

THE DEBATE BETWEEN JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY: WHO IS JUDGING THE JUDGES?

Written *Maushumi Bhattacharjee** & *Prakhar Galaw***

* 4th Year B.B.A. LL.B Student, Institute of Law, Nirma University

** 4th Year B.A. LL.B Student, Institute of Law, Nirma University

ABSTRACT

Through this article, the author tries to discuss about the imminent need for the accountability in the Indian Judicial system or the Indian Judiciary. Accountability or Accountable means actions which require justifiable explanations for that particular action, to the people who are directly or indirectly related with the consequence of that action.

In recent times the actions and decisions of the Indian Judicial system in the matters of appointments, transfers, judgements and orders; calls for a serious question of accountability because of the widespread corruption. The Indian judiciary which is the guardian and protector of the constitution (law of the land) has itself fallen into the prey of corruption and nepotism which is against the preamble which forms the basic structure of the constitution which cannot be amended. Now the question is why the Indian Judiciary is entangled in so much corruption and nepotism. Answer to that is power, absolute powers which are held by the judiciary, which remain unchecked. And as the saying goes "power corrupts and absolute power corrupts absolutely" goes well with the Indian judicial system. All this is happening because of lack of judicial accountability. With powers like contempt of court the judiciary could terrorize anyone. They have many more powers of which they are not answerable to anyone. There are some provisions like judges enquiry which does make the deviant judges accountable to an extent, but since the enquiries are done by the judicial committees themselves, the outcomes are biased and not very surprising. Moreover the impeachment procedure is so complex that not a single judge till date has been removed from his office.

This article tries to discuss about the issue of accountability in the judiciary in exhaustive manner taking into consideration the past present and future events related to appointments, transfers, judgements and misuse of the post for personal benefits and also tries to discuss various solutions of accountability like national judicial appointment commission (NJAC).

INTRODUCTION

In India the Judiciary is the most important organ of the government which has the main function of rule adjudication which are made by the legislature i.e. the rule making body and are implemented by the executive body of the government. The judiciary is the 3rd and most important pillar of the Union followed by the legislature and the executive. The main principle behind such separation of powers is that each institutions in its own domain works for the maximum welfare of the citizens of the democracy, and judiciary is the watchdog which protects, preserves and enforces our fundamental and legal rights against the arbitrary violations. And the legislature and executive are accountable to the judiciary.

But the question is to whom the judiciary is accountable. Are the powers of judiciary unlimited? And if these powers are unlimited and absolute they would likely corrupt the institution, in short absolute power without accountability leads to corruption. Recently there were corruption charges against Calcutta high court judge Soumitra Sen who was found guilty of misappropriating large sums of money and Chief Justice of Karnataka High Court, P D Dinakaran, alleged for land grabbing and corruption but corruption in judiciary is not a new thing, it has always been there, only less talked and reported about in the mainstream media. But due to drastic increase in the case of corruption against the judiciary one needs to ask *who is judging the judges?*

In reality and practical sense there is no organisation which is acting as watchdog over the Indian judiciary. On paper there are many provisions in the advocates act; judge's enquiry act etc. which prescribes codes of ethics, norms, enquiry provisions and many other procedures against the offenders, but all have proven their hollowness due to lack of implementation and nepotism within the judiciary which leads to acquittals.

The main argument which propends the current judicial system against the question of accountability is of the independence of judiciary. The independence of judiciary is another important concept which should be studied together with the concept of accountability. And since the judiciary is the public institutions, which is for the people, it should be accountable to the people. And work according to the provisions of the constitution, keeping an eye on the preamble which is the soul of the constitution.

INDEPENDENCE OF JUDICIARY

Independence of Judiciary is a very important concept which is mentioned in the constitution. It is the part of the basic structure of the constitution which cannot be sacrificed in any circumstance as judiciary is the adjudicatory body of the union, which acts as an umpire between the parties in the dispute (adversarial system). So for giving a sound, lucid and unbiased decision umpires should be free from any kind of pressure from litigants, cabinet ministers, influential personalities, big corporations, rich businessmen and also criminal elements of the society.

When the framers of our constitution were anxious about the kind of judicial system or judiciary India must have, Dr. B.R. Ambedkar gave the answer to their concerns. He stated that:

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

Independence of judiciary essentially means that separating the judiciary from other organs of the government, that is, executive and the legislature. However, the major problem in understanding this independence is that, judiciary is independent from the legislature and the executive and not accountability. It also means independence of the judges that form the judiciary.

Independence of judiciary is needed because:

- a) Judiciary is the watchdog of Indian Constitution and it checks the functioning of other organs of the government.
- b) The judiciary plays a vital role in interpreting the provisions of the constitution and it is important that such interpretation is unbiased and free from any sort of pressure from the executive or legislature.
- c) The judiciary is expected to deliver impartial justice. This is what makes it the most important organ of the government. It is important that the judgements are not influenced by any sort of political inclinations.

Independence of judiciary concept has however faced many criticisms and problems when it comes to appointment and transfer of judges. It is important that Judicial Independence and Judicial Accountability co-exist and go hand in hand in order to maintain harmony in the

judicial system. Article 235 of the Indian Constitution gives power to the High Courts over subordinate courts, thus establishing a perfect example of judicial independence.

JUDICIAL ACCOUNTABILITY

Judicial accountability is nothing but a consequence of the concept of judicial independence. Accountability generally means to be responsible for one's actions and decisions. Judiciary being the most important organ of our government is responsible for passing orders and judgements and providing justice to society. Thus it is absolutely essential that judiciary is accountable for its actions and decisions and is not compromised by biasness and corruption.

However, it is not clear whether the judiciary is accountable to anyone, as diplomatically stating, the judiciary neither stands accountable to the people or the two organs of the government. That being said, the need of accountability in the judicial system is evident. The judiciary has been given the right to award capital punishment to the law breakers. It is the organ of government that performs essential checks and balances and hence judicial accountability must be taken seriously.

Judicial accountability brings about transparency and it can only be achieved if the accountability is ensured and corruption in the system is brought to a stop. Many questions arise as to what has gone wrong with the system. Pt. Nehru has said in a statement, "*Judges of the Supreme Court sit on ivory towers far removed from ordinary men and know nothing about them.*" Judges are also humans after all and can make errors all the time. So how can one achieve accountability in such a system?

Thus, the problems and solutions with judicial accountability have been discussed below.

ISSUES IN MAKING THE JUDICIAL SYSTEM ACCOUNTABLE

1. IMPEACHMENT

Article 124(4) of the Indian Constitution specifies the process of impeachment that is removal of a judge of Supreme Court on the grounds of proven misbehaviour or incapacity. This is the

only possible and available mechanism in the judicial system of making the higher judiciary accountable for their actions. According to the Judges Enquiry Act, 1968, a complaint against a judge can be made by passing a resolution signed by either 100 members of Lok Sabha or 50 members of Rajya Sabha. Then there is a three member committee two judges from the Supreme Court and the other chief justice of India. Investigations have to be made before passing a resolution. In the procedure for removal or impeachment of the judges, a resolution must be passed in each house of parliament by the total majority of members of the house and not less than two-thirds majority of the house present and voting. The process must take place in a single sitting. The resolution has to be presented before the president for his approval.

No judge has been impeached till date. However this does mean that there is no corruption in the system. The whole impeachment process is considered to be a failure as it is so lengthy and clumsy.

Justice Ramaswamy's case:

This was the first impeachment case ever against a Supreme Court judge. Justice V. Ramaswamy was appointed as the chief justice of Punjab and Haryana High Court on November 12, 1987. He got promoted to Supreme Court in October, 1989. In 1990, there were complaints about him in press that he had spent a large amount of office money on himself and misused it grossly. In February 1991, 108 members of the Bharatiya Janta Party (opposition party), signed and submitted a notice of motion to the speaker of Lok Sabha for the removal of Justice Ramaswamy. However, Ramaswamy survived the impeachment because of the huge support from the Southern region MPs. 196 MPs voted for the motion which was less than what was required, that is, two-thirds. The motion failed regardless of the two yearlong proceedings that took place and unanimous votes from the opposition. Thus there is a very strong lesson to be learnt from the failure of this impeachment process, that is, this process of removal of judges is ineffective and obsolete. There is a dire need for an entire new system to restore judicial accountability and correct the failing standards of integrity of the judiciary. This case also demonstrates how corruption in judiciary was allowed to exist in the end. Ramaswamy was allowed to continue as a judge in the apex court of the country even after losing integrity in the public. The question we need to ask is, can the judgements made by a judge of such character be authentic?

Another issue is that the investigating committees also consist of judges and they are hesitant to charge their colleagues for corruption. They all work together like a union. The answer to this problem can be forming a National Judicial Commission, an independent body having its own investigating mechanism.

As already seen in the case of Justice Ramaswamy, a two-thirds majority is not the best option while dealing with such an important organ of the government that has such regulatory functions. A simple majority would prove to be more helpful for faster decision making.

2. CORRUPTION IN JUDICIARY

Judicial corruption includes dishonest use or 'misuse' of judicial powers by the court authorities leading to unfair and unjust judgements. Due to corruption in judiciary, the public is deprived of the right to fair trial and right to equality. The judicial system of a country is responsible for keeping check over the functioning of other organs of the government and the functioning of the society. It is responsible for eliminating corruption from the country, but when corruption reaches the judiciary itself, it shows signs of a weak democracy.

India is the world's largest democracy. Indian judicial system plays the important role of checks and balances over the executive and the legislature. However, corruption in Indian judiciary is a major threat and it largely diminishes judicial accountability. Citizens need to have faith that the country's judiciary will provide them justice and equal protection by law. Here are some cases showing how corruption has crippled Indian judiciary:

*Justice K. Veeraswamy's case:*¹

Justice K. Veeraswamy was the chief justice of Madras High Court. A case was filed against him by the CBI under Prevention of Corruption Act, charging him for possession of assets inconsistent with his income sources. The Madras High Court referred the case to the Supreme Court for dealing with important issues of law. The Supreme Court laid down some stern guidelines for the protection of judicial independence.

¹ *K. Veeraswami v. Union of India*, (1991) 3 SCC 655

- a) No F.I.R. can be registered against a Judge or Chief Justice of the High Court, or a Judge of the Supreme Court without the sanction of the Chief Justice of India in the matter.
- b) It was held that the Supreme Court is not a court of limited jurisdiction of only dispute settling, and that the court has been a law maker and it is the courts responsibility and duty to apply the existing law in a form more favourable to the independence of the judiciary.
- c) It was also said that any complaint against a Judge and its investigation by the CBI, if given publicity will have a far reaching impact on the judge and the litigant public therefore there is need of a judicious use of taking action under the Prevention of Corruption Act.

The Supreme Court's judgement in this case has been criticized on the ground that this is sheer misuse of judicial independence and it completely overlooks the concept of judicial accountability. It provides an unfair shield to the judges for arbitrary behaviour and use of judicial powers.

Justice Soumitra Sen's case:

Soumitra Sen is a former judge of Calcutta High Court. There were allegations against him that he had miss appropriated Rs. 32 lakhs as a court worker in a case from 1993 between *Steel Authority of India Limited (SAIL) and Shipping Corporation of India*. A three judge committee was formed which found him guilty of depositing public funds into his personal account. In 2006, he returned the money due to passing of the High Court order. A year later the Chief Justice of India, KG Balkrishnan recommended his impeachment to the Prime Minister. This was the 2nd case after the Ramaswamy case where the parliament initiated impeachment proceedings against a High Court judge. In 2009, 53 Members of Parliament passed a resolution in the Rajya Sabha for the removal of Justice Sen. In 2011 the Rajya Sabha passed the motion with a majority of 189 votes in fovor of the motion. Before the motion could be passed in Lok Sabha, Justice Soumitra Sen resigned. He was found guilty of miss appropriating public funds and misrepresenting the facts to the court.

Such corrupt judges diminish the accountability of judiciary in the eyes of the public. If such case is repeated then it would be a matter of grave public disgrace for the Indian Judiciary.

Ghaziabad Provident Fund Case:

This is serious case of embezzlement of funds and a wide scaled scam. Ashutosh Asthana, a Ghaziabad court official confessed before the court and blew the whistle by naming 36 judges involved in the scam. These included 1 Supreme Court and 10 High Court judges. After testifying against these 36 judges, he was surprisingly found dead in jail under suspicious circumstances. He gave a detailed account of the scam explaining how most of the funds were withdrawn as provident fund advances from the Treasury and used in purchase of household appliances. There was a miss appropriation of about Rs. 49 crore funds from the provident funds of employees. Due to lack of evidence, and death of a key witness the police found it extremely hard to investigate the matter.

Sexual Harassment Cases:

A retired Supreme Court judge and former Chief Justice of the Orissa High Court, Judge AK Ganguly was accused by a woman intern for sexually harassing her. He was found guilty by the three judge committee even though he continually denied all allegations. He resigned from the West Bengal Human Rights Commission in 2014.

In another recent case, a sexual harassment complaint was filed against Madhya Pradesh High Court judge SK Gangeela. The committee has investigated the matter and 58 Rajya Sabha MPs have passed a resolution for his impeachment.

Such cases of gross misconduct on behalf of higher judiciary judges are a shame for the Indian Judiciary. High court and Supreme Court judges that are supposed to provide justice to the society are themselves involved in such criminal activities is highly unfortunate. They must not be given the immunity from proper criminal proceedings. They must be tried like any other offender. If such cases keep on rising then there would be no accountability left in the judiciary.

Uncle Judges Syndrome:

There are many cases where lawyers have father, uncle or brother as a judge in High Courts and also in Supreme Courts. These lawyers charge exorbitant prices from their clients as they “know” the judge and can ensure a favourable order.

The former Union Law Minister, Mr Shanti Bhushan, has explained the term in a simplified manner. He stated, “Let’s say there are four judges whose sons are practicing as lawyers in

the same court. Obviously, the son of A will not appear in his father's court and son of B will not appear in his father's court and so on. But they will appear in each other's courts and there is a general understanding that if you help my son, I will help your son. This is happening in many cases"

Advocates that are not blessed with uncle-judges have no other option but to keep their mouths shut or else they will be ill-treated by the judges and will face hell in courts. Such criminal contempt is spread across the Indian judiciary and there is no morality left in the judicial proceedings. Sadly, justice has also turned into a game of money.

3. CONTEMPT OF COURT

In a democracy, the people have the power. And the government bodies or judges, courts etc. are public servants or servants of people. Now, the power of contempt is given to the judges to allow the smooth functioning of the judiciary. However, that does not deprive the right of people of freedom of speech. They can criticise the judges all they want.

Article 19(1)(a) gives the right to freedom of speech and expression to the people. But article 129 and 215 give the contempt powers to judges and limit the rights of people. Contempt is generally defined as an act that critically harms the dignity of the court and lowers its authority. There can be two types of contempt: Civil and Criminal.

Civil contempt can be defined as wilful disobedience of any order, decree or discretion of the court. Criminal contempt can be defined as any publication or any act that lowers the authority and harms the dignity of the court.

The Contempt of Court Act has also been panned that it violates two of the fundamental rights, that is, right to personal liberty and right to freedom of speech and expression.

Arundhati Roy issue:

Arundhati Roy and Medha Pathkar were activists from Narmada Bachao Andolan who protested against the Supreme Court's order of increasing the height of Sardar Sarovar dam by 90 meters which would further lead to destruction of nearby villages. Ms Arundhati Roy and other protesters participated in a dharna and gave a demonstration outside the court criticizing

the court's order. The Supreme Court without giving any prior notification or chance to be heard served Ms Roy with a notice of contempt of court and violation of principles of natural justice. Their advocate Mr. Prashant Bhushan stated that the court had abused its powers of contempt. Ms Roy was merely practicing her rights of freedom of speech and expression. The court's order clearly violates her rights. The court without any justification cannot practice its powers of contempt arbitrarily. How does that justify judicial accountability?

Recently the laws of contempt have been relaxed in U.S. and U.K. In US the defence against the order of contempt is to provide truth. The contempt order must not pose any danger in the administration of justice.

Judiciary can earn respect only by being accountable for its actions. If criticising the judges' decision amounts to contempt then protests against the legislature and executive will also have the same cause, as they are also public servants. There is no doubt that the proper functioning of judiciary must be ensure but should it be at the cost of people's rights? Is there no way to stop the judiciary from arbitrarily using its powers of contempt?

4. RIGHT TO INFORMATION(RTI) AND JUDICIARY

In the famous judgement of *Indira Gandhi v Raj Narain*, the Supreme Court stated the importance of Right to Information and explained eloquently how the right was guaranteed to individuals by the constitution. The Supreme Court held that right to receive and impart information is a part of the right to freedom of speech under the constitution. The court rejected the government's claim for privacy over the Blue Book that contained information about security measures for Prime Minister in Indira Gandhi's case. The Supreme Court stated that the government had a responsibility to not keep any secrets regarding public functions and disclose all information that is related to public functionaries.

However the Indian judiciary has shown some serious hypocrisy and double standards about practicing Right to Information. If the Right to Information Act is applicable to the legislative and the judiciary, then how is the judiciary exempted from its provisions? Why does judiciary get special treatment?

The double standards of courts can be clearly seen after the Right to Information Act has been enacted. The RTI Act clearly applies to the judiciary that is court officials or judges as they are also included under the definition of public servants.

So, when Subhash Agarwal, asked for the disclosure of information on Supreme Court judges and whether they were complying with the Code Of Conduct, the Public Information Officer asked the court to provide information regarding the same from the Chief Justice's office to the applicant. But in response, a writ petition was filed in Delhi High Court claiming that such information cannot be disclosed as it was communicated by the judges to the CJI under "fiduciary relationship".

The judiciary will always play the card of judicial independence to escape judicial accountability which cannot be tolerated.

5. JUDICIAL ACTIVISM OR JUDICIAL OVERREACH?

Judicial activism has recently been seen trespassing its limits and turning to judicial overreach. Judicial intervention in matters of labour policy, ecological and environmental policies, fiscal policy etc. tends to look like judiciary oversteps its authority and interferes with the functioning of the legislature and executive. This is called judicial overreach. Justice JS Verma once stated, "*Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial 'ad hocism' nor judicial tyranny.*"

It is essential for the smooth functioning of democracy that the difference between "judicial activism" and "judicial overreach" is clearly recognized. The lack of accountability requires judiciary to step back and restrain in its activities.

6. APPOINTMENT OF JUDGES

Over the course of three judges cases the court evolved the concept of judicial independence to mean that no branch of state, that is, executive or the legislature will have any say in the appointment of judges. The court created the collegium system and put it in function giving exorbitant powers to the senior judges to select and refer the appointments to the government.

This whole process is arbitrary as it leads to political favouritism when the appointments are in hands of the executive and judicial overreach when they are in hands of the judiciary.

SOLUTIONS TO PROBLEMS

1. FORMATION OF NATIONAL JUDICIAL COMMISSION(NJC)

The 80th and 121st Law Commission Reports of India have made the suggestion to form NJC. It is supposed to consist of 5 members:

- a) One member nominated by all the Supreme Court judges
- b) One member nominated by the Chief Justices of the High Courts
- c) One member nominated by the cabinet of ministers
- d) One member nominated by the speaker and the Leader of Opposition of both the houses
- e) The last one member nominated by Chief Vigilance Commissioner of the Central Vigilance Commission (CVC), Comptroller and Auditor General (CAG) and the Chairperson of the National Human Rights Commission (NHRC)

The NJC shall have its own investigative mechanism that shall investigate in the matters of removal of judges. Also the NJC will select the judges for appointment in HC and SC, the information of which will be available to the public. In this way the independence of judiciary is maintained and its accountability to the public too.

2. JUDICIAL ACCOUNTABILITY BILL

The bill was introduced in Lok Sabha on December 1, 2010.

- a) The bill shall lay down judicial standards and provide for accountability of the judiciary. It will establish certain mechanisms to investigate the complaints made against the judges individually. Also, it shall provide a mechanism for the removal of judges. It will replace the old Judges Inquiry Act, 1968.

- b) A five member commission shall be appointed by the president of the recommendation of the prime minister and its cabinet of ministers including the leader of opposition and a minority member.
- c) Declaration of assets of judges' shall be made mandatory.
- d) When a complaint is received against the judges, it shall go to the investigating committee. If the charges are serious then the committee can ask the judge to resign, and if he refuses the case will move forward towards the process of removal.
- e) All the investigation proceeding information shall be made available to the public.

3. JUDICIAL RESTRAINT (NEED OF THE HOUR)

It is important for the judiciary to practice judicial restraint for maintaining the balance between the different organs of democracy. The courts must be concerned with legality and law. Extreme judicial activism can raise questions on its accountability. Curbing judicial activism is required as the judiciary cannot start performing the functions of other organs which shall be totally against the principle of separation of powers. The benchmark of an independent judiciary has been its exclusion from the political and administrative process. Judges must not act like legislators or administrators.

4. AMENDING THE CONTEMPT OF COURT ACT

The Contempt of Court Act has a lot of loopholes and it gives arbitrary powers to the judiciary. Few suggestions for the amendment were made. The accused must be provided with a reasonable opportunity to defend himself. The contempt cases should not be tried by courts but by independent commissions. The Act must make changes to the definition of criminal contempt so that it does not infringe the rights of the people.

CONCLUSION

The time has come when the judicial independence needs to be interfered with. Judicial independence must go hand in hand with judicial accountability. It is important to acknowledge

the fact that the judiciary is not appointed by the people directly. Thus its accountability is questionable. The main task of judiciary is to provide fair trial and speedy justice. It is the organ that protects the society from injustice. It is only through this that the public can acknowledge its accountability.

This does not mean that the judiciary has failed completely. If the solutions to the problems are entertained and show a green light then proper functioning of judiciary and judicial accountability can definitely be ensured.

