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Judicial Overreach: Accountability of the Judiciary

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Abstract

Democracy is the cornerstone of our nation and well imbibed in our Magna Carta, the Constitution of India. The separation of powers between the three organs of the Indian Government is well articulated and clearly observed in the case of, *Divisional Manager Aravali Golf Club v Chander Hass*,¹ where the Court itself noted that in view of the separation of powers doctrine, the judges should not unjustifiably try to perform executive or legislative functions in the name of Judicial Activism. It also clarified that the judiciary cannot attempt to take over the functions of another organ of the government. The great historian Lord Acton once said, 'All power tends to corrupt. Absolute power corrupts absolutely'.²

'Accountability' refers to the formal or legal locus of responsibility.³ Oxford's dictionary defines the word 'accountable' as the fact of being responsible for your decisions or actions and expected to explain them when you are asked.⁴ Every democracy entails accountability. This accountability is the sine qua non of democracy. Transparency befits accountability. Each organ of the government is to held accountable for its ill use of power. Rightly said, any power without checks ends up fatal thus hampering the public who are the beneficiaries. It should always be kept in mind that the power conferred to any organ of the government is from the people and for the people.

The working of the government is based on the principle of checks and balances which runs hand in hand with the separation of powers between the appendages of the government. This theory of checks and balances comprehends that no organ should be provided with unchecked powers wherein the power conferred upon one organ should be

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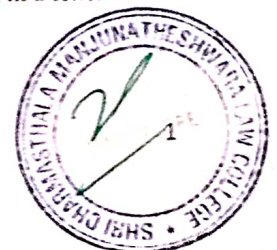
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¹ (2008) 1 SCC 683

² This arose as a quotation by John Emerich Edward Dalberg Acton, first Baron Acton (1834–1902). The historian and moralist, who was otherwise known simply as Lord Acton, expressed this opinion in a letter to Bishop Mandell Creighton in 1887

³ P Ramanatha Aiyar, *The Law Lexicon* (4th edn, LexisNexis 2017)

⁴ Angus Stevenson, *Oxford Dictionary of English* (3rd edn, Oxford University Press 2010)



checked and restrained by the other two, thus a necessary balance is secured.⁵ Nevertheless, 'power alone can be the antidote to power'.⁶ Wherefore, this paper analyses the concept of judicial overreach and the authors comes out with some suggestions to ensure the accountability form judiciary.

Key Words: *Judiciary, Democracy, Judicial accountability, judicial independence, Impeachment.*

Introduction

In India, the executive is individually and collectively responsible to the legislature whereby their removal or transfers are in hands of the legislators. The laws passed by the legislature are checked by the judiciary, if it goes against the Constitution, then the latter declares it null and void.⁷ Moreover, the legislature is accountable to the people as they are the ones who elect them for five years⁸ and any misuse in their power would see consequences in the following elections. Every authority having any amount of public power has a responsibility towards the public. Given this fact, India is a 'democratic republic', hence power with accountability of the individuals enjoying it, is essential to avert disaster for any democratic system.⁹

Any public functionary or institution is accountable to the public and this is ensured by the judiciary. The executive and the legislature are primarily held accountable for their actions by the judiciary hence ensuring a check on their use of power. When the executive and the legislature act beyond their constitutional boundaries, the judiciary comes in and corrects them.¹⁰ This makes it crystal clear that the judiciary is the organ acting as the guardian of the Constitution and protector of our fundamental rights. In spite of this, there are noticeable spate of judicial corruption which proves to be self-defeating and is indicating

⁵ Isha Tirkey, 'Judicial Accountability in India: Understanding and Exploring the Failures and Solutions to Accountability' (2011) Centre for Civil Society 247 <https://ccs.in/internship_papers/2011/247_judicial-accountability-in-india_isha-tirkey.pdf> accessed 15 November 2021

⁶ ibid

⁷ ibid

⁸ ibid

⁹ J S Verma, 'Mechanisms of Judicial Accountability' Campaign for Judicial Accountability & Judicial Reforms <<https://judicialreforms.org/mechanisms-of-judicial-accountability-by-justice-jsverma/>> accessed 15 November 2021; This was seen in the letter written by Former Justice J S Verma to the then Prime Minister on 1 December 1997

¹⁰ G Manohar, G B Reddy and V Geeta Rao, *Judiciary in India: Constitutional Perspectives* (Asia Law House 2009)



towards the lack of accountability in the institution.¹¹ But who holds the judiciary accountable?

In India, it is not only the perception of corruption in public sector (including judiciary) that is elevated, but is the reality faced today. It has been reported that 77% of the respondents in India perceive that the judicial system as corrupt and one among three court users admitted that they have paid the bribe.¹² Speaking on the issue, Justice V R Krishna Iyer opined that ‘the judiciary now functions without check, even illegally and corruptly...’¹³ In 2010, a former law minister declared that eight of sixteen former Chief Justices of India (CJI) were corrupt, and in 2014 a former Supreme Court judge alleged that three former CJIs made ‘improper compromises’ to let a corrupt High Court judge continue in office.¹⁴ Former Chief Justice V N Khare in an interview with Chandrani Banerjee, stated that ‘Judges are only human, like us. They come from the same society. Our society is all about quick successes. Short cuts are taken. Even by the judges.’¹⁵

Judiciary being the backbone of the system of governance is revered for its role and thus brings in the picture of judicial independence. Then again, there exists an animosity between the concepts of judicial accountability and judicial independence. Judicial independence and judicial accountability have long been viewed as in tension with each other. The assumption that any strengthening in judicial independence makes it difficult to hold judges accountable, and that any initiative towards accountability undermines judicial independence and a continuous devotion to strike the ‘right’ balance between these two concepts has always been the objective.¹⁶ Therefore, the focus of the paper is to overcome the Judicial Overreach and to ensure the accountability by judiciary.

¹¹ Tirkey (n 5)

¹² Global Corruption Report (2007) Global Transparency International <https://www.transparency.org/whatwedo/publication/global_corruption_report_2007_corruption_and_judicial_systems> accessed 15 November 2021

¹³ V R Krishna Iyer, *The Majesty of the Judiciary* (Universal Law Publication 2007)

¹⁴ Nayana Renu Kumar, ‘The Indian Judiciary on Trial: Tackling Corruption in India’s Courts’ *The Global Anticorruption Blog – Law, Social Science, and Policy* (12 February 2016) <<https://globalanticorruptionblog.com/2016/02/12/the-indian-judiciary-on-trial-tackling-corruption-in-indias-courts/>> accessed 15 November 2021

¹⁵ Chandrani Banerjee Interviews V N Khare, ‘Corruption is Rampant in the Lower Courts’ *Outlook* (09 July 2012) <<https://www.outlookindia.com/magazine/story/corruption-is-rampant-in-the-lower-courts/281457>> accessed 15 November 2021

¹⁶ David Pimentel, ‘Balancing Judicial Independence and Accountability in a Transitional State: The Case of Thailand’ (2016) 33(2) *Pacific Basin Law Journal*

<<https://escholarship.org/content/qt6gr416nk/qt6gr416nk.pdf?t=ogqid9>> accessed 15 November 2021



Judicial Independence as Armour of the Judiciary

Independence is a necessary bulwark against such corruption and a critical precondition for the rule of law itself.¹⁷ An independent judiciary is necessary for a free society and a constitutional democracy.¹⁸ It ensures the rule of law and realization of human rights and also the prosperity and stability of a society.¹⁹ Separation of powers is a crucial point in this concept. Therefore, primarily, it means that the independence of the judiciary is mainly from that of the executive and the legislature.²⁰ But that amounts to only the independence of the judiciary as an institution from the other two organs of the state but without regard to the independence of judges in the exercise of their functions as judges. In that case it does not achieve much.²¹ The independence of the judiciary does not mean just the creation of an autonomous institution free from the control and influence of the executive and the legislature.²² The underlying purpose of the independence of the judiciary is that judges must be able to decide a dispute before them according to law, uninfluenced by any other factor.²³ The Constitution of India is the fundamental law of the land from which all other laws derive their authority and with which they must conform.²⁴ The Indian Constitution specifically directs the state 'to separate the judiciary from the executive in the public services of the State'.²⁵ The Supreme Court has used this provision in support of separation between the judiciary and the other two branches of the state at all levels, from the lowest court to the Supreme Court.²⁶ The Constitution of India has established a unified three-tier system for judiciary in India, with Supreme Court at the top, followed by High Courts in States, followed by Sub-ordinate Courts at District level, and has further made several provisions to ensure independence of the same²⁷ in respect to the security of tenure of office,²⁸ salaries and allowances of the judges,²⁹ appointment of staff,³⁰ expenditure of the

¹⁷ Samuel L Bufford, 'Defining the Rule of Law' (2007) 46 Judges' Journal

¹⁸ M P Singh, 'Securing the Independence of the Judiciary – The Indian Experience' (1999) Ind. Int'l & Comp. L. Rev. <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/iic110&div=16&id=&page=>> accessed 15 November 2021

¹⁹ Philip S Anderson, 'Judicial Independence and Accountability' (1998) 61 Law & Contemp. Probs

²⁰ Singh (n 18)

²¹ ibid

²² ibid

²³ ibid

²⁴ Singh (n 18)

²⁵ Constitution of India, 1949, art 50

²⁶ *Supreme Court Advocates-on-Record Association v Union of India* (1994) AIR SC 268

²⁷ Gautam Chadha, 'Independence and Accountability of Judiciary in India and UK' *Legal Services India* (6 November 2019) <<http://www.legalservicesindia.com/law/article/1339/10/Independence-and-Accountability-of-Judiciary-in-India-U-K->> accessed 15 November 2021

²⁸ Constitution of India, 1949, art 124(4)

²⁹ Constitution of India, 1949, art 125 and 221



court,³¹ prohibition on practice after retirement,³² restriction on discussion in the parliament,³³ power to punish for contempt,³⁴ power to make rules,³⁵ separation of judiciary from the executive,³⁶ among others. Independence of the judiciary has been misused and has also resulted in the growth of enormous power. The problem actually lies in the understanding of independence of the judiciary; it should be understood as independence of the judiciary from the executive and legislature and not independence from accountability as such.³⁷

Judicial Accountability: An Indispensable Step

The opposite side of the coin with judicial independence is judicial accountability. It is not sufficient for judges to be just independent.³⁸ Ensuring 'fair, impartial, and effective justice' is equally important. Judicial accountability is a facet of judicial independence. On a general view, accountability necessitates responsibility towards any external body; some may insist accountability to principles or to oneself rather than to any authority with the power of punishment or correction.³⁹ Article 235 of the Constitution of India provides for the 'control' of the High Court over the subordinate judiciary indicating that there exists an effective mechanism to enforce accountability. Therefore, entrustment of power over subordinate judiciary to the High Court preserves independence as it is neither accountable to the executive or the legislature.⁴⁰ The process of impeachment is one way towards judicial accountability. On the other hand, the conundrum here is that judiciary has built up its own fort with it not being accountable to the people or the other two organs of the government.

The Supreme Court had rightly asserted that 'A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system'.⁴¹ A campaign issued by the people's convention on Judicial Accountability and

³⁰ Constitution of India, 1949, art 146 and 229

³¹ ibid

³² Constitution of India, 1949, art 124(7) and 220

³³ Constitution of India, 1949, art 121 and 211

³⁴ Constitution of India, 1949, art 129 and 215

³⁵ Constitution of India, 1949, art 145

³⁶ Constitution of India, 1949, art 50

³⁷ Tirkey (n 5)

³⁸ Pimentel (n 16) 165

³⁹ David Pimentel, 'Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' (2009) 57(1) Cleveland State Law Review

<<https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1097&context=clevstrev>> accessed 15 November 2021

⁴⁰ Verma (n 9)

⁴¹ Anil Divan, 'Judicial Integrity: Lessons from the past' *The Hindu* (17 December 2016)

<<https://www.thehindu.com/opinion/lead/Judicial-integrity-Lessons-from-the-past/article16887900.ccc>> accessed 15 November 2021



Reforms had mentioned, 'The judicial system of the country far from being an instrument for protecting the rights of the weak and the oppressed has become an instrument of harassment of the common people of the country.... The system remains dysfunctional for the weak and the poor... (and has been) displaying their elitist bias'.⁴² As observed, judicial accountability promotes the rule of law by deterring conduct that might compromise judicial independence, integrity and impartiality, it promotes public confidence in the judges and the judiciary, and also, promotes institutional responsibility by rendering the judiciary responsive to the needs of the public it serves as a separate branch of the government.⁴³

The concept of judicial accountability clearly refers to making the judges answerable for their decisions on the court of law.⁴⁴ The first aspect of accountability is having the judges responsible for their decisions and the second is in respect to the institutional methods of appointing judges, removal of judges and the inhibitions to the criticism of their work.⁴⁵ In view of ethical accountability, Former Chief Justice of India, Hon'ble Mr. Justice S H Kapadia remarked that, 'When we talk of ethics, the judges normally comment upon ethics among politicians, students and professors and others. But I would say that for a judge too, ethics, not only constitutional morality but even ethical morality, should be the base...'.⁴⁶ He also said that, 'I would request the government that accountability be balanced with judicial independence'.⁴⁷ The well-known legal luminaries like former Hon'ble Chief Justice of India S Venkataramaiah and former Judge of the Hon'ble Supreme Court D A Desai and another former Judge of the Hon'ble Supreme Court Chennappa Reddy, expressed their view that if all the sections of the society are accountable for their actions, there is no reason why the judges should not be so.⁴⁸

Thus, it is the need of the hour to hold the judiciary accountable for its actions just like the other two organs of the government. As iterated, the executive and the legislature are taken to task by the judiciary and not exclusively by their own institutions but the judges are

⁴² Mona Shukla, *Judicial Accountability* (Regal Publications 2010)

⁴³ *ibid.*

⁴⁴ 'Judicial Accountability Bill – Need and Consequences', *Lawyers club india* <<https://www.lawyersclubindia.com/articles/Judicial-Accountability-Bill-Need-and-Consequences-5276.asp>> accessed 15 November 2021

⁴⁵ Cyrus Das and K Chandra, *Judges and Judicial Accountability* (Universal Law Publication 2005)

⁴⁶ 'Kapadia cautions judges against judicial activism', *The Hindu* (11 November 2016) <<https://www.thehindu.com>> accessed 15 November 2021

⁴⁷ *Judicial Accountability* (n 44)

⁴⁸ Padala Rama Reddi, *Advocates Practice* (Asia Law House 2013)



brought before their own institution when held accountable for their actions, which entirely is not a fair card played.

Problems Witnessed in Making the Judiciary Accountable

Administration of justice is a notion accepted by the public to be rendered by the judiciary. Despite the value of judicial accountability in any free democratic republic, the judiciary in India is seen to be unaccountable for its unchecked powers in the country. Many factors have contributed to this dire situation and the problem of accountability is wide and complex.

Impeachment

The only available mechanism in accordance with the Indian Constitution is impeachment, through which the members of the higher judiciary that is the Chief Justices and Judges of Supreme Court and High Courts are held accountable or can be removed.⁴⁹ Under Article 124(4), the process of impeachment is carried out only on the grounds of proven misbehaviour or incapacity.⁵⁰ 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. There is a three-member committee comprising two judges one from SC and the other Chief Justice of India if it is against a HC judge; and two SC judges if it is against a sitting judge at the apex court. Investigations are carried out before making a recommendation to the house. If the committee has concluded for the impeachment process to take place, the matter is discussed in both houses.⁵¹ The alleged judge is also given opportunity to rebut the charges. After the debate, a resolution is passed by 2/3rds majority in both houses. After the resolution is passed, it is sent to the president who then orders for removal. Only that, till date not one judge has been impeached though impeachment proceedings have been initiated.⁵² It is foolishness to think that the judiciary is free from corruption. There exists a major lack in accountability, the loophole being the process of impeachment itself. It is undoubtedly lengthy and cumbersome and, regarded as a complete failure.

⁴⁹ Tirkey (n 5)
⁵⁰ Constitution of India, 1949, art 124(4)
⁵¹ Shukla (n 42)

⁵² FPJ Bureau, 'Impeachment Motion: Sixth judge to face impeachment but none removed thus far' *The Free Press Journal* (21 April 2018) <<https://www.freepressjournal.in/analysis/impeachment-motion-sixth-judge-face-impeachment-but-none-removed-thus-far>> accessed 15 November 2021



One of the requirements for the impeachment is signatures to pass the resolutions. This becomes impossible to obtain because many MPs have their own pending individual or party cases in before the judges court and are not willing to risk themselves. Conclusive documentary evidences are also required before they put their signatures to the motion.⁵³ In one of his interviews, Prashant Bhushan cites an example where in an impeachment proceeding against Justice Bhalla, the BJP declined to sign because L K Advani had been acquitted by him in the *Babri Masjid Demolition case*.⁵⁴ One can also not forget the *Justice Ramaswamy case*, who had been charged with misusing of courts fund, yet the Congress (I) refused to cast their vote.⁵⁵ The additional immunity with which the judges have cloaked themselves was seen in this case, in which it was declared that judges of the Supreme Court or High Court cannot be subjected to investigation in any criminal offence of corruption, or a FIR be registered against them without the prior permission of the Chief Justice of India (CJI). Then again it is highly unlikely that the CJI will allow such permission, as it can bring shame to the entire Judiciary.⁵⁶

Justice Soumitra Sen, Justice P D Dinakaran, Justice J B Pardiwala, Justice C V Nagarjuna Reddy and Former Chief Justice of India Dipak Mishra are among the other judges against whom the impeachment proceedings have been initiated but all of them have walked free. It has often been said that the judges act together like a 'trade union', so they generally wouldn't like to charge their fellow colleagues of corruption and the Investigating Committee consisting of judges have not intended to correct the mechanism.⁵⁷

Contempt Of Court

Contempt of court can be seen as a means to protect the independence of the court, however, looking at the other end, it is mostly seen that it is used as a shield by the court from any criticism by the public.⁵⁸ Contempt is defined as any act that is offensive and critical to

⁵³ Communist Party of India (Markxist-Leninist) Liberation, '*Securing Judicial Accountability*' <<http://www.cpiml.net/liberation/2007/11/securing-judicial-accountability>> accessed 15 November 2021
This article was the background paper prepared by Prashant Bhushan for a Seminar on Judicial Accountability that took place on 13/10/07 at Delhi

⁵⁴ Shoma Chaudhury, '*Half of the last 16 Chief Justices were Corrupt*' <<http://www.judicialreforms.org/files/Tehelka%20interview%20with%20Prashant%20Bhushan.pdf>> accessed 15 November 2021

⁵⁵ Frontline, '*Motion for presenting an address to the President under Clause (4) of the Article 124 of the Constitution*' (1993) 10(11) 18 <<http://www.judicialreforms.org/files/Motion%20of%20Impeachment%20-%20Ramaswami.pdf>> accessed 15 November 2021

⁵⁶ Shukla (n 42)

⁵⁷ Turkey (n 5)

⁵⁸ *ibid*



the dignity and the authority of courts and is further defined as criminal⁵⁹ and civil contempt⁶⁰. 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'.⁶¹

The problem with the definition of contempt is that, there is no definition as to what constitutes scandalizing the court because what was regarded scandalous earlier may not be regarded the same today. The Contempt of Court Act has also been criticized on the basis that it infringes two important fundamental rights of the citizen, namely, the right to personal liberty and the right to freedom of expression.⁶² This can be observed in the case of *Arundhati Roy case*,⁶³ where the decision of the Supreme Court was severely criticized and a notice of contempt was served against Arundhati Roy, Medha Patkar and advocate Prashant Bhushan. The three however asserted that they were exercising their freedom enshrined in the Constitution. Nevertheless, court held Arundhati Roy guilty and sentenced her to one day imprisonment and a fine of Rs. 2000.⁶⁴ What was shocking and rather patriarchal was condescendingly referring her as a 'woman' whom they had treated leniently by giving her punishment for just a day.⁶⁵

Exemption from Right to Information (RTI)

One of the ways that the judiciary can be held accountable is when the people are given the right to know what exactly they are doing. This comes naturally in a democratic form of government.⁶⁶ The foundation for RTI was laid by the Supreme Court in the famous *Raj Narain v Indira Gandhi case*.⁶⁷ It stated that 'the people of the country have the right to know about every public act ... this is derived from the concept of freedom of speech...and to cover it with the veil of secrecy the common routine business is not in the interest of the public'.⁶⁸ This is chief safeguard against corruption. The first hinderance arose when the issue of asset declaration arose when Subhash Agarwal, inquired about the information pertaining to whether the judges were complying with the 1997 'Code of Conduct'. The

⁵⁹ Contempt of Courts Act, 1971, s 2(b)

⁶⁰ Contempt of Courts Act, 1971, s 2(c)

⁶¹ Shukla (n 42)

⁶² Tirkey (n 5)

⁶³ *In re: Arundhati Roy* (2002) 3 SCC 343

⁶⁴ S P Sathe, 'Accountability of Supreme Court' *Economic and Political Weekly* (13 April 2002)

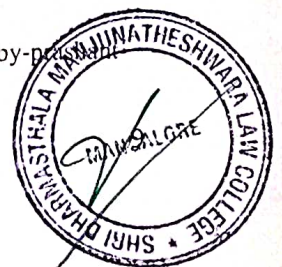
<<http://www.judicialreforms.org/files/Accountability%20SC%20EPW.pdf>> accessed 15 November 2021

⁶⁵ *ibid*

⁶⁶ Tirkey (n 5)

⁶⁷ *Raj Narain v Indira Gandhi* (1972) AIR 1302

⁶⁸ Prashant Bhushan, 'Judicial Accountability' <<https://judicialreforms.org/judicial-accountability-by-prashant-bhushan/>> accessed 15 November 2021



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 and this prompted the Supreme Court to file a writ petition in the Delhi High Court, claiming that asset disclosure was exempted under RTI Act on the basis that this information was disclosed by the judges to the Chief Justice under 'fiduciary relationship'.⁶⁹ The double standard of the courts on RTI Act was seen when although the courts were included in the definition of Public Authorities most of the High Courts did not appoint Public Information Officers (PIOs) even months after this act came to force. In addition, information regarding the appointment of Class 3 and 4 employees by the High Court had been denied under the Delhi High Court rules that provide for an exemption with respect to the same.⁷⁰

In House Mechanism

In 1999, a resolution came into picture, where the Supreme Court declared that an in-house procedure would be adopted to take action against judges who act against accepted values of judicial life and this was prepared after the Supreme Court held in a public interest litigation case of *C Ravichandran Iyer v Justice A M Bhattacharjee*,⁷¹ that an in-house peer-review procedure could be laid down for correcting deviant behaviour and where the allegations do not warrant removal, the in-house mechanism could impose minor measures. An in-house mechanism was also proposed by the Judges Inquiry Act (Amendment Bill) 2006 which provided for a National Judicial Council consisting of the Chief Justice of India, two senior-most judges of the Supreme Court and two Chief Justices' of the High Courts, as members to enquire allegations.⁷² The problem arose when the judges regard themselves as a 'close brotherhood' and therefore were unwilling to take a step against the others.⁷³ What was confounding was that any information relating to the complaint in any proceeding except when directed by the Council was not to be disclosed.⁷⁴ Moreover, even if the Council found the judge guilty of serious misconduct, it can only recommend impeachment and not take any serious action in this regard. The only positive feature of the bill is that at least an enquiry

⁶⁹ Prashant Bhushan, 'Judicial Accountability' *Economic and Political Weekly* XLIV 37 (12 September 2009) <[http://www.judicialreforms.org/files/EPW%20judicial%20accountability%20asset%20disclosure%20and%20beyo nd.pdf](http://www.judicialreforms.org/files/EPW%20judicial%20accountability%20asset%20disclosure%20and%20beyo%20nd.pdf)> accessed 15 November 2021

⁷⁰ Prashant Bhushan, 'Right to Information and the Judiciary' *Deccan Herald* (30 August 2009) <<https://www.deccanherald.com/content/22341/right-information-judiciary.html>> accessed 15 November 2021

⁷¹ (1995) SCC (5) 457

⁷² Prashant Bhushan, 'Committee on Judicial Accountability' <<http://www.judicialreforms.org/files/4%20Comments%20of%20COJA.pdf>> accessed 15 November 2021

⁷³ Communist Party of India (n 53)

⁷⁴ Bhushan (n 73)



into the allegations of misconduct of a judge could be initiated.⁷⁵ The Judges Inquiry Act, 1968, re-directed the steps taken To Impeachment Itself.

Judicial Activism

Another riveting aspect is that in recent times, the higher judiciary is making inroads into and passing orders which are within the domain of the executive and legislature due to their lack of accountability in this respect. One of the instances, was when the Supreme Court directed the centre to release five million tons of food grains immediately for distribution, because millions of tons of food grains were lying in the open for years because of inadequate storage capacity.⁷⁶ Another example is the laying down policy regarding demolition of Jhuggis from Yamuna Pushta, hawkers, cycle rickshaws etc. to name a few.⁷⁷ In 2006, the Supreme Court issued guidelines to reform the police administration which was completely a state subject.⁷⁸ A more recent scenario was the judgment given by the Supreme Court in appointing two former justices to superintend the Special Investigating Team (SIT) on black money issue of the government.⁷⁹ Though, the Supreme Court is right in holding the government accountable, imposing such a judgment is not justified. This way the judiciary is encroaching the spheres which is not allocated to it by the Constitution. It is to be noted that although the decisions may be well intentioned but the 'micro-managing' nature of the judges has to be curbed.⁸⁰

Appointment of Judges

Added to the other problems that came into light, was the collegium system which bestowed abundance power upon the senior judges of the Supreme Court to select and make recommendation to the government for these appointments. This system failed to provide any transparency in the process, in preparing shortlists or for choosing among eligible members. The whole process is entirely ad hoc and arbitrary, which has given way to nepotism when it has been in the hands of the judiciary.⁸¹

⁷⁵ Tirkey (n 5)

⁷⁶ J Venkatesan, 'Release 5 million tonnes of food grains: Supreme Court' *The Hindu* (10 October 2016) <<https://www.thehindu.com>> accessed 15 November 2021

⁷⁷ Bhushan (n 73)

⁷⁸ Abhinav Chandrachud, 'Dialogic judicial activism in India' *The Hindu* (18 July 2008) <<http://www.hindu.com/2009/07/18/stories/2009071852820800.htm>> accessed 15 November 2021

⁷⁹ Pratap Bhanu Mehta, 'Overreaching?' *The Indian Express* (06 July 2011) <<http://archive.indianexpress.com/news/overreaching-/813221/>> accessed 15 November 2021

⁸⁰ Tirkey (n 5)

⁸¹ Bhushan (n 70)



Hence, in light of the problems elucidated that exist in the face of this democratic republic due to the lack of effective judicial accountability, certain solutions can be considered to this effect.

Conclusion and Suggestions for Refinement

It is perceived that the adoption of an all-powerful attitude by the judiciary does not augur well for a healthy democracy.⁸² This is accentuated by the fact that judiciary as an institution is not accountable to the people in the same way, the legislature and the executive are.⁸³ The Supreme Court has on various occasions highlighted the importance of judicial restraint for the maintenance of an equilibrium of power of the different limbs in a democracy.⁸⁴ Justice Markandey Katju in *Minor Priyadarshini's case*,⁸⁵ has explained thus:

Under the Constitution, the legislature, the executive and the judiciary have their own broad spheres of operation. It is, therefore, important that these three organs of the state do not encroach upon the domain of another and confine themselves to their own, otherwise the delicate balance in the Constitution will be upset... The judiciary must therefore exercise self-restraint and eschew the temptation to act as a super legislature. By exercising restraint, it will only enhance its own respect and prestige.

Keeping this in mind, extreme activism is not justified as the courts should be concerned with the legality of the law only. Judicial restraint on judicial activism is necessary as the judiciary is neither directly elected by the people, nor are they answerable to the executive or legislature. Reference to the courts of the United States of America can be made, where there is a private meeting of nine judges deciding on a petition, if four justices vote to grant the petition, the case proceeds, otherwise it ends.⁸⁶ Such methods can help curtail activism and after all one cannot just interfere with the functions of other institutions, which is against the principle of separation of powers.⁸⁷ The Supreme Court noted in the case of *Indian Drugs & Pharmaceuticals Ltd v*

⁸² R Shunmugasundaram, '*Judicial activism and overreach in India*' (2007) 72 *Amicus Curiae* <<https://core.ac.uk/download/pdf/112282.pdf>> accessed 15 November 2021

⁸³ *ibid*

⁸⁴ *ibid*

⁸⁵ (2005) (3) CTC 449

⁸⁶ Supreme Court Procedures, United States Courts <<https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1>>

⁸⁷ *Tirkey* (n 5)



Workmen,⁸⁸ that, 'the Supreme Court cannot arrogate to itself the powers of the executive or legislature... There is a broad separation of powers under the Constitution of India, and the judiciary, too, must know its limits'. Certain steps that can be taken and have been taken in order to restraint judicial overreach can be spelled out.

Firstly, with the failure of the in-house mechanism, the National Judicial Commission, an independent institution which will have its own investigating machinery with members of the executive as well as the legislature⁸⁹ to be involved along with the judicial members, would make this commission a best fit in achieving judicial accountability. This way, no harm is done to the independence of the judiciary as it is not only accountable to either the executive or legislature.⁹⁰ It is necessary to treat the judiciary differently as it possesses responsibilities different from the other organs. The appointment of judges was also to be included with disclosure to the public, the list of selected judges on merit thus condemning and curtailing nepotism in the judiciary. This National Judicial Appointments Commission was suggested by the 99th amendment to the constitution only to be later held unconstitutional by the Supreme Court.⁹¹

Secondly, a Code of Conduct⁹² for the judges that came about in the conference of Chief Justices of all High Courts which was held in 1999, where all the Chief Justices unanimously resolved to adopt the 'Restatement of Values of Judicial Life', can serve as a guide to be observed by the judges, for an impartial administration of justice.⁹³ This 15-point code recommends a serving judge to maintain an air of 'aloofness' in his official and personal life.⁹⁴

Thirdly, The Judicial Standards and Accountability Bill, 2010 which was floated to replace the Judges Inquiry Act, eventually lapsed. It tried to lay down enforceable standard of conduct for the judges and included provisions where the judges had to declare details of their assets and liabilities together with their family members' assets and liabilities. Importantly, it provided to create a mechanism to allow any person to complain against

⁸⁸ (2007) 1 SCC 408

⁸⁹ Shukla (n 42)

⁹⁰ Tirkey (n 5)

⁹¹ *Supreme Court Advocates-On-Record Association and Anr. v Union of India* Writ Petition (Civil) No. 13 of 2015

⁹² Bhushan (n 70)

⁹³ Honourable Justice Satya Brata Sinha, 'Judicial Independence, Fiscal Autonomy and Accountability'

<http://jrn21.judiciary.gov.ph/forum_icsjr/ICSJR_India> accessed 15 November 2021

⁹⁴ Krishnadas Rajagopal, 'Judges' Code of Conduct' *The Indian Express* (09 August 2008)

<<http://archive.indianexpress.com/news/judges--code-of-conduct/346453/>> accessed 15 November 2021



judges on grounds of misbehaviour or incapacity, by establishing the National Judicial Oversight Committee, the Complaints Security Panel and an Investigation Committee.⁹⁵ Incorporating this Bill would have had an effective impact on judicial accountability.

In addition, the problem with the Contempt of Courts Act can be made better by amending it. The suggestions that came about in the Contempt of Courts (Amendment) Bill, 2003, where it was recommended that the accused must be given a reasonable opportunity to defend himself according to law and importantly, cases of contempt should not be tried by the courts themselves, but by an independent commission of concerned district and also to remove words, 'scandalizing the court or lowering the authority of the court' from the definition of criminal contempt.⁹⁶ This provides justice as a good defence in a contempt action can be achieved and can help solve the issue of proving the truth of the allegation made before the same judge against whom the allegation has been made in the first place, deeming the whole exercise meaningless.⁹⁷

Supplementing the above, public being the end receivers of judicial decisions have a full right to a clean judiciary.⁹⁸ As seen in the *Arundathi Roy case*, media also plays a role in fighting for a corruption-free judiciary but has been weakened by the Contempt of Courts Act. Having its own negatives, media also has positive side where it can prove to be effective in portraying public opinions.⁹⁹ Hence, various NGOs, the media and public working in tandem can help bring the judiciary to justice by reflecting their unchecked actions and misuse of power.

On these lines, it is necessary for an enactment of a new law or an inclusion of a provision in the existing legal framework, in lines of the Prevention of Corruption Act, 1988 to provide a legal conscience to the judiciary. Every step towards accountability paves way for a positive change in the system of governance. The above explicated paces in addendum can have an effectual sway in the direction of judicial accountability.

⁹⁵ P Sunderaranjan and J Venkatesan, 'Cabinet nod for judicial accountability bill' *Law Resources India* (06 October 2010) <<https://indialawyers.wordpress.com/2010/10/06/cabinet-nod-for-judicial-accountability-bill/>> accessed 15 November 2021

⁹⁶ Shukla (n 42)

⁹⁷ Tirkey (n 5)

⁹⁸ *ibid*

⁹⁹ Shukla (n 42)



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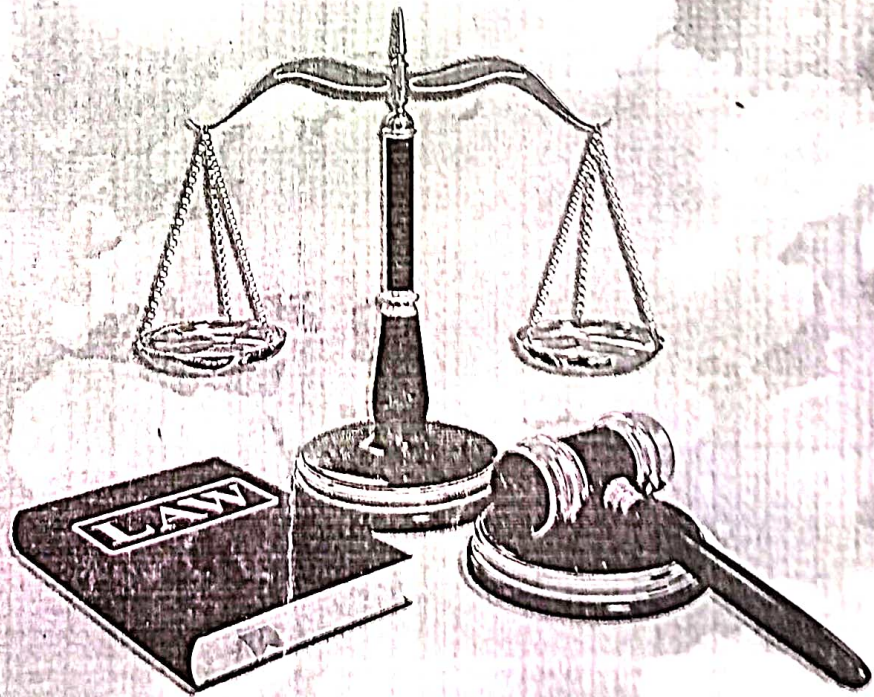
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