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Judicial Appointment, Accountability and Constitutional Obligation of Judges in India

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Abstract:

The Supreme Court of India and its role to upgrading the concept of judicial accountability is weak as compared to the foreign legal system. In the behind of judicial independence veil the judicial system of India moving towards the gross failure. Inordinate delay, corruption, deviant behavior of the higher judiciary, power despotism with the help of contempt proceeding becomes modern phenomenon of judiciary of India. There is having room for development in the procedure of appointment of higher judiciary, their removal and transfer.

Present Article speaks about the Judicial Accountability and Constitutional obligation of the judiciary in India. Whether judicial Accountability and Constitutional obligations are the two side of a same coin or not? Whether judges of the Superior Court shall be accountable to the people for their functioning? Whether here is necessity to think that regular assessment of judicial functionary is important? Whether here is necessity to think that their promotion shall be based on their performance. Above questions will be discussed in the rest of this article.

Key Words: *Judicial Accountability, Power despotism, assessment of functions, Justice delay & denied, right to justice,Contempt of Court.*

INTRODUCTION

Indian Judiciary system is the most powerful judiciary in the world after USA. Judiciary in India being a democratic country is vested with the highest power by the people and is considered as strongest pillar of the democracy. Judiciary in India has been given Supreme powers by the Legislature which has lead to the non-accountability of the judiciary to anyone. Judiciary in India enjoys Judicial Independence but this independence sometimes results in misuse of the powers and privileges by the Judges. Thus, the concept of Judicial Accountability is nowadays is in question. All over the world various conferences and discussions are going on as to whether judiciary can be held accountable for actions.

Judges are being criticized usually that they never live in real world. So there is problem arise to link the judges with the outside world. The critical function of the judiciary is the application and interpretation of law and to ensure that "justice should not only be done, but also seen to be done"[1]

The behavior of judges is closely scrutinized to ensure continued confidence in the integrity of the courts. Ifa judge appears partial, public confidence in the judiciary is eroded, the public loses confidence in the judiciary, and the judicial system cannot function.[2] Therefore, judges must avoid all activities suggesting that the judge's decisions are affected byself interest or favoritism.

Throughout the ages, and in all societies, impartiality has been regarded as the essence of the administration of justice.[3] It is essential for a judge to maintain, in court, a demeanor which gives to the parties an assurance that their case will be heard and determined on its merits, and not according to some personal predisposition on the part of the judge.[4]

The Judges also human beings they do not approach the task of adjudication in blindfolded. They disembark at the bench already fashioned by their own experiences and by the perception of the society they come from, and they might have belief and disbelief, like everyone else. The difference may happen between judicial fairness and human being nature of judges. Judges shall not deny their human nature relatively they has to acknowledge it. But when they accept their human nature they shall be in position to recognize how they can reach impartiality which is demand of their job.

The Constitution vests a lot of power and certain amount of immunity in judges. Fairness and impartiality are the fundamental qualities to be possessed by a judge. In India, for the vast majority of cases, there are no reports of having been heard by a partial and unfair judge but there are instances where the contrary happens.

It was held in *Ram Jawaya v. State of Punjab*[5] "The Indian Constitution has not indeed recognized the doctrine of Separation of Powers in its absolute rigidity but the functions of

[1] Chief Justice R. C. Lahoti, *First M. C. Setalvad Memorial Lecture on "Canons of Judicial Ethics "* 45 UNIV. of New Brunswick L. Jour. 81 (1991).
[2]Kharel, Rajendra. *Recusal and Disqualification of Judges: An Overview* 4 NJA LAW JOURNAL13-24 (2010).
[3]*Id*
[4]*Id*
[5]Ram Jawaya v. State of Punjab, AIR 1955 SC 549.

the different parts or branches of the Government have 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 one another."

a) Definition and interpretation of judicial accountability.

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.

The Constitution provides for accountability of the Executive to the Legislature and the Judiciary and of the Legislature to the Judiciary and the voters. The Judiciary is also accountable to the public. Within the Judiciary, accountability to the superior Court is built into the system because of the requirement: (a) of public hearing of both sides and (b) giving reasons for the decision which can be corrected by review or in appeal or revision. In the case of the Supreme Court which is the highest Court without any scope for further appeal or revision, in addition to the provision for review, a curative petition lies on limited grounds as declared in *Rupa Ashok Hurra v. Ashok Hurra*[6]. Errors of law can be corrected by larger Benches. Judicial appointments made on the recommendation of a Collegiums of Judges are liable to be challenged in a Court of law. There is a precedent where the Supreme Court has quashed the appointment of a High court Judge.

b) 230th Law Commission Report

230th Law Commission Report laid down certain guidelines to improve judicial lethargy and raise more responsibility and responsibility of judiciary. Some of the recommendations of this report are,

[1] There must be full utilization of the court working hours.

The judges must be punctual and lawyers must not beasking for adjournments, unless it is absolutely necessary.Grant of adjournment must be guided strictly by theprovisions of Order 17 of the Civil Procedure Code.

[2] Many cases are filed on similar points and one judgment candecide a large number of cases. Such cases should beclubbed with the help of technology and used to disposeother such cases on a priority basis; this will substantiallyreduce the arrears. Similarly, old cases, many of which havebecome infructuous, can be separated and listed for hearingand their disposal normally will not take much time. Same istrue for many interlocutory applications filed even after themain cases are disposed of. Such cases can be traced withthe help of technology and disposed of very quickly.

[6]Rupa Ashok Hurra v. Ashok Hurra,(2002) 4 SCC 388.

[3] Judges must deliver judgments within a reasonable time andin that matter, the guidelines given by the apex court in thecase of *Anil Rai v. State of Bihar*[7], must be scrupulously observed both in civil and criminal cases.

[4] Considering the staggering arrears, vacations in the higherjudiciary must be curtailed by at least 10 to 15 days and thecourt working hours should be extended by at least half-anhour.

[5] Lawyers must curtail prolix and repetitive arguments andshould supplement it by written notes. The length of the oralargument in any case should not exceed one hour and thirtyminutes, unless the case involves complicated questions oflaw or interpretation of Constitution.

[6] Judgments must be clear and decisive and free fromambiguity, and should not generate further litigation.

[7] Lawyers must not resort to strike under any circumstancesand must follow the decision of the Constitution Bench ofthe Supreme Court.[8]

All over the world various conferences and discussions are going on as to whether judiciary can be held accountable for actions. Judiciary is one of the main constituents of democracy to uphold the rule of law.

It is always necessary for the judiciary to perform its functions in an atmosphere of independence and freedom from the executive and legislature. This sort of independence is necessary to guard the constitution and right of the individuals. Accountability is a much-used but rarely defined word. At its core, accountability means that a person or class of persons is answerable for his or her actions and decisions to some clearly identified individual or body.

„To talk about accountability", it is said, „is to define who can call for an account and who owes a duty of explanation". Its bottom line is that someone in an organization can accept the blame or praise for a decision or action. Judicial Accountability is an assertive concept that members of the judiciary are responsible to the public on abuses of judicial powers and moral misconduct of the members against the genuine expectation of public. The competing perspectives have endemic common features- justice without fear or favour and justice should uphold the truth.

To a large extent the call for greater judicial accountability can be seen in the context of a broader debate, in which those who exercise the enormous and increasing power of the State are called upon to be accountable to the community they serve. With this goal in mind, the advancements in administrative law in recent years, including the creation of the office of the

[7]Anil Rai v. State of Bihar, (2001) 7 SCC 318.

[8]Harish Uppal (Ex-Capt.) v.Union of India, (2003) 2 SCC 4.

Ombudsman and the introduction of freedom of information legislation, were designed to ensure the accountability of the executive branch of government.

Also, during the 1980s, accountability became something of a vogue term in the managerial revolution which swept through the public sector. Codes of conduct, performance indicators, new reporting requirements and the like were introduced to supplement the traditional lines of accountability leading up through the public service to the Minister, Parliament and its committees and thence to the electorate.

In the words of Abraham Lincoln, "A community where the state power is deliberately used to modify the normal play of economic forces so as to obtain a more equal distribution of income for every citizen, a basic minimum irrespective of the market value of his work and his property is known as the welfare state."

In the strictest sense, a welfare state is a government that provides for the welfare, or the well-being, of its citizens completely. Such a government is involved in citizens" lives at every level. It provides for physical, material, and social needs rather than the people providing for their own. Judiciary is a very essential part of any legal system and government, to enforce and protect the right of individual, respect to constitutionalism and its mechanism directly protected by Judiciary.

Indian judiciary is not free from corruption and discrimination made by lower and higher court. The extortion of the litigants is regular business ofthe judicial servants. The whole money extorted from the litigants is being collectedwith the Reader of the court. From this booty, lunch is being served for the Judiciary;their monthly household expenses are met. The remaining booty is being distributedamong the staff of the judiciary. The litigants should be protected from the exploitation.

PRESENT APPOINTMENT OF JUDGES IN SUPERIOR COURTS

The procedure for appointment to the judges to the Supreme Court and High Court is provided under Article 124 and 217 of Indian Constitution known as „Judges Appointment clause" provides judges of the Supreme Court are to be appointed by the President upon consultation with the Chief Justice of India. In the First Judges Case[9] which is popularly known as *S.P. Gupta* v. *President of India and Ors.* Supreme Court held that Supreme Court and High Court judges appointed by President and Chief Justice of India recommendation to the President can be refused for strong reasons. So in the first judge case gave the supremacy of executive over the judiciary in the appointment and transfer of the judges.

In 1993 *Second Judge Appointments Case*[10] where nine judges of the Supreme Court decided held that, no appointment of any judge to the Supreme Court or High Court can be made unless it is conformity with the opinion of the Chief Justice of India. The *Second Judges Appointment Case* brought into existence the system of appointment of judges popularly as the "Colleguim" system of appointments of judges. In 1998, the *Third Judges Appointments*

[9] *(1981) Supp (1) SCC 87; AIR 1982 SC 149.*

[10] *Supreme Court Advocate on Records Association* v. *Union of India* (1993) 4 SCC 441.

Case[11] improved on existing "Colleguim" system of judicial appointments. In 2014, the national Judicial Appointment Commission bill was introduced to the Loksabha and it was enacted on December31, 2014 as The National Judicial Appointments Commission Act. Along with NJAC Act, the parliament also passed the Constitution (121st) Amendment Bill, 2014 that insert Article 124A into the Constitution. NJAC Act was enacted to replace the Colleguim system with new NJAC system for appointment of judges to the Supreme Court and High Courts. But suddenly it was challenged on October 16th 2015 before Supreme Court, in the Fourth Judges Appointment Case[12] five judges of the Supreme Court held that, the NJAC Amendment unconstitutional as violating of the basic structure of the Constitution. So for Appointment and transfer of judges of Supreme Court and High Courts from 2015 to till now we are following the same colleguim system in Judiciary.

This is the most complicated and absurd phenomenon of Legal system of India. The process of judicial appointment in India is the turning point of major development and reform. The collegiums system, formulated in the second, third and fourth judges" cases, has been hindered in the controversy for multiple reasons.

A study of social backgrounds of Supreme Court judges appointed between the period 1950-1990 reveal that over 40% of them were Brahmin at any point of time while close to 50% were from other forward castes and the percentage of Schedule Caste , Schedule Tribes and Other Backward Class barely crossed 10% at their highest.[13] Not much changed during the period of the collegiums system as in the year 2011 the report brought out by the National Commission for Schedule Caste[14] noted that out of 850 judges of 21 High Courts of India , only 24 belonged to SC/STs. Even though court have no obligation to appoint particular group of people but continued absence of these group of people can draw the implication that there is inbuilt bias against these group of people. This kind of implication is in itself attached on the credibility, public confidence and legitimacy of the court.
The Court decoding the supply relating to appointment of judges by the government took over for itself the facility of appointment of judges. The judiciary has become sort of self perpetrating political system. There is no system followed within the choice of judges and there is no transparency with the system.

Under Article 222 of the Constitution the Chief Justice of India has to be consulted on the question whether a particular Judge should be transferred and where he should be transferred while implementing the said policy. If the Government requests the Chief Justice of India to give his opinion on a transfer to implement the said policy which is really in the public interest he cannot decline to do so. Even though the Chief Justice was opposed to the 'wholesale transfers' of Judges there is no bar for the Government treating the

[11] *In Re: Special Reference No. 1 of 1998*, (1998) 7SCC 739.
[12] *Supreme Court Advocates-on-Records Association* v. *Union of India* (2016) 5 SCC 1.
[13] GeorgeH Gadbois, "Judges of the Supreme Court of India- 1950-1989" *Oxford University Press* (2011).
[14] Law Commission of India, "National Commission on Schedule Caste AReport on Reservation in judiciary" (January, 1988).

recommendation for transfers made by the Chief Justice of India as a part of the implementation of its policy.[15]

121st Report of Law Commission of India

The Law Commission of India recommended for constitution of National Judicial service Commission. The report of law commission recommends NJSC shall have eleven members, namely,

1) the chief justice of India and three senior most judges of Supreme Court,
2) three senior most chief justice
3) Minister of Law and Justice,
4) Attorney General of India
5) Immediate retiring office of the Chief Justice of India
6) An outstanding law academic

Law commission also recommends that Commission will also have its own procedure for suggesting persons for selection. Commission recommendation would bind on President but President may refer the recommendation back to Commission on the basis suitability of the candidate.

The Constitution (67th Amendment) Bill:

In 1990 the Constitution 67th Amendment Bill was introduced for National Judicial Commission, but it has being lapsed since then.

In *Supreme Court Advocates-on Record Association* v. *Union of India*[16], also commonly known as *Second Judge's Case*, Article 124(2) was broadly interpreted. In this case opinion and satisfaction of Chief Justice of India shall have primacy in all types of judicial appointments. It means that in the appointments of judicial posts consultation with CJI is compulsory. In Addition Supreme Court held that only CJI views is not required but also two of the senior most judges of the Supreme Court is essential. In this way Colleguim system of appointment started with second judge case. Still uncertainty regarding judicial appointments was not totally cleared. Justice A.M. Ahmadi took the dissenting opinion, Hon"ble Justice Verma wrote the majority opinion on behalf of four judges.

The uncertainty regarding judicial appointment was not cleared, the uncertainty arise the then president K.R. Naryanan to consign this affair for Presidential reference. In 1998, in Re Presidential Reference which is also known as the third judges case, in this case Supreme Court held that The Chief Justice of India shall make a approval to appoint a Judge of the Supreme Court and to transfer a Chief Justice or Judge of a High Court in consultation with the four senior-most Judges of the Supreme Court. At the time of Appointing High Court judges, the recommendation must be made in consultation with the two senior-most Judges of the Supreme Court.

So in this way Colleguim system of appointment of judges" start where consultation with four senior judges becomes compulsory. Apex court cleverly declared the supremacy of executive but kept the control under hand in appointing the judges.

[15] *Id.*
[16] (1993)4 SCC441.

But this system also was not complete, it has also many loopholes, so the colloquium system was criticised on the ground of lack of judicial accountability, lacking transparency, being biased and corruptions. New scamp of the judiciary were being disclosed by the media, people of India roared the voice of judicial accountability and justice. For that purpose appointment of judge‟s issue again came on the top for the government. Example like Chief Justice of Gujarat High Court, Justice Bhaskar Bhattacharya, and allegation was framed that Justice Bhattacharya was not selected to Supreme Courtbecause he was opposed to the selection of then Chief Justice Atmas Kabir sister to become Calcutta High Court Judge.

Judicial Standard Accountability Bill:

Judicial standard Accountability bill, 2010 provided mechanism to deal with complaints against judges of High Court and the Supreme Court, the said bill was brought to Lok Sabha with fresh amendments in December 2011. According to the Bill, "any judge who makes oral comments against other constitutional authorities and individual would render himself/herself liable for judicial misconduct. The bill also set some judicial standards for making judges accountable for their lapses in declaring their assets and liabilities including those of their spouses and dependents and also made provision to file annual returns in this regard which will be displayed on the website of Supreme Courts and High Courts.

Highlights

- The Judicial Standards And Accountability Bill, 2010 requires judges to declare their assets, lays down judicial standards, and establishes processes for removal of judges of the Supreme Court and High Court.
- Judges will be required to declare their assets and liabilities, and also that of their spouses and children.
- The Bill establishes the National Judicial oversight committee, the Complaints Scrutiny Panel and an investigation committee. Any person can make a complaint against a judge to the oversight Committee on grounds of „misbehavior".
- A motion for removal of a judge on grounds of misbehavior can also be moved in parliament. Such a motion will be referred for further inquiry to the oversight Committee.
- Complaints and inquiries against judges will be confidential and frivolous complaints will be penalized.
- The oversight Committee may issue advisories or warnings to judges and also recommend their removal to the President.
- The Bill mandated that judges should not have 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 not contest any election to any office of Club, Society or other Association except those associated with law or any court.

- Judges should not have any bias in judicial work or judgements.

- Section 3(2) (g) of the Judicial Accountability Bill 2012, prohibits judges to making any comment against the conduct of any Constitutional or Statutory authority at the time of hearing matters which are pending before them or likely to arise for judicial determination.

- The proposal on setting up of National Judicial Commission for appointment of judges to High Court and Supreme Court.

Analysis

- Balance between judicial independence and judicial accountability is possible or not by the proposed Bill. Oversight committee has non-judicial members which might impinge on the independence of the judiciary.

- The Bill penalizes anyone who breaches the confidentiality of complaints. Whether penalty is needed or not is a question.

- The Scrutiny panel has judges from same High Court. This is different from the in-house procedure of the Supreme Court.

- The Oversight Committee has non-judicial members. The procedure of the Committee is not in house procedure of the judiciary. It is not clear whether the power of Oversight Committee to impose minor measures is constitutionally valid.

- The bill does not mentioned about whether judge has a right to appeal against order of removal to the Supreme Court or President after parliament found him guilty for „misbehavior".

Result

Unfortunately this bill could not succeed before the parliament and therefore the changes expected in the process of judicial accountability for time being stooped. The bill even though could have passed before the parliament; it could not stand before the Supreme Court of India. So here researchers want to mention that the improvement in the Indian Judiciary is possible when judiciary is inclined to accept the changes in themselves.

EVOLUTION OF NATIONAL JUDICIAL APPOINTMENT COMMISSION

THE CONSTITUTION (NINETY-NINTH AMENDMENT) ACT, 2014 was passed by the Lok Sabha on 13th August, 2014 and the Rajya Sabha on 14th August, 2014. President gave the assent to the Act on 31st December 2014 and it came into force from 13th April, 2015.

The Constitution Ninety Ninth Amendment Act provides for the composition and the functions of the NJAC. The members of NJAC will be consisting of according to Article

124A[17]. Through this Act the Constitution of India was amended and Article 124A, 124B, 124C was added to Article 124.

The **NATIONAL JUDICIAL APPOINTMENT COMMISSION Act** also passed on 31 December 2014. The preamble[18] of the Act define its purpose which having relating to appointment and transfer of the judges.

Section 5 of **National Judicial Appointment Commission Act;** specify the procedure to selection of the Supreme Court judges whereas sections 6 will specify procedure to select High Court judges. The selection will do by commission on the basis of seniority and on merit and ability wise. Section 11of the Act specify the rule making power of the Commission. So that‟s why this Act being criticised and challenged on the aspect that it violating the basic structure Doctrine which was evolved by the Supreme Court in Kesavananda Bharti case and also intervention of executive and political parties in the appointment of judges which is being seemed against independence of Judiciary.

In 2014 the central government of India appointed the National Judical Appointment Commission (NJAC) by amending Constitution of India Through the ninety-nine Amendment with ninety- nine Amendment Act, 2014 which was passed by the both the house of the parliament. The NJAC would have replaced the Colleguim system which was invoked through the result of Second and third Juges" cases. But Supreme Court of India on 16 October 2015 struck down the NJAC Act with 4:1 Majority. The purpose of NJAC Act was to replace the appointment process which was going on from two decade for Supreme Court and High Court judicial appointment but this effort was vanished under the name of judicial Independence.

On 3 November 2015 the Supreme Court upheld that it is open the bringing greater transparency in the colleguim system under the four head;

- How the colleguim system can be made more transparent,

[17] 124A. (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:—
(a) the Chief Justice of India, Chairperson, *ex officio*;
(b) two other senior Judges of the Supreme Court next to the Chief Justice of India —Members, *ex officio*;
(c) the Union Minister in charge of Law and Justice—Member, *ex officio*;
(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People — Members: Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women: Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for re-nomination.

[18] *An Act to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto.*

- The fixing the eligibility criteria through which more eligible candidate will be appointed as a judge,
- A process can be created to receive and deal with the complaints against judges without diluting the judicial Independence,
- Debate on whether a separate secretariat is required, and if so, what could be its functioning, composition and powers.

So finally the judicial system of India been became untouchable to improvement till now because the NJAC judgment[19], and from 2014 to up till now process of judicial appointment being stuck in the era of 1970 and 80. From first judge case till today there is no room for any improvement happen for the judicial Accountability even though there is urgency to improve the judicial system

Serious criticism rose among the judiciary that Law Minister may interfere in to the functioning of NJAC and he can send the detail of the vacancies in the higher judiciary. This is against the Theory of separation of power and if Law minister exercised both power like Executive and Judicial, then there will be chances of misusing the power because absolute power corrupts absolutely. Article 124A (1) (d) also criticised on the basis that introduction of reservation in NJAC which will result that particular member of the Commission will try to cherish the cause of the community and class where he belongs. Up till now the judiciary was immune from any type of government reservation but through NJAC will introduce reservation in the judiciary.

Section 13[20] of National Judicial Appointment Commission Act also objected on the basis that Article 145 and 229 of the Constitution of India empowered the rule making power to judiciary. It means that Sub-ordinate legislation drafted by judicial bodies shall lie before the parliament which is against the Constitution. Sub-ordinate legislations framed by judiciary under the Indian constitution are class wise different, and are not subject to similar treatment.

"It is difficult to hold that the wisdom of appointment of judges can be shared with the political-executive. In India, the organic development of civil society has not as yet

[19] The majority on the NJAC bench held Article 124(1) (C) ultra vires to the provision of the Constitution on the ground that the inclusion of the Law Minister, as an ex officio member of the NJAC impinged upon the independence of the judiciary as well as the separation of powers, and hence violation of the basic structure of the Constitution.

[20]Section 13. Rules and regulations to be laid before Parliament :
Every rule and regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the other organs of governance,"[21] Supreme Court rejected the NJAC Act and 99th amendment to the Constitution also declared unconstitutional and void and colleguim system would be operative relating appointment of the higher judiciary.

Learned Senior Counsel appearing before the Constitution bench under this case made contention that impugned act infringe the basic structure of the Constitution as the same demoralizes the independence of judiciary as the very act itself challenge the role of the Hon'ble Chief Justice in selection of the judges to the Higher Judiciary and therefore, the act must be declared as ultra vires.

National Judicial Commission to be with the concept of independence of judiciary:

Since the independence of judiciary constitutes a basic feature it cannot be taken away or curtailed in any manner by an amendment to the Constitution, it can neither be done directly nor can it be done indirectly. In other words, the independence of the judiciary cannot be affected or curtailed by so changing the method of appointment of judges of the Supreme Court and High Court as to impinge upon their independence.
For example, if Article 124 and 217 are amended to take away the consultation with the Chief Justice of India, it would vitally affect the independence of the judiciary. In such a case the appointment would in fact be made by the executive acting alone in the case of Supreme Court and in the case of the High Court the element of executive would predominate and the concept of primacy of Chief Justice of India would disappear. The convention that the proposal should emanate from the Chief Justice of India (in the case of Supreme Court) would also come to naught. Similarly, if tomorrow a National Judicial Commission is created and it is so constituted that the executive dominates it, it would equally be volatile of the basic structure of independence of the judiciary of our Constitution. It is equally essential that the Commission be presided over by the Chief Justice of Indian and by none else. The composition of the Commission should not also be such that the predominance of judiciary is diluted. Any such measure would be violative of the principle of independence of judiciary which has been accepted and affirmed as a basic feature of the Constitution. Rightly, therefore, the Constitution 67th Amendment Bill provided for a National Judicial Commission, which in the case of appointment to the Supreme Court, consisted exclusively of the Judges (Chief Justice of India and two senior most judges of the Supreme Court) and in the case of appointment to the High Court, the Chief Justice of India, the next senior most judge of the Supreme Court, Chief Justice of the High Court and the Chief Minister of the concerned State. It must also be remembered that the inclusion of the Chief Minister in the National Judicial Commission in so far as the appointment to the High Court was criticized by the Arrears Committee constituted by the Government of India on the recommendation of

[21] *Supreme Court Advocates-on-Record -Association and another* v.*Union of India,* MANU/SC/1183/2015. Justice J.S. Khehar, the presiding judge on the five-judge Constitution Bench, explained in his individual judgment.

the Chief Justices' Conference. By introducing a proviso and an Explanation in Article 124(2), pointed out hereinabove, the role of the executive in the matter of appointment was substantially diluted. Not only was the President precluded from appointing any person not recommended by NJC, the President (Council of Ministers) has to record reasons in writing for not accepting a recommendation made by the NJC.

POWER OF CONTEMPT AND JUDICIAL ACCOUNTABILITY

Common men in this country have great faith and respect on the judiciary, but that respect shall not from fear. Threat of contempt cut off the minute changes of judicial accountability in India. Arundahati Roy was sent to jail for one day for talking about rehabilitation of families discarded by Narmada Project adversely against judicial action. The power of judiciary under Contempt of Court Act, become powerful weapon to suppress the public criticism or even honest evaluation of the judiciary. While deterring people from making unwarranted attacks on judiciary, the Contempt of Courts Act, 1971, has also questionable before peoples. The conduct of judiciary is hardly discussed or debated in the media.

The present day Contempt of Court Act derived from the English law in which was enacted in first time 1926. After the independence the contempt of Court Act 1952 was enacted. The concept of Contempt may classify in Civil and Criminal contempt. Civil contempt means willful disobedience of any, judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking to a court.[22] Whereas Criminal Contempt means the publication of any matter or the doing of any other act whatsoever which- Scandalizes or tends to scandalize or tends to lower the authority of, any court, or prejudices, or interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other matter.[23] The main objectives of this Act to protect dignity of Court which also restrict the constitutional freedom of speech and expression.

Report of the Sanyal Committee

In 1961, government set-up committee headed by Shri H.N. Sanyal to make required changes in to the Contempt of Court Act 1952. The objective to establish the committee were following;

1. To examine the law relating to contempt of Court generally and in particular the law relating to the procedure punishment thereof,
2. To suggest amendments therein with a view to clarifying and reforming the law wherever necessary
3. To make recommendations for codification of the law in the light of examined various judgments of SC and HC.

After recommendations given by committee government replace 1952 Act, and the Contempt of Courts Act 1971 come into existence.

[22]Contempt of Court Act, 1971, § 2b, Acts of Parliament, 1971 (India).

[23]Contempt of Court Act, 1971, § 2c, Acts of Parliament, 1971 (India).

National Commission View

National Commission submitted its report to the government on 2002, which was mainly, was established to introduction of „truth" as defence in contempt proceedings, so commission considered that amendment of the new contempt law is not sufficient but also amendment to the constitution is required because ultimately Constitution specify the power of court to punish under contempt law. Therefore a proviso was recommended to add Art. 19(2) as under:

"Provided that, in matters of contempt it shall be open to the court to permit a defence of justification by truth on satisfaction as to the bona fides of the plea and it being in public interest."

The Contempt of Courts (Amendment) Bill, 2004

The parliamentary committee submitted some suggestion as follow:

1. Accused should be given opportunity to defend himself according to law, to respect the bona fides of the plea in course of natural justice;
2. A proviso shall be added to Sec. 13 of Contempt of Court Act through which any critical, analytical, objective and fair comment on the court proceedings made by the media, based on the reasonably sources, the media person shall not attract contempt proceedings;
3. Again a proviso to Sec. 13 namely: "any comments made by any person and published, regarding the conduct of a presiding judge of a court, which does not interfering with the official functioning of the Court and which is true fact, found an reasonable ascertainment, shall not attract contempt proceeding;
4. Cases of contempt shall be tried by independent commission not by Courts;
5. The words „bona fide" and „in public interest" would be deleted from Sec. 13 of the Act;
6. Contempt of Court Act shall be amended to remove words, „scandalizing the court or lowering the authority of the court" from criminal contempt;
7. Contempt proceeding shall be heard by a different judge;
8. There shall be a code of conduct for the judges, so that the safeguards of contempt of court may exercised;
9. The law of contempt shall be subjected to freedom and rights guaranteed under Constitution of India.
10. A proviso to Art. 19(2) of the Constitution shall be given effect;
11. The words from Sec. 13(b), „the court may permit" shall be deleted;
12. No contempt proceeding shall be initiated against members & officers of Bar Association of respective Courts; unless the committee of a minimum 75 members, including two sitting or retired judges, one public representative comes to the conclusion that contempt is made.

All these suggestion never accepted but Sec. 13[24] of the Contempt of Court Act slightly changed. The word „public interest" never changed from the principal Act up till now. The justification of government in relating not to delete the words „public interest" in

[24]Notwithstanding anything contained in any law for the time being in force, (*a) No court shall impose a sentence under this Act for a contempt of Court unless it is satisfied that the contempt is of such nature that it substantially interferes, or tends substantially to interfere with due course of justice.*
(b) The Court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request invoking the said defence is bona fide.

following words, "under the first exception to Sec. 499 of Indian Penal Code, it is not defamation to impute anything which is true concerning any person, if it is for the public good. In other words, the right to disclose truth against anyone can be allowed for the public good. The only difference between two words, „public interest" and „public good" under Sec. 499 of IPC, anyone can take defence without permission of the Court under Principal Act permission of court is required for invoking truth as a defence. This is only to have proper balance between to maintain the judicial functionary without unhampered and the publication of truth for public cause."[25]

The Attorney General, Soli J. Sorabjiee mentioned the need for amending the law contempt in this words, "If as a journalist you publish such and such judge is corrupt, you will be hauled for contempt, even if you are ready to prove with evidence. The law does not allow any justification in contempt, if there is a serious challenges (in the Supreme Court) this may be regarded as an unreasonable restraint, on the freedom of expression. How can we not allow a person to justify what he says is not Contempt? If he fails, we will come down heavily on him. Otherwise law of contempt operates as a cover for a corrupt judge."[26] This is exactly true that how does one uncover judicial corruption and misbehaviour? The procedure to make complaint is under the Judges Inquiry Act, 1968 end with impeachment proceeding which is very tough in India. It is self evident from the example like Justice V. Ramaswamy case in 1990-1994, Bombay judicial crises in 1994-95, A. M. Battacharjee case 1995. The bar and public pushed into silence on edge of Contempt proceeding and non- cooperative judges could be disciplined by in house procedure. In case *ThrusharKanti Ghosh Editor*[27], Court said, "there can be no justification of contempt of court. Even assuming that the writer believes all he states therein to be true, if anything mentioned amounts to contempt of Court, writer is not permitted to lead existence to establish the truth of his allegation.

The contempt law is origin of English legal system, which a main objective was to curtail the criticism raised by the Indian politicians and civilians in pre-independence era. The opinion of British Jury was that, "in small colonies consisting principally of coloured populations, the enforcement in proper cases for committal of contempt of court for attacks on courts may be absolutely necessary to preserve in such a community, dignity and respect for the court"[28]. But we are in modern democracy world where accountability and responsibility of government wings are the pre-condition for existence of democracy form of the government.

Why imposition on Judicial Discipline

The judges shall be disciplined for the three reasons. The first is for democratic public accountability- so that the governed may safely relinquish control to those

[25]SHUKLA M.,JUDICIAL ACCOUNTABILITY WELFARE AND GLOBALISATION, 20 (Regal Publication2010).

[26]Sridhar, M.,Seven Question on Judicial Accountability;*Judicial Independence And Accountability*120-143(2008).

[27]AIR 1935 CAL 419.

[28]Prashant Bhushan, *Securing Judicial Accountability: Towards an Independent Commission*ECONOMIC & POLITICAL WEEKLY,2007 at 14-17.

who hold authority.[29] The second is to „enforce adherence to law itself- so that neutral principle rather than his own personal preferences motivate in his decision in each and every case. The third is to ensure that judges will follow to professional standards of behaviour and conduct so that they will not lose their respect of those who are subjected to it while exercising their authority.

While justifying first reason, in democracy, citizen must exercise their control over their government. Without this control, the exchange of power from citizens to government cannot be legitimate. It does strictly apply to political leaders so it applies to judges as well. Adherence to legal norms is important because a judicial decision shall be reliable and accurate.

Code of Conduct for Judges

Hon‟ble Mr. Justice S. H. Kapadia, chief justice of India said, "When we talk about ethics, the judges normally comment upon ethics among politicians, students and professors and others. But I would say that for judge too, ethics, not only constitutional morality but even ethical morality, should be the base "

"These days we (judges) are telling everyone what they should do but who is to tell us? We have talk of enforcing the rule of law, but does not exempt and even exonerate us from following it"[30].

CONSTITUTIONAL OBLIGATION OF JUDGES

The Constitution of India laid down some express or implied limitation to the each organ of the state so judiciary is not also immune from the constitutional morality. Indian judiciary especially superior courts need to explain the obligations available under Indian Constitution. Some of the following;

1. Judges bear in mind that justice shall be administered according to the law and chief law is public good. Interpretation of law has to be according for the purpose of proper implementation of the rule of law.
2. Law has to be interpreted according current standards of society, for the purpose of finding a solution to the new problem.
3. Complete justice possible only when it encompass with morality and ethics.
4. Judiciary shall keep everyone within the boundary indicated by constitution, that boundary also applicable to the judges.
5. The contempt power which is given to the judges for check the disobedient, to punish habitual and the adamant and not for their own personal majesty.

[29]Sankar, S. N.,*Disciplining the Professional Judge*,88:1233CALIFORNIA LAW REVIEW, 1233-1278(2000).

[30]Prof. Dr. K.C. Jena, *Judicial Independence and Accountability: a Critique,* 39 INDIAN BAR REVIEW, 4(2012).

6. Independence of judiciary does not mean merely independence from outside but also from within themselves. „Be you ever so high the law is above you" this applicable to judges even.
7. Purpose of effective preservation of judicial independence, it is necessary that judges ought to have ensure proper judicial accountability.
8. In judicial system remove inefficiency, delay, and lack of public confidence and loss of credibility. Main cause is reluctant to change the inherited pattern of working.
9. The obligation which is covered under Article 38 (1) and 39 A of the constitution of India.[31]
10. The legal system was expected to adapt itself to facilitate the transformation of Indian Society into a nation and become an effective instrument for carrying out the mandate of Art.38.[32]
11. The concept of speedy trail is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under Indian Constitution. So speedy trial is as essential judicial obligation of the judiciary.
12. Primary responsibility of judiciary is eliminating inequalities in status, facilities and opportunities among different groups.
13. In criminal cases judgments shall not be decided only on facts and evidence but also on Laws and precedents.
14. When judges spend their time worrying about the consequences of their decisions on their carrier, court becomes just another department of the government.[33] When the route of appeal becomes a structure of management, then system risks losing its independence.[34]
15. To improve court operations in rural areas;
16. Judges should understand the difference between law and Justice; the former chief justice of India JS Verma had devised a new equation: L+X= J. In this L stands for Law, J stands for Justice and X is the power of interpretation vested in Judges. So law itself cannot give justice, when the judge interprets law in a reasonable, rational manner then justice will be restored.
17. Judges has to enhance the efficiency in their functions; in various time, courts take too long to issue decisions; judges write too many concurring and dissenting opinions, leaving no idea about what the law is.
18. Judges shall avoid defective judgments;

    Judgements can be defective if, i)it was decide on wrong principles of law, ii) judgments is not based on sound and rational reasoning supported by relevant law iii) not according to the constitutional standards, iv) if it reflect the judge"s personal ideology or emotion.

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[31] INDIA CONST. art.38
State to secure a social order for the promotion of welfare of the people
1} The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life
2} The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

INDIA CONST. art.39A
Equal justice and free legal aid
The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

[32]LAW COMMISSION OF INDIA, REPORT NO. 117: TRAINING OF JUDICIAL OFFICER (1986).

[33]Geeta Oberroi, *Role of Judicial education in India*, 35 COMMONW. LAW BULL. 497,534 (2009).

[34]*Id*

One of the major reason in Indian context to have defective judgment is judges read the law not the spirit of the Law.

19. To ensure justice for all; it is duty of judges to create a platform for hearing the voices of those less fortunate who do not receive attention in judicial system.
20. Judicial involvement in educational, charitable, religious and other organizations may bring value to the communities. [35] the factors shall take into consideration

- The involvement must not compromise judicial independence or put at risk the status or integrity of judicial office.[36]
- Careful consideration should be given to the propriety of becoming a public spokesperson for an organization.
- The involvement should not be as time-consuming and difficult as to interfere with the judge"s performance of duty.
- The involvement should not be with the purpose of lending status or propriety/respectability to an organization by virtue of judicial office.

21. Judicial proceedings should be conducted with proper dignity and decorum, with the approach where importance to the people and litigants will be given.
22. Parties and advocates will be treated respectfully where regal environment be prevailed in court room.
23. Apart from personal problems, a judge is necessity to show endurance and dignity and general curtsey in daily communication with people.
24. Judicial behavior according to the supreme Court Rule 2013, High Court rules and convention applicable to lower court.

The Bangalore Principles of Judicial Conduct

The Bangalore Principles of Judicial Conduct laid down some basic principles for judicial disqualification as are following;

a. A Judge shall disqualify himself or herself from participating in any proceeding in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.[37]
b. The judge has actually bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.[38]
c. The judge previously served as a lawyer or was a material witness in the matter in controversy,[39]or
d. The judge or a member of the judge"s family has an economic interest in the outcome of the matter in controversy. [40]

[35] Lord Burnett of Madon, Sir Ernest Ryder, *Guide to judicial Conduct*, (Mar. 2018), https://www.judiciary.uk/wp-content/uploads/2018/03/Guide-to-Judicial-Conduct-March-2019.pdf/ (last visited February 20, 2020 at 1 pm).
[36] *Id*
[37] THE BANGALORE PRINCIPLE OF JUDICIAL CONDUCT, PRINCIPLE 2.5
[38] *Id* 2.5.1
[39] *Id* 2.5.2
[40] *Id* 2.5.3

SUMMARY AND CONCLUSION

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

"These days we (judges) are telling everyone what they should do but who is to tell us? We have talk of enforcing the rule of law, but does not exempt and even exonerate us from following it".[41]

Code of Ethics of a Judge

1. **Judicial decision to be honest**: the judge"s life is full of public confidence in their role in society; the judicial decision is to be honest and fair. No judicial decision is honest unless it is decided in response to an honest opinion formed in the matrix of the judge"s proficient of law and fact. Nevertheless the perception of a judge may be wrong. But a wrong decision honestly made does not make that decision dishonest. A decision becomes dishonest if not decided on judicial conviction of fairness, honest and neutrality.
2. **No man can be judge in his own cause**: The principle not applies only to the cause where the judge is an actual party to a case, but also applies to a case in which he has interest. A judge should not adjudicate in a case if he has got interest therein. Judges must remain impartial and should be also known by all people to be impartial.
3. **Administer Justice**: Judges must not fear to administer justice. *"flatjustitia, ruatcaelum"* that is "let justice be done though heaven fall" should be followed as motto by a judge.
4. **Equal opportunity**: Parties to the dispute be treated equally and accordance with the principles of law and equity. A judge does not belong to any person or section or division or group. A judge should not have any concern with personalities who are parties to the case but only with merits. "it is essential to the proper administration of justice that every party should have equal 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".[42]
5. **Maintenance of distance from relatives**: Since judging is not a profession but a way of life, the judge must keep distance himself from the parties to the dispute and their lawyers during the conduct of trial. Now a days the growth of a new caste in legal profession who thrive not by intellectuals or professional capabilities but by utilizing their close connection with the judges. The growth of this suspicious trend can be checked if practicing lawyers and sitting judges avoid meeting frequently in private.
6. **Too much of activity and participation in social functions be avoided**: The Supreme Court in *Ram pratap Sharma Vs. Dayanand* issued a note of caution to the effect that it is proper for a judge not to accept any invitation and hospitality of any business or commercial organization or of any political party or of any club or organisation run on

[41] Prof. Dr. K.C. Jena, *Judicial Independence and Accountability: A Critique,* XXXIX Indian Bar Review, 4 (2012).
[42] *Id*

sectarian, communal or parochial line. As a 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.

7. **Media Publicity shall be avoided**: As far as possible a Judge should keep off the media. Lord Widgery, Lord Chief justice of England since 1971 to England since 1971 to 1980, 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". Most of the problem of judicial stagnation stems from inadequate incentives and overly complicated procedures.[43] This is thought of around the world that judicial inefficiency is not only bad for litigants, legal system; it is also bad for economic prosperity, undercutting a national wealth and economic growth.

8. **Appointment of judges**:

In European Union, judges are elevated to the higher judiciary on pure concrete basis of merit, not on political or judicial consideration. They look to the quality of decision rendered and past records of the judge. In India appointment and rejection should be made public. Constitutional provision should be amended for attainment of democratic, transparent and foolproof method of appointment, removal and transfer of judges.

9. **Judges should brought under Right to Information Act**:

10. **Contempt of Court Act** :

One and foremost task should be to amend the contempt of Court Act, 1972. Because wide powers are being conferred upon the courts vide contempt of court Act. Even today we are following the age old colonial system of deciding contemptuous act. The law of contempt in India has deviated from its very object. So definition of „contempt" shall confine within the four corners of statutory definition.

[43]Juan Carlos Batero, Rafael La Porta, florrencio Lopez-de-Silanes, *et al.,Judicial Reform,* 18 The World Bank Research Observer 61, 88 (2003).