

# JUDICIAL ACCOUNTABILITY IN INDIA: CHALLENGES AND PROSPECTIVE

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## INTRODUCTION

The constitution of India has made elaborate provisions for ensuring independence of judiciary. In a democratic setup the judiciary plays an important role in interpreting law and adjudicating upon various controversies. An independent judiciary is earnestly required not only for deciding the dispute among the states and union but also for deciding the matters among the individuals, between individual or citizens and states on the other side. It is the main function of the courts to maintain rule of law in the country and to assure that the government runs according to laws.

In country with a written constitution, courts have an additional function of safeguarding the supremacy of the constitutional framework. The judiciary stands between the citizen and the state as a bulwark against executive excesses and misuse or abuse of power.<sup>1</sup>The past experience of working of our constitution shows that all is not working well with judiciary. The fault for this state of affairs lies with all the organs of the state including judiciary. The judicial system of our country, far from protecting the Rights and interests of the poor or weaker section, became the weapon of harassment of the people. The relationship between judiciary and executive has not been constant pleasant as a result, the institution of judiciary has suffered most and there has been constant falling in the quality of justice and judicial standards.

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<sup>1</sup> *S.P. Gupta v Union of India* AIR 1982 SC 149

## HISTORICAL BACKGROUND

A study of *Dharmshastras*, *Smritis* and *Arthshastra* reveal that ancient India had a fairly well-developed system of administration of justice. The king was considered as the fountain of justice. In the discharge of his function, he was assisted by the Brahmins. Who were proficient in *dharmshatras*. For appointment of judges, Caste consideration was a dominant factor. Brahmins were preferred for judicial appointment.

As regards qualification, it was clearly laid down that the person should be proficient in the text should be master of vedas and smritis and follow the path of *Dharma*. Women were not allowed to hold judicial office. Judge's tenure depended entirely on the pleasure of the king. In fact, the judges seemed to be more accountable to the king than to the people because their fate and future depended entirely on the pleasure of the king.

During 12th century, there was end of the Hindu period the kingdom and different courts were established at the central, provincial, district and *pargana* level (village level). All the courts functioned under the authority of the king with defined jurisdiction in civil, criminal and revenue matters.<sup>2</sup> The quality of justice in the Mughal Period was very high. Only person possessing the required qualification could be considered for judicial appointment at different courts of that period.

During British Period there existed two sets of courts—the English people were governed by their own laws and courts whereas for the native population there were different courts. During the period 1793- 1861, some of the Governor-Generals showed a keen interest in improving the existing *Adalat* system by introducing many reforms.<sup>3</sup>The judges of the Supreme Court were appointed by the British Crown under his seal and held office during his pleasure. On the other hand, the judges of the Company's court were appointed by the Governor General and held office during his pleasure.

Thus, the concept of "tenure and pleasure" made the judges subservient to the government, which means that the judges were accountable to the government while performing their judicial functions. The enactment of the Government of India Act, 1935 gave a new dimension

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<sup>2</sup> Kalraj Mishra judicial Accountabilty 2013 ,19

<sup>3</sup> M.P. Jain,outline of Indian Legal History,2<sup>nd</sup> Edition 1972

to the judicial system of the country. The act for the first time guaranteed a security of tenure to the judges who could be removed by his Majesty only on the ground of proved misbehavior or infirmity of mind or body. A judge could resign or be removed earlier on the ground of misbehavior or of a mental or physical infirmity if the Privy Council on the reference by the Crown so recommended.<sup>4</sup>The Federal Court continued to function even after India attained Independence in 1947 till its jurisdiction was taken over by present Supreme Court under the Constitution of 1950.

The framers of the Constitution were contended by- conferring wide appellate, original as well as writ jurisdiction on the High Court and the Supreme Court so that they could effectively deliver justice to the people of this great country.<sup>5</sup>

## **MEANING OF JUDICIAL ACCOUNTABILITY**

Whenever there is a mention of the independence of the judiciary, there is always a concern about the latent dangers of the judicial independence and there arises the importance of “Judicial Accountability”. The word ‘accountable’ as defined in the Black’s law Dictionary means ‘responsible for your own decisions or actions and expected to explain them when you are asked’<sup>6</sup>. Accountability is the sine qua non of democracy. Associated with the higher cause of truth and justice, judiciary and the judges have been accorded a distinct position. The provisions of the constitution provide that there should be an impartial and independent judicial body to adjudicate upon the matters and to act as the interpreter and guardian of the Constitution.

It is also a well settled principle of modern day governance that an authority deriving its existence from same source cannot claim to be absolute and unaccountable. Judiciary must be accountable either to the source of its origin, to the institution and more importantly to the people. All wings of Government belong to the people, when the legislature and the executive both are accountable, the judiciary cannot remain unaccountable and absolute. No person,

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<sup>4</sup> Granville Austin, Indian Constitution corner stone of Nation. 1966

<sup>5</sup> Kalraj Mishra judicial Accountability 2013 ,19

<sup>6</sup> Black’s law dictionary 20 (2004).

howsoever high is above the law similarly, no institution howsoever sanctified can claim to be unaccountable. Ultimately, every institution is accountable to the people in every democratic polity like ours. Several countries in their constitutions have already provided for ensuring accountability of judiciary. This to prevent concentration of power in the hands of a single organ of the state especially in countries where judicial activism interferes with and invades into the domain of other organs. But at the same time Judicial independence is a pre-requisite for every judge whose oath of office requires him to act without fear or favor, affection of ill-will and to uphold the constitution and laws of the country. Thus, here arises a tension between Judicial Independence and Judicial Accountability.<sup>7</sup>

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## **JUDICIAL ACCOUNTABILITY AND THE CONSTITUTION OF INDIA**

The Indian Constitution provides the provision under Article 124 the appointment of judges in the Supreme Court and Article 217 regarding appointment of the judges to the High Court<sup>8</sup>. Articles 124 to 147 in the constitution of India under the concept of "union judiciary" deals with the establishment and constitution of Supreme Court, the appointment of judges and their powers, rights, jurisdiction and their service conditions including transfer from one High Court to other. Though the constitutional provisions in Articles 124 and 217 are seemingly simple and unambiguous, yet it has given rise to different interpretations on three different occasions

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<sup>7</sup> Judicial Accountability in India by Isha Tirkey available at [www.ccs.in](http://www.ccs.in)

<sup>8</sup> The Constitution of India Act 1951 sec 124 and sec 217.

since last two decades by the Supreme Court to decide the question of correct selection process. In the case of *S.P. Gupta vs. Union of India*<sup>9</sup>, SC has given rise to a constant debate about the efficacy of the methods of appointment of the judges of the higher judiciary by the existing procedure and the need to set up a national judicial commission.

There have been decisions of the Apex Court wherein the present system of appointment of judges is found efficacious and preserves the independence of judiciary. In view of the contradictory interpretation at different occasions, recommendation for collegium was expressed by many jurists. Justice P.N Bhagwati who delivered the main judgement in first judge case made for collegiums for making a recommendation to the President. The lack of will of the government of India and fear of higher judiciary is basically responsible for the situation which has now taken place in absence of transparency in our judicial system.

Indian constitution provides three organs of the government i.e. legislature, judiciary and executive. These organs works within their sphere even Article 50<sup>10</sup> is also provides that the state shall take steps to separate the judiciary from the executive in the public services of the state. Independence of judiciary is basic feature of constitution of India which means judiciary needs to be kept away from other branches of government.

## **TYPES OF ACCOUNTABILITY**

Accountability is divided under following heads:

1. Legal and Public accountability.
2. Informal or Professional accountability, i.e, to fellow judges.
3. Personal accountability of judges, which can be criminal, civil, and disciplinary.<sup>11</sup>

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<sup>9</sup> AIR 1982 SC 149

<sup>10</sup> The Constitution of India, 1950 Article. 50.

<sup>11</sup> Dr Cyrus Das, *judges and judicial accountability* 214(2010)

## **INTERNATIONAL PRESPECTIVE ON JUDICIAL ACCOUNTABILITY**

### **South Africa**

South Africa is currently in the process of adopting new laws on judicial ethics and discipline, financial disclosure, judicial codes of conduct and training for judges. Issues of judicial accountability have been on the legislative agenda since the late 1990's the subject of wide public debate.

### **Australia**

The federal judiciary enjoys constitutional protection in terms of appointment and removal of judges by virtue of section 72 of the Federal Court of Australia Act Removal can only occur through proved misbehavior or incapacity. Removal must be effected by the Governor General on an address from both houses of parliament in the same sitting on either of the two grounds.

### **Canada**

In Canada the independence of the federally appointed judiciary is guaranteed by the Canadian Constitution (namely sections 96 to 100 of the Constitution Act, 1867) which provides for the appointment, security of tenure and financial security of superior court judges. The 1971 amendments to the Judges Act created the Canadian Judicial Council and gave it statutory authority to investigate complaints against federally appointed judges.

### **United States**

Article III of the US Constitution establishes the judiciary as an independent third branch of government. Article III gives the judiciary the power to hear and adjudicate all cases arising out of the constitution and laws of the USA with impartiality. Article III also states that federal judges can only be removed through impeachment by the House of Representatives and conviction by the US Senate for treason, bribery or other high crimes or misdemeanors.<sup>12</sup>

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<sup>12</sup> Available at <http://www.legalindia.com/judicial-accountability>

## INDIAN PRESPECTIVE ON JUDICIAL ACCOUNTABILITY

Accountability of the judiciary in respect of its judicial functions and orders is safeguarded by provisions for appeal, revision and review of orders. But there is no mechanism for accountability for serious judicial misconduct, for disciplining errant judges. The concept of judicial accountability in India is considered in two ways. First, accountability of the higher judiciary in India for their judgments. Secondly, the paper examines the institutional methods of making judges accountable in India viz., the method of their appointment, removal and the inhibitions to criticism of their work by the law of contempt.

Our judiciary is considered as the most powerful judiciary in the world and the social perception of it is very high. The courts always avoid providing the information about appointments of employees of the courts, about appointment and transferring of judges, and about complaints against judges.

The period of Indian judiciary can be divided into various phases, these are :

- I. Period of confrontation with the executive, i.e. 1950 to 1973 period.
- II. Super session of judges.
- III. Change of Direction by the SC.
- IV. New Questions of Accountability.
- V. Emergency and the blow to the Independence of Judiciary.
- VI. Safeguarding the Independence of the judiciary.
- VII. Demand for national judicial commission.
- VIII. Disciplining judges.<sup>13</sup>

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<sup>13</sup> Mona Shukla, *Judicial Accountability Welfare and Globalisation*, 80 (2010)

### **The Emergency and Blows to the Independence of the Judiciary**

During the emergency between 1975 to 1977, it was the SC of India, which was perceived to have let down the expectations of the people by holding that a detainee did not have even the common law right of securing from the courts his release for an order which was illegal, arbitrary and without the authority of the law, as during the emergency the right to personal freedom guaranteed by the constitution had been suspended as it was held in the case of *ADM Jabalpur vs Shukla*.<sup>14</sup>

### **Demand for National Judicial Commission**

The suggestions for a National Judicial Commission have been made by the 80th report of the Law Commission of India<sup>15</sup> and 121th report of Law Commission of India.<sup>16</sup> The constitutional Amendment (67th amendment) Bill 1990 was formulated by the Ministry of law and Justice in 1990 for a National Judicial Commission but the bill lapsed on the dissolution of the parliament. The demands a diamond hard constitutional code covering every dimension of judicial performance.<sup>17</sup>

### **CHALLENGES TO MAKING JUDICIARY ACCOUNTABLE**

According to the Indian Constitution, the only way through which the members of the higher judiciary that is the Chief Justices and Judges of Supreme Court and High Courts are accountable or can be removed is through impeachment which is prescribed Under Article 124(4) of the constitution of India on the bases of providers, the proven misbehavior or incapacity.<sup>18</sup>

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<sup>14</sup> AIR (1976) SC 1207

<sup>15</sup> The Law commission Report no.80th

<sup>16</sup> The law commission Report No.121

<sup>17</sup>J. V.R. Krishna Iyer, *Are Judges a rare class above public servants?* 77 (2008)

<sup>18</sup> The constitution of India Act,1950



## **THE JUDGES INQUIRY ACT, 1968**

The Judges Inquiry Act, 1968 states that a complaint against a judge is to be made through a resolution signed either by 100 members of the Lok Sabha or 50 members of the Rajya Sabha to their respective presiding officers.<sup>19</sup> After the debate is done and the judge is heard, the house decides to put the motion to vote, a resolution passed by 2/3rds majority in both houses. With this provision no one being judge has been impeached till date. However it will be a misjudgement if one thinks that the judiciary is free from corruption. The loophole is the entire process of impeachment itself. It is undoubtedly lengthy and cumbersome.<sup>20</sup> This is a complete failure. To begin an impeachment one needs signatures to pass the resolutions. It seems impossible task since many MPs have their own pending individual or party cases in these judges court, so they are not willing to risk themselves. Conclusive documentary evidences are also required before they put their signatures to the motion.

## **THE CONTEMPT OF COURTS ACT, 1971**

The contempt of court can be seen as a means to protect the independence of the court, however it is mostly seen that the court has used this as a means of protecting themselves from criticism. Contempt is defined as any act that is offensive and critical to the dignity and the authority of courts. According to Oswald, “contempt of court is so manifold in its aspect that it is difficult to lay down the exact definition of the offence.”<sup>21</sup> The contempt of Court Act, 1971 defines criminal contempt as the publication (whether by words, spoken or written, or by signs or by visible representations, or otherwise), of any matter or the doing of any other act whatsoever which are:

- (i) prejudices or interferes or tends to interfere with the due of any judicial proceedings;
- or

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<sup>19</sup> Judges Inquiry Act 1968,sec 3

<sup>20</sup> Law commission Report No. , 195th.

<sup>21</sup> Supra Note 19,10

- (ii) Interferes or tends to interfere with or obstructs or tends to obstruct, the administration frustration of justice in any manner.<sup>22</sup>

There is a loophole in The Contempt of Court Act that it infringes or violates the two important fundamental rights of the citizens e.g. the right to personal liberty<sup>23</sup> and the right to freedom of expression.<sup>24</sup>In the famous Arunadhathi Roy's Case<sup>25</sup> she asserted that she was exercising her freedom to speak and expression under Article 19(1) enshrined in the Constitution. The court held Arundhati Roy guilty for the contempt of court and sentenced her to one day imprisonment and a fine of Rs. 2000.

## **RIGHT TO INFORMATION ACT, 2005 AND JUDICIAL ACCOUNTABILITY**

One of the ways the Judiciary can be held accountable when the people have the right to know what exactly they are doing. This comes naturally in a democratic form of government. This is a chief safeguard against corruption. The Central Information Commission had directed the information officer of the court to obtain the information from the CJI's office and provide it to the applicant. There is an Exemption clause from the disclosure of information specified under section 8 of the Act<sup>26</sup> which provide that the information relating to personal conducts which do not have any public prosecutor which would cause unwarranted invasion of privacy of the individual. The courts have double standards on the Right to Information Act that seen when although the courts were included in the definition of Public Authorities most of the HCs did not even appoint Public Information Officers (PIOs).

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<sup>22</sup> The contempts of courts Act 1971, sec 2.

<sup>23</sup> The constitution of India Act 1950, Article 21.

<sup>24</sup> The constitution of India Act 1950, Article 19(1)a.

<sup>25</sup> AIR( 2002 )SC 1375

<sup>26</sup> Right to Information Act 2005,sec 8.

## **THE JUDGES INQUIRY BILL, 2006**

The judiciary claims that any outside body having disciplinary powers over them who compromise their independence so they have set up an “in-house mechanism” investigating corruption. This was proposed by the Judges Inquiry Act Amendment Bill 2006 which provided for a National Judicial Council consisting of the CJI, two senior-most judges of the SC and two CJ’s of HCs as members to enquire allegations. The problem which arises is that in this in-house procedure the judges regard themselves as a ‘close brotherhood’ and therefore are unwilling to take any step against the Section 33, of the Act which says not to disclose any information relating to the complaint to any person in any proceeding except when directed by the Council. This will make it impossible to publicise the charges. Moreover, even if it finds a judge guilty of serious misconduct, it can only recommend impeachment which again goes for voting in the parliament, ultimately results in failing.

## **ROLE OF MEDIA AND NGO’S IN JUDICIAL ACCOUNTABILITY**

Many years back, the media was not paying much mention to the court proceedings though the decisions given by the courts had far reaching effect on the life, liberty and rights of the people. The role of the Media, as regards, courts Proceedings had radically changed and it greatly helped the common man to understand the nature and contents of our judicial proceedings.<sup>27</sup> The relationship between the media and the judiciary needs to be carefully managed by both the institutions. While the media strives to provide access to information to the public it needs to ensure that it does not hamper upon the rights of various parties involved in a particular case of unduly influence the judiciary.

The SC and HCs are powered to intervene and punish the publication of any matter, which causes prejudice to a pending case, to keep the stream of justice clear and pure so that parties may proceed with safety both to themselves and to their character.<sup>28</sup> The constitution of India permits imposition by law a reasonable restrictions on the exercise of this freedom in the interests of the sovereignty and integrity of India, the security of the state, the friendly relations

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<sup>27</sup> Justice K.G. Balkrishnan, *Reporting of Court Proceedings by Media Administration of justice* . 2008

<sup>28</sup> A.M.Ahmadi J. *Interrelationship between Law, Media and the Judiciary*.

with foreign state, public order, decency or morality, or in relation to contempt of court, defamation or incumbent to an offence.<sup>29</sup>

Judicial reforms issues were also raised by the NGO's. Some that were discussed are:

- (a) Weak governance and corruption in judiciary
- (b) Lack of laws to govern magistrate.
- (c) Lack of judges and lawyers
- (d) Low salary of judges and prosecutors.<sup>30</sup>

## **THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION ACT, 2014**

The National Judicial Appointments Commission Bill, 2014 was introduced by Lok Sabha on 11.08.2014. It was passed by both the houses in August and cleared by the President on 31 December 2014. Amendments are made to Articles 124 (2) and 217 (1) of the Constitution that deals with the appointment of judges in the Supreme Court and the High Courts, respectively and some words in other articles are also been substituted. Article 124A, 124B and 124C are been inserted in the CONSTITUTION (NINETY-NINTH AMENDMENT) ACT, 2014.

The newly inserted Article 124A and 124B establishes and gives to the National Judicial Appointments Commission constitutional status, while at the same time describes its composition, functions and powers. Through Article 124C, the NJAC Act, confer upon both the Central Government as well as the Commission itself, with rule making power to further define the manner in which appointments are to be made. The NJAC was established to serve as a constitutional body like the Election Commission, Comptroller and Auditor General Etc. The Act has given new procedure to select Supreme Court and High Court judges. The Act

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<sup>29</sup> The constitution of India 1950, Article 19(2)

<sup>30</sup> *Supra Note 19,*

will lead to the establishment of the National Judicial Appointments Commission, which will appoint and transfer judges to the Supreme Courts and the High Courts.

## JUDICIAL ATTITUDES

In 1982, the matter of appointment of High Court judges came before the Supreme Court in *S.P. Gupta v Union of India*.<sup>31</sup> The main question considered by the court was: of the various functionaries participating in the process of appointment of a High Court judge whose opinion amongst the various participants should have primacy in the process of selection. The majority in Gupta gave a literal meaning to the word 'consultation' in Art 124(2) and 217(1) of the constitution of India. In reality this view made consultation with the Chief Justice inconsequential in the matter of appointment of the High Court Judges. The observation of Bhagwati J. on the question of accountability—"The reason why the power of appointment of judges has been left to the Executive appears to be that the Executive is responsible to the Legislature, and through the Legislature it is answerable to the people, who are the consumers of justice. The power of appointment is not entrusted to the CJI because they do not have any accountability to the people and even if any wrong appointment has been made, they are not liable to account to anyone for such appointment."

*Supreme Court Advocates on Record Association v. Union of India* <sup>32</sup>. The Court emphasized that the question has to be considered in the context of achieving the constitutional purpose of selecting the best to ensure the independence of judiciary.

Deliberating on the issue, the Court pointed out that this provision of 'consultation' with the Chief Justice was introduced because of the realization that the Chief Justice is best equipped to know and assess the worth of the candidate and his suitability for appointment. Accordingly, the Court has ruled that "in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight the selection should be based on a participatory consultative process in which the Executive has the power to act as a mere check

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<sup>31</sup> AIR 1982 SC 149

<sup>32</sup> (1993)4 SCC 441

on the power of the Chief Justice. The Judiciary has for all practical purposes had become its own appointing authority. The Supreme Court replaced the Executive primacy with that of the CJI, which in effect has done away with the role of the Executive. The Collegium that decides the matter lacks transparency and is likely to be considered a cabal. The Majority in the Second Judges case tried to clear that The CJI and the Chief Justice of the High Court, being responsible to the functioning of the Courts, have to face the consequence of any unsuitable appointment which gives rise to the criticism.

In *Raj Narain Vs Indira Gandhi* case<sup>33</sup>, the foundation for the RTI was laid by the SC according to which that the people of the country have the right to know about every public act, this is derived from the Right of freedom to speech. To cover it with the veil of secrecy, the common routine business is not in the interest of the public.

*B.A. Khan vs A.D. Savant*<sup>34</sup> It was held that courts of justice are called as temple of justice. Temple donates sancity, purity and reality. So in the temple of justice these things are observed while administering justice. As the temple is holly place, so is the courts where justice is made impartial and aggrieved parts are put to happiness with dignity and sancity. Judges are the protectors of law and justice. A judges is expected to administer justice according to law and with his appointment, as a public trust; he should not allow other affairs of his private interest to interfere with the prompt and proper performance of judicial duties; nor should be administer the office for the purpose of advancing his personal aims or increasing popularity.

*C.Ravichandran Iyer vs A.M. Bhattachariya*<sup>35</sup>, the Supreme Court considered the scope and meaning of the word misbehavior as it is a willful abuses of judicial office, willful misconduct in the judicial office, corruption and lack of integrity, or any other moral turpitude would be misbehavior. Misbehavior would extend to conduct of the judges in or beyond the execution of judicial office.

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<sup>33</sup> AIR 1975 SC 865

<sup>34</sup> 1994Cri LJ 2836(Bom)

<sup>35</sup> (1995) 5 SCC 463

## CONCLUSION

Expansive reforms are necessary in current judicial system. As judges do commit misdeeds which take the form of corruption, biases etc. So in order to have an independent judiciary such malice should be corrected, otherwise the independence would be at stake. But how to do it, it is of prime importance if Executive or Legislature will do it Judiciary will be under a constant pressure. An independent commission to investigate the charges and awarding punishment and to take appropriate measures as per 80th Report and 121st Report of Law Commission of India. Judicial independence depends upon the public acceptance of the judiciary being a fair, just and honest institution. Judicial accountability and good judicial conduct goes hand in hand towards the effective working of the judiciary and maintenance of rule of law. Employ more judges and create more courts to handle the problem of pendency of cases. Increase the number of working hours and working days for all courts, this single measure can dramatically reduce backlog. Incentivise to judges to deliver quality judgements and a mutually agreed number of judgments in a certain period.