punish for contempt of itself.

4. Article 125 speaks about the salaries of the judges. The salaries and allowances of the judges are one of the factors which show that judges are independent as their salaries and allowances are fixed. The salaries of judges of the Hon'ble Supreme Court and High Court are paid from the Consolidated Fund of India and states respectively. Article 125(1) states that "There shall be paid to the Judges of the Supreme Court such salaries as may be determined by parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule." And Article 125(2) states "Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule: Provided that neither the privileges nor the allowances of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment."

5. Article 124(2) states that the retirement age of a Supreme Court Judge is 65 years whereas Article 217(1) mentions that the retirement age of a High Court Judge is 62 years. In addition, Article 124(4) runs as "A Judge of the Supreme Court shall not be removed from his office except by an order of the president passed after an address by each house of parliament supported by a majority of the total membership of that house and by a majority of not less than two-thirds of the members of the house present and voting has been presented to the president in the same session for such removal on the ground of proved misbehaviour or incapacity."

6. Article 138 (1) states that the powers of the Hon'ble Supreme Court cannot be taken away by the parliament. Parliament can only add to the powers and

jurisdiction of the Supreme Court but cannot curtail them, making the judiciary independent from legislature.

Recent controversies on judicial independence-

The issue of judicial independence has been raised in number of cases from Sakalchand to National judicial appointment commission Bill. Recently there is a controversy on National judicial appointment commission Bill which tried to change the settled collegiums system in case of appointment of judges.

The Hon'ble Supreme Court of India's collegium system for appointment of judges to the nation's constitutional courts, has its origin in three of its own judgments which are collectively known as the 'Three Judges Cases'. Those three cases are:

1. S. P. Gupta v. Union of India - 1981⁴ (also known as the Judges' Transfer case)
2. Supreme Court Advocates-on Record Association vs Union of India⁵ – 1993
3. In re Special Reference ⁶

Over the course of these three cases, the court evolved the principle of judicial independence to mean that no other branch of the state - including the legislature and the executive - would have any say in the appointment of judges. The court created the collegium system, which has been in use since the judgment in the Second Judges Case was issued in 1993. If we peruse the whole Indian constitution, we won't find any mention of the collegium either in the original constitution of India or in successive amendments. Though the creation of the

⁴ AIR 1982 SC 149

⁵ (1993) 4 SCC 441

⁶ 1 of 1998

collegium system was viewed as controversial by legal scholars and jurists outside India, her citizens, and notably, parliament and the executive, have done little to replace it. The Third Judges Case of 1998 is not a case but an opinion delivered by the Hon'ble Supreme Court of India responding to a question of law regarding the collegium system, raised by then president of India K. R. Narayanan, in July 1998 under his constitutional powers.

Moreover, in January 2013, the court dismissed on the ground of locus standi, a public interest litigation filed by NGO Suraz India Trust which sought to challenge the collegium system of appointment. In July 2013, Chief Justice of India P. Sathasivam spoke against any attempts to change the collegium system.

On the 5th of September, 2013, the Rajya Sabha passed The Constitution(120th Amendment) bill, 2013, which amends articles 124(2) and 217(1) of the Constitution of India, 1950 and establishes the Judicial Appointment Commission, on whose recommendation the president would appoint judges to the higher judiciary. The criticism about the new setup is that the government through the amendment seeks to achieve is the composition of the judicial appointment commission, the responsibility of which the amendment bill lays on the hands of the parliament to regulate by way of Acts, rules, regulations etc. passed through the regular legislative process.

Interpretation of the word "Recommendation"-

In the judgment of the presidential reference case, Hon'ble Supreme Court dealt elaborately, the modality of rendering recommendation by a constitutional entity such as Supreme Court, President of India, etc. It is not at the discretion of the person consulted to render the recommendation but internal consultations with the

peers shall be made in writing and the recommendation shall be made in accordance with the internal consultations.

Establishment of National Judicial Appointments Commission-

The Lok Sabha and the Rajya Sabha, on 13 August 2014 and on 14 August 2014 respectively passed the National Judicial Appointments Commission (NJAC) Bill, 2014 to scrap the collegium system of appointment of Judges. The president of India gave his assent to the National Judicial Appointments Commission Bill, 2014 on 31 December 2014, after which the bill has been renamed as the National Judicial Appointments Commission Act, 2014.

99th Amendment and NJAC Act quashed by the Hon'ble Supreme court-

On 16 October 2015, by a majority opinion of 4:1, the Hon'ble Supreme Court struck down the constitutional amendment and the NJAC Act restoring the two-decade old collegium system of judges appointing judges in higher judiciary. The Hon'ble Supreme Court declared that NJAC is interfering with the autonomy of the judiciary by the executive which amounts to tampering of the basic structure of the constitution where parliament is not empowered to change the basic structure. However the Hon'ble Supreme Court has acknowledged that the collegial system of judges appointing judges is lacking transparency and credibility which would be rectified/ improved by the Judiciary.

Conclusion-

In India the judiciary is relied upon by the citizen to solve many of their difficulties and therefore consistent standards of accountability that give the Indian judiciary this strength are of utmost importance. Lack of judicial accountability reduces the

credibility of the judiciary whereas, an accountable judicial institution can only lead to a stable political atmosphere as well as a far more efficient system of governance. However, it is also acknowledged that judicial accountability if stretched too far can seriously hamper judicial independence and thus it is essential that we strike the right balance between the two. The final outcome of the above discussions is that the importance of the independence of the judiciary was long ago realized by the framers of the constitution which has been accepted by the courts by marking it as one of the basic features of the constitution. It is well known that law has to change so as to meet to the expectations of a changing society. Similarly judicial independence too has to be seen keeping in mind the changing dimension of society. Judicial Accountability and Judicial Independence have to work hand in hand symbiotically to ensure that the real purpose for setting up of the institution of judiciary is achieved. Transparency is facilitated through the process of accountability. It is best achieved when one is accountable to law. Thus, judicial accountability and judicial independence are two most important aspects with the help of which the tension between two wings of the government i.e. legislature and judiciary can be reduced as these two aspects help to facilitate the smooth functioning of the government and prevents to create judicial autocracy.