Independence of Judiciary:
In Search of Conceptual Clarity

P. Puneeth†

The concept of independence of judiciary has always been a very passionate topic for discussion, which has gained more momentum in recent days. Many issues ranging from one’s relating to judicial accountability to that of judicial activism vis-à-vis judicial independence have been subject matters of intense debate. Lack of proper understanding of the concept of independence of judiciary has been the main cause for undesirable delay in effectively addressing such issues. There is an imperative need to understand that the concept of independence of judiciary is much wider than mere separation of judiciary from legislature and the executive. It not only emphasizes on non-interference of legislature and the executive in the judicial proceedings but also requires the judiciary to remain independent. Judiciary’s duty to remain independent implies, inter alia, duty of the higher judiciary to allow the subordinate judiciary to remain independent and duty not to overreach on the legislative and executive domain in the name of judicial activism, which leads to fusion of power – an antithesis of separation of power. Judicial independence depends largely on judges themselves.

INTRODUCTION

The concept of independence of judiciary as a topic of discussion has been passionately debated both in the academic circles as well as in the political precincts for very long. Discussions over the issue have gained more momentum in recent days in India owing to the over sensitivity of the judiciary, on the one hand, and the undesirable self-restraint of the Parliament, on the other, even in the wake of persistent demand of the general public for transparency and accountability. However, since most of the discussions are confined to the nature, extent and efficacy of constitutional and legal safeguards to protect and maintain judicial independence, some of the other core issues have received less attention. Some of the core issues, answers for which otherwise appear to be obvious, need to be revisited and reconfirmed in order to understand the concept of judicial independence in its entirety. An attempt has been made, in this paper, to understand and answer certain basic issues viz., what do we mean by ‘independence of judiciary’? Is it the same as separation of judiciary from legislature and executive? Or does it imply more than that? Why do we need an independent judiciary? Whether independence of judiciary is an end in itself or is it a means to an end? Do we need a judiciary, which is absolutely independent? Or should it also be made...

† Assistant Research Professor, The Indian Law Institute, New Delhi, India. The author can be contacted at puneethilm@gmail.com. The author is grateful to Kamala Sankaran, Associate Professor, Delhi University and Jyoti D. Sood, Assistant Research Professor (Sr.), Indian Law Institute for their inputs on the preliminary draft of this paper.
accountable like other organs in a democratic system? If yes, how can we strike a balance between ‘independence’ and ‘accountability’?

The paper essentially presents four arguments. Firstly, it argues that the independence of judiciary is not the same as separation of judiciary from legislature and executive. No doubt, separation of judiciary from other organs of the government is a pre-condition for ensuring independence of judiciary, but the separation alone is not sufficient to make the judiciary independent. Secondly, independence of judiciary is not an end in itself, but it is a means to an end. Thirdly, keeping in view the end, what is important is ‘functional independence’. ‘Structural’ and ‘financial’ independence are required only to an extent that ensures ‘functional independence’ but not beyond that. Over emphasis on structural and financial independence negates ‘accountability’. Finally, independence of judiciary is not just a mandate for legislature and executive to stay away from judiciary but it equally requires judiciary to remain independent. The paper basically examines these four propositions in different parts.

I. INDEPENDENCE VIS-À-VIS SEPARATION OF JUDICIARY

Independence of judiciary, to state precisely, means a fair and neutral judicial system, which can afford to take its decisions without being influenced by any external or internal agencies or forces or by irrelevant considerations. Baron De Montesquieu, who formulated, in explicit terms, the theory of separation of powers in his classical work *Esprit des Lois*, argued, in essence, that if the total power of government is divided among different organs, one will act as a check upon the other and as a result liberty can survive. He propounded a tripartite system of governance and advocated for the division of political power among legislature, executive and judiciary. Separation, according to him, was a safety valve against arbitrary control of liberties. If the judiciary is separated from the other two organs of the government, it will be in a position to examine the correctness of the legislative and executive actions on the touchstone of higher norms or grand norms in a fair manner without being influenced by them. Separation, thus, by removing the judiciary from the clutches of the legislature and executive, ensures the neutrality of the judiciary and the judiciary, in turn, can discharge its functions fairly in such cases.

1. As the historians of the doctrine of separation of power suggests, the idea of separation of power did not originate with Montesquieu. Many historians and political theorists including Aristotle, George Buchanan and Polybius have all contributed to the formulation of the concept. However, John Locke is sometimes regarded as the founder of the theory of separation of powers in English political thought. But, the clear statement of separation of power was not explicitly found in the works of earlier writers. It is Montesquieu, who brought together a whole range of earlier thinking on the subject and formulated the theory of separation of powers in his book XI, chapter VI of *Esprit des Lois* [*The Spirit of the Law*], which is regarded as the locus classicus of the theory. For further studies see Vile M.J.C., *Constitutionalism and Separation of Powers* (1967) and Vanderbilt A.T., *Doctrines of Separation of Powers and Its Present Day Significance* (1963).
However, merely by securing separation of judiciary from the other organs of the government, judicial neutrality cannot be ensured. It is important to note that threats to the judicial independence and improper influences in judicial processes not only come from the other organs of the state; they can come from many other sources including from within. Judiciary is expected to decide a wide variety of cases. Its duty is not just confined to resolving disputes between individual and the state in accordance with law and the Constitution. Disputes between union and state/s; state/s and state/s in a federal country and disputes between individual/s and individual/s etc., are all subject matters of judicial adjudication. Judiciary in all such cases, including the cases against the legislature and the executive, should be independent of issues under consideration and parties before it in order to maintain neutrality. That depends on variety of other factors both ‘articulate’ and ‘inarticulate’. Personal views and convictions of a judge, pressures, prejudices, his/her personality, preferences etc., do matter a lot. Thus, independence cannot be assured merely by separating the judiciary from other organs of the state. The concept of independence of judiciary is broader than mere separation of judiciary. It is multi-faceted and multi-dimensional.

‘Independence’ implies ‘impartiality’ as well. The observation of the Supreme Court of Canada in *Walter Valente v. Her Majesty the Queen* makes it categorically clear. The court while making a distinction between ‘independence’ and ‘impartiality’ has observed thus:

[T]he concepts of ‘independence’ and ‘impartiality’, although obviously related, are separate distinct values or requirements. ‘Impartiality’ refers to a state of mind or attitude of the tribunal in relation to the issues and parties in a particular case. ‘Independence’ reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others… particularly to the executive branch of the government… (Emphasis supplied)

This clearly suggests that ‘independence’ includes, *inter alia*, ‘impartiality of state of mind’ also, which cannot be fully assured by mere separation of judiciary. However, it is wrong to be under the impression that this aspect has never been taken note of in the discourses on ‘judicial independence’. Many, including the judiciary, have awakened to the reality that the separation *per se* cannot ensure independence and, thus, emphasized on the other aspects as well. Even the Indian apex court, in *S.P. Gupta v. Union of
India, has not only taken note of but also emphasized thus:

The concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong...

Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says, “Be you ever so high, the law is above you.” This is the principle of independence of the judiciary, which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind...

No further elaboration is required to explain what is obvious. However, it should be made clear, as a matter of precaution, that though the separation alone is not sufficient to ensure independence, need for separation of judiciary from other organs of the government cannot be relegated as an insignificant requirement. Definitely, it is not an exaggeration to state that separation of judiciary from other organs of the government is one of the essential requisites to ensure independence of judiciary. Especially in a democratic form of government, for the very survival of rule of law and principles of constitutionalism, separation of judiciary from other organs of the government is a must. The success of democracy as a form of citizen friendly governance largely depends on the functioning of the government within the limits of law - law that is just, fair and reasonable. It is the judiciary, which is entrusted with the task of ensuring that other organs of the state function within the limits of law and the Constitution, thereby making the rule of law a living reality in the governance. The judiciary, if kept under the control of other organs, cannot reasonably be expected to accomplish the task entrusted to it. Thus, separation of judiciary is of paramount importance in ensuring functional autonomy of the judiciary in the adjudicative process. However, the separation need not be absolute so as to keep the judiciary in an exclusive watertight compartment beyond the reach of the scanner to ensure transparency and accountability.

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5. Id. per Bhagwati, ¶ 27.
Separation is required only to the extent of ensuring functional independence that is of great importance and not total separation. Overemphasis on separation proportionately reduces the potency of institutional checks and balances, which is the cornerstone of Montesquieu's theory of separation of powers.6

II. INDEPENDENCE OF JUDICIARY AS A MEANS TO AN END

Independence of Judiciary is an essential pre-requisite for the very survival of democracy and for maintenance of rule of law, on which the edifice of democratic governance is built. Survival and success of democracy depends on the trust and confidence that people repose in the institutions of governance in a democratic set-up. It is the task of the judiciary to ensure that people repose such trust and faith in various institutions of governance including itself. Judiciary is expected to act as counter majoritarian organ to protect the minorities (not only religious or linguistic minorities) from persecution; it is the duty of the judiciary to safeguard life, liberty and property of individuals from arbitrary regulation or curtailment and to discharge other judicial functions with sufficient amount of neutrality which alone can repose trust and faith in the institutions of governance. This understanding led to the demand, which was universal in nature, for independent judicial system for adjudication of disputes and administration of justice. It would not be incorrect to state that it is the persistent demand all over the world that has led to recognition of the right to independent and impartial judiciary as one of the fundamental human rights. Many international and regional instruments and some of the national Constitutions have expressly recognized right to be tried by independent and impartial judiciary as a human right. Article 10 of Universal Declaration of Human Rights, 1948 clearly provides that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. Similar provisions are contained in International Covenant on Civil and Political Rights, 1966;7 American Convention on Human Rights, 1969; African Charter on Human and People’s Right (adopted on June 27, 1981 and entered into force on October 21, 1986),8 and European Convention

6. For detailed discussion on this aspect, see Part III of this article.
7. Art. 14: (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
8. Art. 8: Right to a fair trial. (1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
9. Art. 7: (1) Every individual shall have the right to have his cause heard. This comprises:.... (d) the right to be tried within a reasonable time by an impartial court or tribunal.
on Human Rights, 1950, etc. In many countries like Poland, Bangladesh, Canada etc., right to be tried by independent and impartial judiciary has been accorded the status of constitutional right.

It is in this context one must appreciate that the independence of judiciary is a human right not an institutional privilege. The fact that it has been recognized as a human right indicates that judicial independence does not exist to serve the interest of the institution of judiciary or of individual judges. It exists to serve the interest of the right holders. The end to be achieved is the protection of life and liberty from arbitrary control or curtailment and safeguarding the interest of the people in the society by upholding the rule of law in its essence and spirit. Independence of judiciary is crucial for this purpose. Various constitutional and legal safeguards and immunities provided in different legal systems including India to secure judicial independence are intended to guarantee such a right to citizens so that they should have an effective remedy against arbitrary control of their rights and liberties by the government. They are not intended to honour the institution but to enable it to perform its functions in a neutral manner, without being controlled or influenced by any outside agency. Perhaps, human right to independent judiciary envisages a duty of the judiciary also to remain independent.

The idea that independence of judiciary is not an end in itself but it is a means to an end is clearly manifested in the Montesquieu's theory of separation of powers as well. His theory was intended to prevent accumulation of all powers

10. Art. 6: (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

14. Though the Constitution of India has not expressly recognized right to independent and impartial judiciary as a specific constitutional guarantee either in part III or in any other parts of the Constitution, various safeguards and immunities provided to secure independence of judiciary in India by necessary implication, in the opinion of the author, confer such a right on citizens. Judiciary in India has also accepted this position (impliedly) way back in 1981 when several high courts have entertained writ petitions mainly challenging the constitutional validity of circular dated March 15, 1981 issued by the Ministry of Law and Justice, Government of India as violative of independence of Judiciary. But in the First Judge’s case (S.P. Gupta v. Union of India, Supra note 4), where the Supreme Court has transferred to itself above said writ petitions filed in different high courts, it has initially shown reluctance to accept another PIL filed under Art. 32 of the Constitution raising similar issues on the ground that issues raised did not lie under Art. 32. However, on the basis of the later approach of the Supreme Court in entertaining petitions raising issues relating to independence of judiciary under Art. 32 of the Constitution (Ex: Subhash Sharma v. Union of India, 1991 Supp. (1) SCC 574; Sub-committee on Judicial Accountability v. Union of India, (1991) 4 SCC 699; Sarojini Ramanan (Mrs.) v. Union of India, (1992) 4 SCC 506, etc...), one can presumably argue that even the Supreme Court of India has also recognized (impliedly) the independence of judiciary as a (fundamental) right.
15. For detailed discussion on this aspect, see Part IV of this paper.
in the same hands, which, in the words of James Madison,16 “may justly be pronounced the very definition of tyranny”. Montesquieu’s tripartite system of governance and division of power among legislature, executive and judiciary were intended to be a safety valve against arbitrary control of liberties. Since the concept of judicial independence emerges from the theory of separation of powers, it is meant to serve the same purpose. As Gerard Brennan also said, “Judicial independence does not exist to serve the judiciary; or to serve the interests of other two branches of government. It exists to serve and protect not the governors, but the governed.”17 Thus, judicial independence is not an end in itself, but undoubtedly an effective means to an end.

III. ‘FUNCTIONAL’ INDEPENDENCE VIS-À-VIS ‘STRUCTURAL’ AND ‘FINANCIAL’ INDEPENDENCE

Having learnt that independence of judiciary is not an end in itself but a means to an end, it is imperative to consider that in view of the end to be achieved, to what extent the judicial independence is required. Should it be absolute so as to provide immunity from accountability? Whether judicial accountability defeats the ‘end’ to be achieved by judicial independence?

The concept of ‘independence of judiciary’ emerges from the theory of ‘separation of powers’, though not confined to it.18 Institutional checks and balances is the central idea of the theory of separation of powers. It allows each of the three branches of government to limit the power of others and thereby allows no branch of the government to become too powerful. The separation of powers is not a formula for sharing power among the dominant organs of the government, but it is a formula for allocating power among the different organs of the government so as to prevent them from becoming predominant to the detriment of rights and liberties of individuals. Protection of rights and liberties of individuals from arbitrary control is the exclusive purpose of the theory of separation of powers and the system of checks and balances. Separation of judiciary from other organs of government should also serve that exclusive purpose. Thus, it should not be so far separated as to make it difficult for other organs to have constitutional control over it. Overemphasis on separation reduces the potency of checks and balances and, thus, will be counterproductive in the democratic governance. Thus, separation only to the extent that is absolutely required to achieve the ‘end’ is desirable and not beyond that. It is in this context that the distinction between functional,


18. For detailed discussion on this aspect, see Part I of this paper.
structural and financial independence of the judiciary becomes very relevant.

Functional separation of the judiciary focuses on non-interference of other organs of the government in the judicial process. It is absolutely required to ensure “…that a judicial officer, in exercising the authority vested in him must be free to act upon his own convictions, without apprehension of personal consequences to himself”. He should not be subjected to any inconvenience, sufferings or disqualification by the other organs of the government merely on the ground that his decisions happened to be disliked by them. Judicial officer should be given nearly absolute immunity for acts done in the discharge of his functions. He should not be made answerable to other organs of the government for performing his functions in good faith and according to his own true convictions. This functional independence is an absolute necessity for the judiciary to discharge its august duties. No doubt, structural and financial independence have some bearing in ensuring total functional independence of the judiciary. In other words, structural and financial independence are required only for the purpose of placing a judge in a position, to use Robert MacGregor Dawson’s words, “where he has nothing to lose by doing what is right and little to gain by doing what is wrong...”. Structural independence, in the context, refers to composition of the judiciary and covers issues relating to appointment, transfer and removal of judges etc.

In most of the democratic countries, where independence of judiciary is considered the prime necessity, and thus, has been constitutionally protected, the power of appointment and removal of judges vests with the executive or, as the case may be, the legislature or with both. In some countries, provisions are made to involve even the judiciary in the process of appointment of judges whereas in other countries, for instance USA, judiciary is not involved in the process of appointment of judges. Even in those countries where judiciary has a say in the matter of appointment of judges, no primacy is accorded to its opinion except in India where judiciary has claimed primacy for its opinion in the process of appointment. If the power of appointment, transfer, and removal is taken away from the legislature and the executive or their role in the process becomes ostensible because of the primacy accorded to the judiciary, these organs of the government cannot exercise any sort of effective control over the judiciary to check its excesses. In the absence of checks and balances, judicial independence becomes absolute and both the institution and individual judges

21. Judiciary, in Supreme Court Advocates-on-Record Association v. Union of India (1993) 4 SCC 441, has created a collegium system and claimed primacy for the opinion expressed by it in the matter of appointment of judges to the high courts and the Supreme Court, thereby rendering executive power of appointment a mere formality. In Special Reference No. 1 of 1998, In re, (1998) 7 SCC 729, the collegium system was further strengthened and its stand on primacy to the opinion of collegium was also reiterated. As per the present practice, collegium’s opinion is binding on the government.
will be unaccountable. Accountability is a virtue that safeguards the credibility of the institution of judiciary on which the democratic edifice is built. Thus, total structural independence may lead to destruction of the credibility of the institution itself. Consultation with the judiciary and giving due regard to its opinion in the matter of appointment and transfer of judges would not lead to such a consequence unless the primacy is sought for. Consultation and transparency in consultative process, rather, helps in protecting institutional credibility by maintaining structural independence within desirable limitations.

Further, as pointed out above, merely separating the judiciary from other organs of the government cannot ensure total functional independence of the judiciary. Threats to the functional independence may come from other sources as well. Situations may arise where either the institution of judiciary as a whole or, as the case may be, an individual judge may cease to remain independent of parties before them or issues under consideration for any reason. There may come situations, which warrant the interference from other organs of the government to check judicial excesses or to ensure its functional independence. Thus, unless the structural independence of the judiciary is kept within desirable limits, no system of checks and balances works effectively to keep the judiciary within its boundaries. Similarly, total financial independence is also not required to ensure functional independence. No doubt, protection of salaries, allowances and other entitlements of judges is very much required. At the same time, judges, like any other public functionaries, should be made accountable to any charges relating to possession of disproportionate assets. Judicial expenditure should also be open to scrutiny. Every taxpayer has the right to know how the public money is spent. Stretching judicial independence to an extent so as to use it as a defence against claim for accountability is outrightly against the spirit of judicial independence itself for judicial independence cannot be maintained without judicial accountability for its failure, errors or misconduct, etc. 22 Thus, bringing an argument of judicial independence in order to defeat claims for transparency and accountability convince none but the most credulous.

In many commonwealth countries judicial accountability has assumed importance and the judiciary in many countries can no longer use judicial independence as a defence for providing accountability.

IV. JUDICIARY’S DUTY TO REMAIN INDEPENDENT

The concept of independence of judiciary is not only a bulwark to protect the judiciary against legislature, executive and other external forces; it is equally a mandate for the judiciary to remain independent. Unless the judiciary remains

independent, the purpose behind the guarantee of human right to independent judiciary will not be served. Perhaps, the duty of the judiciary to maintain independence is more fundamental than any amount of constitutional and legal safeguards to ensure judicial independence. Constitutional and legal safeguards are only supplementary in this regard. They are only intended to protect the judiciary from outside threats.

The general perception that prevailed predominantly for very long was that threats to independence of judiciary are from outside. This perception has changed now. It has come to be understood that the judiciary is, more or less, well protected from outside forces or agencies. The view that real threats to the independence of judiciary are from within the system or personality of the judge himself is gaining more currency these days. It is in this context that certain important issues, which are very relevant in the Indian context, need to be discussed.

A. Interference with the functioning of subordinate courts

Judiciary’s duty to remain independent also implies duty of the higher judiciary to allow the subordinate judiciary to remain independent. Within the hierarchical court system, subordinate courts/judges must be allowed to function independently. No interference should be there by the judges of superior courts in the exercise of judicial functions by the judges of subordinate courts. This aspect has been emphasized in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region.23 Article 6 of the Statement reads:

In the decision making process, any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment in accordance with Article 3 (a).

Clause (a) of Article 3 of the statement obligates that “[t]he judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source…”.

Non-interference in the discharge of judicial functions of the subordinate courts by the superior courts is considered to be one of the fundamental principles of judicial independence. As the Supreme Court of India rightly pointed out, in Jasbir Singh v. State of Punjab,24 “[t]he independence of the

subordinate courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior courts in the discharge of judicial functions. It is the members of the subordinate judiciary who directly interact with the parties in the course of proceedings of the case and, therefore, it is no less important that their independence should be protected effectively to the satisfaction of the litigants.” The existence of possibility of interference by the high courts in the purported exercise of supervisory power over the discharge of judicial functions of the subordinate courts is one of the greatest threats to the independence of subordinate courts in India. Jasbir Singh25 presents a worse example of such an interference totally eroding the independence of subordinate courts. This is a case where the administrative judge of the High Court of Punjab and Haryana has, during his annual inspection, passed an order directing the subordinate judge to look into the bail application of one of the under trail prisoners and enlarge him on bail. There was no scope left for the concerned subordinate court to decide the matter before it “in accordance with its impartial assessment of the facts and its understanding of the law”. Influencing the subordinate judiciary, in the purported exercise of supervisory power, to pass any order or judgment in a particular manner amounts to wholesome encroachment on the judicial power of the subordinate courts. Thus, such an extra-ordinary power of supervision should only be exercised to ensure that the subordinate courts function within the limits of their authority but not in a manner that threatens their independence. Threats from within are more intricate to address and they have much larger and greater potential for harm than threats from outside.

B. Judicial activism vis-à-vis judicial independence

The essence of Montesquieu’s theory is that the liberty cannot survive if the power of the government is concentrated in a single individual or body of individuals. Montesquieu pointed out, very particularly, that the combination of legislative and judicial power exposes the life and liberty to arbitrary control and, similarly, the combination of executive and judicial powers may provide scope for a judge to behave in a violent and oppressive manner. The combination of judicial power with the legislative or/and the executive power may happen in two ways.26 Firstly, when the legislature or executive takes over the task of judicial decision-making or encroaches upon the judicial power. Secondly, when the judiciary encroaches upon the legislative or/and executive field under the guise of ‘judicial activism’.

26. In Westminster form of government, like in India, there is a fusion of power between legislature and the executive. Executive is drawn out of the legislature and it remains as its subset. Thus, virtually there is no separation of powers between them. It is only the separation of judiciary from both the legislature and the executive that is important.
Constitutional history of India is replete with examples of both. There is no dearth of instances of legislative/executive encroachment on the judicial field. Insertions of Articles 31A, 31B (and ninth schedule)\(^ {20} \) and 31C\(^ {20} \) to the Constitution and Article 329A (mainly clause 4 and 5)\(^ {30} \) are some of the important examples of encroachment on judicial power. These provisions aimed at depriving the courts of their jurisdiction to entertain certain matters for adjudication. Deprivation of jurisdiction of the courts to try issues of judicial nature also amounts to infringement of judicial independence in terms of Article 2 of the Syracuse Draft Principles on the Independence of Judiciary.\(^ {31} \) Similarly, instances of judicial overreach into legislative and executive domain under the guise of judicial activism are also high. It is in this context that an important question as to whether an activist judge can remain independent arises for consideration.

Before venturing to address the question, it is pertinent to understand the true nature and import of ‘judicial activism’. Judicial activism, as Baxi says, "is an ascriptive term. It means different things to different people. While some may exalt the term by describing it as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of public duties etc., others have criticized the term by describing it as judicial extremism, judicial terrorism, transgression into the domains of the other organs of the State negating the constitutional spirit etc". Whether judicial activism is a boon or bane depends on perceptions and standpoints. However, in this context, we need to consider this question only from the point of view of judicial independence.

Judicial activism, in the opinion of Subash C. Kashyap, "was born as a corrective to inaction or failure of the executive and the legislature to provide

\(^ {27} \) Inst. by § 4, the Constitution (First Amendment) Act, 1951. Art. 31A saves certain laws from invalidity on the ground of their inconsistency with or abridgement of certain fundamental rights.

\(^ {28} \) Inst. by §§ 5 and 14, the Constitution (First Amendment) Act, 1951. Art. 31B provides for validating Acts and Regulations specified in the ninth schedule notwithstanding their inconsistency with any of the rights conferred by part III of the Constitution of India.

\(^ {29} \) Inst. by § 3, the Constitution (Twenty-fifth Amendment) Act, 1971. Art. 31C provides for saving the validity of laws giving effect to certain directive principles of state policy notwithstanding their inconsistency with Art. 14 or Art. 19 of the Constitution.

\(^ {30} \) Inst. by § 4, the Constitution (Thirty-ninth Amendment) Act, 1975. The article was omitted by § 36 of the Constitution (Forty-fourth Amendment) Act, 1978.

\(^ {31} \) The Syracuse Draft Principles on the Independence of the Judiciary was prepared by the Committee of Jurists and the International Commission of Jurists at Syracuse, Sicily on May 25 – 29, 1981. According to Art. 2 of the Draft Principle, Independence of Judiciary means: (1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and (2) that the judiciary is independent of the executive and the legislature, and has jurisdiction, directly, or by way of review, over all issues of a judicial nature (emphasis supplied).
clean, competent and citizen friendly governance”.

It means judicial activism is a phenomenon of judiciary being active where executive and the legislature are inactive notwithstanding constitutional earmarking of powers. Definition of judicial activism by Baxi makes it amply clear. According to him, “(judicial) Activism is that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes”. In his opinion, “the justification for the judicial activism comes from the near collapse of responsible government and the pressures on the judiciary to step in aid which forced the judiciary to respond and to make political or policy-making judgments”. Judicial activism, thus, came to be generally understood as judicial overreach to correct the failure or inaction of other organs of the government. All most all votaries of judicial activism in India justify it only on the ground of failure or inaction of executive and legislature without understanding the serious implications on the very basis of our constitutional scheme. However, both the questions of constitutionality and propriety of such an encroachment on the alleged ground of failure are outside the scope of this paper. Suffice it to mention that judicial overreach into the domain exclusively earmarked for the executive and legislature on the ground of their alleged failure not only disturbs the power relationship envisaged in the Constitution, but also affects the independence of judiciary itself. If the judiciary takes over the task of essential policy making, in the guise of judicial activism and on the alleged ground of failure of the executive and the legislature, it will not remain independent to decide the validity of such a policy, when questioned by affected individual/s. “History teaches us”, in the apex court’s own words, “that the independence of judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility to resolve the issues which are otherwise not entrusted to them by adopting procedures which are otherwise not known”.

Making political decisions, framing essential policies for the governance of the country and their implementation are the tasks that are earmarked and entrusted to the legislature and the executive. These tasks need to be performed in conformity with higher norms i.e., Constitution. It is for the judiciary, in the exercise of power of judicial review, to examine validity of legislative and executive actions on the touchstone of constitutional provisions.


34. Id. at 13.


But, it is not the business of the court to pronounce policy or to sit in judgment on the wisdom of those who are entrusted with the task of framing policy or on its suitability. However, it is not to say that policy decisions do not fall within the purview of judicial review. Distinction has to be made between framing of policy and determining the constitutionality of the policy. It is only the latter that falls within the purview of judicial review but not the former. If the judiciary takes over the task of framing policy or takes part in framing of any policy or in its implementation process, it will cease to be independent to determine the validity of such policy or the correctness of the process adopted for its implementation. Aggrieved party will not find an independent forum to seek redressal of his grievances. Thus, such an overreach, on whatsoever ground, results in violation of the (human) right to independent and impartial judiciary.

However, it is not to say that every facet of judicial activism is totally inconsistent with the idea of judicial independence. Though, generally judicial activism is understood in terms of judicial overreach, there are instances of activism without overreaching into others’ domain. Evolution of an innovative procedure by diluting the concept of "locus standi" to entertain public interest litigations (PIL) is a classic example of judicial activism without overreaching into others domain. This innovative procedure evolved by the Supreme Court has provided a ray of hope of getting justice to those “vulnerable sections of society who have no means, no facilities and, in fact, no possibilities on their own to approach the Court even in cases of glaring injustice and discrimination”.  

37. See In Re: Destruction of Public and Private Properties v. State of Andhra Pradesh, (AIR 2009 SC 2266) wherein the apex court has taken serious note of various instances of large-scale destruction of public and private properties in the name of agitations, bandhs, hartals, etc., and initiated suo moto proceedings. The court appointed two committees to suggest suitable measures to deal with such problems. The committees have made various recommendations for imposing both penal and tortious liabilities. Though the apex court was not inclined to formally issue "positive directions" for their implementations, it has stated, paradoxically, that "[t]he recommendations of Justice K.T. Thomas Committee and Mr. F. S. Nariman Committees above which have the approval of this court shall immediately become operative. They shall be operative as guidelines." One of the important recommendations made by the Committee headed by K.T. Thomas J was that the Prevention of Damage to Public Property Act, 1984 must be so amended as to incorporate a rebuttable presumption (after the prosecution established two facts that: (i) the public property has been damaged in a direct action called by an organization and (ii) the accused also participated in such direct action) that the accused is guilty of offence. Given the fact that in most of the large-scale political agitations, people participate or rather made to participate in agitations without knowing what they are agitating for, it seems to be unreasonable to presume any of them as guilty of offence merely on the proof of his participation in such agitations. If any person is aggrieved by the operation of such guidelines, he will not have any independent forum to question the constitutionality of such guidelines on the ground that the procedure established by law for imposing penal liability is not "just, fair and reasonable", and, thus, violative of Art. 21 of the Constitution of India. The court having been instrumental in framing such guidelines and making them operational cannot be considered independent to examine their constitutional validity. Thus, an overreach of this kind leads to 'fusion of powers' – an antithesis of 'separation of powers'.

38. Somnath Chatterjee, supra note 35.
The Supreme Court deservedly received high appreciation for providing access to justice to the weaker sections of the society, which was only a theoretical possibility under the original scheme. This was done by liberalizing the concept of *locus standi*, which, if appreciated in proper perspectives, does not seem to amount to judicial overreach. This sort of judicial activism is not only desirable but it is imperative in our constitutional scheme in order to give life and meaning to the constitutional promises. But, judicial overreach into the domain earmarked for other organs on the ground of their alleged failure, apart from being violative of the (human) right to independent and impartial judiciary, goes against the essential tenets of democracy and does not fit into our constitutional scheme. Though the Constitution of India did not incorporate the theory of separation of powers in its absolute rigidity, it has sufficiently demarcated the functions of different organs of the government. It does not contemplate assumption, by one organ of the state, of functions that essentially belong to the other. The theory of separation powers, thus, broadly holds the field in our constitutional scheme and it came to be recognized as one of the basic features of our Constitution. System of *checks and balances*, which is a cardinal feature of the theory of separation of powers, is also an integral part of our constitutional scheme. The system of *checks and balances* is intended to keep each organ of the government within its constitutional confines. Its field cannot be enlarged, as S.B. Sinha, J. proposed in *State of U.P. v. Jeet S. Bish*,[31] to include governmental inaction. Sinha, J. emphasized on the urgent need to enlarge the field of *checks and balances* to include governmental inaction in order to prevent the country getting “transformed into a state of repose”. Whatever may be his apprehensions, such an enlargement of the field cannot be done without contravening the constitutional scheme. Enlargement of the field as proposed by Sinha, J. goes against the very spirit of *checks and balances* as it leads to the ‘fusion of powers’ – an antithesis to ‘separation of powers’. The assumption of functions by one organ of the government that essentially belongs to the other by enlarging the field of *checks and balances*, in the guise of judicial activism, is totally impermissible under the scheme of Indian Constitution. Thus, concerns expressed by Katju, J. in *Jeet S. Bish*[42] and several other cases[43] are not without merits. Past practices do not justify continuance of disobedience to the Constitution. It is never “too late” to correct ourselves in order to ensure and uphold the independence of judiciary and the supremacy of the Constitution.

42. Id.
C. Judicial independence and the personality of a judge

Deliberations on judicial independence cannot be logically concluded without reference to personality of a judge. Judiciary cannot become truly independent unless the individual judges are able to shun and rise above desires, fears, apprehensions, biases and prejudices. No amount of safeguards, constitutional or legal, to protect judiciary from external influences can ensure ‘independence’ unless judges remain independent. ‘Judicial independence’ is not just to be ensured by others but also to be maintained by judges themselves. Integrity of a judge, inner strength of his/her character, capacity to rise above his/her inclinations, personal preferences and desire to seek further elevations etc., matter a lot in ensuring independence.

History is replete with examples where judges have shown independence in their functioning even when there was no security of tenure and other protections.44 Such instances reconfirm the fact that lot depends on the personality of a judge himself and constitutional and legal safeguards are only supplementary in nature in ensuring judicial independence.

An important question that arises in the context is that is it possible to have a judge of that quality who can shun and rise above his desires, fears, apprehensions, biases, pre-conceived notions and prejudices?

“The human mind”, as Frank J said, “even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal or informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices.”45 According to him, “without acquired ‘slants’, pre-conceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem, he would go mad. Interests, points of view, preferences are the essence of living…. An ‘open mind’, in the sense of a mind containing no pre-conceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the

44. Justice H.R. Khanna is one of the best examples of those who have exhibited great amount of independence in their judicial discourses notwithstanding the personal consequences to themselves. In ADM Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521, Khanna J. chose to decide the case in accordance with his “impartial assessment of facts and understanding of law” and wrote a dissenting judgment notwithstanding the likelihood of being arbitrarily superseded for appointment to the post of Chief Justice of India. The fact that there was every likelihood of being superseded and there was no constitutional guarantee against such arbitrary supersession could not deter Khanna J. to change his stand [See H.R. Khanna, NEITHER ROSES NOR THORNS 79,80 (2003)]. This is a standing testimony to the fact that independence of judiciary depends a lot on individual judges than on constitutional and legal safeguards.

psychiatrist’s descriptions of the feeble-minded.” Thus, in his opinion, “If... ‘bias’ and ‘impartiality’ be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will.”

Similar was the view expressed by John Clarke J. He observed: “I have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas! We are all the common growth of the mother earth – even those of us who wear the long robe.” Many other eminent jurists like Thomas Reed Powell, Benjamin N. Cardozo, William James have reiterated the point.

Cardozo’s confession that “[w]e may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own”; William James’s observation that “[e]very one of us has in truth an underlying philosophy of life, even those of us to whom the names and notions of philosophy are unknown or anathema” and Thomas Reed Powell’s comparison that “[j]udges have preferences for social policies as you and I. They form their judgments after the varying fashions in which you and I form ours. They have hands, organs, dimensions, senses, affections and passions. They are warmed by the same winter and summer and by the same ideas as a layman is” clearly explain the impossibility in finding a judge who is totally objective. It is a reality that needs to be accepted. “... Much harm is done”, as observed by Frank J., “by the myth that merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine. The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices. Freely avowing that he is a human being, the judge can and should, through self-scrutiny, prevent the operation of this class of biases.”

In the long run, as Ehrlich said, “there is no guaranty of justice except the personality of the judge”. It is the realization of this fact, it seems, that led to the international effort, which finally culminated into the adoption of the Bangalore Principles of Judicial Conduct, 2002.

The Bangalore Principles of Judicial Conduct, 2002 mainly focuses on judges’ duty to remain independent. It emphasizes on six main values viz., independence, impartiality, integrity, propriety, equality, competence and diligence. The document speaks about both the underlying principles of each of these values and their application in performing judicial functions. In

46. Id.
47. Id.
48. Supra note 44, at 652, 653.
addition, many other international and regional instruments also emphasize on judges duty to remain independent. Forms of oath of office prescribed for judges of the high courts and Supreme Court in the Indian Constitution also require solemn affirmation, at the time of entering into the office, from the judges to remain independent. The act of elevation to the bench does not, by itself, place the judges above, to use Jabe’s phrase, 50 “the total push and pressure of the cosmos”. It is through realization and conscious efforts that judges can rise above them.

CONCLUSION

In the discussions on independence of judiciary propelled by several factors in recent days, as stated earlier, more attention has been paid only to certain aspects as a result of which, of late, there is a perception developed among a section of the legal community that judicial independence and judicial accountability are antithesis to each other. Attempts have been made to justify such a perception by overemphasizing on constitutional and legal safeguards and attributing such meanings to provisions providing safeguards, which they cannot bear. Such a wrong perception can be dispelled by adopting a holistic approach in understanding the concept of independence of judiciary, which leads to the irresistible conclusion that the conflict between judicial independence and judicial accountability is neither apparent nor real. There is actually a total harmony between the two and both go hand-in-hand. Perhaps, judicial independence cannot be maintained without judicial accountability.

Holistic and clear understanding of the concept of independence of judiciary also leads to the conclusion that the destination of independence of judiciary, which has several milestones to be crossed, can be reached only with the consistent and conscious efforts of all the stakeholders. Providing constitutional and legal safeguards to secure independence of judiciary is only the first step, of course very significant, in that direction and lot more is required to be done, which depend largely on judges themselves. The “sunlight of awareness” is the need of the hour.

50. Id. at 12.